Essays on Migration and Legitimacy

Towards a Cosmopolitan Statism

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DANIEL HÄUSER

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EXAMINATION COMMITTEE

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Universität Hamburg

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Department of Political Science
University of California, Berkeley

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1

Introduction

INTRODUCTION

Migration has emerged as one of the most divisive political issues of our time, dominating headlines and polarizing public opinion in many countries. Profound disagreements over immigration and asylum policy are also intensifying the ongoing global trend of democratic backsliding.[1] Yet beneath the political rhetoric and policy disputes lie deeper questions of political philosophy: What gives states the right to control their borders? Do individuals have a human right to migrate? How should we balance the interests of citizens against those of would-be immigrants? In this thesis, I contribute to the exploration of these foundational philosophical questions.

My philosophical interest in migration was sparked during the events that are commonly referred to in Germany simply as *the* refugee crisis or "Flüchtlingskrise" – the arrival of unusually large numbers of refugees in Europe beginning in 2015 in the wake of the Syrian civil war – which triggered intense public debate over Germany's moral obligations towards refugees and the limits of German society's capacity to integrate newcomers.[2] I was impressed, at the time, by the public support for those arriving in Germany, at least in the initial months, which seemed to

[1] For empirical discussions of the political signficance of recent debates over immigration, see Abrajano and Hajnal (2015), Haggard and Kaufman (2021, ch. 2), and Schäfer and Zürn (2021, ch. 3).

[2] For chronologies of these events and the following debates, especially in Germany, see Funk (2016), Mushaben (2017), and Betts and Collier (2017).

express genuine moral conviction and a remarkable spirit of hospitality. Yet I was also struck by the strongly hostile reaction to the government's comparatively liberal admission policies that quickly emerged in some parts of German society. The resulting public debates raised questions about humanitarian duties, cultural identity, and global responsibilities in relation to the governance of immigration that seemed to merit careful philosophical analysis.

Around the same time, I began to study Immanuel Kant's political philosophy, and I was particularly drawn to Kant's account of cosmopolitan law. Kant's attempt to reconcile universal human dignity with the claims to self-determination of political communities in his treatment of the distinctive political relationship between states and foreigners who arrive at their shores seemed especially relevant to current migration debates. While this thesis does not present an exegetical project, my thinking about the ethics of immigration still draws significant inspiration from Kant's philosophy. So, while I make no claim here to presenting a "Kantian" view in any strict sense, I believe that core aspects of the normative proposal I present in this thesis are in the spirit of the Kantian brand of cosmopolitanism.[3]

While public debates over immigration mainly address practical policy questions, the philosophical immigration debate focuses on underlying normative questions. The central question in the migration literature is whether states possess a moral right to exclude prospect-

[3] This thesis does not present the project I initially envisioned — a systematic reconstruction of Kantian cosmopolitan law applied to the contemporary immigration debate – because Kant's central concept of "Recht" is not easily translatable into the language of contemporary political philosophy. Others have, nonetheless, recently presented insightful discussions of Kant's theory of cosmopolitan law and its implications for current immigration debates, see Reinhardt (2019), Huber (2022) and the relevant parts of Ganesh (2021). I share Reinhardt's diagnosis of a "productive disharmony" between Kant's approach and the systematic immigration debate (2019, 206), which in my assessment partly reflects the mismatch between Kant's conceptual framework and the conceptual apparatus employed in the current immigration debate. Parts of my argument also clearly diverge from Kant's view, particularly my discussion of moral rights in Chapter 3. But I believe that one can defend many aspects of Kant's political philosophy without committing to Kant's account of the normative foundations of this theory, as suggested by Pogge (2012).

ive immigrants from their territory. Over the past four decades, the philosophical immigration debate has evolved considerably, developing sophisticated arguments on both sides of what is often framed as a dispute between "open borders" and "closed borders" positions. And this debate expanded dramatically again in the years following the 2015 refugee crisis in Europe and similar crises around the world – although it may be misleading to label persistent structural problems as "crises".[4] My goal in this introductory chapter is to highlight the core questions I address in this thesis, to introduce my central contribution to the immigration debate, and to outline the structure of this thesis.

When I began my research for this project, the major lines of disagreement in the highly polarized immigration debate seemed to be clearly drawn. Proponents of various cosmopolitan views dominated the field, condemning immigration restrictions and calling for open borders, while their statist counterparts defended exclusionary policies, with some exceptions being made for refugees on humanitarian grounds. Although this description of the philosophical landscape is clearly stylized, it captures how the immigration debate was and still tends to be portrayed.

In Section 1.1, I demonstrate that this conventional characterization of the debate — as a straightforward contest between cosmopolitan advocates of open borders and statist defenders of closed borders—is misleading in important ways. I show that the immigration debate actually unfolds along two separate dimensions that are not always distinguished clearly, which concern the justice or moral justifiability of exclusionary immigration policies on the one hand, and the legitimacy of the imposition and enforcement of immigration restrictions on the other. In this thesis, I primarily investigate questions concerning the legitimate governance of immigration, which have received significantly less attention than questions of justice in migration. My goal in this first section is to highlight why these questions of legitimacy deserve further philosophical examination.

[4] For a critical assessment of this reactive mode of philosophizing about migration, see Schramme (2015).

My central contribution to the immigration debate consists in my defense of a "cosmopolitan statism" – a novel intermediary position between traditional cosmopolitan and statist views in the migration debate. In Section 1.2, I outline the core features of this position and situate my proposal within the broader migration literature. I argue that egalitarian demands of social justice and democratic inclusion arise only in distinctly political relationships, which are characterized by the state's claim to exercise legitimate moral authority. I then distinguish two types of authority-claims: states may claim that specific individuals must *obey* their laws, but they may also claim to impose these laws in the name of specific individuals, and to *represent* their political agency. While these two types of authority-claims typically coincide in the relationship between states and their own citizens, I argue that they may justifiably come apart in the relationship between states and prospective migrants. In many cases, states can and should claim that migrants must obey their immigration laws without claiming to represent their political agency — initiating what I call, following Kant, a relationship of "passive citizenship".[5] This framework acknowledges that immigration controls constitute a form of political power, but it also acknowledges that states do not subject migrants to the same form of political rule as their citizens. States accordingly have moral obligations towards migrants that go beyond minimal humanitarian obligations but that still fall short of the far-reaching obligations endorsed by many cosmopolitans. On this basis, I conclude that states can often legitimately enforce immigration restrictions even if migrants are excluded from the decision-making on immigration laws, and even if migrants could significantly improve their prospects in life by crossing borders. I also conclude that refugees occupy a special normative position because states cannot legitimately claim authority over refugees unless they ensure that their human rights are securely protected.

This thesis comprises five main chapters in which I develop independent arguments that make stand-alone contributions to the literature and

[5] The connection between Kant's account of cosmopolitan law and his account of passive citizenship is pointed out by Arthur Ripstein (2021, 241).

which collectively also defend core aspects of my cosmopolitan statism, establish its theoretical presuppositions, and explore the normative implications of my proposal. In Section 1.3, I provide summaries of each chapter and demonstrate how their individual contributions support my broader argument.

1.1 A RIGHT TO EXCLUDE?

The central question in the philosophical immigration debate is whether states have a *right to exclude* prospective migrants from their territory, and this is also my central question in this thesis.[6] Joseph Carens (1987) posed this question in a seminal essay, and his challenge to the idea that states have such a right to exclude set the stage for the subsequent debate in the political philosophy of migration. However, the question whether states have a right to exclude is less well-defined than it may initially appear, so my goal in this section is to narrow down the questions I address in this thesis.

In Section 1.1.1, I show that the debate over the right to exclude has two distinct dimensions, which address the substantive moral evaluation of exclusionary immigration policies and the distribution of moral decision-making power over immigration policy respectively. In Section 1.1.2, I reconstruct the influential debate between Carens and Michael Walzer as a case study to highlight why we must distinguish these two dimensions of the immigration debate, and why doing so is surprisingly difficult. My discussion suggests that critics and proponents of the right to exclude routinely talk past each other, and in Section 1.1.3 I highlight deeper conceptual reasons for this observation.

[6] Throughout my discussion, I treat states as corporate agents who can have rights and obligations, and who can make demands of others. My understanding of states as corporate agents broadly follows List and Pettit (2011) and Pettit (2023). When I speak of "prospective migrants", I refer to individuals who intend to settle for an extended period on the territory of a foreign state. Whether states have a right to exclude tourists and other short-term visitors is a separate question that has attracted much less attention in the literature, and which I will not specifically discuss. The philosophical migration literature naturally also addresses many other questions, for overviews see Brock (2021, ch. 9) and Wellman (2024).

In Section 1.1.4, I build on this conceptual discussion to formulate my overarching questions for this thesis.

1.1.1 *Two Immigration Debates*

The competing positions in the migration debate are often aligned along a single "continuum from 'more closed' at one end to 'more open' at the other" (Brock 2021, 42). Theorists on one side of this continuum invoke arguments based on global egalitarianism, freedom of movement, democratic legitimacy, or the welfare benefits of free migration to defend open borders. By contrast, theorists on the other side of this continuum invoke arguments based on collective self-determination, cultural preservation, domestic social justice, or forms of territorial ownership to defend immigration restrictions.[7] However, this popular framing of the debate cannot be quite correct, as several prominent theorists in the "closed borders" camp actually explicitly favor more open borders (e.g. Wellman 2008, 116–17; Blake 2020, ch. 10). But if the "open borders debate" is not about whether borders should be open, then what is it about?[8]

Many theorists in the "closed borders" camp emphasize that states have a *right to exclude* outsiders from their territory. However, they also insist that this claim does not entail that states ought to adopt exclusionary immigration policies, as states may have good reasons not to exercise their right to exclude. But what exactly does the claim that states have a right to exclude mean then? I believe that the notion of a 'right to exclude' is used ambiguously in the immigration debate, and that critics and proponents of the view that states have such a right typically aim to answer distinct normative questions. This thesis requires justification, as it suggests that proponents of "open borders" and "closed borders" routinely talk past each other.

In the opening of his seminal essay *Aliens and Citizens: The Case for Open Borders*, Carens poses two questions: He asks what "moral

[7] For similar descriptions of the debate, see Kukathas (2005), Reed-Sandoval (2016), and Wellman (2024).

[8] I take the term "open borders debate" from Wilcox (2009).

grounds" might justify the exclusion of foreigners who are merely seeking to build better lives for themselves and their families. And he asks why border guards might be entitled "to point guns at *them*" to enforce exclusionary immigration policies (1987, 251). Carens subsequently subsumes these two questions under the single question whether states have a right to exclude outsiders from their territory. But these are, in fact, distinct questions, as the first concerns the substantive moral evaluation of exclusionary immigration policies, while the latter concerns the right to decide who will be admitted, and to enforce these decisions.[9] To this day, both questions are addressed in the debate over whether states have a right to exclude. Instead of aligning neatly along one dimension, the various positions in this debate therefore align along at least two dimensions: one concerning the substantive moral merits of immigration restrictions, and the other concerning the distribution of moral decision-making power over territorial admissions.

A failure to distinguish these two dimensions of the immigration debate easily leads to confusion, as philosophical commitments along these two dimensions are largely independent. It is entirely coherent, for instance, to argue that states are entitled to decide whom to admit to their territory, and to simultaneously insist that exclusionary immigration policies are generally morally objectionable (e.g. Carens 2013, 270; Stilz 2019b, ch. 7). The risk of confusion is aggravated by the fact that theorists on both "sides" of the migration debate typically focus on different interpretations of the question whether states have a right to exclude. While those in the "open borders" camp tend to be concerned with the substantive moral evaluation of exclusionary immigration policies, those in the "closed borders" camp tend to be concerned with questions related to the distribution of moral decision-making

[9] Carens then develops three arguments against the right to exclude based, in turn, on libertarian, utilitarian and Rawlsian assumptions. On my reading, the utilitarian argument concerns the substantive moral merits of exclusionary immigration policies, while the libertarian arguments concerns the right to implement and enforce such policies. Which question does the Rawlsian argument address? That depends on how we understand the Rawlsian concept of justice, a question that has recently attracted renewed attention, see de Marneffe (2023).

power.[10]

I am naturally not the first commentator to observe this profound ambiguity in the debate over the right to exclude. In fact, Carens calls attention to this point several times in his influential book on the *The Ethics of Immigration* (2013).[11] Carens insists that "we should not confuse the claim that states have a moral right to exercise sovereign power with the claim that every exercise of sovereign power must be regarded as morally right" (2013, 270). And he also argues that prominent advocates of the right to exclude "conflat[e] the question of who ought to make a decision with the question of whether a given decision is justifiable" or "immune from criticism" (219). In these passages, Carens clearly identifies the two dimensions of the migration debate, but he also insists that this debate is primarily about the substantive moral merits of exclusionary immigration policies, and not about whether states are entitled to decide which immigration policies to implement and enforce. I disagree with this assessment, and in the next step of my argument I consider the influential debate between Carens and Walzer as a representative case study to show that the migration debate has always unfolded along these two dimensions. I emphasize this point because my own contributions in this thesis mainly concern the question whether states are entitled to decide for themselves which immigration policies to implement.

1.1.2 *The Walzer–Carens Debate*

The respective views of Walzer and Carens are often treated as the paradigmatic "open borders" and "closed borders" positions (e.g. Brock 2021, 42), and their initial exchange also prefigures many later moves

[10] These correlations are not perfect, as some advocates of the right to exclude also defend the substantive merits of immigration restrictions (e.g. Miller 2016b; Steinhoff 2022), while some critics of the right to exclude also address questions related to the right to decide wich immigration policies to implement and enforce, often from a libertarian perspective (e.g. van der Vossen and Brennan 2018; Freiman and Hidalgo 2022) or from the perspective of demcoratic theory (e.g. Abizadeh 2008; Lepoutre 2016).

[11] For a clear statement of this observation, see also Yong (2017).

in the migration debate. Moreover, their exchange nicely illustrates why the two dimensions of the migration debate must be clearly distinguished, and also why doing so is surprisingly difficult.[12]

Carens sets out to challenge a "conventional view" on the morality of immigration restrictions, which he also attributes to Walzer. According to this conventional view, "each state is morally entitled to exercise considerable discretionary control over the admission of immigrants".[13] By contrast, Carens argues that this form of "discretionary control over immigration is incompatible with fundamental democratic principles and that justice requires open borders" (2013, 10).[14] These claims suggest that Carens and Walzer defend diametrically opposed positions in the migration debate, and that is also how their disagreement is commonly portrayed. However, whether this portrayal is correct is far from clear.

Note that Carens's description of the "conventional view" is ambiguous. The claim that states are morally entitled to exercise *discretionary* control over immigration could, on the one hand, mean that states are morally unconstrained in their governance of immigration. On the other hand, it could mean that states are morally entitled to determine their own immigration policies free from any external interference. The first claim concerns the moral evaluation of exclusionary immigration policies, while the second claim concerns the right to freely decide with policies to implement. Depending on how we interpret this conventional view, it could therefore concern either dimension of the debate over the right to exclude.

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[12] In contrast to Walzer, Carens has continued to work in the philosophy of migration, and I take his more recent work into account here where it clarifies his position, which has remained largely consistent over time.

[13] Compare also Carens's initial description of the conventional view in *Aliens and Citizens* as the view that the "power to admit or exclude aliens is inherent in sovereignty and essential for any political community. Every state has the legal and moral right to exercise that power in pursuit of its own national interest, even if that means denying entry to peaceful, needy foreigners" (1987, 251, footnotes omitted).

[14] Carens actually grants that justice may not require completely open borders, but he still contends that immigration restrictions are typically incompatible with the principles of democratic justice. On Carens's (2013, 2) account, these are the principles underlie liberal democratic political practice.

Walzer clearly believes that self-determining political communities are entitled to determine their own immigration policies free from foreign interference, and in accordance with their own conceptions of justice (1983, 48–51). In this sense, Walzer accordingly defends a right to discretionary control over immigration (with certain exceptions related to the protection of refugees). However, Carens does not actually deny that states have a discretionary right to control immigration in this sense. To the contrary, Carens grants that arguments based on collective self-determination, like those developed by Walzer, may support such a right. He accordingly suggests that his view is, in principle, compatible with a far-reaching commitment to state sovereignty (2013, 270). So far, we have accordingly found no obvious disagreement between Walzer and Carens.

Carens also attributes to Walzer the view that states have a discretionary right to control immigration in the sense that states are largely morally unconstrained in the design of their immigration policies.[15] However, Walzer clearly does *not* claim that states have a right to discretionary control over immigration in this sense.[16] To the contrary, Walzer emphasizes that his claim "that states have a right to act in certain areas" does not imply "that anything they do in those areas is right". More concretely, he argues that exclusionary immigration policies can be criticized by "appealing, for example, to the conditions and character of the host country and to the shared understanding of those who are already members". And he makes clear that such policies are "unjust" when they fail to live up to the moral standards that are embedded in the excluding society's political culture, so that decisions concerning immigration policy are "subject to [moral] constraint" (1983, 40). Like Carens, Walzer accordingly insists that the immigration policies of liberal democratic societies must live up to the principles of democratic justice.[17] So far, we have therefore still found

[15] For a similar reading of Walzer, see Higgins (2013, 146–48).

[16] Walzer's view is, admittedly, not entirely transparent, as his hermeneutical methodology sometimes obscures his arguments. On Walzer's methodology, see Orend (2001). On the similarities between Walzer's methodology and Carens's "contextualist" approach, see Carens (2000, ch. 2; 2004).

[17] This point is easily obscured by the broader structure of Walzer's argument.

no obvious disagreement between Walzer and Carens.

So, what exactly do Walzer and Carens disagree about? At several points, Carens objects to the idea that states are "shielded" from moral criticism in virtue of considerations related to state sovereignty or collective self-determination, an idea which supposedly follows from Walzer's view (cf. Carens 2013, 328; 2000, 12). Carens argues that this "sort of attempt to shield immigration and citizenship policies from moral scrutiny is misguided", as it "confuses the question of who ought to have the authority to determine a policy with the question of whether a given policy is morally acceptable" (2013, 6).

The suggestion that Walzer's view "shields" states from moral criticism can, however, again be read in two ways. On the first reading, immigration policies are shielded from moral criticism because the *content* of such criticism would be inappropriate. On the second reading, immigration policies are shielded from moral criticism because the *expression* of such criticism would be inappropriate. These are very different claims, as the first concerns the morality of immigration restrictions, while the second concerns the morality of certain speech acts. In effect, the idea that states are "shielded" from moral criticism therefore exhibits, in a more specific form, the same ambiguity as the idea that states have "discretionary control" over immigration.

Carens's point is clearly that the *content* of moral criticisms directed

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Walzer's theory of justice has a universalistic part, for which he claims cross-cultural validity, and a particularistic part, which contains norms that only apply to liberal democratic societies. The major exegetical question is therefore whether the membership-chapter of *Spheres of Justice* belongs to the universalistic or the particularistic part of his theory. In outlining his argument, Walzer makes clear that he intends to discuss "the external and internal principles that govern the distribution of membership", by which he means the principles that belong to the universal and the particularistic parts of his theory (1983, 34). But in developing his argument, Walzer does not indicate the boundary between these two parts of his project. On my reading, the first parts of his discussion, which address the question whether states are entitled to exclude outsiders, belong to the universalistic part of his theory, as the norms he develops here are supposed to apply to all societies. By contrast, I take the later part of his discussion, in which he addresses the question whether territorial admissions must ultimately lead to full political inclusion, to explicate norms that belong specifically to liberal democratic political cultures.

at immigration restrictions can be fully appropriate. But in the passages quoted above, Walzer makes clear that he agrees with this point, so it does not mark out a clear disagreement between them either. Granted, Walzer may believe that *expressions* of moral criticism of another society's immigration policies are generally inappropriate, especially if we understand expressions of moral criticism as a mild form of external interference. But neither he nor Carens discuss the morality of the expression of moral criticism in any detail, so we still do not find a clear disagreement between them.

This is not to deny any substantial disagreements between Walzer and Carens. They plausibly disagree over the extent to which the "general case for open borders is deeply rooted in the fundamental values of our tradition" (Carens 1987, 269) – although Walzer actually points out that he is "not yet ready to say" what moral constraints apply to immigration regimes from the internal perspective of liberal democracies like the United States (1983, 40). They plausibly also disagree over the extent to which liberal democratic values can legitimately be invoked to criticize societies that do not share these values, as Walzer seems more hesitant here than Carens (cf. Carens 1987, 269). But these nuanced philosophical disagreements do not support the standard view that Walzer and Carens defend fundamentally opposed positions in the migration debate.

My reconstruction of the debate between Walzer and Carens highlights several points: It shows that the immigration debate always revolved around the two dimensions described above, which are already evident in Carens's description of the "conventional view" on the right to exclude. It also shows that we must avoid projecting these two dimensions onto a single open borders-closed borders continuum, as the entire idea that Walzer and Carens defend diametrically opposed views in the migration debate seems to reflect a failure to distinguish these two dimensions clearly. Finally, my reconstruction highlights that the two dimensions of the migration debate are surprisingly difficult to keep apart, even once they are clearly distinguished. In the next step, I highlight deeper conceptual reasons for this final observation.

1.1.3 *Conceptual Challenges*

So far, I have relied on an intuitive distinction between questions related to the moral evaluation of exclusionary immigration policies and questions related to the right to decide which policies to implement. Before I can highlight the precise questions I seek to answer in this thesis, I must spell out this distinction with greater precision. To do so I must first address several conceptual ambiguities, which undermine previous efforts to pin down the two dimensions of the migration debate.

The framing of this debate as a debate about whether states have a "right to exclude" already invites conceptual ambiguity.[18] The meaning of the claim that states have such a right depends, in part, on one's preferred theory of moral rights. According to the will theory of rights, for instance, rights protect domains of exclusive decision-making power. In contrast, the interest theory of rights holds that rights protect certain interests from moral trade-offs. The claim that states have a *right* to exclude could accordingly mean that states enjoy a sphere of exclusive decision-making power over their immigration policy, or it could mean that immigration restrictions are justified because they serve morally protected interests. The language of rights therefore already obscures the two dimensions of the immigration debate.[19]

Noting this ambiguity, Caleb Yong suggests that we distinguish between a *justification-right to exclude* and a *legitimacy-right to exclude* (2017, 463). On his account, the former bears upon the substantive moral justifiability of exclusionary immigration policies, while the latter bears upon the question whether states have the right to impose and enforce exclusionary immigration policies, even if they are not (fully) justifiable. Yong's distinction seems to capture the two dimensions of the immigration debate, but it inadvertently introduces new difficulties.

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[18] The concept of rights is notoriously ambiguous, as we know from Hohfeld's (1913) conceptual analysis. On the Hohfeldian analysis of the right to exclude, see Lægaard (2010), Angeli (2015, 106–9), and Akhtar (2023). However, the ambiguity of the notion of a "right to exclude" that I point out here runs deeper, as it concerns the interpretation of individual Hohfeldian moral positions, notably claim rights.

[19] On the ambiguity of the notion of a (claim) right, see also Valentini (2023).

Yong's analysis downplays an important distinction between the *justice* of immigration restrictions and their overall moral *justifiability*. On Yong's account, immigration policies are both justified and just if and only if there is, on balance, "sufficient moral reason in favor" of those policies (2017, 463). However, most migration ethicists accept that immigration policies can be *just* without being *justified*, as considerations of justice do not "exhaust the moral universe" (Carens 2013, 108).[20] In practice, the question whether immigration restrictions are *just* plays a much more important role in the migration debate than the question whether restrictions are *justified* overall.[21] So, it might seem natural to adapt Yong's proposal, and to distinguish between a legitimacy-right to exclude and a *justice-right* to exclude.

Thus far, I have mostly avoided the concepts of justice and legitimacy, even though it may seem natural to speak of a "justice-dimension" and a "legitimacy-dimension" of the migration debate. That is, ultimately, how I proceed in this thesis, but this proposal requires further explanation, as the concepts of justice and legitimacy also invite ambiguity.

Once we distinguish between the justice and the justifiability of immigration restrictions, we must determine the subset of moral considerations that bear upon the justice of immigration restrictions. How we do that depends on our *concept* of justice, but several recent contributions highlight that two competing concepts of justice are popular in contemporary political philosophy (see de Marneffe 2023; Estlund 2024). For present purposes, the distinction between these two concepts of justice is highly salient.

According to one conceptual convention, "justice" denotes a specific political *value* or *ideal*, which is typically applied to (basic) social structures, and which these structures exhibit insofar as they are justifiable

[20] Notable exceptions include Hidalgo (2019b). Can immigration restrictions also be justified without being just? The answer to this question depends on how we characterize the set of justice-related reasons. But it is not obvious that we should rule out this possibility on conceptual grounds.

[21] Until recently, moral constraints on the design of immigration policies that are not justice-based have played a minor role in the literature. The most in-depth discussion of such constraints is provided by Blake (2020).

towards all individuals who live under them. Following David Estlund, I call this the *telic* concept of justice.[22] A claim about the justice of immigration restrictions in this telic sense is clearly a claim about their substantive moral merits, as judged from a specific moral perspective. According to a second convention, "justice" denotes the morality of our *perfect moral duties* (cf. de Marneffe 2023). Again following Estlund, I call this the *deontic* concept of justice. Crucially, adherents to this second convention typically insist that justice specifically deals with duties that correspond to *enforceable moral rights*.[23] Along these lines, some prominent migration ethicists define justice in migration in terms of "perfect duties" that are "susceptible, in principle at least, of being defended by coercive means" (Blake 2020, 215; see also Wellman 2008; and Miller 2016b, 163). When these theorists defend the justice of immigration restrictions, they are therefore really defending the claim that prospective immigrants do not have enforceable moral rights to admission. Accordingly, they are primarily defending a claim about the distribution of moral decision-making power, and not about the substantive moral merits of exclusionary immigration policies.[24] Depending on our preferred conceptual convention, claims about the justice or injustice of exclusionary immigration policies could therefore operate on either dimension of the immigration debate.

A similar ambiguity also affects the concept of legitimacy. According to one conceptual convention, "legitimacy" is a *deontic* concept that denotes the *right to rule*, so that a legitimacy-right to exclude denotes the right to rule over borders. Claims about the legitimacy of immigration restrictions in this deontic sense are clearly claims about the distribution of moral decision-making power.[25] But according to a

[22] Estlund explicates this telic understanding of justice in several recent publications, see Estlund (2016, 2020, 2024).

[23] On the difference between duties of justice and other moral duties, see also Buchanan (1987), Vallentyne (2003), Gilabert (2016), and Valentini (2016a).

[24] As Blake points out in the passage that follows the citation provided above, the claim that prospective migrants do not have an enforceable right to admission is compatible with the view that immigration restrictions are generally morally objectionable, for instance because states fail to exhibit important political *virtues* when they close their borders.

[25] As Yong (2017, 463) points out, this right to rule over borders requires further

second convention, legitimacy also denotes a specific political value or ideal. This ideal is typically understood as denoting a social or political order that is justifiable towards all individuals on whom this order is imposed (e.g. Nagel 1995a, 33). I call this the *telic* concept of legitimacy, in analogy to the telic concept of justice.[26] This distinction is important because claims about the legitimacy of immigration restrictions in this telic sense are primarily claims about the substantive moral merits of such restrictions. Depending on our preferred conceptual convention, a debate over the legitimacy of immigration restrictions could therefore also concern either their substantive merits or the question whether states are entitled to impose such restrictions.

These conceptual observations highlight a deeper systematic concern. Note that both the justice and the legitimacy of political arrangements are often understood as political ideals that are only satisfied when political arrangements are *justifiable towards* all individuals who live under them. As John Simmons (1999) points out, this contractualist understanding of the conceptual landscape, which has dominated political philosophy in recent decades, significantly reduces the conceptual space between justice and legitimacy, so that a clear distinction between questions of justice and questions of legitimacy becomes difficult to articulate.[27] Instead of distinguishing two "distinct dimensions of institutional evaluation" – one concerned with justice the other with legitimacy – we accordingly end up with one "watered-down and one-sided" dimension of institutional evaluation (Simmons 1999, 763).[28] At a fundamental level, I suspect that the contractualist background assumptions highlighted by Simmons explain why the two dimensions of the immigration debate are rarely distinguished clearly, and why

disambiguation, a point to which I return below.

[26] Some authors call this the ideal of legitimacy as "civic justifiability", see Pettit (2012, 146).

[27] For a recent attempt at overcoming this difficulty, see Quong (2023).

[28] See also Pettit (2012, ch. 3). Indeed, Rawls (2005, 225) famously insists that the ideals of justice and legitimacy have the same moral basis in the reasoning of the parties in the original position. Compare also Habermas's (2015) co-originality thesis. On the difference between the Rawlsian and the Habermasian views, see Rawls (1995).

they tend to collapse into each other again once they are pulled apart.

I highlight the contractualist underpinnings of the conceptual apparatus used in much contemporary political philosophy because it already codifies substantive normative assumptions.[29] Moreover, this apparatus has primarily been developed in the domestic political context, so it is not obvious whether these assumptions are also appropriate in the migration context. Take, for instance, the assumption that exercises of political power must, in some fairly demanding sense, be *justifiable towards* all individuals over whom power is exercised. The most influential arguments for this assumption specifically refer to features of the domestic political, like the ideal of democratic citizenship (e.g. Rawls 2005, 216–20). Even if we accept this assumption in the domestic context, it is therefore not obvious whether it also holds in the context of migration laws. In fact, some authors who accept that domestic laws must be justifiable towards all citizens in a demanding sense still deny that immigration laws must also be justifiable towards all prospective immigrants.[30] This view may or may not be correct, but we should not define our terms in a way that renders it incoherent. More generally, we should avoid conceptual stipulations that already tip the scales in favor of specific substantive views in the migration debate.[31] For this reason, I do not build contractualist assumptions into my concepts of justice or legitimacy.[32]

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[29] Of course, theorists in the contractualist tradition attempt to justify these normative assumptions, so they do not simply stipulate them on conceptual grounds. For a critical assessment of these justifications, see Enoch (2015).

[30] See especially Nagel (2005, 130). Compare also Nagel's claim that the "pure ideal of political legitimacy" requires that "the use of state power should be capable of being authorized by each citizen" (1995a, 8).

[31] Bertram's argument for open borders and the transnational governance of migration illustrates this point. In earlier work, Bertram (1997) defends a demanding notion of political justification by drawing on specific features of the relationship between democratic states and their citizens. In his work on migration, Bertram (2018, ch. 2) then seems to invoke this notion when he asks whether immigration restrictions could be justifiable towards migrants as well as citizens. Bertram's argument will therefore only be convincing to those who already accept that the same justificatory standards apply to immigration laws that also apply domestically.

[32] Let me be clear that I am not assuming that these contractualist assumptions are false, but only that they may not apply to immigration laws in the same

To conclude this conceptual discussion, let me outline how I intend to keep the two dimensions of the migration debate apart, and how I use the concepts of justice and legitimacy. I operate with a telic concept of justice, according to which "justice" denotes an important political value or ideal. In line with the republican political tradition, broadly understood, I specifically understand justice as the ideal of *equal freedom*.[33] Of course, this abstract characterization of the ideal of justice largely leaves open what justice actually requires, and it certainly does not immediately tell us what just immigration regimes may look like. But my point here is only to highlight that I think of justice ultimately as a moral goal, so that claims about the justice of exclusionary immigration policies are claims about the substantive moral merits of such policies, judged with respect to the promotion of this specific moral goal.

As mentioned earlier, I do not think that justice provides the only moral standard by which to evaluate the substantive moral merits of immigration policies.[34] Accordingly, I say that immigration policies are *justified* in case these policies are not subject to valid moral criticism, taking into account all morally relevant considerations.[35] In consequence, I divide the evaluative dimension of the immigration debate into two strands, one concerning the overall justifiability of exclusionary immigration policies, the other specifically concerning their justice.

By contrast, I operate with a deontic concept of legitimacy, according to which "legitimacy" denotes a right to rule. Thus, I describe

way in which they (arguably) apply to domestic laws. Nothing I say here is incompatible with a general contractualist theory of morality or meta-ethics, or with a contractualist methodology as described by Quong (2017).

[33] On the ideal of equal freedom and its various interpretations, see Pettit (2012, ch. 2; 2013) and the essays collected in Darwall (1995).

[34] I also accept what Saunders (2011) calls a *pluralistic* rather than an *inclusive* conception of justice, according to which justice can compete with other ideals, which may sometimes even be more important.

[35] For certain pruposes, it might be useful to introduce further conceptual distinctions, for instance, between policies that are justified, permissible, supererogatory, or suberogatory. But for present purposes, I bracket this additional layer of conceptual complication. On these further distinctions, see Archer (2018).

questions about the distribution of moral decision-making power related to immigration policy as questions of legitimacy. In this thesis, I focus primarily on the question whether states can legitimately impose and enforce immigration restrictions. In other words, I focus on the question whether states have a right to rule over their borders. In next step, I accordingly clarify what I mean when I speak of a "right to rule".

1.1.4 *The Legitimacy of Immigration Restrictions*

The idea that states have a right to rule over their borders, and to decide which prospective immigrants to admit or exclude, can be understood in various ways (cf. Yong 2017, 463). Some further conceptual work is therefore required to sharpen the questions I address in this thesis.

Theorists of political legitimacy often use the Hohfeldian analytical toolkit to distinguish different conceptions of the right to rule (see Schmelzle 2012; Brinkmann and Vorland Wibye 2023). But the Hohfeldian toolkit also has significant limitations, as it cannot capture a particularly prominent conception of the right to rule. The right to rule is often taken to denote the *overall* permissibility or justifiability of exercises of political power, and especially of the coercive enforcement of the state's laws (see Brinkmann 2020). Here, I will refer to this conception of the right to rule as the *overall right to rule*. The overall right to rule cannot be described in Hohfeldian terms because the Hohfeldian scheme can only capture what we owe to each other, but not what we may do all things considered.[36] From the perspective of excluding states, the question whether they have an overall right to rule over their borders is especially important, as the answer to this question has immediate action-guiding implications.

One central question I ask in this thesis is whether states have an overall right to rule over their borders, and to employ their law enforcement apparatus to exclude prospective migrants from their territory. At this point, one may wonder whether I am, again, collapsing the

[36] Hohfeldian liberty rights therefore do not entail all things considered moral permissions and vice versa, see Sreenivasan (2010).

two dimensions of the immigration debate, as it may seem like the enforcement of exclusionary immigration policies can only be justified overall when the policies themselves are justified overall too. But this is not so, as the reasons that speak for or against the enforcement of exclusionary immigration policies may not be the same reasons as the reasons that speak for or against the policies themselves. The enforcement of exclusionary immigration policies through coercive means could, on the one hand, fail to be justified even if the policies themselves are just or justified, and even if migrants would actually be required to accept their exclusion voluntarily. On the other hand, the enforcement of exclusionary immigration policies could also be justified even when the policies themselves are not. States may, for instance, be required to execute the will of their citizens even if citizens have voted for morally objectionable immigration policies, as states stand in a principal-agent relationship to their citizens. These possibilities have not been discussed much in the literature, but both possibilities seem highly relevant.[37]

From the migrants' perspective, the question what excluding states may do all things considered is less relevant than the question how they themselves may respond to their exclusion. Are they free to evade or resist immigration officials, or are they required to accept or even obey foreign immigration laws? Are they wronging the citizens of excluding states by immigrating without authorization, or are they being wronged by their exclusion? To address these questions, we must ask whether states have a right to rule over their borders under various Hohfeldian interpretations, as the Hohfeldian toolkit allows us to model the moral relationship between migrants and excluding states. Hohfeldian conceptions of the right to rule are therefore especially interesting if we consider the legitimacy of immigration restrictions from the migrants' perspective.[38]

[37] Note that I am not describing a right to do wrong here, understood as a claim right against interference in the implementation of unjust immigration policies. On the claim right to wrongfully exclude, se Akhtar (2023).

[38] Of course, migrants must also ask how they may respond to their (attempted) exclusion all things considered, and this question again goes beyond the Hohfeldian framework. But in my view, this question belongs to the individual ethics of migration, and need not be answered by an account of the legitimacy

Hohfeldian conceptions of the right to rule typically treat this right as a bundle of Hohfeldian entitlements, often emphasizing one particular type of entitlement: *liberty rights* to exercise political power, *claim rights* against interference with the exercise of political rule, or the *authority* or Hohfeldian *power* to create morally binding immigration laws. In line with recent non-essential accounts of political legitimacy, I do not think that we must identify a "correct" Hohfeldian conception of the right to rule (see Brinkmann and Vorland Wibye 2023). Instead, I believe that various conceptions of the right to rule allow us to articulate different but equally relevant questions. If we want to know, for instance, whether migrants can resist their exclusion in self-defense, we must ask whether states have a liberty right to exclude them.[39] But if we want to know whether migrants are required to obey foreign immigration laws, then we must ask whether states have the authority to impose moral obligations on them.[40] Both questions are interesting, and both are naturally understood as questions about the legitimacy of immigration restrictions. In this thesis, I accordingly also ask whether states have various Hohfeldian rights to rule over their borders.

At the conceptual level, we can clearly distinguish between the overall right to rule over borders and the various Hohfeldian conceptions of this right. But philosophers who discuss the legitimacy of immigration restrictions tend to assume that the various interpretations of the right to rule over borders are tightly connected at the normative level. They specifically tend to take for granted that states only have an overall right to impose and enforce immigration restrictions if they also have a liberty right to do so, and if prospective migrants are, in addition, morally required to accept their exclusion (see Grey 2015, 17–20; Miller 2023, 836–37). This assumption profoundly shapes the debate over the legitimacy of immigration restrictions, as it implies that the perspective of excluding states and excluded migrants on the legitimacy of immigration restrictions must align harmoniously, at least

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of immigration restrictions. For an overview of the emerging literature on the political ethics of migration, see Hidalgo (2019a).

39 I discuss this question at length in Chapter 5.

40 A question I discuss in Chapter 2.

when both sides reason correctly. But why should we assume that states can only justifiably enforce exclusionary immigration policies if prospective migrants are also required to accept their exclusion?

In the literature on domestic political legitimacy, the idea that states can only justifiably enforce their laws if citizens are also required to accept or even obey their legal order is often taken for granted.[41] This idea derives from the principle that legitimate political power must be justifiable *towards* each individual over whom it is exercised, which is broadly accepted in the liberal political tradition. And this principle seems to apply in the migration context too, as the imposition and especially the coercive enforcement of immigration restrictions also seem to constitute exercises of political power. Accordingly, many contributors to the immigration debate assume that the "coercive power" involved in immigration restrictions "must be justifiably to the person being coerced" (Carens 2013, 257). If we accept this line of reasoning, then we should accordingly expect that states can only justifiable enforce exclusionary immigration policies if these policies can be justified towards prospective migrants, so that these migrants have compelling reasons to accept their exclusion.

The line of reasoning I have just outlined is potentially problematic, however, as the most prominent rationales for the assumption that exercises of political power must, in a non-trivial sense, be *justifiable towards* each individual over whom power is exercised invoke specific features of the domestic political context. As I already pointed out above, it is by no means obvious that these rationales also apply in the context of immigration laws. Thomas Nagel, one of the most prominent advocates of a demanding ideal of domestic political justification, emphasizes this point in his influential essay on *The Problem of Global Justice* (2005).[42] On Nagel's account, the specific demands of political justification only arise in virtue of the fact that states claim authority

[41] Although this assumption is still controversial, see Zhu (2017) and Brinkmann (2020).

[42] Carens (2013, 336) mentions Nagel as a possible detractor from the general consenus outlined above, but he does not discuss Nagel's view further. Another exception to this consensus is Steinhoff (2022).

over their citizens, and claim to impose their legal order in the name of their citizens. But Nagel also argues that immigration policies are "simply enforced" against outsiders, and that states do not claim any authority over prospective immigrants (2005, 129–30). Nagel accordingly denies that immigration restrictions must be justifiable *towards* migrants, so he also denies that the perspective of excluding states and of excluded migrants on the legitimacy of immigration restrictions must align harmoniously. Instead, Nagel argues that states may sometimes be entitled to enforce immigration restrictions even though migrants may not be required to accept their exclusion. Nagel therefore paints a broadly Hobbesian picture, in which excluding states and their officials effectively clash with prospective migrants in a state of nature, so that both sides may resort to force according to their own moral judgment. Nagel's arguments thus pose a fundamental challenge to the basic normative framework within which the legitimacy of immigration restrictions and their enforcement is usually discussed.[43] In my thesis, I accordingly also ask whether Nagel's challenge is convincing, and whether we actually have good reasons to assume that states only have an overall right to rule over their borders if migrants are also required to accept their exclusion.

In sum, my central question in this thesis is whether states can legitimately exclude prospective migrants from their territory. This question then divides into three main sub-questions: First, do states have an overall right to rule over their borders? In other words, can states justifiably impose and enforce exclusionary immigration policies? Second, do states have a right to rule over their border under the most relevant Hohfeldian descriptions? In other words, are migrants

[43] In the migration literature, Nagel's challenge is usually either ignored or dismissed out of hand, e.g. Miller (2023, 837). Grey's (2015, 107–13) discussion of Nagel's view provides a notable exception. However, Grey attributes to Nagel a less radical challenge than I do, as he attributes to him the view that migrants must accept their exclusion even if it is not justified towards them according to the same standards of political justification that apply domestically. In my view, this reading of Nagel is exegetically unsustainable. Nagel' view has been discussed more extensively in the global justice literature, cf. Cohen and Sabel (2006), Julius (2006), Abizadeh (2007), and Pevnick (2008).

wronged by the enforcement of their exclusion, are they required to accept their exclusion, and are they required to accept their exclusion because they are required to obey foreign immigration laws? Finally, should we assume that the perspectives of excluding states and prospective migrants on the legitimacy of immigration restrictions must align harmoniously? In other words, should we assume that states may only exclude prospective migrants by coercive means if these migrants are morally required to accept their exclusion anyways? This final question is, in a sense, the most fundamental, as the answer to that question determines how we must approach the other questions. In the following overview of my substantive proposal, I accordingly focus on my answer to that question, and on my response to the Nagelian challenge.

1.2 MY PROPOSAL IN CONTEXT

In this section, I provide an overview of the substantive position I develop in this thesis. I first outline the major families of views in the migration debate in Section 1.2.1, before I highlight the precise point at which my proposal diverges from other views in Section 1.2.2. Finally, I outline the core features of my proposal in Section 1.2.3, and indicate some key upshots of my proposal in Section 1.2.4.

1.2.1 *Four Families of Views*

The immigration debate is often divided into two camps, with statists in one camp and cosmopolitans in the other. Statists contend that states ought to prioritize their citizens and adopt immigration policies that mostly benefit them, while cosmopolitans insist that all individuals deserve equal moral consideration, so that states must adopt policies that are impartially justifiable to all. Under plausible empirical assumptions, the statist view accordingly supports exclusionary immigration policies, while the cosmopolitan view implies that borders must normally be open. In practice, the distinction between statist and cosmopolitan positions therefore aligns with the continuum from open borders to closed borders views that I described above.

In the the previous section, I already highlighted that the framing

of the immigration debate in terms of cosmopolitan open borders views against statist closed borders views is misleading because it collapses the two dimensions of the immigration debate. In addition, this framing also collapses two axis of substantive disagreement in the literature, between proponents of "single-layered" and "multi-layered" theories of our political morality on the one hand, and between statist and cosmopolitan accounts of the content of the moral norms that apply to the design, implementation and enforcement of immigration policies on the other hand.[44] Because these are cross-cutting debates, we actually find four broad families of views in the migration debate: single-layered cosmopolitanism, single-layered statism, multi-layered statism, and multi-layered cosmopolitanism.[45] This taxonomy provides a helpful initial map to the theoretical option space in the migration debate, as most contributions to this debate can be assigned to one of these four families of views. Let me briefly highlight how these four types of views are commonly understood.

Most contributors to the immigration debate explicitly accept a form of "weak" moral cosmopolitanism. According to this weak cosmopolitanism, all human beings count equally at a fundamental moral level regardless of their political membership (cf. Blake 2013; Miller 2016b, 33).[46] It would therefore be misleading to describe statist views

[44] I take the term 'multi-layered' theories from Nagel (2005, 132).

[45] These four types of views are familiar from the global justice literature, although they receive various labels, cf. Sangiovanni (2007, 2012) and Blake (2013). Note that one may want to defend one type of view in the migration debate and another type of view in the general global justice debate.

[46] The exception is Steinhoff (2015), who denies that all human beings have equal moral worth. However, Steinhoff also insists that any differences in moral worth between individuals reflect their individual characteristics, so his view is not chauvinistic in the sense that it does not suggest that foreigners are inherently morally inferior. This is not to deny that such chauvinistic views once played a significant role in academic debates over migration, or that such views still play a significant role in broader public debates over migration. Moreover, it may even be true that chauvinistic ways of thinking still inform certain views in the philosophical migration debate, as some open borders advocates suggest, e.g. Goppel (2015, 341), Sager (2020, 74–77), and Finlayson (2020). I remain skeptical of this suggestion, but in this thesis I focus on the views explicitly defended in the literature, and I will not speculate about the cognitive patterns that may inform these views.

in a way that is incompatible with this weak cosmopolitan commitment, which is how statist views are sometimes described by their critics. But if statists and cosmopolitans agree that all individuals count equally in some fundamental sense, then what exactly is their philosophical disagreement?

At this point, we must take into account that both statist and cosmopolitan views come in two broad varieties, which I call "single-layered" and "multi-layered". According to single-layered moral theories, we fundamentally have the same moral obligations towards all other human beings, regardless of our relationships to specific people. Proponents of this type of view accordingly reject irreducible special moral obligations, so they also reject special obligations among compatriots or between states and their citizens. The most famous single-layered moral theory is the classical utilitarianism of Jeremy Bentham or J.S. Mill, but many other moral theories can also be single-layered in this sense. One important objection to such single-layered views holds that they have counter-intuitive implications, as special moral obligations are deeply ingrained in our moral practice. Accordingly, proponents of such theories often argue that we are entitled to act *as if* we had genuine special obligations, as that is how we can most efficiently discharge our universal obligations.[47]

Proponents of multi-layered moral theories, by contrast, defend special moral obligations that cannot be reduced to the most efficient means of discharging our universal obligations. For present purposes, I focus on multi-layered moral theories that accept special obligations that specifically arise in political contexts, for instance in the relationship between states and their citizens. Proponents of such theories typically argue that states can simultaneously prioritize the interests of their own citizens and acknowledge the equal moral status of all human

[47] To be precise, I am specifically concerned here with single-layered theories of our *political* morality, which deny the existence of relevant special obligations in the political realm. Such theories may still allow for certain special obligations in the private realm, such as obligations of gratitude. For an overview of the literature on special obligations, which highlights strategies for integrating derivative special duties into single-layered moral theories, see Jeske (2021).

beings.[48] Moreover, proponents of such theories usually accept that we also have moral obligations outside political contexts, which they often describe in humanitarian terms. So, they tend to emphasize a distinction between humanitarian obligations and genuinely political obligations.[49]

Proponents of single-layered cosmopolitan views insist that there is nothing inherently morally significant about the relationship between states and their citizens. They usually argue that justice requires much more open borders, because states may not show any partiality towards their citizens, and because the interests of migrants in crossing borders are typically more significant than the interests of citizens of destination states in restricting immigration. Proponents of this type of view usually still acknowledge that states can justifiably limit immigration under certain exceptional circumstances, but they typically also insist that these circumstances will be exceedingly rare.[50] In principle, this ideal of open borders is compatible with various institutional proposals, and it is even compatible with sovereign nation states adopting open borders policies. But in practice, proponents of this type of view tend to favor the creation of novel transnational or supranational institutions, which ensure that states do not unjustifiably restrict immigration.

Proponents of single-layered statist views agree that there is nothing inherently morally significant about the relationship between states and their citizens. However, they still argue that states ought to prioritize the interests of their own citizens, as a global political system in which states show a significant degree of partiality towards their citizens efficiently satisfies the relevant universal moral demands, at least under realistic empirical assumptions. Henry Sidgwick provides the classic

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[48] Influential multi-layered theories of our political morality are defended, among others, by Rawls (2005), Blake (2001), Miller (2005c), Nagel (2005), and Dworkin (2011).

[49] This brief discussion of the distinction between single-layered and multi-layered moral theories glosses over many philosophical questions that arise once we try to spell out this distinction with precision. Some of these questions are helpfully surveyed in Jeske (2021). However, I set these questions aside here to focus on the upshot of this distinction for the immigration debate.

[50] Views in this family are prominently defended, for instance, by Higgins (2013), Oberman (2016), Hidalgo (2019b), Sager (2020) and Kukathas (2021).

formulation of this type of view in *The Elements of Politics*, where he offers a single-layered utilitarian defense of a "national ideal of political organisation" ([1898] 2005, 275). While Sidgwick expresses the hope that we may one day be able to transition to a "cosmopolitan ideal" of political organisation, he did not consider his time ripe for this transformation, and single-layered statists today may argue that our time is not ripe for this transformation either.[51]

Proponents of multi-layered statist views also argue that states ought to pay special attention to the interests of their own citizens, but not just out of a concern for efficiency, but because states have genuine special obligations towards their citizens. Moreover, proponents of this type of statism usually argue that these special obligations contribute significantly to the justification of immigration restrictions, as they effectively allow states to discount the interests of prospective migrants relative to the interests of their citizens. Statist views of this type come in many varieties, but they all tend to highlight the special normative significance of some feature of the relationship between states and their citizens that is absent from the relationship between states and would-be migrants. Proponents of multi-layered statist views accordingly tend to defend the justice and legitimacy of exclusionary immigration policies, although they typically also emphasize that states have far-reaching humanitarian obligations to protect refugees, and to treat migrants who arrive at their borders decently.[52]

Proponents of multi-layered cosmopolitan views agree that certain distinctive political relationships create special obligations that are relevant for the question whether states can justifiably restrict immigration. However, they also insist that these relationships hold not just between states and their citizens, but also between states and prospective migrants. They may insist, for instance, that our genuinely political

[51] For critical discussions of Sidgwick's attempt to derive a national political ideal from universalist premises, see Walzer (1983, 38) and Miller (1995, 64). In the migration debate, single-layered statist views are currently not popular, but Nussbaum (2004) defends this type of view in the global justice debate.

[52] Prominent versions of this type of view are defended, for example, by Walzer (1983), Nagel (2005), Wellman (2008), Pevnick (2011), Miller (2016b), Stilz (2019b), and Blake (2020).

obligations extend across state boundaries to all individuals who are, in some relevant sense, subjected to a state's rule, and that states actually subject migrants to their rule in the relevant sense, for instance because states subject prospective migrants to the coercive enforcement of their immigration laws. Proponents of this type of cosmopolitanism tend to favor much more open borders, but they also emphasize the need to create novel transnational or supranational institutions to guarantee that states do not abuse their political power over migrants, and to ensure that migrants can participate democratically in the making of immigration laws.[53]

In my view, all four types of views are ultimately unsatisfying, at least in the form in which they are usually developed, and I defend this assessment in more detail below. In short, I believe that single-layered accounts of our political morality are unconvincing because they fail to take seriously the moral significance of relationships of political rule, and the distinctive justificatory demands that arise in such relationships. Multi-layered cosmopolitan views fare better in this respect, but they are not convincing either, because they do not attribute sufficient weight to the special relationship between states and their citizens, especially in democratic polities. And finally, multi-layered statist views fail to recognize that states exercise political power over prospective migrants, making it inappropriate to conceptualize their moral relationship to migrants primarily in humanitarian terms. Still, I believe that proponents of multi-layered statist view are on the right track, and the position I defend in this thesis constitutes a novel version of this type of view. In the next step, I outline the core tenets of my proposal.

1.2.2 *Subjection and Political Justification*

Like other proponents of multi-layered moral theories, I argue that certain relationships give rise to special moral obligations. One prom-

[53] Views in this category are prominently defended, for example, by Abizadeh (2008), Carens (2013), Bertram (2018), Brock (2020) and, with a focus specifically on refugees, Owen (2020).

inent explanation for this view holds that certain relationships, such as relationships of friendship, provide us with new moral reasons that we have *in addition to* our reasons to discharge our universal moral obligations.[54] Even though our universal moral obligations are fundamentally egalitarian, we may therefore be permitted or even required to show partiality towards specific other people (or themselves).[55] Once we take all our reasons into account, certain forms of partiality are thus compatible with the weak cosmopolitan commitment introduced above.[56]

In this thesis, I focus on special obligations that arise in distinctly political relationships. Advocates of multi-layered moral theories usually insist that these obligations have more profound normative implications than other special obligations, such as those that arise in friendships or families. One way in which this idea is often spelled out is that these obligations encompass a demand to justify all or some of one's actions to one's fellow participants in these relationships in accordance with distinctive standards of *political justification*. In this respect, genuinely political relationships are seen to have *transformative* moral effects; they do not merely create new reasons for agents who stand in such relationships, but also fundamentally alter the justificatory burdens that participants in such relationships incur towards each other.

The precise demands of political justification are subject to an intense ongoing debate that I will not retrace in detail here.[57] But in the

[54] For influential statements of this view, see Nagel (1995a) and Scheffler (2002, especially Ch. 7). For an insightful discussion of the differences between Nagel's view and Scheffler's view, see Thomas (2015, 183–89).

[55] This type of view is often spelled out in terms of *agent-relative reasons*. The idea is that relationships that are important to specific individuals are of value to them, and therefore provide them with reasons to participate in these relationships, and to favor their fellow participants in these relationships. These reasons are agent-relative, because these relationships are not necessarily valuable to other people, or at least not in the same sense. For a classic discussion of how to balance agent-relative and agent-neutral reasons, see Scheffler (1994).

[56] The question whether and how we can reconcile our particularistic and our universal obligations is especially central to Nagel's moral and political philosophy. For an insightful overview of Nagel's various attempts at answering it, see Thomas (2015, ch. 6 & ch. 7).

[57] The most influential theory of political justification is surely the theory of politial

previous section, I already indicated that one prominent explication of these demands holds that political power must be *justifiable towards* all individuals over whom it is exercised.[58] Much depends, of course, on how we understand this idea, but for the purposes of my argument a minimal interpretation of this justifiability-towards condition is sufficient, which I take to be uncontroversial.[59] This minimal condition holds that exercises of political power are only justifiable towards specific individuals if they are justified from the perspective of these individuals, taking into account all their reasons, including their reasons to discharge their special obligations. Accordingly, this condition is not met when exercises of political power are only justifiable from the perspective of those in power, taking into account only their reasons, including their reasons to discharge their own special obligations. The justifiability towards-condition thus prevents those in power from acting on the basis of reasons that are not shared by those over whom they rule.[60]

If genuinely political relationships have this transformative moral effect, then we must determine the precise conditions that initiate such relationships – the "political triggers" – to determine whether such relationships only hold within political communities, or whether they also extend across state boundaries to include would-be immigrants.

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liberalism developed by Charles Larmore (1996), John Rawls (2005), Thomas Nagel (1987) and many others in recent decades. However, a commitment to the idea that there are special standards of political justification need not imply a commitment to the broader theory of political liberalism.

58 As Waldron (1993, 44) points out, the idea that the political order must be justifiable towards all individuals who live under it plausibly belongs to the theoretical foundations of the liberal tradition of political thought.

59 More precisely, I take it to be uncontroversial among those who accept a non-trivial justifiability-towards condition. Critics of this idea will presumably still object, see especially Enoch (2015). Some theorists build a commitment to a broader political liberalism into the justifiability towards-condition, e.g. Lister (2011). But note that the minimal justifiability-towards criterion I introduce here does not entail a commitment to a public reason view.

60 Thus, the justifiability-towards condition restricts the reasons that may be invoked to justify exercises of political power, a point to which I return in Chapter 2. Note that I am concerned here with "justifications" understood as the set of reasons that actually justify some action, and not with "justifications" understood as speech acts. Agents exercising political power may also be required to communicate their reasons or to defend their actions publicly, but I do not introduce assumptions concerning such requirements here.

Various political triggers have been proposed, especially in the global justice literature, such as extensive cooperation (Beitz 1975) or specific relationships of reciprocity (Sangiovanni 2007). But one particularly influential view sees the *political subjection* of specific individuals to the rule of states as the salient trigger that initiates genuinely political relationships. I agree with this subjection-based view, because I believe that the demands of political justification ultimately reflect a concern for the reconciliation of the hierarchical nature of political subjection with the ideals of freedom and equality.[61]

Both statists and cosmopolitans routinely emphasize the moral significance of political subjection, but the prevalence of the language of subjection can mask significant disagreement over the right way to understand the type of subjection that ultimately grounds the demands of political justification. Three distinct conceptions of political subjection are currently popular, which potentially have different implications for the question whether states politically subject prospective migrants. I will call these three conceptions of political subjection *de facto* subjection, *de jure* subjection, and *moralized* subjection.[62] These three theoretical options require some explanation, as my own proposal builds specifically on a moralized conception of subjection.

According to the de facto conception of political subjection, individuals are subjected in the relevant sense if others exercise power over them and render them dependent on their will, whether or not those in power make any claim to rule legitimately. In the migration literature, the most prominent de facto conception of political subjection focuses on subjection to coercive state power.[63] According to the de jure concep-

[61] This point comes out clearly in the critical discussion of the political liberal traditon in Enoch (2015).

[62] I adapt the terms 'de facto subjection' and 'de jure subjection' from the democratic inclusion literature, see Abizadeh (2021, 604). I introduce the term 'moralized subjection' myself, as this conception of subjection is easily conflated with the de jure conception.

[63] See especially Abizadeh (2008), who builds on the coercion-based conception of political subjection proposed by Blake (2001). The neo-republican understanding of political subjection as subjection to domination by the state also falls into this category, see especially Pettit (2012). And also the relational egalitarian understanding of subjection as subjection to objectionable power-hierarchies, see

tion of subjection, by contrast, political subjection essentially involves subjection to the state's legal system, so that individuals are only politically subjected if states impose legal obligations on them.[64] Finally, according to the moralized conception, political subjection necessarily involves claims to legitimate moral authority by those in power, so that those in power claim that their purported subjects are morally and not just legally expected to obey their directives.[65] These three conceptions of political subjection are therefore primarily distinguished by the normative claims made by those in positions of power.[66]

In recent years, the coercion-based de facto conception of political subjection has been particularly influential in the migration literature. And this specific conception of political subjection also provides a central premise for many recent cosmopolitan contributions, as it seems clear that states employ coercive means to exclude outsiders from their territory.[67] However, I favor a moralized conception of political subjection, because I believe that only the moralized conception of subjection can account for the specific role that the notion of political subjection plays in the liberal political tradition. More specifically, I will argue that only the moralized conception of subjection can explain why political subjection triggers the demands of political justification, and specifically the justifiability towards-condition. When those in power express the moral expectation that their subjects ought to comply with their directives, they effectively claim that their would-be subjects ought to act in accordance with their practical and moral judgments.

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especially Kolodny (2023). For an application of the neo-republican account of subjection to the immigration debate, see Sager (2017). And for an application of the relational egalitarian account of subjection, see Sharp (2022).

64 On this de jure conception of subjection, see especially López-Guerra (2005).

65 See especially Nagel (2005). Beckman (2023) also defends a moralized conception of political subjection. However, Beckman argues that claims to legal authority function as perfect proxies for claims to moral authority, so that his view is co-extensional with a de jure conception of subjection. I critically discuss this idea in Chapter 2.

66 For reasons of simplicty, I bracket various hybrid options here, such as disjunctive views, according to which both coercion and the imposition of legal obligaitons are individually sufficient to constitute political subjection. On such hybrid views, see Abizadeh (2021, 604–5).

67 Although this assumption has been contested, see Miller (2010).

And in doing so, they attempt to subordinate their would-be subjects' capacity for practical agency to their own. In my view, such claims to moral authority are only compatible with the equal status of subjects as autonomous agents who are entitled to act in accordance with their own practical and moral judgments if these claims can be adequately justified *towards* them. This is not to say that de facto or de jure subjection are morally irrelevant – coercion is certainly morally concerning – but I will argue that forms of subjection that are not connected to claims to moral authority do not ground a non-trivial justifiability towards-condition.[68]

This discussion of political subjection brings us back to the Nagelian challenge that I introduced at the end of the previous section. Nagel also defends a moralized conception of political subjection, so he accepts that states only politically subject specific individuals if they claim that these individuals are morally required to comply with the state's laws. However, Nagel also argues that states do not politically subject would-be migrants, because states do not claim that migrants are morally required to obey their immigration laws (2005, 129–30). In other words, states enforce their immigration laws through *pure coercion*, which is not connected to expectations of obedience or even compliance. And because states do not politically subject prospective migrants, they are not required to justify their immigration laws towards them according to the standards of political justification. For this reason, states are not constrained in their implementation and enforcement of immigration restrictions by genuinely political obligations, but only by less demanding humanitarian obligations. As mentioned in the previous

[68] I develop this line of reasoning in Chapter 2. Let me add a speculation here, which I cannot defend here further. A concern with autonomy is generally shared by theorists who treat subjection as the relevant political trigger. However, theorists who defend a de facto understanding of subjection typically focus on a concern for *personal autonomy*, understood in broadly Razian terms, e.g. Blake (2001) and Abizadeh (2008). By contrast, I believe the strongest case for a moralized conception of subjection builds on a concern for *moral autonomy*, understood along broadly Kantian lines. I suspect that the shared language of autonomy masks some deeper philosophical disagreements here, which underlie the rather technical debate over the correct understanding of political subjection. For an insightful discussion of these two ideals of autonomy and their respective roles in the liberal tradition, see Waldron (2005).

section, this line of argument leads Nagel to endorse a particularly radical form of statism.

In the previous section, I characterized Nagel's view as "Hobbesian", and we are now in a better position to see why this label fits.[69] Because Nagel denies that migrants and excluding states stand in political relationships to each other, he also denies that the justifiability towards-condition applies to the outward-facing justification of immigration restrictions. In consequence, states may, in principle, be entitled, on agent-relative grounds, to exclude outsiders even if these outsiders have no compelling reasons to accept their exclusion. At the same time, migrants may also be entitled, on agent-relative grounds, to resist their exclusion even though states may justifiably attempt to keep them out. In certain cases, migrants therefore effectively confront excluding states and their officials in a Hobbesian state of nature, in which both sides are at liberty to use force according to their own best judgment. I do not find this Hobbesian vision compelling, but I agree with the central premises of Nagel's argument, especially his moralized conception of political subjection. Accordingly, I treat Nagel's arguments as a significant challenge.

1.2.3 *Immigration and Political Subjection*

To respond to the Nagelian challenge, one may insist, contra Nagel, that states do not enforce immigration restrictions through pure coercion, but actually claim legitimate moral authority over migrants. Several recent cosmopolitan contributions suggest this response, as they defend interpretations of the global political order according to which states claim legitimate authority over migrants through their participation in the global state system, and especially through their participation in international systems of migration governance and refugee protection.[70]

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[69] Of course, many aspects of Nagel's view do not fit with this Hobbesian label, such as Nagel's endorsement of universal humanitarian obligaitons, see also Cohen and Sabel (2006, 147). However, Nagel himself repeatedly invokes the Hobbesian roots of his position.

[70] These include book-length discussions by Bertram (2018), Brock (2020) and Owen (2020). Note that these authors do not present their arguments as

If these interpretations of the normative commitments of modern states are plausible, then Nagel's challenge may not get off the ground.

I remain skeptical of this line of response to the Nagelian challenge, as it appears to me to be predicated on a questionable interpretation of the normative ambitions manifest in current practices of immigration governance at the national and international level. With few exceptions, for instance within the European Union, the way that many states govern immigration does not seem to demonstrate the aspiration to attain any legitimate moral authority over prospective migrants. This seems especially clear if we focus on how states in the Global North tend to regulate immigration from states in the Global South. In this context, it seems more plausible that states usually govern immigration in the spirit of a "consequentialist nationalism", which recommends that states design their immigration policies exclusively in the interest of their own citizens (see Ruhs and Chang 2004, 85–87; also Lægaard 2010, 254–55; Grey 2015, 93). Granted, many states seem to express more demanding normative aspirations when it comes to the protection of refugees, and especially when it comes to the protection of political refugees who are being persecuted by their home state. But it is not clear that states claim any form of authority over refugees either, or whether states merely treat refugees as the recipients of their humanitarian concern. At some point, states may aspire to adopt immigration policies that prospective migrants must obey because they can be fully justified towards them, but I do not think that time has come already.

I pursue a different response to the Nagelian challenge, according to which states *ought* to claim moral authority over prospective migrants, at least if they wish to restrict their freedom of movement through coercive means. My response therefore does not hinge on the descriptive claim that states already make such authority-claims, but instead hinges on the normative claim that states often have decisive moral reasons for making such claims. I argue that states often have such reasons even though they incur particularly stringent justificatory demands once

responses to the Nagelian challenge, and may not intend to respond to this challenge. Indeed, Nagel is not mentioned in these three books.

they claim that migrants are morally required to obey their immigration laws. Moreover, I argue that states can, in principle, live up to such claims in a broad range of cases, so that this line of argument need not imply a call for open borders. I develop the argument for these claims in the next chapter, so I will not anticipate them here. Instead, I will only highlight one distinctive aspect of my view here.

On Nagel's account, states have strong reasons not to claim any moral authority over outsiders, as such claims trigger a normative dynamic that ultimately requires states to extend egalitarian schemes of social justice and democratic inclusion to these outsiders (2005, 136–40). In institutional terms, this need not necessarily imply the inclusion of migrants as full members of the political community, as it may be possible to satisfy these requirements through transnational institutions that govern immigration in conformity to egalitarian standards of social justice and democratic inclusion. These institutions could take various shapes, such as "an international convention arrived at after discussions that would involve a range of different actors, including states, NGO's and a representative selection of affected persons, including, most importantly, migrants themselves" (Bertram 2018, 70). But irrespective of the concrete institutional form such a proposal may take, states would no longer be entitled to insist on their right to unilaterally restrict immigration once they claim that migrants are morally required to obey their exclusion. States have strong incentives not to go down this route, on Nagel's account, so any argument that aims to show that states have decisive reasons for making such claims must meet a high burden of proof.

In contrast to Nagel, I reject the idea that authority-claims over migrants necessarily trigger a normative dynamic that ultimately requires the inclusion of migrants in egalitarian distributive schemes and in democratic decision-making, either at the national level or at the level of newly created transnational institutions. Accordingly, I reject the idea that states must inevitable abdicate a substantial part of their sovereignty over their immigration policies once they claim legitimate moral authority over prospective migrants. Because I reject this idea, I argue that the reasons that push states not to make outward-facing authority-claims are significantly weaker than Nagel's account implies.

On the flipside, I also highlight reasons that push states to make such outward-facing authority-claims, which Nagel does not address. On the basis of these two lines of argument, I then argue that the balance of all relevant moral reasons typically pushes states to claim legitimate authority over prospective migrants, even though states must accept certain new justificatory burdens once they start making such claims. I conclude that Nagel's thesis that states can justifiably enforce their immigration laws through pure coercion is therefore not convincing.

In developing this argument, I draw inspiration from a well-known aspect of Kant's political philosophy, his distinction between *active* and *passive* citizens, which I connect to a distinction between two types of authority-claims states may choose to make vis-à-vis specific individuals.[71] The modern state's claim to legitimate moral authority over its citizens has two dimensions: On the one hand, states claim that citizens are morally required to obey their laws. On the other hand, states claim to impose these laws in the name of their citizens, so that their citizens should be able to see themselves as active co-authors of the law. In other words, states make claims to *obedience* against their citizens, but they also claim to *represent* their political agency.[72] Nagel consistently discusses these two types of claims to legitimate authority as two sides of the same coin, so he does not consider the possibility that states may claim that some individuals must obey their laws *without* claiming to impose these laws in their name.[73] By contrast, I argue that this is precisely the stance states generally ought to take

[71] The distinction between active and passive citizenship dates back, at least, to Sieyès and Rousseau, but I took inspiration from the Kantian version of the distinction. For a discussion of this distinction, its historical roots, and its systematic significance, see Tuck (2024) and the responses in the same volume.

[72] An ideal of citizens as co-authors of the law is integral to the Franco-German tradition of republican political thought, see Pettit (2013, 193–98).

[73] Nagel's insistence on considering these two types of authority-claims as two sides of the same coin has akward implications that come out in a note addressing colonial regimes and regimes of military occupation. Nagel argues that such regimes are, in some sense, imposed in the name of colonial subjects or the citizens of occupied territories, as members of these groups are expected to obey the laws, cf. Nagel (2005, 129, n. 14). In many such cases, it would seem more plausible to me to say that states impose laws on certain people and expect them to obey these laws *despite* not imposing these laws in their name.

towards prospective migrants. And I also argue that states can often live up to such limited claims to authority without including migrants in egalitarian redistributive schemes or in democratic decision-making.[74] This line of argument then undermines the inclusionary normative dynamic that Nagel invokes to justify the reluctance of states to make outward-facing claims to legitimate moral authority.

The distinction I have just drawn between two types of claims to authority maps onto Kant's distinction between active and passive citizenship.[75] On Kant's account, passive citizens of legitimate states – including all women and economic dependents – are expected to obey the law, while only active citizens – specifically propertied men – directly participate in the political process, so that only the active citizens can see themselves as co-authors of the laws. Of course, Kant's (seeming) acceptance of a status of passive citizenship in the domestic political context is controversial, and the exclusion of women and economically dependent men from the political process is surely unacceptable in modern democracies. However, all modern democracies assign some status resembling Kant's status of passive citizenship to temporary migrants and tourists (see Weinrib 2008, 2). The normative category of passive citizenship has accordingly not disappeared from contemporary political practice, even though the concept of passive citizenship has largely disappeared from theoretical discussions. My arguments suggest that a status resembling that of passive citizenship must generally be extended to prospective migrants who have not yet entered the state's territory, but who are already subjected to coercion by the state's immigration law enforcement apparatus.[76] This suggestion tracks

[74] I develop this line of argument in Chapter 2 by building on the Razian service conception of authority, see Raz (1985).

[75] In recent years, Kant's theory of citizenship has received increasing attention. For a strong discussion of Kant's theory of citizenship, see Davies (2023).

[76] Note that this claim does not imply a specific view on the scope of the coercive character of immigration law enforcement measures. Abizadeh (2008) argues that states subject essentially everyone around the world to coercion in virtue of their *threats* to enforce their immigration laws against unauthorized migrants. In principle, my view is compatible with this claim. However, I actually favor a significantly narrower view of the scope of the coercive effects of immigration restrictions that broadly follows Miller (2010).

Kant's own theory of *cosmopolitan law*, as Kant also conceptualizes the moral relationship between states and would-be migrants in analogy to the relationship between states and their passive citizens.[77]

In the picture that emerges from my discussion, Nagel's twofold division of our morality into a humanitarian and a political domain is replaced by a threefold division of our morality into a humanitarian domain and two distinct political domains, which are constituted by two distinct types of authority-relationships. On the one hand, states claim to impose and enforce their laws in the name of their (active) citizens, and they must accordingly ensure that citizens can actually see themselves as co-authors of these laws. Although I do not defend this claim here, I agree with Nagel that states must generally implement egalitarian schemes of social justice as well as inclusive democratic decision-making procedures to ensure that citizens can actually see themselves as co-authors of the law. On the other hand, states claim that migrants must obey their laws even though these laws are not imposed in their name, so they must ensure that migrants have sufficiently strong reasons to accept these claims.[78] This threefold model of our political morality allows states to avoid the Hobbesian conflict with outsiders described by Nagel, and also allows them to avoid the inevitable slide towards authoritative transnational institutions envisioned by contemporary cosmopolitans.

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[77] See Ripstein (2021, 241). The connection between Kant's theory of citizenship and his account of cosmopolitan law is rarely pointed out. However, I doubt that it is possible to make sense of Kant's account of cosmopolitan law without invoking a category of passive citizenship, which may explain why cosmopolitans today who explicitly build on Kantian premises tend to defend views that deviate fundamentally from Kant's own position, e.g. Grey (2015) and Bertram (2018).

[78] Because I am concerned here specifically with migration, I do not explore the justificatory demands that arise specifically in virtue of the claims states make to govern in the name of their citizens. However, I am broadly sympathetic to the fiduciary account of the relationship between states and their citizens developed by Fox-Decent (2011). Thus, my view is that claims to obedience ground obligations to be of service to would-be subjects – in the Razian sense of "service" – while claims to representation ground special fiduciary obligations.

1.2.4 *The Right to Rule over Borders*

To conclude this overview of my proposal and of its place in the immigration debate, I return to the questions I set out at the end of the previous section and highlight some key upshots of my proposal. My overarching conclusion is that states generally have a legitimacy-right to impose and enforce exclusionary immigration policies, although this right is limited in important ways.

On my account, the answer to the question whether states have a legitimacy-right to exclude specific migrants partly depends on the situation of these migrants, which determines whether states can justifiably treat these migrants as passive citizens. In the most straightforward type of case, states exclude prospective migrants who are themselves citizens of reasonably wealthy democracies. This type of case receives comparatively little attention in the migration literature, which tends to focus on the movement of economically disadvantaged migrants from the Global South to states in the Global North. But wealthy democracies constantly exclude citizens of other wealthy democracies, so this type of case is still highly relevant. I argue that citizens of wealthy democracies do not have a moral right to immigrate to other states, as I reject a general right to global freedom of movement. In other words, I argue that states typically have a liberty right to exclude citizens of wealthy democracies. Additionally, I argue that citizens of wealthy democracies are generally required to obey the immigration laws of foreign states, and that they are also liable to the enforcement of this requirement, by coercive means if necessary. From the perspective of excluded individuals, their exclusion is therefore legitimate, as states have the relevant Hohfeldian rights to rule over their borders.

Do states also have an overall right to rule over their borders? Can they justifiable enforce immigration restrictions even though would-be migrants presumably have non-trivial interests in crossing borders? My discussion suggests that states have such an overall right to exclude in a broad range of cases, as they are permitted and even required to show substantial partiality towards the interests of their own citizens. Moreover, because states normally aspire to rule in the name of their citizens – and are usually also required to do so – they also have

special obligations towards their citizens to execute their will, which citizens express through the democratic process.[79] Accordingly, states may actually be required to enforce immigration policies that exhibit a range of moral shortcomings, especially if these policies have been implemented through democratic procedures.[80]

Let me emphasize again that this line of argument does not justify exclusionary immigration policies themselves, as citizens of democratic states may naturally be morally mistaken to support exclusionary immigration policies. In this respect, my arguments for an overall right to exclude still concern the distribution of moral decision-making power, and not the substantive moral evaluation of immigration restrictions. But as states and their officials must normally act as the agents of their citizenry, I suspect that they can often justifiably implement the will of their citizens even if citizens favor policies that are morally objectionable or even unjust.

The line of argument I have just sketched faces a well-known objection, which is frequently raised in response to other arguments that invoke considerations related to democratic self-determination in defense of the right to rule over borders. This objection holds that the democratic self-determination of citizens cannot justify immigration restrictions or their enforcement because the exclusion of migrants from the demos already violates the ideal of democratic legitimacy. According to one influential formulation of this objection, the ideal of democratic legitiamcy requires that all who are subjected to state coercion are included in the demos (Abizadeh 2008). Immigration restrictions are therefore inherently undemocratic, unless they are sanctioned by democratic procedures that include migrants on fair terms in the decision-making process.

My account defuses this objection because it suggests that the ideal

[79] I broadly accept the justification for special political obligations outlined in Stilz (2019b, 208–14).

[80] My proposal therefore potentially supports an argument for the right to exclude based on democratic self-determination which, in contrast to other self-determination based arguments, supports an overall right to rule over borders, and not just liberty rights to exclude outsiders or claim rights against interference with the implementation of immigration policies.

of democratic legitimacy only applies in relationships in which those in power claim to act in the name of their subjects. The democratic ideal therefore explains why the exclusion of citizens from the democratic process would be undemocratic, but it does not speak against the exclusion of prospective migrants from democratic decision-making, at least not as long as states do not claim to impose immigration laws in their name.[81] If I am right to argue that states can often justifiably exclude migrants without claiming to represent their political agency, then the enforcement of exclusionary immigration policies is therefore not inherently undemocratic.

My assessment of the reasons that determine whether states can justifiably enforce exclusionary immigration policies changes once we consider cases that deviate markedly from the ideal outlined above. In relation to refugees, for instance, I argue that states are not entitled to claim any legitimate authority for their immigration laws unless they ensure that refugees receive sanctuary or asylum somewhere else. On my account, states therefore cannot justifiably exclude refugees unless they put in place effective international refugee protection schemes. My arguments therefore only support a qualified endorsement of a legitimacy-right to enforce exclusionary immigration policies. And my arguments also highlight that the enforcement of such policies has significant downstream normative implications, especially with respect to the protection of refugees. My discussion suggests that states (normally) have an overall right to rule over their borders only if they claim that prospective migrants are required to obey their immigration laws, and if these outward-facing claims to moral authority are actually valid. If states wish to enforce immigration restrictions, they must accordingly make sure that migrants are actually required to obey their immigration laws, which implies that states must, at the very least, ensure that the human rights of migrants are securely protected.

In closing, I return to the taxonomy of statist and cosmopolitan views introduced in the beginning of this section. The view I have outlined here is clearly statist in its basic form and assumptions. Like

[81] I develop this response in Chapter 2.

many other statists, I defend a multi-layered account of our political morality, and I emphasize the moral significance of relationships of political rule, as well as the justificatory demands that arise in such relationships. Moreover, I accept demanding special obligations between states and their citizens, and I argue that these obligations generally do not extend across state borders. Finally, I argue that states can, in many cases, legitimately close their borders to prospective immigrants.

Granted, some cosmopolitans are willing to concede that states may have an overall right to rule over their borders, at least for the time being. But they typically also insist that this right can, at most, be provisionally valid while transnational institutions are still being developed that allow migrants to participate on equal terms in the democratic decision-making on immigration laws (e.g. Bertram 2018, 104–8; Brock 2020, 60). By contrast, I argue that we need not set an expiry date on the legitimacy of immigration restrictions that states unilaterally impose and enforce on the basis of their own internal democratic decision-making process.

The position I defend in this thesis still has significant cosmopolitan elements, though. Unlike many other statists, I argue that states and migrants ought to stand in a distinctive form of political relationship to each other, so that their interactions are not governed purely by humanitarian norms. While states need not include migrants in their citizen's shared project of democratic self-governance, they ought to ensure that the interactions between their officials and prospective migrants are governed by authoritative law rather than pure force, so they ought to overcome the state of nature at the border described by Nagel. Contemporary cosmopolitans may consider this result less than fully satisfying, but I believe that my proposal still exhibits many features that are characteristic of the cosmopolitan tradition, especially the Kantian account of cosmopolitan law. I accordingly propose the view outlined here as an intermediary alternative to mainstream statist and cosmopolitan positions, and therefore call it a "cosmopolitan statism".

1.3 OVERVIEW OF THE CHAPTERS

I conclude this Introduction with summaries of the following chapters, accompanied by a short explanation of how the arguments I develop in each chapter contribute to the broader project I have outlined here.

Chapter 2: Claiming Authority across Borders

In Chapter 2, I defend the central tenets of the cosmopolitan statism outlined in the previous section. I depart from the disagreement between statists and cosmopolitans over the justificatory demands that apply to the imposition and enforcement of exclusionary immigration laws. I then develop my argument in four main steps. First, I defend Nagel's assertion that claims to legitimate moral authority are constitutive of the relationships that ground demands for a special form of political justification. Next, I defend the plausibility of Nagel's suggestion that states generally enforce their immigration laws through pure coercion. In the third step, I reject two versions of the statist view that states can justifiably enforce immigration restrictions through pure coercion – Nagel's broadly Hobbesian statism and a neo-Lockean statism that is usually based on certain theories of territorial rights or collective self-determination. Finally, I defend my own cosmopolitan statism.

As mentioned above, one key upshot of my proposal is that migrants should normally be treated as passive subjects of the state's political rule, who are expected to obey the state's laws even though these laws are not imposed in their name. In my view, proponents of traditional statist views are therefore wrong to insist that states only have humanitarian obligations towards migrants, while cosmopolitans are wrong to insist that migrants can demand the same form of political justification as citizens in whose name states claim to exercise political rule. My proposal therefore allows us to combine many attractive aspects of traditional statist views, such as the statist ideal of democratic self-determination, with many attractive aspects of cosmopolitan views, especially the cosmopolitan insistence that the relationship between states and prospective immigrants should not be one of naked force, but should be regulated through legitimate law.

Chapter 3: Rights, Interests, and the Problem of Generality

My argument in Chapter 2 assumes that individuals do not have a general moral right to immigrate to any country of their choosing. But this assumption is controversial, as some cosmopolitans prominently defend such a right. If their arguments are convincing, then any justification for immigration restrictions must be compelling enough to justify *infringing* this general right to immigrate. In practice, the enforcement of immigration restrictions would then only be justified under truly exceptional circumstances, so that my argument for a cosmopolitan statism may not get off the ground. In Chapter 3, I discuss the philosophical methodology that informs the defense of a moral human right to immigrate – the interest-based approach to the justification of moral rights. My methodological discussion shows that the argument for a moral human right to immigrate is structurally flawed, and therefore does not pose an objection to my proposal.

Proponents of the interest-based approach to the justification of moral rights treat moral rights as rules that are justified if their general observance would promote sufficiently weighty interests.[82] My discussion provides a constructive critique of this interest-based approach, which revolves around a novel methodological challenge, which I call the "problem of generality".[83] This problem stems directly from the conception of moral rights as moral rules, as these rules can function at various levels of generality. Depending on how we describe the rights we are trying to justify, various incompatible sets of moral rights can therefore be derived from the same underlying distribution of interests. The negative part of my discussion shows that most previous interest-based justifications for specific moral rights are structurally flawed, as they fail to explain why we should assign rights at a specific level of generality. The positive part of my discussion shows how proponents of

[82] This methodology for the justification of moral rights was pinoeered by Scanlon (1977) and Raz (1986). Note that Nagel also endorses this approach at one point, see Nagel (1995a, 141).

[83] I call this challenge the "problem of generality" because it structurally resembles the problem dsicussed under this label in epistemology, see Feldman and Conee (1998).

the interest-based approach can reformulate their arguments to avoid the problem of generality. However, my solution to this problem significantly complicates the structure of interest-based arguments, so that it is questionable whether the arguments for a general moral right to immigrate can actually be salvaged.

Chapter 4: The Bundle Account of Enforceable Duties

The notion of enforceable moral duties plays a central role in debates over justice and political legitimacy. I also invoke this notion at several points in my discussion of the legitimacy of immigration restrictions, for example when I argue, in Chapter 2, that migrants have enforceable moral duties to accept their exclusion if states have the authority to impose morally binding immigration laws. However, we still lack a convincing philosophical account of the enforceability of moral duties, which is why Christian Barry and Emily McTernan diagnose a "puzzle of enforceability" (2021). In Chapter 4, I address this puzzle and propose a novel account of the enforceability of moral duties.

I argue that moral duties are enforceable just in case they are embedded in specific bundles of Hohfeldian moral positions. The puzzling question why certain duties are enforceable therefore dissolves into smaller questions, which are themselves no longer philosophically puzzling, concerning the justifiability of the individual moral positions in these bundles. One key upshot of my discussion is that moral duties are, in one relevant sense, enforceable by default in a Hobbesian state of nature, in which individuals are, by assumption, liable to the enforcement of their duties simply because they lack any rights against interference. In Chapter 2, I invoke this result when discussing the enforceability of moral duties to obey foreign immigration laws. By invoking this result, I can bypass a prominent objection to the Razian service conception of authority, on which I base my argument for the external authority of immigration restrictions, which holds that the service conception cannot explain the enforceability of duties to obey the law.

Chapter 5: Resistance at the Border, Self-Defense and Legitimate Injustice

According to an influential argument in the migration literature, migrants can always resist their unjustified exclusion in self-defense because immigration officials unjustly threaten to harm them when they enforce substantively unjustified restrictions.[84] If this argument is correct, then it implies that the enforcement of unjustified immigration restrictions is generally also illegitimate, because the moral asymmetry between aggressors and victims that characterizes genuine self-defense situations is incompatible with the right to rule under any standard interpretation. The two dimensions of the immigration debate that I have distinguished in this introductory chapter would then largely collapse into each other again, as states would essentially never be entitled to decide to implement immigration policies that are not fully substantively justified. Moreover, if this argument is correct, then it would also undermine my suggestion that states can legitimately enforce a range of unjustified and even unjust immigration policies. In Chapter 5, I therefore address and reject this argument for defensive resistance at the border.

I argue that the argument for defensive resistance at the border fails because states often have a liberty right to rule over their borders even when they exercise this liberty right to enforce substantively unjustified or even unjust immigration policies. When states have such a liberty right to enforce unjust or unjustified immigration restrictions, then migrants cannot resist their exclusion in self-defense, as immigration officials can then prevent them from crossing the border without violating their rights. This result supports my own discussion of the legitimacy of immigration restrictions, and I build on it in Chapter 2. However, this result also supports the Nagelian view that migrants and immigration officials effectively confront each other in a quasi-Hobbesian state of

[84] This argument was first proposed by Hidalgo (2015). Hidalgo's argument is part of a broader trend in the literature on political legitimacy that employs the tools of defensive ethics to justify extensive rights to political resistance, see for instance Brennan (2018), Delmas (2018), and Pasternak (2018). For overviews of this trend, see Flanigan (2023) and Lim (2023).

nature, in which both sides are at liberty to resort to force according to their own unilateral moral judgment. My discussion in Chapter 5 therefore also sharpens the Nagelian challenge.

Chapter 6: Denizenship and Democratic Equality

So far, I have focused on the territorial exclusion of prospective immigrants. But the view I have outlined here naturally raises the question how states ought to relate to foreigners who already reside on their territory, their so-called *denizens*. Can they also treat them as "passive" citizens, or must all who live within the boundaries of the state be included as "active" citizens? One of the most broadly accepted principles in the migration literature holds that all individuals who are admitted to a state's territory must, within a reasonable time frame, be put on a path to citizenship and full political inclusion. A long-term status of "passive citizenship" for migrants is therefore, in principle, ruled out on democratic grounds. This principle also plays a central role in the debate over the justifiability of immigration restrictions, as it implies that states can only limit access to political membership by limiting the physical access to their territory.[85] In Chapter 6, Suzanne Bloks and I reject this broadly accepted principle. We argue that a politically passive guest status for denizens can, even in the long-run, be fully compatible with democratic ideals, at least for denizens who are themselves citizens of democratic polities. To support this conclusion, we argue that the original citizenship of some denizens can function as a substitute for their full democratic inclusion, as it can effectively protect them from domination, and provide them with the social basis of self-respect.

Our rejection of the principle that the territorial admission of migrants must eventually escalate to their full political inclusion has broader theoretical implications, as it potentially undermines certain prominent justifications for exclusionary immigration policies. But in

[85] Proponents of self-determination based arguments for the right to exclude, for instance, tend to rely on this principle as a key premise, e.g. Wellman (2008, 133).

closing, I specifically wish to highlight how our results complement the cosmopolitan statism I propose in this thesis. States clearly expect their denizens to obey their laws even though they do not impose these laws in their name, but are they justified in this expectation? One peculiar feature of the situation of denizens is that they are the only group whose obligations to obey the law can plausibly be grounded primarily in their actual consent. Neither migrants who have not yet entered the state's territory nor citizens who already grew up on the state's territory plausibly consent to the laws in the same way as denizens who voluntarily accept a visum to settle in a foreign country. For this reason, it seems entirely plausible to me that states can justifiably claim legitimate authority over denizens even though they do not rule in their name, and do not treat them as co-legislators of the law. I accordingly believe that states can, in a broad range of cases, justifiably offer outsiders the opportunity to reside as guests on their territory, in accordance with a mutually beneficial contract.[86]

The arguments we develop undermine one particularly strong reason why the citizens of democratic states may not want to offer outsiders this opportunity, namely their legitimate concern for their democratic self-determination. Our proposal to decouple territorial and political admissions will ideally motivate the citizens of destination states to further open their borders and to allow themselves, those who enter their territory as denizens, and the citizens of sending states who remain at home to reap the cultural, economic, and political benefits of such hospitable arrangements.

[86] As Kant also seems to suggest in his *Towards Perpetual Peace* ([1795] 2006, 8:358).

2

Claiming Authority across Borders

ABSTRACT

In this chapter, I propose a novel cosmopolitan statism, an intermediary position in the long-standing debate between statists and cosmopolitans in the philosophy of migration. I focus specifically on the question whether states can legitimately enforce immigration restrictions. In contrast to many cosmopolitans, I argue that the democratic inclusion of prospective migrants is not necessary for the legitimate enforcement of immigration restrictions. But in contrast to many statists, I argue that states can only legitimately enforce restrictions if they claim that migrants are required to obey their immigration laws, and if these claims are actually valid. Moreover, I argue that such claims to legitimate authority have normative implications that are substantially more demanding than statists usually anticipate, because states subject migrants to their political rule once they expect them to obey their immigration laws. Finally, I introduce a distinction between "passive" and "active" citizenship to explain why states can often justifiably subject prospective migrants to their political rule, even if migrants are excluded from the making of immigration laws.

CHAPTER 2

INTRODUCTION

Cosmopolitans believe that the same standards of egalitarian justice and democratic legitimacy apply within borders and across borders. They accordingly argue that justice in migration requires largely open borders, and that legitimate immigration laws must be authorized through transnational democratic procedures. Statists, by contrast, believe that egalitarian standards of social justice and democratic inclusion only apply within societies, while immigration policies are regulated by a less demanding humanitarian morality. They accordingly insist that justice licences exclusionary immigration policies, and they deny that unilateral immigration restrictions are illegitimate or exhibit a democratic deficit.[1]

In this chapter, I develop a novel intermediary position in this debate between statists and cosmopolitans. Like other statists, I argue that demanding requirements of social justice and democratic inclusion arise only within distinctive political relationships. But I also argue that states *ought to* enter into a form of political relationship with prospective migrants, although this relationship differs qualitatively from the relationship between states and their own citizens. In short, my proposal holds that states ought to claim that citizens are required to obey their laws because these laws are imposed in their name, while states ought to claim that migrants are required to obey their laws even though they are not imposed in their name. Accordingly, states ought to treat their citizens as active co-authors of the law, while treating migrants as passive subjects of the law. I argue that these limited-authority claims across borders have stronger normative implications than statists usually acknowledge, but weaker implications than cosmopolitans usually assert. To mark the status of my proposal as an intermediary view in the debate between statists and cosmopolitans, I label it a "cosmopolitan statism".[2]

[1] This description of the debate is obviously stylized, but it is broadly correct, see also Levitov and Macedo (2018, 469–72).

[2] My view is notably more cosmopolitan than the "cosmopolitan statism" proposed by Levitov and Macedo (2018), which is a traditional statist view with a

I proceed as follows: In Section 2.1, I defend the core statist commitment that requirements of egalitarian justice and democratic inclusion only arise within distinctive political relationships. Building on Thomas Nagel's work, I argue that such relationships are characterized by the dual fact that states exercise coercive political power *and* claim legitimate authority over those whom they subject to coercion. I then defend this view against cosmopolitan critics who argue that coercion alone suffices to constitute the relevant political relationships.

In Section 2.2, I defend a second statist assumption, namely that states typically do not claim legitimate authority over migrants. In Nagel's words, immigration restrictions "are simply enforced against the nationals of other states; the laws are not imposed in their name, nor are they asked to accept and uphold those laws" (2005, 129–30). This assumption has recently been criticized by cosmopolitans who insist that states do claim authority over migrants, and who argue that such claims entail further normative commitments.[3] In response to these critics, I argue that statists offer a plausible interpretation of the legitimacy-claims states usually make for their immigration laws.

In Section 2.3, I switch gears and argue that existing statist views are nonetheless unconvincing. I critically discuss two versions of the statist view, which offer competing descriptions of the moral relationship between states and prospective migrants that are broadly inspired by Hobbesian and Lockean ideas respectively. I argue that proponents of both views fail to show that states can justifiably impose and enforce restrictive immigration laws.

In Section 2.4, I then develop my own cosmopolitan statism. My core assumption is that states usually make two distinct types of authority-claims. As Nagel points out, states claim that citizens are obligated

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particularly strong emphasis on our humanitarian duties. But my view is substantively more statist than the "statist cosmopolitanism" proposed by Ypi (2008), as I accept that states have special obligations towards their own citizens.

[3] Versions of this so-called "legitimacy argument" for more open borders and strengthened global systems of migration governance and refugee protection are defended by Carens (2013), Bertram (2018), Brock (2020), Owen (2020) and Schmid (2025). For insightful discussions of these arguments, see Buxton and Draper (2022) and Sharp (2024).

to obey their laws, and that they impose these laws in the name of citizens (2005, 128). In the domestic political context, these two types of authority-claims are rarely distinguished, as citizens are presumably only required to obey the law if states also govern in their name. But I argue that these two types of authority-claims can justifiably come apart in the migration context, and that states often have good reasons to demand that migrants obey their immigration laws *even though* these laws are not imposed in their name. I argue that the normative implications of these limited authority-claims are more demanding than statists envision, but less demanding than cosmopolitans suggest.

I have outlined an ambitious program, so let me clarify my aspirations for this chapter. My goal is to stake out an attractive novel position in well-trodden theoretical terrain. Doing so requires covering a fair amount of ground, so I will focus on explaining the motivation for and appeal of my proposal. My critical discussion of traditional statist and cosmopolitan views serves this end, and is not meant to be comprehensive. Still, I believe my arguments also pose a strong challenge to proponents of these statist and cosmopolitan views.

2.1 TAKING STATISM SERIOUSLY

In this section, I explain why I defend a form of statism. To this end, I introduce what I take to be the most compelling version of the statist view, and defend it against two prominent objections.

2.1.1 *The Statist Challenge*

Can states justifiably impose and enforce exclusionary immigration laws? Statists believe so, and they often support this assessment with the following line of argument: Granted, states have moral reasons not to prevent migrants from moving freely, as doing so sets back the legitimate interests of migrants. However, the citizens of legitimate states also have valid interests in restricting immigration. Moreover, states have special obligations towards their own citizens, and in virtue of these special obligations states must show some degree of partiality towards the interests of their citizens (cf. Nagel 2005; Macedo 2007;

Miller 2016b, 71).[4] Once states appropriately factor in these special obligations, the balance of morally relevant reasons therefore favors immigration restrictions.

Cosmopolitans reject this argument, and they reject it in part because they accept different standards for the justification of immigration restrictions. Most cosmopolitans accept the following principle:

> *Liberal Justification*: Coercive state power must be *justifiable towards* all individuals over whom it is exercised.

In the domestic political context, a commitment to *Liberal Justification* is one of the defining features of the liberal tradition (cf. Waldron 1993).[5] But cosmopolitans insist that *Liberal Justification* also applies to immigration laws, as the imposition and enforcement of immigration restrictions constitutes coercive state power. Moreover, they argue that immigration restrictions cannot be justified *towards* migrants by invoking the state's inward-facing special obligations, at least not in a world as unequal as ours (e.g. Carens 2013; Hidalgo 2019b; Sager 2020).

Many cosmopolitans also accept a more demanding assumption:[6]

> *Democratic Justification*: Coercive state power must be *procedurally justified towards* all individuals over whom it is exercised by including them in democratic decision-making.

This principle is more controversial, but also enjoys broad theoretical support in the domestic political context. Some cosmopolitans argue that *Democratic Justification* applies to immigration laws too, so they insist that migrants must be included in the making of immigration laws,

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[4] For a classic defense of special obligations towards compatriots, see Miller (2005c).

[5] Or at least of the tradition of political liberalism. As Enoch (2015, 116) highlights, it is possible to be a liberal of the non-political variety while rejecting *Liberal Justification*.

[6] My formulations of *Liberal Justification* and *Democratic Justification* follow Abizadeh (2008, 41).

ideally through transnational institutions that legitimize immigration laws (e.g. Abizadeh 2008; Lepoutre 2016; Bertram 2018; Wilson 2022).[7]

Most statists accept *Liberal Justification* and *Democratic Justification* in the domestic political context. In fact, statists often derive the special obligations that states supposedly owe their own citizens precisely from these justificatory standards. Nagel (2005), for instance, argues that egalitarian requirements of social justice and democratic inclusion arise within political communities because states cannot adequately justify their rule *towards* their citizens unless they meet these requirements.[8] However, statists like Nagel still deny that *Liberal Justification* and *Democratic Justification* apply to the outward-facing justification of immigration laws.

Nagel's statism is based on a normative and a descriptive assumption: The normative assumption holds that *Liberal Justification* and *Democratic Justification* capture justificatory demands that arise only in distinctive political relationships. On Nagel's account, such relationships are constituted by the state's exercise of coercive power *in combination with* the state's claim to possess legitimate authority. The descriptive assumption holds that "immigration policies are simply enforced against the nationals of other states; the laws are not imposed in their name, nor are they asked to accept and uphold those laws" (2005, 129–30). In other words, immigration restrictions are usually enforced through *pure coercion* that is not connected to claims to legitimate authority. Because pure coercion does not initiate genuinely political relationships, *Liberal Justification* and *Democratic Justification* do not

[7] The claim that immigration restrictions are coercive in the relevant moralized sense is controversial, cf. Miller (2010). While I agree with Miller's core argument, I will not rely on it here. When I say that immigration restrictions are coercive, I employ a flat non-moralized notion of coercion. Moreover, I assume that the claim that immigration restrictions are enforced by coercive means in this flat non-moralized sense is largely uncontroversial, at least as far as the use of physical force at the border is concerned. The extent to which the communicative *threat* of the enforcement of immigration restrictions is itself coercive, rather than being merely a threat of coercion, is less clear, but I cannot discuss this question here. For surveys of moralized and non-moralized accounts of coercion, see Edmundson (2012, 460–64), Garnett (2018), Anderson (2023).

[8] Nagel does not use these labels, but I believe this reconstruction captures his core point.

apply to the outward-facing justification of immigration laws. Of course, Nagel does not claim that states are morally unconstrained in their treatment of foreigners. But he insists that immigration policies only have to conform to a thin humanitarian morality that also applies outside political relationships. On this basis, he defends a "multi-layered" account of our political morality.

I have introduced Nagel's view here because I agree with Nagel that *Liberal Justification* and *Democratic Justification* apply only when those exercising coercive power also *claim* to possess authority over their subjects. In the remainder of this section, I defend this idea against cosmopolitans who insist that these justificatory standards apply regardless of what those exercising political power *claim* to be doing.

2.1.2 *Naked Tyranny?*

Nagel's statism is subject to a prominent objection from *naked tyranny*. According to this objection, Nagel's view condones coercive power as long as those in power rely solely on pure coercion. However, it seems morally "perverse" that "a purely tyrannical regime that treated human beings as slaves" should "in virtue of its very tyranny, be excused of special responsibilities to those over whom it exercises power" (Abizadeh 2016, 116).[9]

This objection fails because statists are not committed to the view that pure coercion is morally innocuous. To the contrary, statists are free to acknowledge that coercive power is prima facie objectionable for all the reasons that their cosmopolitan critics emphasize, chief among them a concern for moral and personal autonomy. Statists can accordingly acknowledge that exercises of coercive power normally have significant *moral costs*, and are therefore only justified if these costs are outweighed by greater moral benefits.[10] Because purely tyrannical

[9] For earlier statements of this objection, see Julius (2006) and Abizadeh (2007).

[10] I speak of "moral costs" because it does not matter for present purposes whether these consist of wrongs or bads. On the wrongs and bads of coercion, see Garnett (2018).

regimes are presumably not morally beneficial, statists can still easily condemn such regimes. Crucially, this response to the objection from naked tyranny does not hinge on the assumption that coercive power must be justifiable *towards* the subjects of coercion. Instead, it only hinges on the assumption that coercion must be justified *tout court*. To see the significance of this point, we must take a closer look at *Liberal Justification*.

What exactly does *Liberal Justification* entail? On the most common understanding of this principle, it entails that coercive power must be justifiable in terms of reasons that are *accessible* or *acceptable* to all individuals over whom power is exercised. There is much disagreement about what makes reasons "accessible" or "acceptable" (cf. Enoch 2015, 115–17), but one minimal condition, which I take to be uncontroversial, holds that the *agent-relative reasons* of the coercing agent are *not* accessible or acceptable to the subjects of coercion.[11]

To mark this point, let me introduce some terminology: I say that exercises of coercive power are *agent-justified* if they are justified from the coercing agent's perspective, taking into account all their agent-relative reasons and all relevant agent-neutral reasons. Conversely, I say that exercises of coercive power are *subject-justified* if they are justified from the coercion subject's perspective, taking into account all their agent-relative reasons and all relevant agent-neutral reasons. Accordingly, I take *Liberal Justification* to imply, at a minimum, that exercises of coercive power must always be subject-justified.[12]

We can now see that there is something inherently strange about

[11] The precise explication of the distinction between agent-relative reasons and agent-neutral reasons remains contested, cf. Ridge (2023). However, my argument does not hinge on a specific explication of this distinction.

[12] Does this characterization of *Liberal Justification* imply that states cannot justifiably coerce anarchists who do not accept their authority? No, because anarchists may be wrong about the reasons that apply to them, so that exercises of political power may be justifiable towards them, in the morally relevant sense, even if they fail to see this. My explication of the justifiability-towards condition is therefore weaker than some epistemic explications discussed in the literature on public justification, which cannot easily address this type of objection. See Vallier (2022) for an overview of this literature. I thank David Miller for raising this concern.

Liberal Justification. After all, why would coercing agents not be entitled to act in ways that are, as a matter of fact, agent-justified? Why would they accept that their actions must also be subject-justified? I am, of course, not the first to notice that the justifiability-towards condition is rather mysterious (cf. Bird 2014, 193–98; Enoch 2015, 112–13). But cosmopolitans have, so far, not dispelled this sense of mystery.

Things look different, however, when coercing agents *claim* to possess legitimate moral authority over the subjects of coercion.[13] In that case, coercing agents claim that their subjects *ought* to comply with their authoritative directives, and *ought* to accept their coercive rule. But to make such claims is to make claims about the subject's reasons, so there is nothing mysterious about the idea that claims to legitimate authority must be subject-justified, as well as agent-justified. In my view, this is the fundamental logic behind *Liberal Justification*, which critics of this principle usually overlook.[14] And this logic neatly explains why this principle only applies in relationships that are characterized by claims to legitimate authority. *Liberal Justification* therefore only applies when states claim to possess authority over their subjects.

I emphasize the distinction between the agent-justifiability and the subject-justifiability of coercion because statists usually insist that states have agent-relative reasons for restricting immigration. As mentioned above, statists argue that states have special obligations towards their citizens, which often provide strong reasons for limiting immigration. But the reasons that derive from special obligations are inherently agent-relative, and will therefore not count as relevant reasons from the perspective of would-be migrants.[15] The statist view accordingly implies

[13] When I say that an agent "claims" to posseess moral authority, I use that phrase in the sense in which Raz (1985, 300–305) uses it when he argues that the law or legal officials "claim" to possess moral authority, i.e., to possess the normative power to issue morally binding directives. Such claims need not necessarily be explicitly communicated, but they characterize how would-be authorities see themselves, so that it would be inconsistent for an agent to claim to be a legitimate authority but to act in a way that undermines such claims.

[14] For an alternative argument that derives *Liberal Legitimacy* from claims to moral authority, see Van Schoelandt (2015).

[15] Note that I am not claiming that migrants could not possibly appreciate the force of these agent-relative reasons, or that it would be impossible to communicate

that states may, in virtue of their special obligations, be agent-justified in enforcing immigration restrictions that cannot be subject-justified.[16]

2.1.3 *A Democratic Deficit?*

Nagel's statism suggests an authority-principle of democratic inclusion, according to which only the subjects of claims to legitimate moral authority must be democratically included. But this view seems to imply that dictatorial regimes need not justify their rule democratically, as long as they rule through pure coercion. Some critics therefore insist that this view is fundamentally undemocratic (Wilson 2022, 184).[17]

Cosmopolitan democratic theorists typically emphasize an ideal of personal autonomy, understood along broadly Razian lines as the capacity to direct one's own life (cf. Raz 1986; e.g. Abizadeh 2008; Wilson 2022). However, proponents of an authority-principle of democratic inclusion, like myself, are free to endorse this ideal too, and to insist that it usually prohibits dictatorial rule. Moreover, this argument can be made without relying on *Democratic Justification*, as Raz demonstrates in *The Morality of Freedom*. A commitment to the ideal of personal autonomy therefore does not, by itself, support this principle.[18]

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these reasons to them. According to a standard view in the literature on normative reasons, the communicability of reasons is a separate matter from their agent-relativity, see Ridge (2023, sec. 5). Nor am I claiming that the relationship between states and their citizens cannot have any agent-neutral value that would provide agent-neutral reasons for migrants. I thank David Miller for urging me to clarify these points.

16 The statist view is therefore inherently path-dependent, as it treats the ongoing special relationship between citizens and the state as providing legitimate agent-relative reasons for excluding outsiders from these same relationships. Because the statist view exhibits this path-dependency, it does not allow us to determine *a priori* what the boundaries of political communities ought to look like in a just world. Some commentators argue that this path-dependency involves a vicious form of justificatory circularity, e.g. Julius (2006, 184–87). However, I do not think that Julius's arguments – which are specifically aimed at Nagel's version of the statist view – successfully reveal any structural flaws in the statist position.

17 For another response to this objection, see Beckman (2023, 139–40).

18 Nor, for that matter, does a commitment to the ideal of personal autonomy, by itself, lend any support to *Liberal Justification*.

Why should we accept *Democratic Justification* then? Two popular arguments deserve separate discussion. According to the first argument, this principle follows from a specific political ideal of *democratic legitimacy*. This ideal supposedly requires the democratic inclusion of all individuals who are subjected to coercive state power, whether or not the state claims authority over them (Abizadeh 2008).[19]

The argument from democratic legitimacy rests on two assumptions: First, that the coercion-principle of democratic inclusion provides a convincing explication of the democratic ideal. And second, that democratic legitimacy, thus understood, is necessary for the moral justifiability of coercive political power.[20] Both assumptions are questionable, as others have pointed out before. The coercion-principle seems too far removed from actual democratic practice to provide a plausible interpretation of the democratic ideal (Saunders 2011). And the democratic inclusion of all who are subjected to state coercion does not generally seem necessary for the moral justifiability of coercive power either, as demonstrated by counter-examples involving defensive military force (Steinhoff 2020).[21] For these reasons, I reject this argument.

I do not, however, reject the ideal of democratic legitimacy or its moral significance. Instead, I favor an alternative explication of this ideal, according to which democratic legitimacy requires the inclusion of all individuals who are subjected to coercive state power *and* in whose name the state claims to rule. This alternative explication of the democratic ideal fits better with actual democratic practice, and also explains why democracies must include all their citizens in the democratic process. I return to this point in Section 2.4, so I only wish to note here that this narrower interpretation of the democratic ideal

[19] For an insightful reconstruction of this argument, see Saunders (2011).

[20] I add the "usually" because proponents of this objection may want to leave room for cases in which the value of democratic legitimacy is defeated by especially weighty competing concerns.

[21] Note that Abizadeh explicitly brackets questions concerning the normative status of the ideal of democratic legitimacy in his orginal formulation of the coercion-argument for a global demos, see Abizadeh (2008, 38). As far as I can tell, Abizadeh does not discuss this question in detail in later work either.

only supports *Democratic Justification* as an inward-facing principle.[22]

According to the second argument, *Democratic Justification* follows from the assumption that individuals have moral rights to democratic inclusion in all decisions that may negatively impact their personal autonomy. In James Wilson's prominent version of this argument, these rights protect our "second-order" autonomy-interests in being able to "share in determining the actions that shape the contexts of one's choice" (2022, 172).

I accept that individuals have strong *interests* in second-order autonomy, but I doubt that individuals have general *rights* to second-order autonomy.[23] Wilson does not explain how he derives rights to autonomy from these interests, but this step is by no means trivial, as Raz (1986, 247) points out in his critical discussion of general rights to personal autonomy. Like Raz, I do not think that individuals have general rights to personal autonomy, as competing reasons – most obviously the interests of prospective duty-bearers – will often speak against the recognition of such rights. Nor do I accept that individuals have moral rights to be democratically included in the making of all political decisions that might negatively impact their autonomy, as I believe that the recognition of such rights would impose disproportionate burdens on democratic societies.[24]

Let me emphasize that my view is compatible with the claim that

[22] In defense of similar views, see Bird (2014) and Beckman (2023). My disagreements with Beckman will become clear in the following section. In short, while Beckman and I agree that the state's claim to legitimate *moral* authority is necessary to trigger claims to democratic inclusion, Beckman believes that claims to *legal* authority provide a perfect proxy for claims to moral authority. By contrast, I believe that claims to legal authority are neither necessary nor sufficient for claims to moral authority.

[23] Wilson speaks of "claims" rather than "rights", but it seems clear that he means Hohfeldian moral claim rights. On the methodological question how rights can be derived from interests, see the following chapter of this thesis.

[24] Wilson acknowledges that the value of personal autonomy may be defeated by competing considerations. But on his account, "other values, including political equality, the importance of good outcomes, and many contextual considerations" are only relevant for determining exactly *how* specific individuals ought to be included, cf. Wilson (2022, 191). In my view, these considerations are just as relevant for determining whether specific individuals have rights to democratic inclusion in the first place.

the *citizens* of democratic states have autonomy-based moral rights to inclusion in the democratic process. I will not defend this claim in detail here, as my argument does not hinge on citizens having such rights. But in short, my suggestion would be that the considerations that speak most strongly against the recognition of such rights, namely the interests of prospective duty-bearers, loose much of their normative significance when these same duty-bearers claim to exercise political power in the name of specific individuals. My rejection of *Democratic Justification* as an outward-facing principle therefore does not imply a rejection of *Democratic Justification* as an inward-facing principle.

2.2 A MATTER OF INTERPRETATION

Several cosmopolitans reject the statist assumption that states enforce their immigration laws through pure coercion.[25] These critics insist that states actually do claim moral authority over migrants, and that such claims are integral to the normative self-understanding of modern states. In this section, I introduce and defend two prominent statist responses to this objection, which are based, respectively, on broadly Hobbesian and Lockean ideas.

2.2.1 *Two Statisms*

Statists and their cosmopolitan critics agree that states claim to legitimately rule over their borders *in some sense*. But what exactly do such claims entail? At this point, a clarification concerning the notion of legitimacy is in order. Legitimacy is often taken to denote the *right to rule*, but this right is variously interpreted as:

- (a) the ability to exercise coercive power *justifiably*,
- (b) a Hohfeldian *liberty right* to exercise coercive power,

[25] Cf. Carens (2013, 196), Bertram (2018, 48–50), Owen (2020, 48, 110), Brock (2022, 456), and Schmid (2025, 2). These authors also develop constructive arguments for more open borders and strengthened global systems of migration governance and refugee protection on the basis of this observation. I do not discuss these arguments here, but see Sharp (2024) for an overview.

- (c) a Hohfeldian *claim right* to rule without interference, or
- (d) the *authority* to impose moral obligations to obey the law through the exercise of a Hohfeldian *moral power*.

These four notions of legitimacy are logically independent, so states can consistently claim that their immigration laws are also externally legitimate in any one sense without claiming that they are legitimate in any other sense. So, how do statists understand the external legitimacy-claims that states make for their immigration laws?

Statists broadly agree that states claim that their immigration policies are morally justified, and hence legitimate in sense (a). Statists also broadly agree that states claim a liberty right to impose and enforce exclusionary immigration laws (b). Accordingly, states claim that they can impose and enforce exclusionary immigration laws without thereby infringing the moral rights of migrants.[26]

More interestingly, statists disagree about whether states claim to possess Hohfeldian moral claim rights to rule over their borders, which correspond to moral duties on the part of migrants to accept their exclusion (c). According to one version of the statist view, states do not claim that migrants are morally required to accept their exclusion. In fact, states do not even claim that migrants are required not to resist immigration officials. I will refer to this view as "Hobbesian statism", because it holds that states claim that migrants effectively clash with their immigration officials in a Hobbesian state of nature.

According to a second version of the statist view, states claim to possess claim rights against unauthorized border-crossings. Moreover, states claim that their officials merely enforce these rights when they exclude migrants by coercive means. However, proponents of this second statist view still deny that states claim any moral authority over migrants, as they insist that states claim that their right to exclude does not derive from exercises of legitimate authority. I will refer to this

[26] This liberty right does not follow from the justifiability of the enforcement of immigration restrictions, because the exclusion of would-be migrants might involve justified rights-infringements. I discuss this point in the fifth chapter of this thesis.

second view as "Lockean statism", because it holds that states claim to have rights over their territory that exist independently of political authority, similar to Lockean property rights.

I have characterized Hobbesian and Lockean statist views in terms of competing *descriptions* of the types of external legitimacy-claims that states make for their immigration laws.[27] But statists also argue that states can often *justifiably* claim that their immigration laws are legitimate in sense (a), (b), and – depending on the view in question – in sense (c) *without* claiming that they are also legitimate in sense (d). These endorsements of the legitimacy-claims states make for their immigration laws are based, in turn, on multi-layered accounts of our political morality of the kind described in the previous section.

2.2.2 *The Charge of Incoherence*

Hobbesian and Lockean statists face two popular objections, which aim to establish – unsuccessfully in my view – the incoherence of their views. A first Kantian-inspired objection holds that the statist view is incoherent because the *unilateral* imposition and enforcement of immigration restrictions necessarily implies claims to moral authority (cf. Grey 2015; Huber 2017; Bertram 2018; Stilz 2019b).[28]

The unilaterality-objection is based on the idea that agents who resort to coercion on the basis of their own unilateral moral judgments thereby make implicit authority-claims, as they privilege their own moral judgments over the judgments of those whom they subject to coercion. But this line of reasoning is flawed, as David Enoch (2015,

[27] In using the labels "Hobbesian" and "Lockean", my point is not to suggest that proponents of these views also accept the broader theoretical commitments of Hobbes or Locke. However, Hobbesian statists tend to build explicitly on Hobbesian ideas, e.g. Nagel (2005, 129–30) and Lægaard (2010, 257–59). While many Lockean statists also defend broadly neo-Lockean theories of territorial rights, e.g. Miller (2007), Nine (2008), and Moore (2015).

[28] This objection comes in different flavors, which locate implicit claims to moral authority in different aspects of unilateral exercises of coercive power, see Sinclair (2018). For present purposes, we can treat these objections as variations on the same theme. On the place of the unilaterality argument in Kant's political philosophy, see also Hodgson (2010) and Walla (2014).

130–31) points out, because unilateral moral judgments need not imply any expectation of deference or obedience to these judgments, but only to the reasons on which these judgments are based. Agents who act on the basis of their own moral judgment therefore need not necessarily claim any special moral authority.[29]

The unilaterality objection can be repaired by adding the premise that some of the moral facts that bear on the justifiability of the unilateral enforcement of immigration restrictions are objectively *indeterminate* (cf. Grey 2015, 137; Sinclair 2018). Under this additional assumption, the state's unilateral judgment that immigration restrictions are morally justified could not be fully guided by the underlying moral reasons, and would therefore imply an attempt to exercise "moral legislative authority" (Huber 2017, 683). But if states attempt to *legislate* morality when they unilaterally enforce immigration restrictions, then they must also claim authority over would-be migrants.

The problem with the amended unilaterality objection is that it is far from clear whether the relevant moral facts are really indeterminate. Hobbesian statists will presumably insist that the exclusion of migrants through pure coercion is often determinately justified. And Lockean statists will presumably insist that states often have determinate moral claim rights to unilaterally exclude outsiders. These claims may or may not be correct, but they are fully coherent.

A second objection holds that statist views are incoherent because states claim the authority to impose *legal* obligations on migrants, and because claims to *legal* authority entail claims to *moral* authority (cf. Grey 2015, 19). States accordingly cannot regulate immigration through legal means without claiming moral authority over migrants.[30]

[29] For insightful discussions of Enoch's argument, see also Sinclair (2018) and Christmas (2021). Koltonski (2021) develops an ingenious – but in my view ultimately unsuccessful – rejoinder to Enoch's objection.

[30] Moreover, statists normally endorse the rule of law, so they would presumably not recommend the regulation of migration through extralegal means. As Abizadeh (2010, 121) points out, statists usually accept the "principle of rule of law", according to which the "state's deployment of physical force and its threats of punitive harms against persons are legitimate only if carried out according to public, general, impartially applied, standing laws".

It is not obvious whether states really impose legal obligations on would-be migrants. Among legal theorists, the criteria that delimit the scope of claims to legal authority are subject to ongoing debate (cf. Goodin and Arrhenius 2022; Beckman 2023, ch. 5). While some accounts of the scope of legal obligations, like the coercion-based account, suggest that immigration laws impose legal obligations on migrants (see Abizadeh 2021), other accounts, like the legal-determination account, suggest the opposite conclusion (see Beckman 2023, 78–81).[31] Personally, I doubt that states generally impose legal obligations on would-be migrants, but I grant this first premise of the legalistic objection here for the sake of the argument.

The second premise of the legalistic objection is even more questionable. Proponents of this objection usually invoke Raz's specific brand of legal positivism to support the idea that claims to legal authority always imply claims to moral authority (e.g. Grey 2015, 19; Beckman 2023, 5). But the Razian view that claims to moral authority are constitutive of genuine legal systems is also highly controversial (cf. Kramer 2006, 181–86). This is not the place for an inquiry into the nature of legal systems, so let me just note the following point: Raz may be right to insist that the law must claim to be justifiably enforceable – and hence legitimate in sense (a) – for legal directives to be distinguishable from the brute "threats of the highwayman" (cf. Raz 2009, 158).[32] However, this influential argument does not suggest that the law must also claim

[31] In Abizadeh's original formulation of his coercion-argument for the democratic inclusion of migrants, subjection to coercion directly counts as the kind of subjection that triggers a claim to democratic inclusion, cf. Abizadeh (2008). In his more recent work, subjection to coercion seems to function only as a proxy for subjection to claims to legal authority, which then count as the kind of subjection that triggers claims to democratic inclusion, see Abizadeh (2021, 603).

[32] I actually doubt that the law necessarily claims to be morally justified or justifiably enforceable. It seems possible, for instance, to imagine a slave-holding society that has a legal system that imposes legal duties on slaves, even though such a legal code would transparently serve as a tool for the efficient coordination of the oppression of the enslaved population. Such a legal system would presumably not claim any moral authority, at least not over the enslaved population, despite relying on the legal form. For a discussion of similar cases, see Kramer (2003, 92–101; 2006, 184).

to have moral authority – and hence to be legitimate in sense (d).[33] This argument accordingly does not undermine the statist position.

Critics of the statist view may object here that the enforcement of legal norms can only be justified when these norms also have moral authority, so that the law's claim to be justified effectively implies a claim to legitimate authority. However, statists deny this additional assumption, at least as far as the enforcement of immigration laws is concerned, and they support this denial with substantive moral arguments. These arguments may or may not succeed, but they are entirely coherent.

2.2.3 *The Global Political Order*

If claims to legal authority functioned as perfect proxies for claims to moral authority, then we would only have to consult the relevant legal sources to determine whether states claim moral authority over prospective migrants.[34] But I have rejected this idea, so how do we determine whether states make such claims?

David Owen suggests that we must provide a holistic "normative reconstruction" of political practices to determine the precise legitimacy-claims that states make for their political rule. And he specifically argues that we must reconstruct the normative commitments that underpin the global political system, and especially global systems of migration governance and refugee protection, to explicate the legitimacy-claims states make for their immigration laws (Owen 2020, 10–11). On Owen's account, the global political system constitutes a "normative order" that is "oriented both towards the Janus-faced norm of state sovereignty and

[33] In his original statement of the highwayman-argument, Raz does not distinguish these two dimensions of legitimacy. The relevant passage reads: "Secondly, the law – unlike the threats of the highwayman – claims to itself legitimacy. The law presents itself as justified and demands not only the obedience but the allegiance of its subjects" (Raz 2009, 158).

[34] In earlier work, Beckman (2014, 407) explicitly argues that the only facts we need to consider to determine whether states claim moral authority over specific individuals are legal facts, as claims to legal authority are perfect proxies for claims to moral authority.

non-intervention and towards the cosmopolitan norm of human rights" (44). And this cosmopolitan reconstruction of the global normative order supports his assertion that states claim legitimate moral authority over would-be migrants.

In terms of methodology, Owen's holistic reconstructive approach strikes me as basically correct. However, I believe that statists can use the same methodology to provide a plausible normative reconstruction according to which states do not claim any moral authority over prospective migrants. I will not try to develop such a reconstruction in detail here. Instead, I limit myself to defending the initial plausibility of a statist reconstruction of the global political order.

In principle, statists could simply reject Owen's suggestion that the global political system constitutes a genuine normative order. While this realist view is too popular to be dismissed out of hand, I personally consider it too cynical to be plausible. Moreover, I suspect that most contemporary statists also reject this view. For present purposes, I will therefore not explore this possible statist response.

More plausibly, statists can insist that the global normative order is really an *international* and not a *cosmopolitan* order. In other words, they can insist that states primarily make normative claims vis-à-vis other states, but not vis-à-vis individual foreigners. States accordingly do not expect individual foreigners to obey their immigration laws, although they expect foreign states to respect their territorial sovereignty. Of course, some of the rules of this international normative order *benefit* individual foreigners, most obviously international human rights law. But even these rules are part of an international regime, in which individuals are usually not treated as political agents in their own right. By participating in this international normative order, states accordingly do not claim authority over individual foreigners.

I will not try to settle the question whether the internationalist or the cosmopolitan reconstruction of our global normative political order is more compelling. But it is worth noting that statists can offer some strong evidence for their proposal. They can, for instance, point to the fact that many states choose not to criminalize unauthorized border-crossings (cf. Lægaard 2010, 254). More generally, Owen and other cosmopolitans emphasize the enormous gap between their preferred

reconstruction of the global political order and the actual political practice of many states. However, this gap may simply be too wide for their arguments to get off the ground, as the normative reconstruction of a practice must fit the actual practice at least tolerably well. The internationalist reconstruction of the global political order – in both its Hobbesian and Lockean variety – avoids this problem, and therefore plausibly strikes a more convincing balance between cynicism and reconstructive optimism.

2.3 CHALLENGING THE STATIST VISION

So far, I have defended the statist vision of our political morality. Next, I explain why I still reject traditional Hobbesian and Lockean statist views, focusing on representative formulations of these positions.

2.3.1 *The Expanding Political Circle*

My discussion naturally raises the question why states would ever claim authority over would-be migrants. After all, if such claims commit states to justify their immigration policies in line with *Liberal Justification* or even *Democratic Justification*, then it seems like states would always benefit from enforcing their immigration policies through pure coercion. While Nagel (2005, 143–45) hints at an answer to this question, it has not been properly spelled out before.[35]

Nagel acknowledges that states have strong reasons to avoid the justificatory demands that result from claims to authority over outsiders. But Nagel also insists that states have competing reasons to make such outward-facing authority-claims. He specifically points out that states may be able to discharge their universal humanitarian obligations, such as their obligations to fight climate change, more effectively by setting up transnational institutions that claim authority across borders, and that use this authority to solve global coordination problems. On Nagel's

[35] This question is also central to Julius's (2006, 180) critique of Nagel. Julius does not consider the answer to this question that I propose here.

account, states accordingly face competing normative "pressures" to expand their political relationships beyond their borders on the one hand, and to refrain from doing so on the other. Whenever the balance of these pressures favors expanding the circle of genuinely political relationships, the statist position becomes morally unstable. Nagel accordingly suggests an innovative and, in my view, compelling *pressure model* of an expanding political circle. In the remainder of this section, I employ this pressure-model of an expanding political circle to argue against Hobbesian and Lockean statists.

Note that the view I am defending here is not voluntaristic, but still has a strong decisionist element. This view is not voluntaristic because states may have decisive moral reasons to engage in political relationships with outsiders, including would-be migrants. But it retains a decisionist element, as states remain free to maneuver strategically even when the balance of normative pressures pushes them to expand the political circle. States may, for instance, try to reduce these pressures without making outward-facing authority-claims, for instance by solving global coordination problems through international treaties, without creating authoritative transnational institutions (cf. Nagel 2005, 145). The normative significance of the decision to claim authority over outsiders is therefore not reducible to the reasons that pressure states into making such claims.

2.3.2 *Challenging Hobbesian Statists*

Hobbesian statists like Nagel argue that states can justifiably exclude migrants through pure coercion, at least when these migrants do not face threats to their human rights. In a recent article, David Miller (2023, 837) rejects this view on the basis that pure coercion is inherently "repugnant", so that coercion is generally only justifiable if coercing agents make valid claims to legitimate authority.[36] My critique of

[36] To support this objection, Miller cites Dworkin's claim that "no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations" (Dworkin 1986, 191). However, Dworkin here specifically discusses the state's enforcement of the domestic legal regime

Hobbesian statists effectively amounts to a version of this objection from repugnancy.

Miller does not spell out his repugnancy-objection, but this is how I understand it: Coercion often has significant moral costs, as coercing agents rely on (the threat of) force to limit other people's freedom and personal autonomy, and to prevent them from accessing otherwise viable options. Some of these moral costs are *relational*, as coercion often creates objectionable inegalitarian relationships. And some of these costs are *non-relational*, as subjects of coercion often have legitimate interests in accessing their full range of options. The coercive enforcement of immigration laws arguably exhibits both relational and non-relational moral costs, as it severely limits the options migrants can access, and threatens to undermine the equal status of migrants by rendering them dependent on the will of the excluding state, by exposing them to domination, and by reinforcing objectionable social hierarchies.[37] The repugnancy-objection holds that these moral costs are not (agent-)justifiable *unless* states make valid authority claims over would-be migrants.

Nagel's overarching view is not immediately vulnerable to this repugnancy-objection, as Nagel defends an unusually minimalistic account of the universal morality that governs interactions between migrants and excluding states. On his account, states are only required to respect the basic human rights of foreigners, so as long as the human rights of migrants are securely protected, states therefore do not need to take the additional moral costs of their coercive exclusion into account (cf. Nagel 2005, 130). However, Nagel's moral minimalism does not follow from the structure of his Hobbesian statism, but constitutes a controversial additional commitment.[38] And in my view, our universal

against citizens *in whose name the state claims to govern*. Like Nagel, I see no incompatibility between Dworkin's position and the Hobbesian statist view, cf. Nagel (2005, 120–21). Moreover, Dworkin's view is controversial even in the domestic context, cf. Zhu (2017) and Brinkmann (2020).

[37] Cosmopolitans routinely emphasize these moral costs, cf. Abizadeh (2008), Carens (2013), Honohan (2014),Oberman (2016), Kukathas (2021) and Sharp (2022).

[38] Nagel's minimalism supposedly follows from a broadly Scanlonian contrac-

morality is significantly more demanding than Nagel suggests.

Like most statists, I accept a form of *moral* cosmopolitanism (see Blake 2013). I accordingly accept that all human beings fundamentally have equal value, and I believe that this commitment supports a moral requirement of *universal concern* for other people's legitimate interests. Just because we do not stand in political relationships with certain people, we are therefore not morally free to simply ignore their interests. To the contrary, I believe we have general agent-neutral reasons to help others satisfy their legitimate interests, and to refrain from acting in ways that prevent others from satisfying their interests.[39] We have these reasons because we ought to prefer a world in which legitimate interests are satisfied to a world in which such interests are needlessly thwarted, whether or not we stand in special relationships to the interest-holder. This requirement of universal concern does not imply duties of *equal* concern or treatment, as our general reasons to promote legitimate interests can be defeated by competing considerations, and because we may have special obligations to prioritize the interests of specific individuals. Still, this requirement implies that states must take into account all of the moral costs of their coercive immigration regimes, even when migrants do not face any threats to their basic human rights.

At this point, Hobbesian statists may acknowledge that the coercive enforcement of immigration restrictions has moral costs, but they may still insist that states can justifiably incur these costs once they factor in their special obligations towards their citizens. This response may be convincing in a limited range of cases, for instance when states lack the institutional capacity to integrate additional migrants. But like Miller, I believe that the moral benefits of exclusionary immigration policies are generally not significant enough to justify their coercive enforcement,

tualism, see Nagel (2005, 131). However, Scanlon's contractualism is not as minimalist as Nagel suggests, as Scanlon defends universal duties to help others satisfy their legitimate interests, see Scanlon (2000, 225).

[39] In earlier work, Nagel (1995a, 40) defends a similar view. Note that I am not claiming that these reasons amount to moral duties or even pro tanto duties, as my point does not hinge on this assumption. My point only hinges on the assumption that these reasons are the kinds of reasons that we are not morally free to disregard all else being equal.

even once we take any inward-facing special obligations into account – at least when states fail to make valid outward-facing authority-claims.

Why would the coercive exclusion of foreigners be less repugnant when states make valid claims to authority over would-be migrants, instead of resorting to pure coercion? Political authority is often seen to function as as "trail blazer for the legitimate exercise of coercive power" (Brinkmann 2020, 123). The thought here is that legitimate authorities can impose moral obligations on their subjects to obey their directives, and that the enforcement of these obligations (largely) *avoids* the moral costs of coercion.[40] When states claim authority over migrants, and these claims are actually valid, they can accordingly enforce their immigration laws while (largely) avoiding the moral costs of coercion.[41] If states wish to enforce exclusionary immigration policies, they accordingly face significant normative pressures to claim authority over prospective migrants.[42] But once states claim that their officials merely enforce the moral duties of would-be migrants, they must also

[40] This effect presupposes that duties to obey the law are enforced *appropriately*. I will not try to spell out this appropriateness-condition here. But this condition will, at least, encompass a proportionality constraint that may disqualify certain common practices of immigration law enforcement, cf. Mendoza (2016, ch. 5) and Ip (2022).

[41] Some theorists worry that the moral costs of coercion cannot be avoided as long as enforcing agents act *unilaterally*, cf. Stilz (2019a, 381). I address this concern below, but note already that my argument only assumes that the enforcement of moral obligations significantly *reduces* the moral costs of coercion, not that it avoids them entirely.

[42] Note that the trail blazing effect of authority plays out slightly differently for the relational and the non-relational moral costs of coercion. When states enforce duties not to immigrate without authorization, they can avoid the non-relational costs of coercion because migrants already lack the moral freedom to immigrate, so that their exclusion only prevents them from pursuing options that were already unavailable for them, morally speaking. And when states transparently claim that they only employ coercive means to enforce the moral duties of migrants to accept their exclusion, then migrants cannot complain that excluding states do not treat them appropriately. Similar conclusions are supported by Raz's influential conception of personal autonomy. Raz argues that personal autonomy has a conditional value that dissipates when individuals autonomously decide to do wrong, cf. Raz (1986, 411–12). On his account, the enforcement of moral obligations therefore does not infringe valuable forms of personal autonomy and does not create disvaluable forms of dependence on the will of another. I am indebted to Suzanne Bloks for discussions of this point.

abandon the Hobbesian stance towards them.

My discussion clearly does not show yet that the *balance* of normative pressures pushes states to claim authority over prospective migrants. That will depend, in large parts, on the normative burdens that states would incur as a result of such claims. However, in the following section I argue that these burdens are significantly lower than statists anticipate. On balance, I therefore believe that the Hobbesian statist view is unsustainable.

2.3.3 *Challenging Lockean Statists*

Lockean statists argue that states have claim-rights against unauthorized border-crossings that do not result from exercises of legitimate authority. On their account, migrants accordingly have duties to *accept* their exclusion, although these are not, strictly speaking, duties to *obey* foreign immigration laws.[43] Lockean statists therefore insist that states can benefit from the trail blazing-logic outlined above *without* claiming authority over would-be migrants.

Lockean statists offer various arguments for the assertion that states have claim rights to exclude outsiders that do not result from exercises of moral authority. One argument builds on neo-Lockean theories of territorial rights, according to which states or their citizens effectively *own* the state's territory (e.g. Simmons 2016, 240.). Another argument builds on the value of collective self-determination, which supposedly supports a claim right to exclude outsiders politically and territorially.[44] I will focus here on one popular version of this argument from collective self-determination, according to which internally legitimate states have claim rights to exclude outsiders that are grounded in the importance of their citizens' interests in *freedom of association* (cf. Wellman 2008;

[43] Some migrants may also have duties not to move to another state that are not owed to that state or its citizens. Individuals with rare medical skills, for instance, may have duties towards their compatriots not to emigrate, cf. Miller (2023, 838). I bracket such cases because I suspect that they are quite rare, and because Lockean statists typically emphasize claim rights to exclude.

[44] For an overview of different versions of this argument, see Fine (2013).

Steinhoff 2022). If this argument succeeds, then it shows that migrants have moral obligations not to immigrate without authorization, even though they are not required to treat foreign states as legitimate moral authorities.

The plausibility of the argument from freedom of association is the subject of a long-standing debate (see Fine 2010; van der Vossen 2015). But I will not rehearse this debate here, as my objection to this argument does not hinge on a wholesale rejection of the idea that the citizens of internally legitimate states have associational interests that contribute to the justification of immigration restrictions or their enforcement. Instead, my objection specifically targets the assertion that these interests ground *claim rights* to exclude, rather than mere *liberty rights*. In other words, I doubt that the argument from freedom of association really supports a Lockean rather than a Hobbesian statism. This objection has been overlooked in the literature, which largely assumes that we must either accept that states have claim rights to exclude, or that migrants have claim rights to global freedom of movement.[45]

How might the associational interests of citizens ground a liberty right to exclude? At first glance, migrants seem to have moral claim rights against coercion that entitle them to cross borders without coercive interference. However, statists argue that this initial impression is misleading, as the *scope* of individual rights against coercion is limited by competing considerations, like the associational interests of citizens. Statists maintain that these interests should inform the proper *specification* of individual rights against coercion, so that these rights do not actually cover unauthorized border-crossings. I agree with this

[45] On this assumption and why it is unwarranted, see also Tiedemann (2023). Steinhoff briefly considers the possibility that states may only have liberty rights to exclude. However, Steinhoff assumes that this possibility is morally irrelevant, as it would absurdly imply "the possibility of a war of all against all" between states and migrants, in which everything goes, including the "massacring of would-be migrants at the border" (2022, 92, n. 106). As I have explained above, the Hobbesian statist view does not have this absurd implication, as a liberty right to exclude migrants by reasonable coercive means does not imply a liberty right to employ excessive violence, and because liberty rights do not entail moral permissions anyways.

line of reasoning, which supports a liberty to exclude.[46]

Note that the argument I have just outlined does not suggest that states are morally free to exclude migrants at will, at least not if we accept the requirement of universal concern. But this argument suggests that states can, in a broad range of cases, coercively exclude outsiders without *infringing* their moral rights. This upshot is significant because rights-infringements normally demand particularly stringent justifications, for instance in *lesser-evil* terms. Indeed, some cosmopolitans insist that immigration restrictions always involve infringements of a general right to global freedom of movement, and are therefore only justified if they are necessary to avert a sufficiently great evil (e.g. Oberman 2016, 49; Hidalgo 2019b, 58). If the self-determination based argument for a liberty right to exclude is sound, then it undermines this influential cosmopolitan assumption.

Why would the associational interests of citizens not ground a claim right to exclude, if these interests are weighty enough to ground a liberty right to exclude? The reason is that infringements of this claim right to exclude would be just as difficult to justify as infringements of a right to global freedom of movement. If states had a claim right to exclude, then migrants could, accordingly, only justifiably infringe their duties not to immigrate without authorization under truly exceptional circumstances (even if their interests in immigrating are, in fact, more important than the competing interests of the excluding state's citizens). The recognition of a claim right to exclude would therefore largely *immunize* the associational interests of citizens against moral trade-offs.[47] However, I see no reason why these associational interests should enjoy any special immunity against trade-offs, and proponents of the argument from freedom of association do not, as far as I can tell, provide such reasons. In my view, the argument from freedom of association therefore shows that the citizens of internally legitimate states often have valid interests in controlling immigration, and that these interests are important enough to restrict the scope of individual rights to

[46] I discuss this line of reasoning in more detail in the fifth chapter of this thesis.
[47] I defend an immunizing understanding of moral rights in the following chapter.

freedom of movement – nothing more and nothing less.

This leaves us with a conflict between the valid interests of would-be migrants and the valid interests of the citizens of excluding states, neither of which are protected by moral claim rights. Of course, migrants must abide by the requirement of universal concern too, so they must also consider the associational interests of citizens. But migrants need not show any partiality towards these interests, and they may even have their own agent-relative reasons for discounting them. I accordingly expect that migrants are usually only required to *accept* their exclusion if they are also required to *obey* foreign immigration laws.

Let me add a qualification here to preempt a possible objection. My claim is not that states *never* have an authority-independent claim right to exclude. Instead, I am sympathetic to Anna Stilz's (2019b, 187) view that states have a *conditional* right to exclude that is triggered if and only if additional immigration would significantly undermine the way of life of the excluding state's citizens. However, this conditional right to exclude cannot vindicate the Lockean statist vision, as Stilz points out herself, as this right will only be relevant under exceptional circumstances. Granted, there is significant room for disagreement over the precise contours of this conditional right to exclude, as the triggering-condition for this right is inherently vague and indeterminate. Outside a limited range of paradigmatic cases, it will often be unclear whether further immigration would "significantly undermine" the way of life of citizens. But the indeterminate boundaries of the conditional right to exclude do not provide any support for Lockean statists either, as states cannot unilaterally enforce indeterminate duties without making implicit authority-claims. As a general account of the appropriate relationship between states and would-be migrants, the Lockean statist view therefore still fails.

2.4 A COSMOPOLITAN STATISM

It now seems like statists face a dilemma: Either they recommend that states continue to enforce their immigration laws through pure coercion, but then immigration restrictions will be difficult to justify. Or they recommend that states start to claim authority over migrants, but

then they undermine their own position. In this section, I propose an alternative cosmopolitan statism that avoids this dilemma.

2.4.1 *Two Types of Authority-Claims*

The modern democratic state makes two types of authority-claims in relation to its citizens: it claims that citizens are "responsible for obeying its laws and conforming to its norms" and it also "makes us responsible for its acts, which are taken in our name" (Nagel 2005, 129). Nagel argues that this combination of *claims to obedience* and *claims to representation* – my labels not his – is constitutive of the political relationships that give rise to demands of egalitarian justice and democratic inclusion. But Nagel does not consider the normative implications of these two types of authority-claims independently, and he does not explore the possibility that states may claim that migrants are required to obey their immigration laws *without* claiming to impose these laws in their name. I want to suggest that states often can and should make such limited authority-claims over migrants, and that statists can avoid the dilemma outlined above by endorsing this view.[48]

My suggestion only helps statists to avoid the dilemma outlined above if mere claims to obedience are easier for states to justify than claims to representation, but why would this be? To see the logic behind this suggestion, we must first ask why a state's claim to coercively impose its legal order in the name of its citizens supposedly raises egalitarian demands of social justice and democratic inclusion.

When states claim to rule in the name of their citizens, they attempt to enlist their citizens as active participants in a shared project of self-

[48] Let me clarify that I think of both types of authority claims as claims to the possession of a specific normative power – the power to impose morally binding directives in the case of claims to obedience, and the power to speak and act for specific individuals in the case of claims to representation. For an insightful discussion of the normative power of acting for others, and the conditions under which agents actually have this power, see Viehoff (2022). Going forward, I assume that claims to representation imply claims to obedience, because I assume that states normally claim that their citizens are required to obey their laws, in part, *because* these laws are imposed and enforced in their name. There may be exceptions to this rule, but I will bracket these exceptions here.

government. Such claims to the active engagement of the political will of citizens raise moral concerns, in part, because they potentially undermine the autonomy of citizens.[49] Liberals in the social contract tradition typically respond to these concerns by insisting that states can only rule in the name of their citizens if their citizens *consent* to their rule (cf. Waldron 1993, 42–43). When citizens give their consent – actual, hypothetical or normative consent, depending on the precise view – the autonomy-concern is alleviated, as citizens jointly decide to govern their collective affairs. While the precise link between democracy and the relevant form of consent remains contested, one influential view holds that the inherent fairness of democratic procedures ensures that citizens can rationally consent to democratic rule.[50]

The demands of egalitarian social justice are sometimes derived from the demands of democratic inclusion. Along these lines, George Klosko (2009) argues that the authority of democratic procedures hinges on a substantive fairness-condition, which grounds egalitarian social justice demands.[51] Other statists, including Nagel, offer a more direct justification for egalitarian principles of social justice. Nagel emphasizes that the participants in a collective project of self-government take on shared moral responsibility for the state's actions. Moreover, this

[49] As Grey points out in his reconstrution of Nagel's version of this argument, such claims also raise concerns because citizens might have to engage in forms of self-oppression if the state imposes injustices on them in their own name, and there is something particularly worrisome about the prospect of self-oppression. So, "[s]ince all members are implicated in the coercive demands of their state's laws, avoiding self-oppression requires that they be entitled to demand a particularly rigorous form of justification" (Grey 2015, 107).

[50] Some theorists defend similar views without focusing on the connection between democracy and consent. Dworkin's "partnership conception of democracy", for instance, builds directly on the value of political equality (2011, 390–92). For a skeptical assessment of the idea that there is any special connection between democracy and any type of consent, see Hershovitz (2003, 215).

[51] Klosko specifically proposes his argument explicitly as a friendly amendment to Nagel's position. Klosko does not call out the distinction between the active and the passive dimensions of the authority-claims of modern states. However, he affirmatively invokes Nagel's assumption that "[i]n democracies, individuals are not only subject to state coercion, but through representative institutions, are also its authors" (Klosko 2009, 250). For this reason, I take him to be concerned with claims to authority that combine claims to obedience and claims to representation.

shared responsibility cannot be isolated to specific laws or policies, but applies holistically to the entire legal order, and by extension the social order it creates and maintains. On Nagel's account, the principles of egalitarian justice reflect the conditions under which individuals can rationally accept this responsibility (2005, 130).[52]

The arguments I have just outlined assume that states claim to speak in the name of their citizens, and this assumption is so deeply embedded in liberal political thought that it is sometimes included among the basic "circumstances of politics" (Waldron 1999, 101–3). But this assumption may not hold in the case of immigration laws, as states may claim that migrants must obey their laws *without* claiming to impose these laws in the name of migrants. What justificatory burdens would result from such limited authority-claims?

According to Raz's (2005) influential service-conception of authority, claims to obedience with laws and other directives are normally only valid if the subjects of these claims are more likely to comply with the reasons that independently apply to them by following the authority's directives than by acting on their own practical judgments. Thus, migrants ought to obey foreign immigration laws only if they can optimize their compliance with their independent moral reasons by doing so.[53] Raz emphasizes that the justification of authority in terms of the service-conception need not require democratic procedures, nor do claims to legitimate authority inherently ground demands of social justice. Indeed, the point of the service-conception is to sever any essential link between authority and consent (cf. Viehoff 2011, 248).

The Razian service-conception of authority is controversial, in part because it does not have obvious democratic implications. However, the

[52] A similar argument also informs Rawls's conception of social justice. While Rawls is often said to derive the demands of social justice from the fact of social cooperation, I agree with Nagel that the Rawlsian principles of justice are specifically chosen as principles of fair cooperation under a coercive legal system that citizens jointly impose on themselves and each other. Rawls is not explicit on this point, but see especially Part II of Rawls (2001).

[53] Following Viehoff (2011), I accept a broad reading of the independence-condition, according to which independent reasons can be outcome-oriented as well as proedure-oriented.

most prominent objections to the service-conception already presuppose that a theory of political authority *should* explain how states can justifiably claim to rule in the name of their citizen, and how "*we are binding ourselves* through acts of legislation" as citizens of democratic polities (Hershovitz 2003, 210; cf. Waldron 1999, 100–102). These objections therefore do not apply when states merely claim that migrants must obey their immigration laws, but do not claim to impose these laws in their name. In my view, the service-conception therefore provides the appropriate framework for evaluating the validity of claims to authority that are limited to claims to obedience.[54]

In sum, mere claims to obedience must be justified, in line with the Razian service-conception, in terms of the reasons that independently apply to the subjects of authority. Such claims must accordingly be subject-justified, and therefore ground a version of *Liberal Justification*. Claims to representation, by contrast, must (normally) be justified through democratic procedures, as states can only justifiably claim to rule in the name of specific individuals if these individuals were fairly included in democratic decision-making. Thus, claims to representation ground a version of *Democratic Justification*. An intermediary position between statist and cosmopolitan theories of justice in migration is now coming into view.

I have argued that states can make two distinct types of authority-claims, which raise distinct justificatory burdens. On my account, we must therefore distinguish two types of political relationships, those constituted by claims to obedience to coercively enforced laws, and those constituted by claims to the representative imposition of these laws. While this suggestion is novel in the context of the current immigration debate, similar ideas have a venerable tradition in the history of political thought. Kant captures a particularly prominent version of this idea with his distinction between "active" and "passive" citizenship (cf.

[54] I accordingly suspect that different theories of political authority may be appropriate depending on whether states merely claim that their laws ought to be obeyed, or whether they also claim to impose these laws in the name of specific individuals. For a similar suggestion, see Hershovitz (2003, 210–11).

Weinrib 2008).[55] On Kant's account, states claim that their passive citizens – including all women and economically dependent men – are required to obey the law, while only active citizens directly participate in the political process, so that laws are only imposed in their name. Moreover, in the context of his discussion of "cosmopolitan law", Kant also seems to conceptualize the moral relationship between states and "visitors" seeking admission in analogy to the relationship between states and their passive citizens (cf. Ripstein 2021, 241). My suggestion that states may claim that migrants are requried to obey their immigration laws without claiming to speak in their name accordingly mirrors this Kantian suggestion. The brand of statism I propose here could therefore also be labeled as a Kantian statism, although this label is, again, only meant to capture a specific understanding of the moral relationship between states and prospective migrants.

2.4.2 *The Authority of Immigration Laws*

I turn now to the substantive question whether states can actually make *valid* claims to obedience vis-à-vis prospective migrants. In contrast to most previous discussions of the external authority of immigration laws, I defend a pluralistic account of the authority of immigration laws, according to which duties to obey foreign immigration laws are normally based on multiple normative grounds.[56] My pluralistic approach naturally fits the service-conception of authority, which holds that migrants are required to obey foreign immigration laws whenever they can thereby improve their compliance with their independent moral reasons, whether or not these reasons belong to a unified category.

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[55] This idea also maps onto Rousseau's distinction between *subjects* and *citizens*, cf. Canivez (2004, 397) and Tuck (2024).

[56] My account therefore follows influential pluralistic accounts of domestic political authority, cf. Wolff (1995) and Klosko (2004). Previous discussions of the authority of immigration laws typically assume that such duties must have a single normative ground. This assumption partly explains why several commentators are skeptical of the suggestion that migrants may have duties to obey foreign immigration laws, e.g. Risse (2012, 165), Hidalgo (2019b, 122–27), and Huemer (2019).

For the purposes of exposition, I start by asking whether migrants *would* have duties to obey foreign immigration laws in a reasonably just world, taking as my moral baseline the internationalist understanding of global justice favored by many statists, including myself. The answer to this ideal-theoretical question will determine the viability of my cosmopolitan statism as part of a convincing statist vision of global justice. Afterwards, I ask whether states can make valid claims to obedience with their immigration laws in our non-ideal world. The answer to that question will determine whether states have good reasons to claim authority over migrants here and now.

I cannot defend a specific theory of global justice here, so for the purposes of exposition I accept a schematic account that is broadly inspired by Rawls's *Law of Peoples* (1999b). Accordingly, I assume that in a just world all individuals will be citizens of reasonably just democracies that are wealthy enough to provide their citizens with a decent standard of living.[57] Moreover, states will coordinate internationally to enforce the rules of the law of peoples, and to ensure that societies that are temporarily unable to provide their citizens with a decent minimum receive any necessary assistance. In principle, justice will still permit significant economic inequalities between societies, as long as these inequalities result from democratic decisions or sheer bad luck, rather than injustice or exploitation. But for the moment, I also assume that all societies are, more or less, equally wealthy.

Under such ideal conditions, I believe that migrants generally have obligations to obey foreign immigration laws, which are based on three distinct normative grounds: First, migrants have consequentialist reasons to *support just institutions* by obeying their directives – the just institutions of the excluding state, and also the just international structure that *de facto* grants states the authority to restrict access to their territory.[58] Second, migrants have moral reasons to *respect the political*

[57] Note that Rawls makes space for decent non-democratic societies in his law of peoples. I take Rawls' view to be that such regimes have a claim to international recognition should they exist, but that they would not exist in a just world.

[58] These reasons are also invoked by accounts of the authority of immigration laws that are based on natural duties of justice, cf. Grey (2015), Lee (2016),

autonomy of the citizens of excluding states, which the citizens of excluding states express in their capacity as "makers" of the excluding state's legal order.[59] Finally, migrants have reasons of *reciprocity* to obey foreign immigration laws, partly because migrants from democratic states typically also expect foreigners to obey the immigration laws of their own state, but more importantly because the international structure involves a "reciprocity-based practice" of "mutual recognition of states' rights to control their borders" in which individuals participate as citizens of their home state (Miller 2023, 840).[60] I doubt that these three types of reasons – supporting just institutions, respect for political autonomy, and reciprocity – are weighty enough on their own to justify obligations to obey foreign immigration laws. But taken together, they normally seem sufficient to ground the authority of immigration laws, at least if we accept the statist vision of global justice.[61] Under ideal conditions, states can therefore claim that migrants ought to obey their immigration laws, and can reap the benefits of such claims, without incurring significant additional normative burdens.

Our world obviously does not live up to the ideal outlined above. But even in our world, the situation of some migrants closely resembles this ideal. If, say, a German citizen like myself wanted to move to

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and Miller (2023). However, I do not assume that these reasons by themselves ground moral duties. Note that according to Rawls, the international legal system actually ought to grant states the legal authority to restrict immigration for functionalist reasons, see Rawls (1999b, 38–39).

59 My understanding of political autonomy and its value broadly follows Stilz (2019b, ch. 4) and Lovett and Zuehl (2022).

60 Note that reasons of respect and reciprocity apply independently to prospective migrants in the sense outlined by Viehoff (2011), even though they are not purely outcome-oriented.

61 Miller (2023, 836–38) describes these reasons as alternatives to the Razian service-conception, rather than as reasons of the kind that might justify the authority of immigration laws according to the service-conception. On this basis, Miller rejects the idea that the authority of immigration restrictions might be justifiable in terms of the service-conception. However, Miller operates with an unusually narrow understanding of the service-conception, which is focused entirely on the benefits that result from the authoritative solution to coordination problems and the provision of public goods. While Raz routinely emphasizes the importance of coordination problems, he does not introduce any such restrictions on the kinds of reasons that may justify authority.

Canada, I believe they would be required to obey Canadian immigration laws for all the reasons mentioned above. Of course, the situation of many migrants is markedly less ideal, and it is not clear whether these migrants must also obey foreign immigration laws. To determine whether states can justifiably claim that these migrants must also obey their immigration laws, we must therefore move from ideal to non-ideal theory. The non-ideal cases are, however, almost infinitely varied, so I can only discuss a few particularly relevant types of cases here.[62]

A first type of case involves migrants from reasonably just and wealthy democracies who wish to move to wealthier states. Examples are bound to be controversial here, but the situation of migrants from certain South American countries arriving at the US border comes to mind. In my view, economic inequalities between home states and excluding states do not, in and of themselves, undermine the authority of immigration laws, as such inequalities are not inherently morally objectionable (as long as they do not result from historic injustice or ongoing exploitation).

Granted, there will be hard cases in which the basic needs of certain migrants cannot be met in their home state, but could be met in the excluding state, for instance because certain medical treatments are only available in the latter. Such cases may also arise in the absence of large economic disparities, as some societies may invest more than others into medical care, but inequalities will make such cases more common. It is not obvious how to think about such cases, but in my view these migrants are still required to obey their exclusion, although they may have a necessity-based *excuse* for violating these duties.[63]

[62] I specifically focus on cases in which the political or economic situation in the migrants' *home state* deviates from the ideal, rather than cases in which the situation in the *destination state* deviates from the ideal. The latter category of cases is less relevant here, as the present debate is mainly about whether reasonably just democracies can justifiably impose and enforce exclusionary immigration policies.

[63] Miller (2023, 848) remains ecumenical about whether necessity functions as a mere excuse or as a proper justification for breaking immigration laws. I favor the first option in cases like these, as I believe that citizens of reasonably just democracies must accept the consequences of democratic decisions, including decisions about how much to invest, for instance, into medical care. For a

The moral situation gets more complicated when inequalities do not result (entirely) from freely taken democratic decisions or simple bad luck, but (also) from historic injustice or ongoing exploitation. If these injustices are severe enough, I accept that they will undermine the authority of immigration laws, at least until excluding states compensate historic injustices and rectify present unjust policies (cf. Schmid 2025). However, statists typically accept that states are required to adopt such compensatory and rectificatory measures anyways, so these measures do not amount to *additional* normative burdens that states incur only because they claim authority over migrants.

A more difficult type of case involves migrants from non-democratic states who are sufficiently well-off to lead decent lives, and who are not being actively persecuted by their government.[64] Such individuals do not count as refugees under international law, and many migration ethicists do not count them as refugees either (cf. Gibney 2018). Yet, it is questionable whether these migrants have duties to obey foreign immigration laws, as it is not clear whether the reciprocity-based reasons I have cited above apply to them. This type of case is particularly challenging, due to the diversity of non-democratic regimes. I can therefore only offer some initial thoughts here on two theoretically relevant limit-cases.

Some states may not be governed democratically, but may still be entirely "decent" in the Rawlsian sense. Such states may even allow their citizens to exercise their collective political autonomy, if their citizens have sufficient political voice through effective consultation mechanisms, can see their preferences reflected in the government's political decisions, and are realistically able replace the government (cf. Stilz 2019b, 128–30). In my view, it seems plausible that migrants from such decent non-democratic states are normally required to obey

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detailed discussion of the distinction between justifications and excuses, see Botterell (2009). My point here does not hinge on a specific way of spelling out this distinction.

64 I focus here on ordinary citizens of authoritarian countries, and different considerations may apply to the economic and political elites of such regimes. I suspect that these elites will, in a broad range of cases, be required to obey foreign immigration laws.

foreign immigration laws, as they can still see themselves as engaged in reciprocal relationships of recognition with the citizens of excluding states. I believe a particularly strong case can be made for obligations to obey foreign immigration laws when the migrants' home state is currently undergoing a process of democratization, especially if that process is supported by the excluding state.

Other non-democratic states are locked-in dictatorships that show no sign of becoming more democratic – the North Koreas of the world. "Citizens" of such states are really mere subjects and victims of pure tyranny. In my view, migrants from such states should be treated as refugees, even if they are not currently persecuted, as they are robbed of the opportunity to express their political autonomy. Most non-democratic states lie between these two extremes, but these intermediary cases resist a general philosophical analysis.

This finally leads us to cases involving refugees. I believe that refugees do not have obligations to obey foreign immigration laws *unless* excluding states effectively secure the protection of their human rights. Refugees do not have such obligations because the relevant reciprocity-reasons do not apply to them, and because they have especially weighty reasons to cross borders, which will predictably outweigh the reasons that support the authority of immigration restrictions. In contrast to (some) other migrants, refugees are therefore less likely to act in accordance with their underlying reasons by obeying foreign immigration laws, so they are not required to do so.[65]

In line with international law, I also believe that we must distinguish between subsistence refugees escaping (temporary) destitution, and political refugees escaping oppression or persecution. Subsistence refugees and political refugees face different threats to their human rights, and therefore require different forms of protection. Subsistence refugees require temporary *sanctuary* until the situation in their home state improves, at least if their basic rights cannot be secured in their home state through international assistance. Political refugees,

[65] I accordingly disagree with Miller's (2023, 844–46) assessment that refugees have obligations to obey foreign immigration laws that they can only permissibly infringe. For a nuanced exploration of the duties of refugees, see Gibney (2021).

by contrast, require *asylum* and a path to acquiring a new political membership.[66] If states wish to claim authority over refugees, they must therefore ensure that any refugees who arrive at their borders receive sanctuary or asylum, as appropriate, because these refugees will not be obligated to obey their immigration laws otherwise. This does not mean that excluding states must offer sanctuary or asylum themselves, but they must ensure that refugees receive adequate protection somewhere.[67]

Given the numbers involved, the requirement to ensure the protection of refugees may result in substantial normative burdens for many states. However, most statists already accept that states have far-reaching obligations to promote the protection of human rights globally, so authority-claims over refugees need not result in significant *additional* burdens. Still, there is an important difference between general obligations to protect human rights around the globe and the normative burdens that result from authority-claims over specific refugees. While the latter can be discharged either by helping specific refugees or by aiding other deprived individuals, for instance through developmental aid, the burdens that result from claims to authority over specific asylum seekers can *only* be discharged by aiding these specific individuals. My argument therefore suggests that states have special responsibilities for refugees who arrive at their borders, at least once they claim that these refugees must obey their asylum-regimes.

In sum, states can plausibly make valid authority-claims over migrants in a broad range of cases. If states make such claims, and these claims are actually valid, then they can generally also justifiably enforce their immigration laws against prospective migrants, as they can profit then from the trail blazing effect of legitimate authority that I have described above. However, states also incur certain normative

66 My discussion here broadly follows Owen (2020, ch. 3).

67 In my view, refugees do not have a right to choose where they receive protection, although they often have legitimate interests in moving to specific states, which states are required to take into account. When these interests are needlessly thwarted, this provides a strong ground for the moral criticism of refugee protection schemes. However, refugees may still be required to obey the provisions of such morally flawed asylum schemes.

burdens once they make such claims to authority. To live up to these claims, they must ensure that migrants are actually required to obey their immigration laws. This will, at least, require states to ensure that the basic economic and political rights of migrants are securely protected. But as long as states merely claim that migrants must obey their immigration laws, but do not claim to impose or enforce these laws in the name of prospective migrants, these normative burdens will be significantly lighter than many cosmopolitans anticipate, as states will not have to live up to the demanding egalitarian standards of social justice and democratic inclusion that apply domestically in virtue of the fact that states claim to impose their legal order in the name of their citizens. I accordingly expect that the balance of normative pressures will routinely push states to claim authority over would-be migrants, even in our non-ideal world.

My proposal may, arguably, be somewhat optimistic. In our profoundly non-ideal world, the number of migrants who cannot be expected to obey foreign immigration laws may be so large that even the limited normative burdens that result from mere claims to obedience may still pressure states to enforce their immigration laws through pure coercion. Nagel's Hobbesian vision may therefore still be appropriate, at least for the time being. Such pessimistic expectations cannot be undermined through abstract philosophical arguments, but I do not share them. To the contrary, I expect that many destination states are capable of securing the conditions under which prospective migrants are required to obey their immigration laws at fairly minimal costs to their own citizens. I am therefore (cautiously) optimistic that we can insist that interactions between states and prospective migrants must be governed by authoritative law, rather than pure force.

2.4.3 *A Stable Compromise?*

In the domestic political context, the idea of passive citizenship is usually treated with suspicion, and Kant is routinely criticized for his apparent endorsement of a status of second-class citizenship (cf. Weinrib 2008). Granted, such a status may be appropriate for short-term visitors, like foreign students, but most political philosophers follow Michael Walzer's

claim that a status of passive citizenship cannot be acceptable in the long-run.[68] The following objection may therefore be raised here: I have argued that states should effectively treat migrants as passive citizens, by claiming authority for their immigration laws without claiming to impose these laws in the name of migrants. However, relationships of passive citizenship are inherently normatively deficient, so they cannot be acceptable in the long-run. My view may thus appear unstable, as the political circle will either have to continue to expand until migrants are fully included, or must collapse back into a Hobbesian statism.

Christopher Bertram develops a specifically Kantian defense of a version of this objection. Bertram's core concern is that immigration restrictions are, from the migrant's perspective, imposed and enforced *unilaterally*. But unilateral exercises of coercive power are supposedly inherently morally objectionable, so that immigration laws can only be fully legitimate when they are authorized *omnilaterally*, through transnational democratic procedures that allow migrants to participate fairly in the making of immigration laws. Bertram (2018, 104–8) acknowledges that unilateral immigration restrictions may still be temporarily legitimate, at least if states contribute their fair share towards building the necessary global institutional infrastructure.[69] But he still insists that unilateral immigration restrictions must eventually be abolished. In this respect, Bertram draws on Kant to go beyond Kant, and his argument also suggests that the cosmopolitan statism I have defended can, at most, provide a stepping stone towards a fully-fledged cosmopolitans.[70]

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[68] See Walzer (1983, 60). Suzanne Bloks and I argue against this claim in the sixth chapter of this dissertation. We also point out that Walzer does not actually make this claim, although it is generally attributed to him in the migration literature, as Walzer acknowledges that a passive political role for foreign residents can be acceptable when robust international arrangements are in place to protect individuals from domination and exploitation.

[69] See also Brock's (2020, 60) account of the "interim" legitimacy of unilaterally imposed immigration laws.

[70] Note that this objection differs from the unilaterality-objection to Hobbesian and Lockean statist views discussed in Section 2.2. That objection was meant to show that unilateral exercises of coercive power always imply claims to legitimate authority, so that Hobbesian and Lockean statist views are incoherent. The

Kantians raise two main concerns related to unilateral coercion: that it undermines personal autonomy and that it undermines relational equality.[71] The first concern holds that unilateral coercion undermines personal autonomy because it undermines the capacity of the subjects of coercion to lead self-directed lives. And the second concern holds that unilateral coercion undermines relational equality because it implies an arrogation of authority that creates objectionable social hierarchies. These concerns closely resemble the concerns that I already emphasized when discussing the general moral costs of coercion. But the point here is that unilateral exercises of coercion supposedly have significantly larger moral costs than exercises of coercion that are sanctioned by an "omnilateral" will, so that these concerns go beyond the concerns related to the general moral costs of coercion. Moreover, these concerns supposedly persist even when unilateral coercion merely serves to enforce the moral duties of the subjects of coercion.

While I share these general concerns related to unilateral coercion, I do not think they speak against my proposal. My proposal avoids the relational egalitarian concern because it does not allow states to simply *arrogate* authority to themselves. Instead, states may only claim legitimate authority over prospective migrants if these claims are actually valid, and such claims are only valid if they can be justified in terms of the service-conception. In such cases, I do not think that states create an objectionable hierarchy between themselves and would-be migrants even if they enforce their immigration laws unilaterally, as their position of authority must be justifiable towards these migrants in terms of reasons that apply to them anyways. And my proposal avoids the autonomy concern because I do not think that states undermine a valuable form of personal autonomy when they prevent migrants from breaking their authoritative immigration laws. Being the author of one's own life is generally morally valuable, but when migrants are

objection under discussion now is meant to show that the unilateral imposition and enforcement of immigration restrictions is inherently morally deficient, even if states make valid claims to legitimate authority.

[71] My summary of the objection to unilateral coercion follows Stilz (2019b, 98–101). Elsewhere, Stilz also explicitly invokes these concerns to criticize a version of the Lockean statist view, see Stilz (2019a, 318).

required to obey the authoritative directives of foreign states, then they are, in this respect, not entitled to be the author's of their own lives anyways. In such cases, unilateral coercion does not seem morally costlier than coercion that is not unilateral.[72] For these reasons, I do not see why migrants would have an autonomy-based complaint against the unilateral enforcement of authoritative immigration laws.

Another objection may be raised here: My response to the unilaterality-concern seems to presuppose that the duties migrants have to respect foreign immigration laws are *enforceable*, that they are the kinds of duties that can be enforced through the use or threat of (proportional) force without wronging migrants. However, it is a well-known problem of the Razian service-conception of authority that it cannot establish the enforceability of moral duties to comply with authoritative directives (cf. Sherman 2010b, 421–24).

This objection does not undermine my proposal either. In discussing the argument from freedom of association, I already pointed out that individual rights against coercive interference must be specified in a way that renders them compatible with competing claims and values, including the interests of citizens of excluding states. In my view, these rights must therefore be specified fairly narrowly, so that they do not actually protect migrants from (proportional) interference when they attempt to enter foreign states without authorization. On my account, moral duties to obey foreign immigration laws are therefore enforceable simply because migrants never had a right against their enforcement in the first place.[73] So, the Razian service conception is not actually needed to explain the enforceability of duties to respect foreign immigration laws.

Of course, even if unilateral coercion was always morally objectionable to some extent, the conclusion that unilateral immigration restrictions must be abolished would not follow. A fully-fledged cosmopolitan institutional framework that avoids problems of unilaterality

[72] Moreover, it is questionable whether the autonomous choice of morally wrongful options is also valuable in and of itself, see Raz (1986, 411–12).

[73] I discuss the enforceability of moral duties and the logic behind this claim in more detail in the fourth chapter of this thesis.

altogether may, after all, also exhibit significant normative deficiencies. Kant was certainly worried that state-like institutions at the global level would inevitably degenerate into a "soulless despotism" (Kant [1795] 2006, 8:367). My cosmopolitan statism therefore does not hinge on the assumption that a world in which states unilaterally enforce their authoritative immigration laws is morally perfect. Instead, my proposal only hinges on the assumption that such a world is morally at least as desirable as a world in which immigration is governed omnilaterally through transnational institutions. Of course, I have not *proven* that, just as cosmopolitans have not *proven* the superiority of their proposals. An all things considered evaluation of the moral justifiability of unilateral immigration restrictions must therefore await a comprehensive comparative assessment of the moral merits of all politically feasible institutional schemes. Fully-fledged cosmopolitan proposals may come out ahead in such a comparison, but I suspect that a state-based global order will be the preferable model for a long time to come.

2.5 CONCLUSION

In this chapter, I have defended a cosmopolitan statism that occupies an intermediary position between traditional cosmopolitan and statist views in the philosophy of migration. My view is statist, because it supports a multi-layered account of our political morality, according to which genuinely political relationships give rise to special obligations. But my view also has cosmopolitan elements, because I have argued that states ought to engage in political relationships with prospective migrants, although these relationships differ qualitatively from the political relationships between states and their own citizens. On my account, states ought to claim that migrants are required to obey their immigration laws, but they need not claim to impose these laws in the name of migrants. States accordingly ought to treat migrants as "passive citizens", who are subjected to their immigration laws, but who are not active participants in the making of these laws. While states cannot justifiably relegate their own citizens to such a passive status, I have argued that states can often justifiably treat migrants as mere recipients of their immigration laws. I have also argued that mere claims

to obedience do not give rise to egalitarian demands of social justice or democratic inclusion, even though such demands arise domestically when states claim to rule in the name of their citizens. But once states make even such limited claims to authority, they still committ themselves to live up to these claims, and to justify their authority over their borders towards prospective migrants. At the very least, states accordingly commit themselves to the creation and maintenance of institutional mechanisms which ensure that the human rights and the basic political and economic needs of migrants are securely protected.

3

Rights, Interests and the Problem of Generality

ABSTRACT

In this chapter, I develop a constructive critique of the interest-based approach to the justification of moral rights, an influential methodology in moral and political philosophy. In the critical part of my discussion, I diagnose a profound methodological challenge for this interest-based approach, which arises because it understands rights as rules for the resolution of types of practical conflicts. As these types can be described at different levels of generality, multiple incompatible assignments of moral rights can be derived from the same underlying distribution of interests, which renders the results of interest-based arguments largely indeterminate. In the constructive part of my discussion, I propose a solution to this problem of generality, according to which the appropriate level of generality at which to assign moral rights is determined by our rationales for relying on rights as rules in our moral reasoning. To highlight the methodological implications of this solution, I then develop it in detail with respect to one such rationale, which holds that rights function as heuristics that make our moral reasoning more efficient. I conclude that most interest-based arguments are structurally flawed, but that the interest-based approach can still be salvaged.

CHAPTER 3

INTRODUCTION

Disagreements over moral rights pervade public political discourse. Political and social movements routinely assert that certain groups already posses controversial rights, morally speaking, for which these movements now demand legal and political recognition. Similar disagreements over the existence of specific moral rights also animate many debates in moral and political philosophy, and to resolve such disagreements many theorists utilize the *interest-based approach* to the justification of moral rights pioneered by Thomas Scanlon (1977) and Joseph Raz (1986). The popularity of this approach is hardly surprising, as it promises to deliver a transparent and empirically grounded methodology for the assignment of moral rights, that bridges abstract moral debates about the nature of the good life and concrete political debates, for instance about whether we should recognize a general moral right to free migration or extensive animal rights.[1] In this chapter, I develop a constructive critique that reveals a fundamental methodological challenge for this interest-based approach while also offering a solution that preserves its core promise. My analysis shows that most interest-based arguments are structurally incomplete, but also that the underlying interest-based methodology for the justification of moral rights can be salvaged.

At the heart of this chapter lies a fundamental methodological challenge that I call the *problem of generality*.[2] This problem emerges because the interest-based approach conceptualizes moral rights as rules for the adjudication of types of practical conflicts. As these types of conflicts can be described at different levels of generality, multiple

[1] This approach has recently been applied, for instance, in debates over human rights, territorial rights, animal rights, children's rights, global justice, and just war theory. Examples include Cochrane (2012, ch. 2), Fabre (2012, 23–24), Garner (2013, ch. 6), Miller (2014), Angeli (2015, 9), Tasioulas (2015), Oberman (2016, 45), Stilz (2019b, 40), Ladwig (2020, 111–15) and Gheaus (2021).

[2] Because it structurally resembles the "problem of generality" in epistemology, see Feldman and Conee (1998). Scanlon (1978, 537–42) briefly hints at this challenge in his early work on speech rights. He does not develop this point though, and it is not discussed in the subsequent literature.

incompatible assignments of moral rights can be derived from the same underlying distribution of interests. Unless the choice to assign moral rights at a specific level of generality can be justified, the results of interest-based arguments therefore remain largely indeterminate. The need for such a justification has so far been overlooked, which is why most interest-based arguments remain incomplete. In the constructive part of my discussion, I propose a solution to this problem of generality. I argue that the level of generality at which moral rights should be assigned is determined by the reasons for which we rely on rights in our moral reasoning at all, the relevant *rule-generating rationales*. I then develop this solution in detail for one such rule-generating rationale, which holds that rights function as *heuristics* that increase the efficiency of our practical reasoning. The resulting heuristic model of rights-based moral reasoning transforms the problem of generality into a tractable optimization problem. I conclude that the interest-based approach delivers a cogent methodology for the justification of moral rights, although this methodology is significantly more complex than generally acknowledged.

My argument unfolds in three main steps. I begin in Section 3.1 by outlining the interest-based approach to the justification of moral rights. This approach is rarely articulated in detail despite its popularity, and this part of my discussion already clarifies several controversial methodological issues. In Section 3.2, I then diagnose the problem of generality that threatens to undermine this approach. Finally, I develop my solution to this problem in Section 3.3. But before diving in, I must offer some clarifications concerning the scope of my project.

A comprehensive theory of moral rights should clarify what "moral rights are and 'where they come from', how we can recognize them and resolve disagreements about their existence, and what practical consequence, if any, follows from their possession" (Feinberg 1992, 150). My project is more modest, as I specifically address the methodological question of how we can resolve disagreements over the existence of specific moral rights. This methodological investigation necessarily intersects with broader questions about nature of moral rights, their

metaphysical status, and their role in our moral lives.[3] Let me therefore highlight three theoretical presuppositions of my discussion that I cannot defend within the confines of this chapter.

The interest-based approach is closely associated with Raz's influential theory of rights, and many proponents of this approach also accept Raz's view that rights *justify* corresponding duties. On this Razian view, a single right may justify different duties under different circumstances, so this view introduces an additional step between the assignment of moral rights and the assignment of moral duties. By contrast, I adopt the Hohfeldian view that (claim) rights *entail* corresponding duties in a one-to-one fashion, so that the assignment of moral rights already *implies* the assignment of specific moral duties.[4] While my central argument also applies to Razian theories of rights, proponents of such theories would need to adapt aspects of my analysis.

The interest-based approach to the justification of moral rights is also routinely equated with the Razian interest theory of the nature of rights.[5] However, the interest-based approach to the justification of moral rights does not presuppose Raz's specific theory of the nature of

[3] Let me also add a terminological clarification. Throughout this methodological discussion, I will speak of the "justification" and the "assignment" of moral rights. Note that I am always concerned here with the justification and the assignment of moral rights *at the level of our moral theory*. When I say that certain interests justify specific moral rights, this formulation is therefore meant as a convenient way of saying that claims about the relevant interests justify claims about the existence of the rights in question. My goal in this chapter is not to defend a metaphysical thesis, so I am not asserting that moral rights only exist in virtue of being justified or assigned by our best moral theory. While I am sympathetic to this constructivist view about the metaphysics of moral rights, I neither defend nor invoke it here.

[4] On the debate between Razian and Hohfeldian theories of rights, see Kramer (2000, 44), Cruft (2004, 375–79) and Zanghellini (2017).

[5] This equation is facilitated by the fact that Raz's specific version of the interest theory is often called the "justificatory interest theory" of rights. However, it is not called that because it provides an account of the justification of moral rights, but because it holds that rights justify duties. This label accordingly distinguishes the Razian interest theory from alternative Hohfeldian versions of the interest theory. Raz also defends a version of the interest-based approach to the justification of moral rights, but these are distinct theoretical commitments. On this point, see also Preda (2015).

rights, nor does this approach follow from his theory.[6] This approach is, in fact, compatible with all all major theories of the nature of rights, such as the will theory (Steiner 2000), the kind-desire theory (Wenar 2013), and Hohfeldian versions of the interest theory (Kramer 2000). I accept such a Hohfeldian interest theory, which has subtle methodological implications that I cannot fully explore here.[7]

Finally, the interest-based approach presupposes an instrumental conception of moral rights, according to which rights are justified in terms of the promotion of other valuable goals.[8] This instrumental conception competes with influential non-instrumental conceptions that treat rights as fundamental aspects of moral reality.[9] I cannot defend this instrumental conception of moral rights in this chapter, so I am primarily addressing an audience here that is already sympathetic

[6] This point is easily missed due to the biconditional formulation of the Razian claim that "X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty" (1986, 166). But Raz explicitly notes that the condition that an interest provides "sufficient reason" for the assignment of duties merely serves as a placeholder to indicate that there is some "sound argument of which the conclusion is that a certain right exists and among its non-redundant premises is a statement of some interest of the right holder" (181). The interest-based approach can be seen to provide a specific account of the structure of such arguments. Cochrane also points this out but still insists that the Razian interest theory can "be used as a method with which to *assign* rights" (2012, 9). He does not defend this assessment, which is, in my view, incorrect.

[7] The choice to adopt an interest theory of rights rather than, say, a will theory has methodological implications because the interest theory is normally seen to allow individual claim rights to exist in isolation, while the will theory only allows claim rights to exist as part of broader bundles of Hohfeldian moral positions that also contain, for instance, a power to waive these rights, see Kramer (2000, 64). In contrast to the interest theory, the will theory therefore suggests that claim rights can only be justified if all the other Hohfeldian positions in the relevant bundle are justified too, which has implications for how we must describe the types of practical conflicts that are regulated by rights.

[8] The interest-based approach therefore belongs to a family of instrumental accounts of the justification of moral rights in terms of needs, capabilities, non-domination or human excellence, see Wenar (2005). My discussion applies, in modified form, to all these instrumental accounts.

[9] For an overview of this debate, see Wenar (2023). For particularly influential objections to instrumental theories, see Kamm (1992), Quinn (1994), and Nagel (1995b).

to the instrumental interest-based approach and wishes to apply it conscientiously. But my analysis is still relevant for the broader debate between proponents of instrumental and foundational theories of rights, as instrumental theories are often lauded for their methodological transparency (see Wenar 2005). Both the critical and the constructive part of my discussion therefore bear upon the balance of reasons for such theories or their theoretical rivals.[10] If only my critical point should prove compelling, then it provides strong reasons to abandon instrumental theories of moral rights. But if my constructive discussion also succeeds, then it shows that instrumental theories can indeed deliver on their promise of methodological transparency.

3.1 INTRODUCING THE INTEREST-BASED APPROACH

Despite being advertised for its methodological transparency, the interest-based approach to the justification of moral rights (IBA) is rarely spelled out.[11] In this section, I outline my preferred interpretation of the IBA before I introduce the problem of generality in the following section. While my formulation of the IBA has novel elements, my goal here is not to propose a new account of the justification of moral rights, but rather to make explicit the underlying logic of the most plausible versions of the IBA. Because the objection I introduce afterwards provides an internal critique of the IBA, I will not defend the theoretical presuppositions behind this approach, but only my specific interpretation of it.

[10] For an in-depth analysis of the relative merits of instrumental and non-instrumental theories of rights, see Wenar (2005).

[11] As far as I can tell, Alasdair Cochrane's provides the most in-depth discussion of the IBA in the second chapter of *Animal Rights Without Liberation*. However, it is not clear to me whether Cochrane's interpretation of the IBA is internally consistent. He initially characterizes moral rights as moral rules, which is also how I explicate the IBA below, see Cochrane (2012, 43). However, he also argues that moral rights are "established by close attention to specific circumstances of any particular case" (45). So, he does not seem to conceptualize rights as rules after all, but as conclusive judgments about particular conflicts between various interests. While I disagree with Cochrane on this point, for reasons that will become clear below, my discussion owes much to his careful analysis.

3.1.1 *An Immunizing View of Rights*

Moral rights are widely understood to protect rights-holders from being sacrificed for the greater good by shielding their interests from utilitarian trade-offs.[12] But which interests warrant this special protection, and why? The IBA addresses precisely these question, and it promises to deliver a methodology for determining which limitations on moral trade-offs we should accept "by reference to something tangible and concrete – the well-being of individuals – via a process that is clear and systematic" (Cochrane 2012, 10).

This description of the IBA raises the following question: Interests are normally understood as aspects of well-being or "good-for" values — their fulfillment is what makes someone's life go well. All else being equal, the satisfaction of interests is therefore morally desirable. In other words, our theory of interests is part of our theory of the good.[13] But how can we invoke aspects of the good to justify limits on the permissible pursuit of the good?

Before I can answer this question, I must clarify what we should expect from such an answer. We can distinguish two types of views about the relationship between rights and the interests they protect, which I call *diagnostic* and *immunizing* views. According to diagnostic views, we assign moral rights to signal that certain special interests are (largely) immune to trade-offs, but the assignment of moral rights does not confer any additional protection to these interests. Rights accordingly function essentially as a shorthand in our moral vocabulary – they highlight interests that enjoy a form of lexical priority over competing interests. According to immunizing views, by contrast, rights confer additional protections to specific interests, thereby immunizing these

[12] This idea is captured, in slightly different ways, in Dworkin's (1977, 364) claim that rights *trump* competing considerations and in Nozick's (1974, 28–33) claim that rights function as *side-constraints* in our practical reasoning. On different ways of understanding this idea, see also Pettit (1987).

[13] Different accounts of the nature of interests are surveyed in Crisp (2021). I follow Stilz (2019b, 40) in conceptualizing interests as objectively reasonable preferences. However, my argument does not hinge on this specific account of the nature of interests.

interests against trade-offs that would otherwise have been permitted. Once we assign moral rights to protect certain interests, these interests therefore gain additional resistance to moral trade-offs. How we should understand the IBA largely depends on whether we favor a diagnostic or an immunizing view of rights.[14]

One appealing feature of diagnostic views is their straightforward explanation for why certain interests resist moral trade-offs. According to one prominent diagnostic view, we use the language of rights to designate special interests that are categorically more important than ordinary interests. The reason why we should not sacrifice these interests for the greater good is simply that these reasons are, in fact, qualitatively more important than most other interests (see Waldron 1989, 507–13).[15] To explain why rights may (normally) not be sacrificed in utilitarian calculations, we must accordingly only explain why some interests are categorically more important than others.

But diagnostic views also face serious objections. For one, it is doubtful whether any interests really enjoy this lexical priority purely in virtue of their inherent importance. Even our most important interests, like those in bodily integrity or basic liberties, can be set back in all kinds of ways and to varying degrees. But if certain interests truly had the categorical priority that diagnostic views attribute to them, our theory of the good would imply that everything should be geared towards the promotion of these special interests. Yet, we routinely accept trade-offs between our most important interests and much more trivial interests, for instance when we set speed limits or work safety

[14] The choice between diagnostic and immunizing views also has implications for the burden of proof in debates over rights. Under the diagnostic view, the assertion and the denial of specific rights are theoretically symmetrical claims about the importance of the relevant interests. And because these claims are symmetrical, neither side bears a special burden of proof. Under the immunizing view, by contrast, the assertion and the denial of specific rights are theoretically asymmetrical, because the assertion of a right implies that certain interests should receive an additional level of immunity that is not directly warranted by their importance. Someone who asserts the existence of specific rights must therefore bear the initial burden of proof.

[15] One way to express this view would be to assign certain interests an importance of a higher cardinality than other interests. Views along these lines are discussed by Arneson (2001, 179–80) and Sherman (2010a, 222).

standards, and such trade-offs seem entirely reasonable. A plausible theory of the good should therefore recognize that some interests are much more important than others, but it should not place these interests on an entirely different plane of importance.[16]

Diagnostic views may also endow moral rights with excessive force by suggesting that our fundamental interests cannot be defeated even by large sets of non-fundamental interests (cf. Waldron 1989, 509). Therefore, such views suggest that rights cannot be justifiably overridden on lesser-evil grounds, and many rights theorists consider this implication to be too uncompromising. To accommodate this concern, one may argue that *sets* of non-fundamental interests can, in the aggregate, acquire the same kind of importance as fundamental interests. But once we allow for this possibility, it becomes less clear how rights protect individuals from being sacrificed for the greater good.

Diagnostic views also struggle to maintain a meaningful distinction between rights and the interests they protect, as they effectively identify rights with especially important interests.[17] This identification is problematic, in part, because proponents of interest-based theories of rights typically insist that interests *ground* rights, and this grounding relationship presupposes that rights are distinct entities from the interests they protect.[18] The identification of rights with specific interest also collapses the distinction between rights-based moral reasoning and moral reasoning aimed directly at the satisfaction of important interests. But as Scanlon (2008, 75) points out, "claims about rights" should not be reducible to "claims about what it would be good to have happen", as rights otherwise lose their distinctive role in our moral lives.[19]

Finally, diagnostic views also undermine the core promise of the IBA:

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16 For a closely related point, see Tasioulas (2015, 47).

17 A prominent objection to the IBA holds that rights become redundant if they merely protect interests, see Lazar (2009, 292), Sherman (2010a) and Moore (2015, 32, n. 31). A similar idea informs certain error theories of moral rights in the utilitarian tradition, see Feinberg (1992). Below, I argue that my immunizing interpretation of the IBA avoids this objection.

18 On interests as grounds for moral rights, with a specific focus on moral human rights, see Tasioulas (2015).

19 For a related concern, see Cohen (2008, 290).

to provide a clear methodology for resolving disagreements about the existence of specific moral rights.[20] According to diagnostic views, the immunity of certain interests against most moral trade-offs is already established by our theory of the good. Disagreements over the existence of specific rights therefore turn into disagreements over the importance of specific interests, which must be resolved at the axiological level. However, this relocation of disagreements over rights provides no obvious methodological advantage. A useful methodology for resolving such disagreements over the existence of specific moral rights should, at a minimum, (i) identify a baseline of agreement that we must presuppose to apply the methodology, and (ii) specify concrete steps for moving from this baseline of agreement to conclusions about the existence of specific rights. But diagnostic interpretations of the IBA do not clarify the relevant baseline of agreement, nor do they suggest concrete steps that we could take to resolve disagreements over the existence of specific moral rights.

For these reasons, I conclude that any plausible interpretation of the IBA must be based on an immunizing view of rights. The challenge, then, is to explain how interest-based considerations can justify granting certain interests additional protections against moral trade-offs – protections that go beyond whatever priority these interests naturally possess in virtue of their inherent importance.

3.1.2 *Rights as Indicators Rules*

Proponents of the IBA maintain that moral rights are justified if they protect sufficiently important interests. But why do we need moral rights if we ultimately care about interests, why not aim at promoting important interest directly? One answer, prominently articulated by Raz (1986, 181), holds that rights function as "intermediary conclusions"

[20] This objection does not undermine diagnostic views of the relationship between rights and interests per se, but it undermines the suitability of such view as a basis for a plausible explication of the IBA. Note that Waldron's project is not primarily methodological, so this objection does not necessarily target his view.

in arguments from ultimate values to action-guiding conclusions.[21] Building on this answer, I argue that rights function as *indicator rules* for the morally desirable adjudication of types of practical conflicts.

On the Razian account, we rely on intermediary conclusions to improve our practical and moral decision-making, as such intermediary conclusions express valid *generalizations* that we can invoke to make particular practical and moral judgments. If rights function as intermediary conclusions in our moral reasoning, then what kinds of judgments are they meant to facilitate? Typically, we invoke moral rights in situations in which two parties (or more, but I focus on the case of two) find themselves in a *practical conflict* over the distribution of certain resources, broadly construed. We use rights to determine how such conflicts should normally be adjudicated – if one party to such a conflict is morally entitled to the disputed resource, then they should normally get it. Moral rights thus express generalizations about the morally desirable adjudication of *types of practical conflicts*, which we then apply to particular instances of such conflicts. In Anna Stilz's summary, the "assertion of a right sums up our assessment, from a general perspective, of several more fundamental, intersecting, and potentially competing, value considerations", which we can use to adjudicate individual conflicts without having to consider their "underlying merits case by case" (2019b, 47). On this view, rights are instrumentally justified, but they do not merely single out especially important interests, but instead express our general assessment of the relative importance of competing interests in certain types of conflicts.

The conception of moral rights outlined here effectively treats rights as *rules* for the morally desirable adjudication of types of practical conflicts.[22] When we assert a moral right to freedom of expression, for

[21] Raz's formulation holds that rights express intermediary conclusions in arguments from values to *duties*. I adapt Raz's formulation here because it is tied to his justificatory interest theory of the nature of rights, while my formulation is also compatible with Hohfeldian accounts of the relationship between rights and duties.

[22] What justifies the use of the language of rights to characterize such moral rules? This conceptual move may seem dubious, as moral rights belong to the morality of *what we owe to each other*, and not to the theory of rational moral

instance, we assert the general rule that important interests are likely to be served better, on balance, when conflicts over free expression are resolved in favor of those wishing to speak freely rather than those seeking to limit free speech (cf. Scanlon 1978). But since the concept of a "rule" is contested, some clarifications are needed here.[23]

Frederick Schauer (1991) helpfully distinguishes between three categories of rules: *Ultimate rules*, such as Kant's Categorical Imperative, capture fundamental principles that are not justified instrumentally in terms of the promotion of other goals (86). By definition, ultimate rules cannot misfire, since they determine the appropriate decision in particular cases. *Rules of thumb*, by contrast, are "weightless" generalizations that we may rely on as convenient guidelines for rational decision-making. But whenever rules of thumb seem to produce suboptimal outcomes, we are rationally free to disregard them and to adopt a particularistic decision-procedure instead (79). *Indicator rules* occupy a distinctive middle ground: they are justified instrumentally, yet they provide reasons to act in accordance with the rule even when it seems like we could produce better outcomes through particularistic decision-making.[24] Such rules accordingly "generate normative pressure even in those cases in which the justifications (rationales) underlying the rules indicate the contrary result" (5). At the heart of my interpretation of the IBA lies a conception of moral rights as indicator rules for the

decision-making. However, according to the interest theory of the nature of rights – which I accept here – the relational character of moral rights is explained precisely by the fact that rights express rules that are justified by the fact that they are likely to promote the rights-holders' interests, see May (2015, 528–29). The plausibility of this explanation naturally remains contested, see for instance Pallikkathayil (2016, 153–56) and Valentini (2016b, 56–57).

[23] Some proponents of diagnostic views of rights may want to deny that rights express rules, insisting instead that we ascribe rights particularistically to highlight fundamental interests in specific practical conflicts. However, it is difficult to make sense of the idea that rights may not express generalizations, as pointed out by Schauer (2000).

[24] Schauer (1991, 105) simply calls such rules "genuine rules". But I follow Regan's (1988, 1003–9) terminological suggestion here. Alexander and Sherwin (2001, 28–32) introduce the concept of "serious rules" to capture a similar idea. Somewhat confusingly, Raz tends to use "rules of thumb" to describe such rules, see for instance Raz (1999, 59–62).

adjudication of practical conflicts.

My proposal to understand moral rights as indicator rules faces two objections: One may object that moral rights are really ultimate rules that are not justified instrumentally. Although this is a prominent view, I set it aside here because the IBA inherently presupposes an instrumental conception of rights.[25] Alternatively, one may object that instrumentally justified rights can only function as rules of thumb, but cannot exert any normative pressure in their own right. This objection is more salient, as I rely, in a next step, on the indicator rule conception of moral rights to explain how rights additionally immunize the interests they protect against moral trade-offs.

The objection that instrumentally justified rights can only function as rules of thumb arises in a general and a specific form. The general objection – a version of the well-known "rule-fetishism" objection – targets the entire category of indicator rules on the basis that it cannot be rational to follow rules even when following them seemingly produces suboptimal results. This objection reflects a fundamental divide in contemporary moral philosophy between those who reject indicator rules entirely and those who see such rules, or some closely related category, as essential to our rational practical reasoning. I belong to the latter camp, but I cannot try to resolve this long-standing philosophical debate here, so I must take for granted that it can be rational to follow rules even when they appear to misfire in particular cases.[26]

The specific version of this objection accepts the category of indicator rules in general, but questions why we should treat instrumentally

[25] Note that proponents of the IBA are not necessarily committed to the view that the indicator-rule conception of moral rights applies to all moral rights, as they could also accept that there are certain "fundamental" or "basic" rights that express ultimate moral rules. In defense of such a hybrid view, see Wenar (2005). I personally tend towards the view that all moral rights should be understood as indicator rule, but my discussion does not presuppose this claim, as it only applies to rules that should, in fact, be seen as instrumentally justified.

[26] For a survey of relevant literature, see Hooker (2023, sec. 8). I broadly accept Schauer's (1991, ch. 3 & ch. 4) account of indicator rules as expressing "entrenched generalizations". On the underlying disagreement between rule-sensitive particularistic accounts of rational decision-making and genuinely rule-based accounts, see also Schauer (1991, 93–100).

justified moral rights as indicator rules rather than as mere rules of thumb (Preda 2024, 344–46). I will postpone my response to this specific objection until Section 3.3, when I develop my solution to the problem of generality. For the moment, I just take for granted that we have good reasons to treat moral rights as indicator rules rather than mere rules of thumb. The interpretation of the IBA that I present in this section therefore remains formal in the sense that it leaves open why we should treat moral rights as indicator rules.

A distinctive feature of indicator rules is that they provide what Raz calls *exclusionary reasons*, which are reasons not to act for certain other reasons (Raz 1986, 186–89; see also Schauer 1991, 89). Specifically, indicator rules give us reasons to follow the rule rather than to act directly on the considerations that justify the rule even when these considerations might suggest a different course of action in particular cases.[27] Consider a highway speed limit and assume, for the sake of the argument, that this limit is justified purely in terms of safety-considerations. If the speed limit constitutes an indicator rule, rather than a mere rule of thumb, then it precludes us from driving faster than the speed limit permits even if doing so would be safe under particular circumstances. In that case, the speed limit accordingly provides exclusionary reasons not to act directly on the same safety considerations that justify the rule in the first place. While this example involves a legal rule, the same logic applies to indicator rules in the moral domain.

The exclusionary force of indicator rules explains how moral rights immunize the interests they protect against trade-offs despite themselves being justified in terms of interests. As indicator rules for the adjudication of practical conflicts, rights provide reasons to decide such conflicts in favor of the rights-holder even when an alternative decision might promote important interests better in a particular case. The

[27] For insightful discussions of the idea of exclusionary reasons, see also Edmundson (1993, 338) and Adams (2021). Here, my conception of indicator rules follows Raz rather than Regan (1988, 1013), who conceptualizes indicator rules as reasons not even to consider the reasons that justify these rules in the first place.

right to free speech, for instance, provides exclusionary reasons not to suppress speech even when doing so might seem morally beneficial in specific circumstances. Rights thus give us reasons to bracket the very interest-based calculations that justify these rights in the first place. This exclusionary logic explains the preemptive force that is characteristic of rights in our moral deliberations.

In contrast to prominent diagnostic views, the indicator rule conception of moral rights also explains why rights remain overrideable despite their preemptive force. Even if rights provide exclusionary reasons, they can still be defeated in at least three ways: First, rights can be defeated by reasons that lie outside their exclusionary scope, such as moral concerns besides the promotion of well-being. Second, even reasons within their exclusionary scope may override rights when it becomes obvious – without requiring a thorough case-specific investigation – that following the rule would produce egregiously wrong results in particular cases (see Regan 1988, 1015–17; Schauer 1991, 88–93).[28] Third, rights may be defeated by competing rights when a single conflict falls under multiple justified indicator rules.[29] More could obviously be said about these possibilities, but my point here is only that the indicator conception of moral rights has resources for explaining why rights are not necessarily absolute.

The indicator rule conception of moral rights also preserves the distinction between rights and the interests they protect by conceptu-

[28] Raz (1986, 61) seems to reject this possibility, although the textual evidence is somewhat ambiguous. Still, I agree with Regan and Schauer that cases of this kind are both logically and psychologically possible. See also Raz (1988, 1195–96) for his response to Reagan, which does not, in my view, entirely clarify Raz's own position.

[29] The possibility of conflicts between competing indicator-rules naturally raises further questions that I cannot address here. For insightful discussions see Schauer (1991, 188–91) and Raz (2005, 1020–21). This possibility is also controversial because some proponents of the IBA defend the specificationist view that rights must be assigned as compossible sets, e.g. Scanlon (2008, 76–78). But the indicator rule conception of moral rights is also compatible with generalist views that allow for conflicts of rights. On the debate between specificationist and generalist theories of rights, see Waldron (1989), Liberto (2014) and Mullins (2020). On the concept of a compossible set of rights, see Steiner (1977) and Christmas (2019).

alizing rights as rules that operate on top of the interests that justify them. This explains why rights-based moral reasoning is genuinely distinct from direct interest-based moral reasoning, as it implies that claims about rights are not just claims about the importance of specific interests, but claims about the likely balance of interests in certain types of practical conflicts. In contrast to what some critics maintain, the view that rights function as intermediary conclusions in our moral reasoning therefore does not treat rights purely as "rhetorical conveniences" that are easily "theoretically eliminable" (Walen 2019, 46).

Does the indicator rule conception of moral rights also help us resolve disagreements over the existence of specific rights? I examine this question in detail in the following sections, but before going into detail it will be useful to consider the general structure of the justification of moral rights that emerges if we conceptualize rights as indicator rules for the adjudication of practical conflicts.

As Scanlon (1977, 89) notes in his original defense of the IBA, interest-based arguments for specific rights always encompass three types of claims:[30] First, an empirical claim about "how individuals would behave or how institutions would work" unless we assign certain rights, and which interests would be satisfied as a result. Second, another empirical claim about how the "envisaged assignment of rights will produce a different outcome". And finally, an evaluative claim about the relative importance of the interests that are satisfied in both scenarios. Crucially, this third claim must be based on a careful weighing of the interests of prospective rights-holders and prospective duty-bearers, so that we only assign moral rights if their assignment will, as a general rule, be morally beneficial *on balance*.[31] This justificatory structure

[30] Note that it is not obvious to what extent Scalon's recent work on moral rights is compatible with his pre-contractualist account. Scanlon (2021, 17–25) himself suggests that his recent work is basically compatible with his earlier view, except that he now accepts a different account of how we determine the importance of various interests. I am not sure about this, so I am not claiming that the account of the justification of moral rights that I present here is compatible with Scanlon's recent contractualist work.

[31] I bracket the interests of third parties here, who are neither rights-holders nor duty-bearers but whose intersets are still affected by the assignment of specific rights. Eventually, these interests must also be taken into account, see Scanlon

disaggregates disagreements over the existence of specific moral rights into evaluative disagreements about the relative importance of various interests and empirical disagreements about the likely consequences of different rights-assignments. This disaggregation of disagreements over rights into evaluative and empirical disagreements explains how the IBA is meant to demystify moral rights, and to allow us to resolve disagreements over their assignment through ordinary moral reasoning (cf. Cochrane 2012, 10).

This outline of the general structure of interest-based arguments for the assignment of specific rights leaves many details open. Such arguments clearly presuppose, for instance, that the assignment of moral rights actually changes the behavior of individual agents or institutions. Such arguments accordingly build on a compliance-assumption, according to which moral rights are, to some extent, motivationally effective. This assumption can be formulated more or less stringently, and its precise formulation can significantly affect which rights we end up with when applying the IBA.[32] However, to appreciate the problem of generality that I introduce in the following section, this general characterization of interest-based arguments for specific moral rights suffices. Accordingly, I deliberately leave these further methodological details open.

In sum, my preferred interpretation of the IBA is based on a conception of moral rights as indicator rules for the adjudication of types of practical conflicts, which are justified if their general observance would, on balance, promote morally important interests. In the remainder of this section, I defend this interpretation of the IBA against two challenges, before I introduce the problem of generality.

3.1.3 *Defending My Comparative Methodology*

The interpretation of the IBA outlined above implies that moral rights are justified in terms of the relative importance of the interests of

(1978, 527–28).

[32] For a detailed discussion of this compliance assumption, see Hooker (2000, 75–85).

prospective rights-holders and duty-bearers. Some proponents of the IBA reject this comparative approach, insisting instead that moral rights are justified solely in terms of the interests of prospective rights-holders. According to this view, we should assign rights when "an individual's interest, *taken by itself*, has the requisite kind of importance to justify the imposition of duties on others" (Tasioulas 2007, 77, emph. added).[33] The comparative dimension of my version of the IBA is central to the following discussion, so let me explain why I reject this alternative view.

My core objection to the non-comparative view is that it systematically disadvantages prospective duty-bearers in our moral theorizing, at least if we accept an immunizing account of rights.[34] If the assignment of moral rights boosts the immunity of certain interests against moral trade-offs, then it necessarily imposes a corresponding disadvantage on any competing interests. The theoretical choice to boost the immunity of certain interests therefore requires a justification that is fair towards individuals who have competing interests, especially prospective duty-bearers. Unless we take the interests of prospective duty-holders into account *before* we decide to assign moral rights, we accordingly systematically disadvantage them, which would likely result in an inflation of moral rights.

Let me offer an example to illustrate this point. According to an influential interest-based argument, we should recognize a general moral right to immigrate, which supports a commitment to largely open borders.[35] The basic premise of this argument is that individuals have significant interests in being able to move to any country of

[33] This view is particularly influential in the literature on moral human rights, see also Miller (2007, 187–88). In more recent work, Miller (2014) has revised his view and now accepts that moral human rights must be justified in terms of the balance of all relevant interests. However, Miller's earlier account remains influential.

[34] Note that Tasioulas (2015, 47) also accepts such an immunizing view. Proponents of a diagnostic view of rights, like Waldron (1989), also tend to argue that rights are justified solely in terms of the rights-holder's interests. But I focus on immunizing interpretations of the IBA here, as I have already rejected the diagnostic view.

[35] My reconstruction of this argument follows Oberman (2016). Note that Oberman explicitly invokes the non-comparative interpretation of the IBA proposed by Tasioulas (2007).

their choosing — interests related, for instance, to family relationships, economic opportunity, or cultural participation.[36] These interests are then deemed sufficiently important to justify a presumptive moral right to immigrate, which largely immunizes the interests of prospective migrants against moral trade-offs.[37] Crucially, these interests receive their additional immunity *before* any competing interests are taken into account. The interests of citizens of destination states — who now bear the corresponding duties to maintain open borders — enter the analysis only *after* the right to immigrate has been justified. This right can, of course, still be overridden, but only if the citizens of destination states have interests in closing borders that are *much weightier* than the interests of prospective migrants. This will only be the case under exceptional circumstances, when additional immigration would profoundly harm receiving communities.[38]

This argument for a general moral right to immigrate is structurally flawed because it systematically disadvantages the interests of citizens of destination states, creating an artificially high bar for the justification of immigration restrictions. The problem is that the interests of prospective migrants receive their immunity booster — the special protection characteristic of rights — before competing interests are taken into account.[39] Consequently, these competing interests can only justify

[36] For critical discussions of this part of Oberman's argument, see Miller (2016a, 20–21) and Stilz (2019b, 204).

[37] Oberman (2016, 46) speaks of a "freedom to immigrate" here rather than a "right to immigrate". But he seems to use this notion to denote the same normative category that many people would call "pro tanto rights", as he assumes that this "freedom" has the same preemptive force that is characteristic of rights.

[38] As Oberman (2016, 33) puts it, immigration restrictions can only be justified under "extreme circumstances in which immigration threatens severe social costs that cannot otherwise be prevented".

[39] Oberman (2016, 45–47) supports this step with a second argument, according to which a right to immigrate would protect the same interests as other established rights, such as the right to internal freedom of movement. Accordingly, it would be inconsistent to accept the latter but to deny the former. But this argument fails. One can consistently deny the existence of a right to immigrate while also endorsing a right to internal freedom of movement because the same interests may compete with less important interests in one context (such as emigration) and with more important interests in another context (such as immigration). This aspect of Oberman's argument explains why it is often categorized as

immigration restrictions if they are weighty enough to *override* the right to immigrate. This sequential approach accordingly conflates two distinct normative questions, namely (i) whether a right to immigrate is justified given all relevant interests, and (ii) under what conditions such a right could be justifiably infringed.[40] To avoid this problem, we have to take the interests of citizens of destination states into account before we accept a right to immigrate, but once we adopt this comparative approach the justifiability of a general right to immigrate becomes more questionable.

Some proponents of non-comparative interpretations of the IBA attempt to avoid this problem of systematic bias by incorporating duty-bearers' interests into their analysis at an earlier stage. John Tasioulas, for instance, proposes a two-step justificatory procedure for moral rights, according to which one must show (i) that certain interests are "pro tanto of sufficient importance to justify the imposition of duties on others" (2015, 51) and (ii) that the imposition of these duties would not impose "excessive burdens on potential duty-bearers, in terms of other values" (60).[41] Yet this second step clearly introduces a comparative element into the justification of moral rights, so that it is not clear in what sense the justification of rights stems purely from the "normative significance of each person's interests considered individually" (58). At this point, Tasioulas's suggestion that the interests of prospective duty-holders only constrain the *feasibility* of specific moral rights seems unmotivated.[42]

belonging to a broader family of "cantilever arguments" for open borders, see Miller (2016b, 50).

[40] For related objections to Oberman's argument, see Stilz (2019b, 203–4) and Steinhoff (2022, 38–40).

[41] Tasioulas's procedure actually has four steps, but the other two steps are not relevant here as they specifically relate to the justification of moral *human rights*, see Tasioulas (2015, 50–51).

[42] For a similar assessment of Tasioulas's view, see Brinkmann (2016, 88–89).

3.1.4 *Rule-Utilitarianism in Disguise?*

One reason why some proponents of the IBA insist that rights must be justified solely in terms of the interests of prospective rights-holders appears to be their concern that a comparative interpretation of the IBA collapses into a form of rule-utilitarianism (Tasioulas 2015, 58). And my conception of rights as indicator-rules undeniably resembles certain attempts to incorporate rights into rule-utilitarian moral theories. These attempts face well-known objections, so let me clarify why proponents of the IBA need not be rule-utilitarians.[43]

Utilitarian moral theories are typically characterized in terms of four commitments: (i) the *consequentialist* doctrine that only outcomes ultimately matter, (ii) the *welfarist* doctrine that these outcomes must be evaluated solely in terms of well-being, (iii) a principle of *impartiality* according to which everyone's well-being counts equally, and (iv) specific views about *aggregation*, typically a commitment to a total welfare maximizing axiology. The IBA does not presuppose any of these commitments, and is therefore compatible with a broad range of moral theories.

The IBA only provides an account of the justification of moral rights and not a comprehensive moral theory, so in that respect it cannot presuppose a comprehensive consequentialism. But does it presuppose a consequentialist theory of rights? This question is not straightforward because the recent literature on the consequentializing of deontic views has considerably complicated the distinction between consequentialist and non-consequentialist moral theories (see Portmore 2022). But the IBA is not consequentialist in at least one important sense, as it can readily accommodate interests that are not merely outcome-oriented but also process-oriented. These include, for instance, autonomy-based interests to participate in the making of decisions that shape one's life (see Wilson 2022, 172). If the IBA presupposes a form of consequential-

[43] Note that Scanlon (1977, 82) explicitly introduced his version of the IBA as an alternative to rule-utilitarian theories of rights that allows us to capture some of the methodological benefits of such theories without having to accept their less plausible implications.

ism, then this is a broader form of consequentialism than utilitarians traditionally accept.[44]

The IBA clearly has a welfarist element, as it holds that rights are justified in terms of interests. But proponents of the IBA need not accept a welfarist theory of the good for two reasons: First, they are not necessarily committed to the welfarist doctrine that well-being is all that matters from a moral perspective, as they can acknowledge moral concerns that are not welfare-related (Cochrane 2012, 25). Second, proponents of the IBA are not committed to the view that well-being is the only morally fundamental category. Scanlon (1977), for instance, influentially argues that the importance of specific interests is determined by various objective moral factors, including considerations of fairness and equality.[45] Proponents of the IBA can therefore incorporate a broad range of moral factors into their underlying theory of the good for which traditional utilitarian moral theories have no space, such as considerations of distributive justice, historical entitlement, special obligations, autonomy, or human dignity.[46]

The IBA does not presuppose a strong principle of impartiality either. One reason is that the IBA is compatible with the view that some interests derive special importance from the relationships in which they are embedded, such as the interests of parents in caring for their

[44] Note that I am not denying that the IBA presupposes a form of rule-consequentialism, broadly construed. I stay neutral on this point because a broad range of moral theories that differ profoundly from traditional rule-utilitarian views can be classified as rule-consequentialist, see Hooker (2023).

[45] A prominent objection to the IBA holds that it implicitly presupposes an objectionably narrow form of welfarism that cannot accommodate important moral concerns like equality, dignity or autonomy, see Lazar (2009) and Moore (2015, 32). Scanlon's view demonstrates that this objection applies, at most, to specific interpretations of the IBA.

[46] Even though I conceptualize interests as reasonable preferences, I am therefore not committed to the view that the importance of interests is identical to their subjective intensity. In principle, interests can be important even if they do not reflect particularly intense preferences, and vice versa, see also Scanlon (1975). There is a tendency in the literature to conflate questions concerning the nature of interests with questions about how we determine their importance. Accordingly, it is often assumed that proponents of a preference-account of the nature of interests must also understand the importance of interests in terms of the intensity of preferences. But these are separate theoretical questions.

children. Moreover, the IBA provides a methodology for the justification of moral rights that must be applied by specific moral reasoners or communities of reasoners. And any reasoner who is applying the IBA may, in principle, also have agent-relative reasons to attribute special significance to the interests of specific people with whom they stand in morally significant relationships.

Finally, the IBA does not presuppose any specific view about the aggregation of interests, nor does the IBA presuppose that we should try to maximize the total sum of aggregate well-being. As Tasioulas points out, we "can understand morality, or some segment of it, as teleological – as grounded in advancing, protecting, and respecting human interests – without adopting a consequentialist or maximizing interpretation of the proper moral response to interests" (2015, 48). Granted, if rights are justified in terms of the balance of competing interests, then the justification of rights presupposes an ordinal ranking of the importance of these interests. This means that we cannot apply the IBA unless we can meaningfully rank the importance of all interests that are relevant in a specific context, and that may involve a degree of aggregation in that specific context.[47] But while the comparative assessment of the importance of various (sets of) interests raises technical challenges, others have addressed these challenges elsewhere.[48]

Some proponents of the IBA may, of course, still endorse a utilitarian axiology, and nothing I have said excludes this possibility. But in that case, they are bringing in additional normative commitments that other proponents of the IBA remain free to reject.

3.2 THE PROBLEM OF GENERALITY

To see why the IBA faces a methodological challenge, consider two stylized interest-based arguments:

Open Borders: Individuals who wish to migrate to another

[47] Note that this point does not imply that we also need a complete social welfare function in order to apply the IBA.

[48] Many of these challenges are discussed in the social choice literature, see List (2022) for an overview.

> country generally have important interests in doing so. Moreover, these interests are generally more important than any competing interests of citizens of destination states in limiting immigration. Thus, we should assign a general moral right to immigrate, as this right expresses a rule that is likely, on balance, to promote important interests.

And:

> *Refugees Only*: Refugees have especially important interests in moving to another country, which generally far outweigh any competing interests of the citizens of destination states. Voluntary migrants, by contrast, have less important interest in moving, which are generally less important than competing interest in limiting immigration. Thus, we should assign refugees a right to immigrate, and destination states a right to exclude voluntary migrants.

Similar arguments are popular in the migration ethics literature, although they are not presented this crudely. However, this stylized presentation serves to highlight the basic structure of these arguments.

To determine whether *Open Borders* or *Refugees Only* are actually plausible, we would have to consider the underlying interests of prospective migrants and of citizens of destination states, evaluate the moral importance of these interests, and assess the likely consequences of the proposed rights-assignments. But I will not evaluate these assumptions here, as my goal is not to discuss the ethics of immigration restrictions. Instead, my goal is to highlight that both arguments could, in principle, be plausible *at the same time*. This observation illustrates the methodological challenge that I introduce in this section.

How could *Open Borders* and *Refugees Only* be plausible at the same time despite their incompatible conclusions? One reason is that refugees presumably have much more important interests in crossing borders than other migrants, so that the relevant interests are not distributed uniformly within the group of prospective immigrants. As a result, a general right to immigrate may indeed seem justifiable when we consider a single type of practical conflict between the citizens of

destination states and all prospective migrants, as suggested by *Open Borders*, since the weighty interests of refugees will then contribute significantly to the balance of interests on the migrants' side. But if we consider two narrower types of conflict independently instead, as suggested by *Refugees Only* — one between the interests of voluntary migrants and of the citizens of destination states, and another between the interests of refugees and the citizens of destination states — we may also find that only refugees should be granted a right to immigrate. Depending on our chosen description of the relevant types of conflicts, we accordingly group the underlying interests in ways that can support several incompatible assignments of moral rights, even if we accept exactly the same account of these interests in both cases.

If we assume that *Open Borders* and *Refugees Only* accurately represent the underlying distribution of interests, then what do such arguments actually achieve given that they can be plausible at the same time? Presumably, the goal in formulating an argument like *Open Borders* is to convince an audience to accept a general moral right to immigrate, and consequently also to accept the need for far-reaching reforms of current systems of migration governance. But if this audience currently accepts *Refugees Only*, which essentially supports the legal status quo in many countries, then *Open Borders* provides no compelling reason for members of this audience to change their mind. After all, both arguments are supported by the same underlying distribution of interests, described at different levels of generality. At most, the observation that both arguments are plausible may induce a skeptical suspension of judgment on both sides of the debate, which may facilitate an agreement of sorts, but not the agreement proponents of such arguments were presumably aiming at.

These examples illustrate a broader point: In the migration context, the same underlying distribution of interests may, in fact, support a vast number of incompatible rights-assignments, as we could describe the practical conflicts that potentially arise in this context in countless other ways too. We could, for instance, make more fine-grained distinctions between categories of migrants, or between different kinds of destination states. And once we introduce these fine-grained distinctions, we may, for instance, find that labor migrants from the Global South have a

right to move to states in the Global North but not vice versa, or we may arrive at any number of alternative conclusions. Thus, we may derive not just two but countless incompatible assignments of moral rights from identical assumptions concerning the distribution and importance of the relevant interests, depending solely on how we describe our practical conflicts.

My discussion of these stylized interest-based arguments illustrates the general observation that the application of the IBA often has vastly indeterminate results. If moral rights express rules for the adjudication of certain types of practical conflicts, then it is always possible to slice up the underlying distribution of interests in various ways that support incompatible rules of this sort. The fundamental problem here is that types of practical conflicts are not natural kinds, so we must *impose* some categorization scheme for practical conflicts unto the underlying distribution of interests. And unless the theoretical decision to impose a particular typology of practical conflicts can itself be justified, the results of interest-based arguments therefore remain largely arbitrary. This threat of arbitrariness lies at the heart of the methodological challenge that I call the *problem of generality*.

Note that my point is not simply that the interest-based justification of moral rights leaves a certain indeterminacy in the assignment of rights that must be resolved through authoritative institutional decisions. I suspect that every plausible philosophical methodology will leave our moral rights somewhat underdetermined around the edges, and I do not consider such limited indeterminacy to constitute a methodological problem. Rather, my point is that assertions of specific moral rights that are based on the IBA seem largely arbitrary, as one can always redefine the relevant types of conflicts to justify entirely different conclusions. In the limit case, we can even describe the relevant conflicts so narrowly that we effectively return to a particularistic form of moral reasoning that dispenses with rights altogether, adjudicating each case based on its underlying merits. The problem of generality therefore does not reveal a mild indeterminacy of the sort plausibly considered unproblematic, but rather a fundamental indeterminacy that constitutes a profound methodological challenge to the IBA.

The problem of generality indicates that the IBA only meets one

of the two conditions for a useful methodology for the justification of moral rights that I introduced above. Recall that such a methodology should, at a minimum, (i) identify a baseline of agreement that we must presuppose to apply the methodology, and (ii) specify concrete steps for moving from this baseline of agreement to conclusions about the existence of specific rights. The IBA meets the first condition, as it establishes a clear baseline of initial agreement, namely agreement about the distribution and importance of various interests, and about the empirical consequences of various rights-assignments. However, it falters on the second condition because it fails to specify how we can move from this baseline of agreement to determinate conclusions about rights. Without principled criteria for determining the appropriate level of generality at which to assign moral rights, we accordingly cannot reliably employ this methodology to resolve disagreements over the existence of specific rights after all.

The IBA was introduced primarily as a methodology through we can resolve disagreements over the existence of specific moral rights, but the problem of generality reveals a fundamental limitation: Both sides to such disagreements can often provide plausible interest-based justifications for their incompatible positions simply by describing the relevant types of conflicts at different levels of generality. This observation directly challenges the IBA's core promise of methodological transparency. Until proponents of the IBA address this problem, the numerous interest-based arguments advanced across various domains of moral and political philosophy therefore remain incomplete at best.[49]

[49] The problem of generality also threatens to undermine interest-based arguments discursively. Such arguments often justify calls for social reforms, presented not as mere political opinions but as authoritative academic results. But if interest-based arguments yield largely indeterminate conclusions due to the problem of generality, then their apparent methodological rigor becomes questionable. Indeed, some commentators worry that interest-based arguments mostly provide sophisticated post-hoc rationalizations for their proponents' prior normative commitments, although this critique has not been connected to the problem of generality before, cf. Wenar (2023, sec. 6). My analysis suggests that such concerns might be warranted, even when theorists are acting in good faith.

3.3 SOLVING THE PROBLEM

In this section, I argue that the appropriate level of generality at which to assign moral rights is determined by the reasons for which we rely on rights in our moral reasoning in the first place — the relevant *rule-generating rationales*. I then outline the broader implications of this solution to the problem of generality for the formulation of interest-based arguments.

3.3.1 *Rule-Generating Rationales*

As Schauer observers, whenever we employ general rules in our practical reasoning, the decision to opt for a specific "direction and a degree of generalization" must be made "subsequent to the decision to generalize in the first place" (1991, 20). To determine the appropriate level of generality at which to assign moral rights, it therefore seems natural to examine the reasons for which we rely on rights in our moral reasoning in the first place, the rule-generating rationales for rights-based moral reasoning.[50] Five such rationales feature particularly prominently in the literature:[51]

(a) The Coordination Rationale: Rights help us solve social coordination problems that arise when everyone acts on their direct interest-based moral judgments (Harsanyi 1977; Miller 2009).

(b) The Communicative Rationale: Rights provide a lingua franca for the negotiation of social conflicts, and thus

[50] Schauer speaks of "rule-generating justifications", rather than "rule-generating rationales". I adapt his terminology to avoid confusion between the justification for relying on moral rights in our moral reasoning at all, and the justification for particular moral rights.

[51] The following list is not exhaustive and several other rule-generating rationales are also discussed in the literature, see Harsanyi (1977) and Miller (2009). These include the role of general moral rules in building trust in society and a sense of common purpose, for incentivizing moral behavior, and for allowing people to form life plans on the basis of reliable expectations.

enable the formation of a common culture in pluralistic societies (Raz 1986, 181).

(c) The Power-Sharing Rationale: Rights distribute decision-making power in society and thereby protect individual freedom and personal autonomy (Scanlon 1977, 88; Schauer 1991, 158–62).

(d) The Epistemic Rationale: The use of rights as general decision-rules improves the accuracy of our moral judgments, as rules can be "examined in tranquility on the basis of the best information available" (Raz 1999, 59).

(e) The Heuristic Rationale: Rights function as heuristics that increase the efficiency of our reasoning process and reduce the "time and tediousness" involved in moral reasoning (Raz 1986, 181).

These five rule-generating rationales are mutually compatible, but for the purposes of exposition I will initially focus on one such rationale in isolation.[52] In my view, the heuristic rationale provides the strongest grounds for the use of rights in our moral reasoning, so I focus on this heuristic rationale in developing my strategy for solving the problem of generality. The primacy of the heuristic rationale is, admittedly, controversial, and I cannot defend it here.[53] However, I generalize my

[52] Because recent discussions of the IBA draw strongly on Raz's work, the heuristic and the communicative rationales tend to be emphasized. The most relevant passage in Raz reads: "They [rights] are, so to speak, points in the argument where many considerations intersect and where the results of their conflicts are summarized to be used with additional premises when need be. Such intermediate conclusions are used and referred to as if they are themselves complete reasons. The fact that practical arguments proceed through the mediation of intermediate stages so that not every time a practical question arises does one refer to ultimate values for an answer is […] of crucial importance in making social life possible, not only because it saves time and tediousness, but primarily because it enables a common culture to be formed round shared intermediate conclusions, in spite of a great degree of haziness and disagreement concerning ultimate values" (1986, 181).

[53] For a critical discussion of the significance of the heuristic rationale, see Marmor (2005, 152).

solution to the problem of generality below.

Having outlined the rule-generating rationales for rights-based moral reasoning, we can now return to the specific objection to understanding rights as indicator rules, the discussion of which I postponed in Section 3.1.2. Recall that this objection holds that instrumentally justified rights can only function as normatively weightless rules of thumb because we remain rationally free to revert to a particularistic mode of decision-making whenever the rights-based adjudication of particular conflicts seems to yield suboptimal results. How can proponents of the IBA respond to this objection?

The precise reply to this objection depends on the chosen rule-generating rationale for moral rights. If we accept the heuristic rationale, for example, then rights express rules that exert normative pressure because we normally no longer even consider the merits of particular cases covered by these rules.[54] After all, we cannot reap the benefits of using heuristics in our practical reasoning if we still think through the details of all individual cases. If we have sufficient reason to rely on heuristics in our practical reasoning in the first place, then we accordingly cannot treat moral rights that express such heuristics as mere rules of thumb. The heuristic rationale for rights-based moral reasoning therefore explains how the assignment of moral rights "grounds duties with pre-emptive force" that "preclude our direct consideration of the underlying merits case by case" (Stilz 2019b, 48).[55]

This story changes if we (also) accept other rule-generating rationales, but all standard rationales provide their own distinctive justifications for why rights retain their normative force even when they

[54] Raz emphasizes that his exclusionary reasons are reasons not to *act for* other reasons, not reasons not to *consider* other reasons. But he also acknowledges that reasons not to consider other reasons effectively function as exclusionary reasons, which is why I will not make a distinction here, see Raz (1988, 1156).

[55] In the migration context, Stilz's (2019b, 187–88) overall view seems to be that states have a moral right to exclude (certain) migrants, but are still morally required to consider the balance of all relevant interests on a case-by-case basis to determine whether they can justifiably exercise this right. It is not clear to me how this view fits Stilz's description of the logic of rights-based moral reasoning, as a requirement to engage in particularistic reasoning seems to undermine the point of having a right to exclude in the first place.

seem to misfire in particular cases. If we primarily reason with moral rights to sustain a common culture, for instance, then this rationale will also provide us reasons not to deviate from our rights-based judgments when doing so would seemingly allow us to promote important interests more effectively in particular cases, as we otherwise risk undermining the common culture we are trying to sustain in the first place. I believe the same holds for the epistemic rationale, the power-sharing rationale, and the social coordination rationale, although I cannot discuss them individually here.[56] In the remainder of this section, I show how we can employ these rule-generating rationales to address the problem of generality for the IBA.

3.3.2 *An Analogy*

Imagine the following scenario: Emmi is an immigration ethicists. Impressed by her moral wisdom, her government puts Emmi in charge of its immigration policy. Emmi is morally conscientious and wants to do her best, so what policies should she suggest?

If Emmi's home state only receives few admission requests, then she can easily adopt a particularistic decision-procedure and evaluate each request on its underlying merits. She would then ask, in each case, whether the admission of specific migrants is likely, on balance, to promote important interests. This approach allows her to consider all available information, which should enable her to make high-quality decisions.[57]

The obvious disadvantage of this particularistic decision-procedure is that it demands a lot of Emmi's time and cognitive energy. In this respect, this procedure is extremely *costly*. To make Emmi's task easier,

[56] In Schauer's (1991, ch. 3) terminology, each rule-generating rationale suggests its own "source of entrenchment" for the generalizations expressed by the assignment of moral rights.

[57] In principle, this particularistic procedure can also be especially fair, as it allows Emmi to treat like cases alike and to take into account any unusual circumstances of specific individuals that deserve special considerations. The popular idea that general decision-procedures are inherently especially fair is therefore unwarranted, see also Schauer (1991, 136).

let us assume the she is given resources to hire staffers to which she can delegate all the relevant empirical fact-finding, although she must still make all necessary normative judgments herself. This division of labor frees up some of Emmi's time and attention, although her decision-making now takes up the time and attention of her staffers.

Why should Emmi care about the costs of her decision-making if her only goal is to make morally optimal decisions? These decision-making costs matter for two reasons: First, Emmi's time and cognitive energy are limited, so if the number of cases increases she will eventually be forced to spend less time and attention on each individual case, which will presumably reduce the quality of her particularistic judgments. Second, the costs of Emmi's decision-making are themselves partly *moral costs*, as Emmi and her staffers could also use their time and energy to pursue other morally worthwhile projects and to promote other morally important interests. Because the costs of Emmi's decision-making are themselves morally salient, she must take them into account when she decides which decision-procedure to adopt.[58] Her particularistic decision-procedure may therefore not be optimal after all.

To reduce her decision-making costs, Emmi could, instead, opt for a rule-based decision-making procedure. And if she wants to push down these costs as much possible, she could formulate a single rule by which to adjudicate all requests for admission. To formulate such a maximally general rule, Emmi and her staff would have to estimate whether the admission of prospective migrants can generally be expected, on balance, to promote or to undermine important interests. Both the empirical and the normative dimension of such an assessment will clearly involve inductive reasoning, so the goal will be to find statistically valid generalizations. Depending on the outcome of this inquiry, Emmi will

[58] Are these really two separate considerations or is the first reducible to the second? I believe they are separate because the first consideration would apply even if Emmi and her staffers could do nothing more morally productive with their time and attention than evaluate requests for admission, say because that is the thing they enjoy doing most in life. In this sense, the first consideration partly belongs to the epistemic as well as the heuristic rule-generating rationale, which cannot be separated entirely. I thank Anca Gheaus for urging me to clarify this point.

then either adopt a policy of accepting all requests (as suggested by *Open Borders*) or a policy of rejecting all requests.

Once Emmi concludes that one of these two general rules is justified, she can use it as a heuristic to adjudicate individual admission requests without having to evaluate their individual merits. She will then no longer need a staff to gather empirical information, except for occasional checks to ensure that her decision-rule remains based on valid generalizations. However, while this maximally general decision-procedure greatly reduces costs, it may not be optimal either. A major downside of this procedure is that Emmi no longer allows herself to take into account any information related to specific cases. By applying such broad rules, she may therefore resolve many cases in ways that would seem clearly wrong from a particularistic perspective. The moral risks of over-generalization are particularly obvious here if we assume that she adopts the policy of denying all requests for admission, as she would then also exclude all refugees, which she would never do if she considered their requests individually.

Instead of adopting either a particularistic or a maximally general decision-procedure, Emmi could obviously also adopt countless other decision-procedures. She could, for instance, distinguish between refugees and voluntary migrants (as suggested by *Refugees Only*), or she could adopt more complex decision-procedures like those adopted by most states, which combine rules for different types of visa and asylum requests with some particularistic decision-making by individual officials. There is no way to tell *a priori* which of these procedures Emmi should rationally adopt, as that depends on a broad range of factors, including Emmi's cognitive capacities and the difficulty of acquiring various empirical data. But some decision-procedures will clearly produce better results in the long-run than others, so some decision-rules will provide more useful heuristics for Emmi than others.

3.3.3 *Heuristics and Trade-Offs*

The Emmi example illuminates several features of our ordinary moral reasoning, whether as individuals or as moral communities. Most importantly, the example illustrates that moral reasoning has costs, or at

least opportunity costs, as it takes up time and cognitive energy. And these costs are themselves morally significant – indeed, it is not clear what could be more significant than the use of our time and attention – and a world in which we do nothing but engage in moral reasoning would not seem particularly enticing. We must therefore internalize these cots in our moral reasoning and aim to minimize them, all else being equal.

In describing Emmi's predicament, I have not used the language of rights. But Emmi could, of course, institutionalize a general decision-rule like "accept all requests for admission" by granting all foreigners a legal right to immigrate. Likewise, if we, as individuals or as a moral community, conclude that open borders are generally likely, on balance, to promote morally important interests, we can express this conclusion by assigning a general moral right to immigrate (as suggested by *Open Borders*). Such a right would then express a heuristic that we can invoke to evaluate the moral merits of different immigration policies. We can now see that the use of such heuristics can actually be required *for moral reasons*, and not just for reasons of convenience.

The example of Emmi also highlights a downside of relying on rights as heuristics in our practical reasoning, namely that it reduces the *information* we allow ourselves to take into account when we adjudicate individual conflicts of a given type. To capture this informational loss, I refer to the amount of information that certain decision-rules allow us to take into account as the *resolution* of our practical reasoning. This resolution is largely determined by the number of different types of practical conflicts we consider separately in a given context. Metaphorically speaking, the level of generality at which we specify these types of conflicts determines the resolution of the heuristic lens through which we view the underlying distribution of interests. A high resolution lens provides detailed images of the normative landscape, which take more time and cognitive energy to process but allow us to make out fine-grained distinctions. A low resolution lens, by contrast, delivers cruder images that are easier to parse but less informative. Literally speaking, the resolution of a decision-rule refers to the number of distinctions it allows us to make between distinct types of cases in a certain domain. The maximum resolution is therefore reached when

we resolve every conflict on its underlying merits, while the minimum resolution is reached when we subsume all conflicts in that domain under a single type.[59]

In general, we can expect a decrease in the resolution of our practical reasoning to increase our errors of judgment, as we will adjudicate individual cases in ways that would have seemed misguided if we had taken all relevant information into account.[60] The error rate in our judgments will increase particularly sharply whenever the underlying distribution of interests exhibits pronounced patterns that disappear from sight at low resolutions. In the migration context, for instance, we can expect to find that refugees predictably have much more important interests in admission than other migrants. Once we no longer distinguish different forms of migration, we loose this pattern and therefore risk wide-spread errors of judgment. Different patterns in the normative landscape will accordingly emerge depending on our chosen heuristic lens, and these patterns will partly determine what rights we end up with.

Because the use of rights as heuristics has advantages as well as disadvantages, we face a *trade-off* between the *costs* and the *resolution* of our practical reasoning: We can reduce these costs a lot, but only by loosing a lot of resolution, and vice versa.[61] How we navigate this cost-

[59] I introduce the concept of "resolution" here because I am not aware of any standard concept in statistics that expresses the right idea. A decrease in the resolution of our practical reasoning may decrease both the *accuracy* and the *precision* of our judgments. However, it need not necessarily affect either, as a decrease in resolution will only have detrimental effects if there are relevant patterns in the underlying distribution of interests. The resolution metaphor introduces a helpful simplification, as it suggests a natural continuum from low resolution to high resolution modes of practical reasoning. In fact, there are many ways of grouping conflict tokens into general types at the same level of generality, some aligning well with cultural, legal, or linguistic traditions, others using more or less arbitrary criteria to define the relevant conflict categories.

[60] Relying on rights might sometimes also be epistemically beneficial, as it may reduce cognitive biases. Whether moral reasoning at higher levels of generality is less prone to cognitive biases is a question of ongoing debate, see McGrath (2019). For a critical discussion of this idea, see Frey (1985).

[61] For the purposes of exposition, I bracket other trade-offs connected with the use of rights as heuristics, for instance between Type I and Type II errors of moral judgement. Eventually, these other trade-offs will have to be taken into account as well. For an insightful discussion of the different types of errors in

resolution trade-off is largely determined, in turn, by the degree to which our practical judgments rely on statistical generalizations. We generalize more if we consider types of conflicts under coarse descriptions, and we generalize less if we consider types of conflicts under fine-grained descriptions. We can now see that *Open Borders* and *Refugees Only* strike a different balance between the costs and the resolution of our practical reasoning, as *Open Borders* sacrifices more resolution in return for greater expected cost-savings, while *Refugees Only* provides fewer cost-savings but is informationally richer. Which argument we should prefer depends, accordingly, on how we *should* ideally navigate this cost-resolution trade-off.

3.3.4 *An Optimization Problem*

The use of rights as heuristics inherently involves trade-offs – of which the cost-resolution trade-off is the most conspicuous – and some ways of striking these trade-offs will be better than others. Even when we have good reasons to rely on heuristics in our moral reasoning, there comes a point at which the marginal utility of reducing our reasoning costs by reducing the resolution of our reasoning process will no longer be worth it. At this point, we lose so much information that we could achieve better outcomes in the long run – including the moral costs of our reasoning process among these outcomes – by adopting a more fine-grained decision-procedure. This insight allows us to translate the problem of generality faced by the IBA into an intricate but tractable *optimization problem*.

From the perspective of an omniscient observer, a solution to this optimization problem identifies the heuristics that some reasoner or group of reasoners should employ to achieve the morally best outcomes, where the best outcomes are calculated taking into account all the (opportunity) costs of the reasoning process itself. A solution to this optimization problem accordingly identifies, for specific agents, an ideal balance between the costs and the resolution of their moral reasoning.

rule-based decision-making, see Schauer (1991, 149–55).

Once found, such a solution would provide a principled criterion for adjudicating between competing interest-based arguments like *Open Borders* and *Refugees Only*, revealing which strikes the more appropriate balance between generality and specificity.

Two points are worth noting here: First, every solution to this optimization problem will be indexed to a particular reasoner or reasoning community and to a particular point in time, as the best way to navigate the cost-resolution trade-off will depend on the cognitive capacities and the time available to the relevant reasoners, their empirical and normative knowledge, and the opportunity costs of spending their time and energy on moral deliberation. Different solutions to this optimization problem might therefore be optimal for different moral reasoners, or for the same moral reasoner at different times. In consequence, different moral rights may be justifiable to different reasoners or to the same reasoners at different times. Like all indicator-rules, the assignment of moral rights must remain open to revision.[62]

Second, there may, in principle, be more than one unique solution to this optimization problem. For any given reasoner at any given time, there may be multiple equally optimal ways of striking the cost-resolution trade-off in practical reasoning. While it seems unlikely that both *Open Borders* and *Refugees Only* would strike this trade-off equally well, we should acknowledge that the results of applying the IBA may remain somewhat underdetermined even after addressing the problem of generality, if to a far lesser extent than before.[63]

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[62] Under which conditions should we seek to reformulate our indicator rules instead of applying them? This is a complex question and I am not aware of a fully developed answer. For insightful discussions, see Regan (1988, 1008–10) and Schauer (1991, 45–52).

[63] One could respond to this observation by emphasizing path-dependent reasons for sticking with broadly accepted assignments of moral rights, for instance because the fact that they are broadly accepted helps us solve coordination problems. In this case, we might view rights as partially grounded in conventions, see for a similar idea Scanlon (1978, 535, n.20).

3.3.5 *A Statistical Exercise*

I have characterized an optimal solution to the problem of generality from the perspective of an omniscient observer, but this characterization is of limited use to ordinary moral reasoners who will, by assumption, lack much of the information needed to determine precisely how they should strike the cost-resolution trade-off. So, how does this solution to the problem of generality actually help us?

The interest-based justification of moral rights inherently involves a degree of statistical reasoning, as moral rights are justified by the likely consequences of their assignment, as described in Section 3.1.2. We can now see that the interest-based justification of moral rights also has a second statistical dimension. Because we cannot know *a priori* how we should navigate the cost-resolution trade-off, we must *estimate* the merits of different proposals for striking this trade-off through a second process of statistical reasoning, which encompasses three main steps:

The first step involves acquiring representative sample data. In the migration case, this step would involve working through a range of individual requests for admission in a particularistic manner, figuring out how these individual requests should ideally be handled given the underlying distribution of interests. The goal at this stage is to collect an unbiased sample of individual cases and of our best judgments for their individual adjudication.

In a second step, this sample data must be processed on the basis of a given proposal for striking the cost-resolution trade-off. In the migration example, this might, for instance, be the maximally low resolution proposal that informs *Open Borders*. Of course, at this stage it is not clear yet whether the cases in the sample actually support a moral right to immigrate, or rather a right to exclude all prospective migrants. At this stage, the sample cases must therefore be processed twice – once using both possible rules – to estimate which rule is more likely, on balance, to promote important interests in the long run. Assuming that the rule to admit all prospective migrants actually fares better than the rule to exclude all prospective migrants, we must then assess the number and severity of errors this decision-procedure produces relative to the careful adjudication of particular cases on

their individual merits. Throughout this process, we must keep track of the relative costs of applying these competing decision-procedures, by measuring, for instance, how long certain rules take to apply in comparison to the particularistic assessment of individual cases.[64]

In a final step, the results of this limited investigation must be extrapolated to all conflicts of the relevant type. In the migration example, this would require us to estimate the effects of the general application of the rule "grant all requests for admission" as well as the error-rate and the costs associated with the scaled-up application of this rule.[65] My brief description of these steps does not answer all technical questions related to their execution, but in principle we confront a problem here that can be addressed using standard statistical methods.

3.3.6 *Aiming for Improvement*

The statistical procedure I have just outlined has a conspicuous limitations in that it does not allow us to determine, in *absolute* terms, how closely a given proposal for navigating the cost-resolution trade-off approaches the theoretical optimum. Nonetheless, this procedure enables us to assess the *relative* merits of different proposals for navigating this trade-off, and such relative assessments are, fortunately, all we need to address the problem of generality.

Interest-based arguments typically aim to persuade an audience to revise their accepted assignment of moral rights. An argument like *Open Borders*, for instance, is presumably meant to convince an audience that is skeptical of a general moral right to immigrate to accept such a right.

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[64] Of course, the rule to simply grant all requests for admission by prospective migrants can effectively be applied instantaneously. The same would not be true for more complex rules like those suggested by *Refugees Only*, as the application of these rules would still require us to determine whether individual migrants count as refugees in the relevant sense.

[65] I am simplifying this process here as I am assuming that there are no interaction effects between decisions concerning particular requests for admission. In practice, the balance of interests may favor granting each request individually, when considered in isolation, but may not favor granting a large number of requests once their aggregate effects are taken into account. In this respect, we must avoid a "fallacy of composition", as pointed out by Moore (2015, 188).

Interest-based arguments therefore operate relative to a baseline view (or set of such views) currently accepted by their target audience.[66] And in cases that bring the problem of generality to the fore, this baseline view is often supported by a plausible interest-based argument that strikes a different balance between the costs and the resolution of our moral reasoning, like *Refugees Only*, which operates at a higher resolution than *Open Borders*. To persuade an audience that currently accepts an argument like *Refugees Only*, one must therefore demonstrate that reducing the resolution of our moral judgments would actually improve the overall results of our moral reasoning. However, one need *not* demonstrate that *Open Borders* strikes the *optimal* balance between the costs and the resolution of our moral reasoning. If we can improve our moral reasoning by accepting *Open Borders*, then we should do so, even if we can later improve our moral reasoning again. This also means that proponents of interest-based arguments must go through the statistical steps outlined above not just once but at least twice, once for their own proposal for navigating the cost-resolution trade-off, and once for the proposal that informs the relevant baseline view.

What does this methodological analysis mean in practice? Moral and political philosophy is not a mathematically precise discipline, so even if the logic of interest-based arguments involves the statistical generalizations described here, these generalizations need not be based on precise mathematical calculations. Nor would it seem reasonable to expect proponents of interest-based arguments to explicitly present every step of the procedure I have outlined in this section, even though these steps capture the underlying logic of interest-based arguments. Nevertheless, it does seem reasonable to expect proponents of interest-based arguments to provide some justification for their choice to assign moral rights at a particular level of generality, especially when their arguments support calls for large-scale social reforms – and we now

[66] Indeed, we can now see that even the choice not to assign moral rights in some context but to rely instead on a direct assessment of the relevant interests in particular cases effectively involves a specific choice for how to navigate the cost-resolution trade-off, namely the choice to forgo the cost-savings of rights-based moral reasoning entirely.

have an account of the form that such a justification might take. An argument like *Open Borders*, for instance, may well be plausible, but anyone who invokes such an argument to advocate for comprehensive policy changes should also explain why we should subsume all potential conflicts over admission under a single type, and why we should abandon the more fine-grained decision-procedures currently accepted by most states (which were presumably implemented after an extended process of trial and error).

In sum, convincing interest-based arguments involve statistical comparisons in two directions: between the interests of the various parties to certain types of practical conflicts, and between the merits of describing these conflicts at various levels of generality. While the first comparative dimension is widely (although not universally) recognized, the second is generally overlooked — a significant omission that renders most interest-based arguments incomplete. My heuristic model of rights-based reasoning shows that this gap can be addressed systematically, although my discussion also shows that complete interest-based arguments are substantially more complex than previously acknowledged.

3.3.7 *Generalizing the Solution*

So far, I have focused exclusively on the heuristic rule-generating rationale for rights-based moral reasoning. I therefore conclude my constructive proposal by generalizing my results.

Let us first consider whether the general structure of my solution to the problem of generality holds if we exclusively accept some alternative rule-generating rationale. Take the communicative rationale, for instance, according to which rights express key points of moral agreement in pluralistic societies that we can invoke to facilitate public debate and to maintain a common culture. If we accept this rationale, we should still expect to find that assignments of moral rights at certain levels of generality allow them to fulfill this communicative function better than assignments at other levels of generality. The assignment of moral rights that are too general, for instance, may not provide a sufficiently thick foundation for a sustainable common culture, while rights that are too specific might fail to secure broad enough societal

agreement to support a common culture effectively. There will, accordingly, again be some goldilocks zone for the level of generality at which moral rights should be assigned, so that we can still translate the problem of generality into an optimization problem. I believe that all the rule-generating rationales mentioned above support this logic, although I cannot discuss them all individually.

As soon as we accept multiple rule-generating rationales simultaneously, the picture gets more complicated. Let us, for the sake of the argument, accept both the heuristic and the communicative rule-generating rationales for moral rights (as suggested by Raz 1986, 181). While each rationale will individually indicate some optimal level of generality for the assignment of moral rights, they may not indicate identical optima. The optimal level of generality at which to assign moral rights according to the communicative rationale may, for instance, differ from the optimal level at which to assign rights according to the heuristic rationale when the latter supports rights that are too general to optimally facilitate public debate in pluralistic societies. Multiple rule-generating rationales may therefore pull us in different directions. Although I believe that the heuristic rationale carries the most weight, I actually favor a pluralistic view that attributes some importance to all the standard rationales discussed in the literature, which raises the question of how to resolve tensions between these rationales.

To resolve possible tensions between multiple rule-generating rationales, we must assess their relative importance in order to find an appropriate balance between them. This requirement adds another layer of complexity to our optimization problem, as we now must weigh not only competing interests and different levels of generality, but also the comparative significance of different rule-generating rationales themselves. If we accept both the heuristic and communicative rationales, for instance, and the former favors substantially more general rights than the latter, we must determine which rationale deserves greater weight in our moral reasoning. If the heuristic rationale proves more important, the optimal level of generality will fall closer to what the heuristic rationale recommends than to what the communicative rationale recommends. While this additional weighing procedure leads to a more complex multi-dimensional optimization problem, the basic

logic of my solution to the problem of generality remains intact even when we accept multiple rule-generating rationales.

These observations highlight that proponents of interest-based arguments should explicitly identify and defend their preferred rule-generating rationales. Different rationales may support different assignments of moral rights, and unless we are clear about which rationales we prioritize, interest-based arguments remain largely indeterminate, so that we cannot solve the problem of generality after all. The formulation of convincing interest-based arguments thus requires not merely attention to the comparative importance of competing interests, but also a principled account of why we engage in rights-based moral reasoning in the first place. Because interest-based arguments necessarily reflect our broader understanding of the role that rights play in our practical reasoning, such arguments will only be convincing if these broader commitments are made explicit.

3.4 CONCLUSION

In this chapter, I have identified a fundamental methodological challenge for the IBA, the problem of generality, and I have developed a solution to this challenge that preserves the core promise of the interest-based methodology. My central critical result is that previous applications of the IBA are structurally flawed, either because they fail to address the problem of generality or because they are based on an unconvincing interpretation of the IBA to begin with. My central constructive result is that the problem of generality can be addressed, so that the interest-based methodology for the justification of moral rights remains viable, although it is more complex than previously thought. My discussion also highlights a central aspect of the conception of moral rights that informs the IBA, namely that it views moral rights as tools in our moral reasoning, which are subject to continuous replacement and refinement once better tools become available.

Let me emphasize that my explication of the IBA leaves room for reasonable disagreements about the existence of specific rights, even among people who fully agree about the underlying distribution of interests. Such disagreements can persist simply because the empirical

and statistical aspects of interest-based arguments are potentially highly complex, so that competent and conscientious reasoners may reach different conclusions. Such disagreements can also persist because there may be multiple equally optimal solutions to the problem of generality in specific contexts, so that multiple incompatible assignments of moral rights might be equally justifiable on the basis of shared normative and empirical assumptions. The IBA accordingly cannot *guarantee* that we will eventually be able to resolve all disputes over the existence of specific moral rights, even once we resolve all disagreements over the relative importance of competing interests. But I do not think that this observation reveals a fundamental flaw of the interest-based approach, as I doubt that we should expect any philosophical methodology to offer such guarantees.

4

The Bundle Account of Enforceable Duties

ABSTRACT

Moral duties seem to differ in their enforceability. If we were forced not to murder or steal, for example, we would not seem to have a valid complaint, but we would seem to have such a complaint if we were forced to keep our promises or be faithful spouses. In a recent paper, Christian Barry and Emily McTernan argue that we lack a satisfying explanation for these apparent enforceability differences between our moral duties. Accordingly, they diagnose a philosophically troubling "puzzle of enforceability". In this chapter, I address this puzzle and develop a novel account of the enforceability of moral duties. I argue that duties are enforceable just in case they are embedded in specific bundles of Hohfeldian moral positions. The puzzling question why duties differ in their enforceability therefore dissolves into smaller questions concerning the justifiability of specific Hohfeldian moral positions, which are no longer individually puzzling.

CHAPTER 4

INTRODUCTION

Some moral duties, such as duties not to murder or steal, seem enforceable. By that, I mean that we can presumably be forced to discharge these duties without being wronged. Other moral duties do not seem enforceable in that sense, such as promissory duties, duties of gratitude, or duties of spousal fidelity. In a recent paper, Christian Barry and Emily McTernan (2021) argue that we lack a satisfying explanation for these apparent enforceability differences between moral duties. Accordingly, they diagnose a *puzzle of enforceability*.

As Barry and McTernan point out, this puzzle is morally troubling because of the "ills we might be committing by enforcing the wrong duties, or not enforcing duties when we should" (2021, 253). This puzzle is also philosophically troubling because enforceability differences between moral duties play a major explanatory role in many normative debates. They are invoked, for instance, to distinguish duties of justice from humanitarian duties (Gilabert 2016; Valentini 2016a; Miller 2020), to explain which moral failures warrant criminal punishment (Tadros 2016), or to identify casus belli in just war theory (Fabre 2012; Lippert-Rasmussen 2017). If we cannot explain why duties apparently differ in their enforceability, these debates would rest on shaky foundations.

In this article, I propose a new response to the puzzle of enforceability. In short, I argue that moral duties are enforceable just in case they are embedded in certain bundles of Hohfeldian moral positions, which I call *enforceability bundles*. Duties are embedded in such enforceability bundles just in case each moral position in these bundles is justified. The question why duties differ in their enforceability thus dissolves into several smaller questions concerning the justifiability of individual moral positions. And these smaller questions are no longer puzzling, as we can answer them using our preferred general theory of the justification of moral entitlements.

Let me highlight one point before jumping in. My core thesis is that there is nothing puzzling about the observation that moral duties seem to differ in their enforceability, as such enforceability differences are fully explained by the reasons that determine the justifiability of the individual moral positions in the relevant enforceability bundles. By

itself, this *bundle account* of the enforceability of moral duties does not tell us what these reasons might be, nor does it tell us which moral duties are, in fact, enforceable. This bundle account must therefore be combined with a theory of the justification of Hohfeldian moral positions – of which there are many on offer – before it has substantive normative implications. Far from being a bug, this limited ambition of my proposal will turn out to be a major feature.

I proceed as follows: In Section 4.1, I introduce the puzzle of enforceability. I then develop my response to it in the following three sections. In Section 4.2, I provide a Hohfeldian analysis of the concept of enforceable duties. In Section 4.3, I show how this analysis enables us to dissolve the puzzle of enforceability. In Section 4.4, I explain why my response to this puzzle is philosophically satisfying even though it does not have immediate action-guiding implications. In Section 4.5, I defend my proposal against several objections, and in the process I address the closely related debate over rights to do wrong. In Section 4.6, I briefly summarize my results.

4.1 THE PUZZLE OF ENFORCEABILITY

Why do our moral duties seemingly differ in their enforceability? According to Barry and McTernan (2021), this question raises a philosophical puzzle of enforceability. Before I can introduce this puzzle, some preliminary conceptual clarifications are in order.

4.1.1 *Conceptual Clarifications*

The first clarification concerns the concept of moral duties.[1] The two main types of views about the nature of moral duties are sometimes

[1] Note that I use "X has a moral duty to Φ", "X is morally obligated to Φ" and "X morally ought to Φ" interchangeably. Moreover, I am concerned throughout with all things considered duties, not with pro tanto duties. The observation that pro tanto duties differ in their enforceability does not seem particularly puzzling, as discharging such duties is sometimes not even obligatory all things considered.

called *rationalism* and *sentimentalism*.[2] Rationalists analyse the notion of moral duties in terms of the duty-bearer's practical reasons. Along these lines, Joseph Raz suggests that X has a duty to Φ just in case Φ-ing is supported by categorical exclusionary reasons (1994, 40).[3] Sentimentalists, by contrast, analyse the notion of moral duties in terms of the reasons that other agents have to respond to duty-violations in certain ways. A particularly popular sentimentalist view defines moral duties in terms of certain negative reactive attitudes, like blame or condemnation, that others may appropriately take in response to failures of compliance (see Darwall 2006, ch. 5). I personally favor a hybrid view, according to which agents have moral duties to perform certain actions if and only if they have reasons of the right kind to perform these actions *and* a failure to perform these actions would provide others with reasons of the right kind to adopt such negative reactive attitudes.[4] However, my argument in this chapter does not hinge on this hybrid view – which is why I will not attempt to spell it out here – but is compatible with all standard accounts of the nature of moral duties, with one important exception.[5] That exception is provided by certain sentimentalist views that *define* moral duties in terms of their enforceability, taking inspiration from J.S. Mill's sanction theory of moral duties. I say more about such views in Section 4.5, but for the moment I just assume that we can meaningfully speak of unenforceable moral duties.[6]

Moral duties are commonly divided conceptually into two types, *directed* duties and *undirected* duties.[7] If moral duties are *owed to* someone, they are directed, and if not, they are undirected. My discussion does

[2] For the state of the debate over the nature of moral duties, see Kiesewetter (2025).

[3] Another rationalist view has recently been defended by de Kenessey (2025).

[4] In defense of such a hybrid view, see Kiesewetter (2025).

[5] Barry and McTernan do not explicitly define their notion of moral duties. In personal communication, McTernan has confirmed to me that their diagnosis of a puzzle of enforceability is also supposed to be compatible with all standard accounts of the nature of moral duties.

[6] On the conceptual coherence of unenforceable duties, see also Enoch (2002) and Flanigan (2019, 342–46).

[7] For an overview of the literature on this distinction, see May (2015).

not presuppose a specific conception of the direction of moral duties either, except that I assume, for the moment, that directed duties are not enforceable by definition. This assumption is more controversial but it is not idiosyncratic, as it is supported, for instance, by the prominent justificatory interest theory of directed duties (Raz 1986, 166). In Section 4.5, I then address the objection that directed duties are necessarily enforceable for conceptual reasons.

Following Barry and McTernan (2021, 233), I call duties *enforceable*, for now, just in case duty-bearers are *liable* to their enforcement, that is, just in case duty-bearers *lack moral rights* against their enforcement.[8] The enforceability of a duty accordingly entails that it can be enforced without wronging the duty-bearer, but not that it ought to be enforced, nor that its enforcement is permissible all things considered.[9]

Again following Barry and McTernan (2021, 232), I define the *enforcement* of a duty preliminarily as an action (i) intended to make an agent discharge a duty (ii) by *forcing* or *pressuring* them into compliance through the imposition of *enforcement costs*, which (iii) would wrong the duty-bearer if they did not have this enforceable duty.[10] I say more about these conditions below, but the important point here is that the transgression of enforceable duties entitles others to *interfere* with duty-bearers in ways that would ordinarily wrong them.[11]

Even if a duty is enforceable, the duty-bearer's liability may still be limited in certain ways. Enforcement costs may become excessive,

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8 I follow Tadros (2012) in adopting this negative conception of liability.

9 To mark this technical use of the concept, Barry an McTernan replace "enforceable" with "enforcement-apt", but I stick to the traditional terminology. Note that duties can be enforceable, on this definition, even if their enforcement is not actually possible. The observation that certain duties cannot be enforced, potentially even for metaphysical reasons, therefore does not undermine the enforceability of these duties in the normative sense in which I use the term.

10 I formulate these conditions slightly differently than Barry and McTernan, who only formulate conditions (i) and (ii) explicitly, introducing (iii) as a later clarification. But I believe that my conditions capture the same idea.

11 Following Barry and McTernan (2021, 230), I use "transgression" to cover both unjustifiable *violations* and justifiable *infringements* of duties. For the purposes of my core argument, this distinction plays no further role.

and certain means of imposing such costs may be unacceptable. The possibility of such constraints naturally raises further questions, but I bracket these here and simply call the enforcement of a duty *appropriate* when it satisfies all relevant constraints.[12]

4.1.2 *Three Failed Explanations*

According to Barry and McTernan, the observation that moral duties seem to differ in their enforceability is philosophically puzzling because we still lack a satisfying explanation for this observation. They reach this negative result in several steps:

First, Barry and McTernan (2021, 234) argue that a satisfying response to the question why duties seem to differ in their enforceability should meet three desiderata: It should "accommodate paradigmatic cases" of enforceable and unenforceable duties, or otherwise explain why common intuitions concerning these cases are mistaken (1). It should also explain why the enforceability of many moral duties remains contested (2).[13] And it should help guide the "choices that we make when confronted with others' failure to do their duty" (3). This desideratum has two components, as our response to the puzzle should "clearly mark off" our enforceable duties (3a), and should do so in a way that can "successfully guide our actions" (3b).

Next, Barry and McTernan consider three possible explanations for the observation that the enforceability of our duties seems to vary. The first explanation aims to identify "substantive features" or *intrinsic properties* of enforceable duties – such as their stringency or their content – that clearly mark them out and explain their enforceability (2021, 235). They suggest that an ideal solution to the puzzle of enforceability would identify such properties, which I refer to as

[12] Of these, the question that has attracted most attention is how we determine at what point enforcement costs become excessive. For discussions of this question see Burri and Christie (2019) and Barry (2019).

[13] In Barry and McTernan's words, such an explanation should "shed some light on why the enforcement status of certain duties is controversial". Barry and McTernan refer to differences in the enforceability of specific duties as differences in their "enforcement status" (2021, 231).

enforceability markers. According to the second explanation, all moral duties are actually enforceable, and it only seems like duties vary in their enforceability because certain kinds of duties can rarely if ever be enforced appropriately (246-248). The third explanation accounts for apparent enforceability differences between duties not by reference to their intrinsic properties, but in broadly rule-utilitarian terms by reference to the "overall benefits and burdens of norms that regard types of duties as enforcement apt" (249).

Barry and McTernan conclude that all three explanations for the observation that duties seemingly differ in their enforceability fail to meet the desiderata outlined above. This observation therefore raises a philosophical puzzle, on their account, because we cannot explain it in a satisfying manner. Finally, Barry and McTernan (2021, 253) ask whether we could live without a satisfying explanation for the observation that duties seem to differ in their enforceability. However, they conclude that this prospect is deeply unappealing, as questions related to the enforceability of moral duties are morally too significant.

4.1.3 *A Fourth Strategy*

Before I develop my own response to the puzzle of enforceability, let me briefly contrast my general explanatory strategy to the three strategies rejected by Barry and McTernan.

My argument has three main steps. First, I deploy W.N. Hohfeld's (1913) conceptual toolkit to describe an *extrinsic property* that moral duties exhibit *in relation to* other justified moral positions that allows us to draw a clear line between our enforceable and unenforceable duties. I argue that duties are enforceable if and only if they are embedded in certain bundles of Hohfeldian moral positions, which I call "enforceability bundles".

Next, I show how this analysis enables us to address the puzzle of enforceability. My core suggestion is that we can break down the question why specific duties differ in their enforceability into a series of smaller questions concerning the justifiability of each element in their surrounding enforceability bundles. These smaller questions are then no longer puzzling, as we can answer them using our preferred general

theory of the justification of moral positions. This also means that my proposal must be combined with such a theory before we can determine the enforceability of specific duties.

Finally, I argue that my bundle account of the enforceability of moral duties provides a satisfying explanation for the observation that duties seem to differ in their enforceability even though it cannot, by itself, meet Barry and McTernan's action-guidance desideratum (3b). Because I reject this desideratum, I conclude that my proposal *dissolves* the puzzle of enforceability, as Barry and McTernan construe it, but does not straightforwardly *solve* it.[14]

In contrast to Barry and McTernan's first explanation for the observation that duties seemingly differ in their enforceability, my explanation does not invoke any intrinsic properties of moral duties that function as enforceability markers. To the contrary, a key upshot of my discussion is that enforceable duties may generally have nothing in common except for the extrinsic property of being embedded in enforceability bundles.[15]

In contrast to Barry and McTernan's second explanation, according to which duties only *seem to* differ in their enforceability, my explanation suggests that some duties are genuinely enforceable while other duties are genuinely unenforceable. Accordingly, I am not proposing an error theory of the distinction between enforceable and unenforceable duties.

In contrast to Barry and McTernan's third potential explanation, my proposal is not tied to any form of rule-utilitarianism, although it *can* be combined with a rule-utilitarian theory of the justification of

[14] Once we drop the action-guidance desideratum we may wonder whether the three strategies discussed by Barry and McTernan still fail. I cannot pursue this question here, but Barry and McTernan's discussion suggests that the failure of these strategies is overdetermined.

[15] This implication highlights one difference between my proposal and the *multiple factors proposal*, a variant of the first strategy discussed by Barry and McTernan. According to this proposal, enforceability differences are explained by *sets* of intrinsic properties of moral duties that may shift from case to case. Thus, duty a may be enforceable because it exhibits intrinsic properties P and Q, while duty b may be enforceable because it exhibits intrinsic properties R and S. Barry and McTernan reject this proposal because it does not explain why "some factors make a difference sometimes but not always" (2021, 245). My proposal does not share this shortcoming, as it does not assume that the enforceability of moral duties must be explained by their intrinsic properties at all.

Hohfeldian moral positions. If my proposal is combined with a rule-utilitarian account of the justification of Hohfeldian moral position, then it does resemble the third explanatory strategy discussed by Barry and McTernan, which is why I discuss their objections to this strategy in Section 4.5.

4.2 ENFORCEABILITY BUNDLES

In the first step of my argument, I use Hohfeld's conceptual toolkit to describe an extrinsic property of moral duties that we can use to distinguish our enforceable and unenforceable duties, namely the property of being embedded in *enforceability bundles*. I assume some familiarity with Hohfeld's analytical scheme here, so I will only explain points that are essential to my discussion.[16]

4.2.1 *Applying Hohfeld*

Hohfeld's key insight is that talk of legal "rights" and "duties" tends to be ambiguous, as these terms often refer to *bundles* of more fundamental *legal positions* (duties, claims, liberties etc.). Legal scholars have long used Hohfeld's analytical toolkit to *model* complex legal phenomena, such as property rights. More recently, moral philosophers have also begun using this toolkit to model complex moral phenomena, but this application of Hohfeld's insights to the moral domain requires some clarifications.[17]

[16] For an introduction to Hohfeld's scheme, see Kramer (2000).

[17] The utility of the Hohfeldian conceptual toolkit for the purposes of analytical jurisprudence is not entirely uncontroversial. For a recent defense of the Hohfeldian approach to understanding property rights in particular, see Glackin (2014). For an insightful discussion of the utility of Hohfeld's analytical scheme in moral reasoning, see Upton (2000). On the pitfalls of this approach, see Sreenivasan (2010). These pitfalls can be avoided as long as we keep in mind that the proposition that an agent has a Hohfeldian duty to Φ does not *entail* that they are morally obligated to Φ all things considered, nor does the proposition that an agent has a Hohfeldian liberty to Φ *entail* that they can permissibly Φ all things considered. For reasons of space, I cannot discuss cases here in which an agent has a Hohfeldian duty to Φ but can justifiably infringe this duty all things considered.

Hohfeld's basic legal positions all describe legal relationships. A Hohfeldian legal duty, for instance, describes the relationship between an agent X who legally *owes it to* another agent Y to Φ. When Hohfeld's scheme is applied to the moral domain, the basic assumption is that each Hohfeldian legal position has a structurally analogous moral position, and I also take this assumption for granted here. So, a Hohfeldian *moral* duty describes the relationship between some agent X who morally *owes it to* another agent Y to Φ. Hohfeldian moral duties are therefore inherently directed, as they are always *owed to* someone.

Because Hohfeld's scheme describes normative relationships, it has proven particularly useful for conceptualizing the *relational* or *second-personal* part of morality, the morality of *what we owe to each other*.[18] And for the purposes of this discussion, I also focus on this part of the moral universe. Accordingly, I will not try to integrate undirected duties into my account here, even though I believe that we also have such undirected duties.[19]

Hohfeldian models of complex normative phenomena describe *bundles* of Hohfeldian positions, but this bundle-metaphor is rarely spelled out. When I talk about bundles of Hohfeldian positions, I simply mean *sets* of such positions. Accordingly, I assume that Hohfeldian bundles are the sum of their parts, and that no "strings" are required to tie them together. On this definition, Hohfeldian bundles exist if and only if all the normative positions that make up these bundles exist. In the case of *moral* positions, I assume that they exist whenever the relationships they describe are *morally justified* according to the

[18] The three main paradigms for understanding this part of the moral universe are developed by Scanlon (2000), Darwall (2006), Wallace (2019). Note that these authors do not claim that the morality of what we owe to each other exhausts our moral obligations. However, this stronger claim has recently been defended by Zylberman (2021).

[19] In short, my proposal would be that undirected duties are enforceable just in case they are *referenced* in the right way by other Hohfeldian moral positions that constitute modified enforceability bundles. For an interesting discussion of the enforceability of undirected duties, see Flanigan (2019). In general, such duties play a much smaller role in the literature than duties that correspond to moral rights, in part because the very existence of undirected moral duties is controversial, see Kramer (2006, 188).

correct first-order moral theory.

4.2.2 *Modelling Enforceability*

A Hohfeldian model of the enforceability of moral duties must capture the meaning of statements of the form "X has an enforceable duty to Φ towards Y". If a Hohfeldian model fully captures the meaning of such statements, I say that this model describes *enforceability bundles*, as moral duties are then enforceable just in case they are embedded in such bundles.

According to the core definition of enforceable duties, duties are only enforceable if their bearers are liable to their enforcement. Enforceability bundles must therefore contain at least two positions, a duty and a *no-right* against its enforcement.[20] In the most straightforward type of case, the agent to whom the duty is owed also has the standing to enforce it, and therefore has a *liberty right* to do so. But we can also use the Hohfeldian toolkit to model more complex cases, in which a third party, like the police, has the standing to enforce.

In some contexts, this basic dyad consisting of a duty and a no-right against its enforcement may fully capture the meaning of statements of the form "X has an enforceable duty to Φ towards Y". But in other contexts, such statements may have more demanding implications. In defensive ethics, for instance, such statements are typically seen to entail that X also has a secondary duty not to resist the appropriate

[20] While Hohfeld uses "liability" to denote the correlate of legal *powers*, the term is used in much of the relevant literature to refer to the lack of a claim right against the enforcement of a duty, i.e., a Hohfeldian *no-right*. To avoid ambiguity, I never use "liability" in its Hohfeldian sense here. If one were to overlook this point, one may assume that the enforcement of moral duties must involve the exercise of Hohfeldian moral powers. But this does not seem to be the case, as it seems possible to enforce moral duties without changing anyone's first-order entitlements. This possibility potentially marks an interesting difference between the enforcement of moral and legal duties, as the enforcement of legal duties typically does involve the exercise of various legal powers, such as the power of public prosecutors to initiate proceedings. Note therefore that my analysis here is only meant to apply to moral duties, as I suspect that the enforceability of legal duties has a more complex Hohfeldian structure.

enforcement of their primary duty. To model this implication, we would have to add a secondary duty not to resit the enforcement of the original duty to our enforceability bundles.[21] But even the resulting triad of a duty, a no-right against its enforcement, and a duty not to resist its enforcement may not fully capture the meaning of statements like "X has an enforceable duty to Φ towards Y". In some contexts, such statements may also entail, say, that enforcing agents have a claim to be compensated for their efforts. In such contexts, more elaborate models may be needed to describe the enforceability of moral duties.

Which of these Hohfeldian models captures the "true" concept of enforceable duties? This question may be ill-formed, as different debates may employ slightly different concepts of enforceability to capture a range of related moral phenomena. "Enforceability" may thus be a family resemblance concept, and different members of that family may take on different theoretical tasks. If that is the case – and I suspect it is, although I cannot survey the literature here in support of this suggestion – then my Hohfeldian approach enables us to distinguish different members of the family of enforceability concepts by explicating the structure of their associated enforceability bundles. However, all of these bundles will contain at least the basic dyad of a duty and a no-right against its enforcement.

4.2.3 *Concepts and Conceptions*

One may object here that my analysis generates false positives in a range of cases like:

> Unconditional Waiver: B has a duty to Φ towards A that would ordinarily seem unenforceable. However, for reasons unrelated to this duty, B waives all their rights against interference vis-à-vis A. Accordingly, A can force B to discharge their duty without wronging B.

[21] Are these secondary duties also enforceable? This question is relevant, for instance, for the debate over defensive escalations, cf. Lang (2022). I take no stance on this issue here, although modeling this possibility in Hohfeldian terms presents an interesting challenge.

In this case, my proposal seems to suggest that B's duty is enforceable because it is embedded in an enforceability bundle (assuming that a duty and a no-right against its enforcement constitute such a bundle). But this result seems counterintuitive because A is only incidentally entitled to interfere with B here. Cases like Unconditional Waiver may therefore suggest that my purely extensional description of enforceability bundles is inadequate, and that we need additional theoretical strings to tie such bundles together after all.

A more compelling response to cases like Unconditional Waiver, in my view, denies that *B's* duty is genuinely enforceable here. Recall that Barry and McTernan suggest that *A's* interference with B is only genuinely enforcing *B's* duty if "in the absence of a duty to Φ, [*A's* interference] would transgress *B's* rights" (2021, 232). Barry and McTernan accordingly introduce a counterfactual condition that distinguishes between *genuine enforcement acts* and other acts of interference that merely *de facto* make an agent discharge their duty. They introduce this condition to capture the intuition that we do not really *enforce* duties when we "pressure" people into compliance through positive inducements, but this condition also takes care of cases like Unconditional Waiver.

The broader implication of Barry and McTernan's counterfactual definition of genuine enforcement acts is that duties are genuinely enforceable, on their account, only if their bearers are liable to interference under a specific *intensional description*. If we accept this suggestion, we can therefore avoid the problem of over-inclusivity in cases like Unconditional Waiver by adding intensional content to our characterization of the individual moral positions that jointly constitute enforceability bundles. So, there is no need to abandon the purely extensional definition of these bundles.

Even if we accept this counterfactual definition of genuine enforcement acts, my analysis may still seem to generate false-positives in cases like:

> Conditional Waiver: Like Unconditional Waiver, except this time B makes a contract with A through which they waive all their rights against interference if and only if they violate

their otherwise seemingly unenforceable duty.

Here, Barry and McTernan's counterfactual condition is satisfied, but it is still questionable whether B's duty is really enforceable.

To address cases like Conditional Waiver, we can further enrich our intensional description of the individual moral positions that jointly constitute enforceability bundles. Following Victor Tadros (2012, 260), we may, for instance, insist that agents who voluntarily waive their rights against interference are not really *liable* to the enforcement of their duties. Tadros makes this suggestion when discussing the ethics of self-defense, and at least in this context it seems intuitively plausible that agents who voluntarily waive their rights against interference, say during a boxing match, do not incur any liability to defensive harms in the relevant sense.

These responses to cases that potentially undermine my analysis may seem ad hoc, as I have not defended the view that agents are genuinely liable to the enforcement of their duties only if they lack moral rights against acts of interference that fit a specific intensional description. However, the impression that these cases undermine my analysis already reflects the *prior* intuition that certain duties are not genuinely enforceable even though their bearers lack rights against interference with de facto enforcing effects. My point here is merely that this intuition can be incorporated into my Hohfeldian analysis, as this analysis leaves room for disagreements over the precise *interpretation* of the various moral positions that constitute enforceability bundles.

To capture this point systematically, I will say that a Hohfeldian model of the structure of enforceability bundles identifies a particular *concept* of the enforceability of moral duties, while a specific interpretation of the individual positions in such bundles fixes a *conception* of the enforceability of moral duties. Moreover, just like the appropriate concept of enforceable duties may depend on our theoretical needs in different theoretical contexts, so may the appropriate conception of enforceable duties be context-dependent. I return to this point below, when I discuss objections to my proposal.

In sum, duties are enforceable just in case they are embedded in enforceability bundles, the precise structure and interpretation of which

may be context-dependent. Being embedded in such bundles is an extrinsic property that some moral duties exhibit in relation to other justified moral positions, and we can invoke this property to draw a clear line between our enforceable and unenforceable moral duties. As the following discussion does not hinge on the precise shape of these enforceability bundles, I assume, for the purposes of exposition, that such bundles consist only of duties and no-rights against their enforcement.

4.3 DISSOLVING THE PUZZLE

Next, I must show how this analysis helps us address the puzzle of enforceability, which does not primarily concern the *meaning of* but the *explanation for* the observation that duties seem to differ in their enforceability.

4.3.1 *A Modular Proposal*

The key upshot of my Hohfeldian analysis is that it allows us to reformulate the question at the heart of the puzzle of enforceability. Instead of asking why duties apparently differ in their enforceability, we can now ask why duties apparently differ with respect to their embeddedness in enforceability bundles. However, by asking this question we are effectively just asking why all the moral positions in the enforceability bundle surrounding certain duties seem justified, while some of the moral positions in the enforceability bundle surrounding other duties do not seem justified. Thus, we have broken down Barry and McTernan's original question into smaller questions concerning the justifiability of each element in the relevant enforceability bundles. My core claim is that these are ordinary first-order moral questions that raise no special theoretical puzzles.

To make this more concrete, let us assume that we are wondering why two moral duties, p and q, seemingly differ in their enforceability. If my analysis is correct, we can now draw up a list of all the moral positions that would have to be justified for p to be enforceable, and of all the moral positions that would have to be justified for q to be

enforceable. We can then go through each position on this list, one by one, and ask whether it is, in fact, justified. Presumably, the justifiability of each of these positions will depend on certain *moral reasons*, and once we have considered these reasons we can make a list of these too. If we find, at the end of this process, that p is enforceable and that q is unenforceable, then this list of reasons *taken together* provides a full answer to the question why these duties differ in their enforceability. Once we have clarified these reasons, nothing remains to be explained.

Clearly, we only gain something by breaking down the question at the heart of the puzzle of enforceability into smaller questions concerning the justifiability of individual moral positions if these smaller questions are not themselves philosophically puzzling. So, this suggestion naturally prompts inquiries into *how* we determine the justifiability of particular moral positions. What kinds of reasons are relevant here, and how do we determine what reasons we actually have?[22]

Unsurprisingly, moral philosophers profoundly disagree about the right methodology for evaluating the justifiability of particular moral positions. Contractualists invoke hypothetical agreements, Rawlsians aim for reflective equilibrium, rule-consequentialists seek to efficiently promote the good, and so forth. I cannot go into these broader methodological debates here, but nor do I have to, as my general proposal can be combined with all such theories, and should therefore be acceptable to proponents of various broader moral visions. So, my general proposal is that any enforceability differences between moral duties are fully explained by the reasons that determine the justifiability of the individual moral positions in the relevant enforceability bundles *whatever these reasons may be*.

This ecumenical stance may strike some readers as unsatisfying. How can I maintain that there is nothing puzzling about questions

[22] The reasons I am referring to here are those considerations that explain the existence of particular Hohfeldian moral positions at the level of our moral theory. These reasons may be practical reasons, so everything I say here is compatible with a deontic buck-passing account, cf. Kiesewetter (2025). But these reasons do not have to be identical to (a subset of) our practical reasons, and my analysis is also compatible with the view that Hohfeldian moral positions are not reducible to practical reasons or any other normative category.

concerning the justifiability of particular moral positions if I do not explain how we might answer such questions? But note that anyone who is even trying to evaluate the enforceability of particular duties must *already* accept some method for the justification of Hohfeldian moral positions, as they already accept that certain duties are, in fact, justified. But if the justification of one type of moral position is not puzzling, then the justification of the other types of positions should not be puzzling either.[23] So, my suggestion is that every moral reasoners can explain why specific duties seem to differ in their enforceability by going through the exercise outlined above – listing the moral reasons that bear upon the justifiability of all relevant moral positions – employing whichever theory of the justification of moral positions they happen to accept already.

4.3.2 *Example: Interest-Based Justifications*

An example may help to illustrate what the application of my proposal might look like in practice. For the purposes of formulating this example, I combine my proposal with the popular *interest-based approach* for the justification of moral positions that was introduced by Thomas Scanlon (1977) and Joseph Raz (1986).[24]

The interest-based approach is based on the idea that moral positions express rules for the resolution of practical conflicts, which are justified if their general observance would, *on balance*, promote sufficiently important interests. The moral importance of our interests is determined, in turn, by various factors including non-consequentialist considerations like fairness or equality (cf. Scanlon 1977, 85–87). The assignment of specific moral positions thus "sums up our assessment, from a general perspective, of several more fundamental, intersecting, and potentially

[23] The reason is that Hohfeld's first-order positions are interdefinable, so that an account of the justification of Hohfeldian moral duties already implies an accout of how we can evaluate the justifiability of all first-order Hohfeldian moral positions. If enforceability bundles also contain second-order positions, which I doubt, their justification might raise additional methodological questions.

[24] I discuss this interest-based approach in detail in the third chapter of this dissertation.

competing, value considerations" (Stilz 2019b, 49; see also Cochrane 2012, 9).

The assignment of moral duties places a burden on prospective duty-bearers, and by extension it advantages the prospective holders of the corresponding claims. To determine, from an interest-based perspective, whether the assignment of some duty is justified, we must therefore estimate and compare the importance of the affected interests of prospective duty-bearers and claim-holders.[25] Once we determine that the assignment of some duty is justified, we can then determine its enforceability by repeating this procedure for each position in its surrounding enforceability bundle. In the case of no-rights against a duty's enforcement, we must therefore estimate whether the interests of duty-bearers in not being interfered with are generally more or less important than the interests of those who may benefit from such interference. If, after assessing all relevant interests, we find that all positions in the enforceability bundle surrounding some duty are justified, we conclude that this duty is enforceable.

More could obviously be said about the mechanics of this interest-based approach, but the key point here is this: If we find that a duty is part of an enforceability bundle, then the various interest-based calculations that justify each element in this bundle jointly provide a full explanation for that duty's enforceability. And if we find that another duty is not embedded in such a bundle, then the calculations that support this conclusion fully explain why that duty is not enforceable. Moreover, *taken together* these calculations also explain why these duties differ in their enforceability. Once we have performed these calculations, we have accordingly provided a fully satisfying answer to the question why these duties differ in their enforceability. Moreover, we have provided such an answer even if we cannot identify any intrinsic properties of these duties that contribute to this explanation.

Of course, many philosophers reject this interest-based approach. Contractualists, for instance, may insist that the justifiability of specific

[25] In contrast to Scanlon (1977), I bracket the interests of third parties here for the purposes of exposition. However, I agree with Scanlon that the interests of third parties must also be taken into account.

moral positions actually depends on the general acceptability of a principle that endorses these positions, and not on a comparative assessment of the importance of various competing interests. But my general point also holds if we accept this contractualist view or some other competitor to the interest-based approach. In that case, different kinds of reasons will determine the justifiability of the individual moral positions that jointly constitute enforceability bundles. But taken together, these reasons will still provide a full explanation for any enforceability differences between moral duties. Once we clarify these reasons, whatever they may be, we accordingly no longer face a puzzle of enforceability.

Time to take stock. I have argued that the puzzle of enforceability dissolves once we accept the bundle account of the enforceability of moral duties, and once we appreciate that enforceability differences between duties are fully explained by the reasons that bear upon the justifiability of the individual moral positions in their surrounding enforceability bundles. Once we have made a list of these reasons, this list provides a complete answer to the question why duties differ in their enforceability, even if this list should turn out to be long, complicated, and devoid of any unifying logic. Because my proposal connects to broader moral visions in a modular fashion, it does not, by itself, allow us to identify these reasons. Accordingly, it cannot, by itself, tell us which duties are actually enforceable. But my proposal still shows that there is nothing inherently philosophically puzzling about the observation that moral duties seem to differ in their enforceability.

4.3.3 *The Order of Explanation*

One key implication of my proposal concerns the role that judgments of the form "X has an enforceable duty to Φ" play in our moral reasoning. On my account, such judgments summarize the *conclusion* of prior moral arguments that justify the individual moral positions in the relevant enforceability bundle. Thus, my discussion implies that duties are enforceable because duty-bearers are liable to their enforcement, and not, as one might initially think, that duty-bearers are liable to the enforcement of their duties because these duties are enforceable.

This result may give rise to the objection that my initial analysis

already got us off to a false start, as the enforceability of moral duties should be conceptualized as a property of moral duties that *explains* why we are liable to the enforcement of certain duties. So, the enforceability of moral duties should enter as a *premise* into arguments that establish the duty-bearer's liability to enforcement acts, and should not express the conclusion of such arguments. My proposal accordingly gets the order of explanation backwards, and thus misrepresents the role that judgments of the form "X has an enforceable duty to Φ" play in moral deliberations.

To avoid terminological confusion, let us say that a duty is "enforceable", in the alternative sense suggested by this objection, if it exhibits some property, let us call it the *e*-factor, that contributes to the explanation of the "enforceability" of moral duties in the sense in which I use that term. By assumption, we do not have a satisfying account of this *e-factor* yet, but it presumably denotes some feature that enforceable duties generally have in common and that explains why they are embedded in enforceability bundles.[26] The objection holds that my account does not address the real puzzle of enforceability, which arises because moral duties seem to vary, for reasons not yet understood, with respect to this e-factor.

In my view, this objection mischaracterizes the observation that initially gave rise to the puzzle of enforceability. What philosophers observe and find puzzling is that duty-bearers seem liable to the enforcement of certain duties but not others. The idea that there must be some underlying e-factor that explains this observations already expresses a demanding interpretation of this moral phenomenology. I see no reason to accept this interpretation, as my bundle account of the enforceability of moral duties can explain this phenomenology without positing such an e-factor.

More importantly, I believe my account also provides an accurate picture of the role that judgments of the form "X has an enforceable duty to Φ" play in our moral deliberations. What the objection gets right is

[26] Note that this e-factor may be multi-realizable, so the view that there must be such an e-factor is compatible with the *multiple factors proposal* discussed by Barry and McTernan (2021, 245–46).

that such judgments are often invoked as premises in moral arguments. It seems perfectly natural, for instance, to say that criminal punishments are justified *because* criminals have violated their enforceable duties. However, this observation is compatible with my account. On my account, judgments of the form "X has an enforceable duty to Φ" entail that X would not be wronged by the appropriate enforcement of their duty, but such judgments do not entail that the enforcement of *X's* duty would be wise or justified *all things considered*. Such judgments can therefore function as premises in debates over whether certain duties *should* be enforced, for instance through criminal sanctions.[27]

One implication of the view that judgments of the form "X has an enforceable duty to Φ" summarize the conclusions of prior moral arguments is that different people can agree on such judgments for disparate underlying reasons. Contractualist, orthodox Kantians, and rule-utilitarians, for instance, may all conclude that duties not to murder are enforceable, even if they reach this conclusion by different routes. Judgments like "people have enforceable duties not to murder" can therefore express an *overlapping consensus* between competing moral visions. Proponents of these competing visions can then appeal to this consensus to debate more applied issues, for instance concerning the ethics of criminalizing murder, without having to invoke first principles. And in many applied contexts, it seems plausible to me that theorists often make claims about the enforceability of moral duties precisely in order to appeal to such an overlapping consensus. Given how such claims tend to function in practice, it is a significant advantage of my account of the enforceability of moral duties that it is compatible with many competing moral visions.

[27] Note that some contributors to these more applied debates, for instance about the ethics of criminal punishment, use the language of enforceability to refer to the overall permissibility of the enforcement of specific duties, e.g. Tadros (2011, 131). Adherents to this alternative terminological convention will have to translate my argument into their preferred terminology.

4.4 MANAGING EXPECTATIONS

At this point, one may object that my response to the puzzle of enforceability is not philosophically satisfying because it does not, by itself, allow us to determine which duties are, in fact, enforceable, and because it cannot tell us what substantive considerations determine the enforceability of moral duties. To conclude the exposition of my proposal, I therefore argue that my response to the puzzle is still philosophically satisfying, as it satisfies all theoretical expectations that are actually warranted. I assume here that such expectations are only warranted if they meet two conditions: They must be *motivated*, by which I mean that they must express valid theory-building criteria, like explanatory power, simplicity, or theoretical coherence. And they must be *realistic*, by which I mean that we have reasons to believe that these expectations can actually be met. I argue that the expectations that inform this objection to my proposal fail to meet these conditions.

4.4.1 *Action-Guidance*

According to Barry and McTernan, a satisfying response to the puzzle of enforceability should be action-guiding. By itself, my proposal cannot be action-guiding, however, as it connects to broader theories of the justification of moral positions in a modular fashion. I therefore start by explaining why I reject the action-guidance desideratum.

Barry and McTernan motivate their action-guidance desideratum by pointing out that a response to the puzzle of enforceability "matters not only for ethical theory, in clarifying the nature of duties, but also for the choices that we make when confronted with other's failure to do their duty". For this reason, such a response can only be satisfying if it "clearly marks off" our enforceable duties "in order to successfully guide our actions"(2021, 234–35). I am not convinced by these remarks for two reasons: First, they suggest a false dichotomy, as there is ample space for theoretical contributions that are not action-guiding, but that do more than merely clarify the nature of moral phenomena. Most contributions to moral philosophy seem to occupy this space, including my contribution here, insofar as they aim to systematize aspects of

our moral reasoning but do not aim to be immediately action-guiding. Second, the suggestion that a satisfying response to the puzzle should "clearly" mark out our enforceable duties exploits an ambiguity.[28] On a weak *metaphysical* reading of this expectation, a response to the puzzle of enforceability should identify properties by which we can, *in principle*, assign duties to the enforceable or unenforceable categories. According to my proposal, this is the property some duties have of being embedded in enforceability bundles. And on a strong *epistemic* reading of this expectation, such a response should also enable us to easily identify these properties *in practice*. My proposal does not meet this stronger expectation, as it implies that we must engage in further substantive moral reasoning to determine which specific duties are embedded in enforceability bundles. Barry and McTernan clearly have the strong epistemic reading of this expectation in mind, but from a theory-building perspective only the weaker metaphysical reading seems justified. Of course, it would be *convenient* if we could identify criteria that clearly mark out our enforceable duties in the epistemic sense. However, we cannot reasonably expect that important ethical questions should be convenient to answer, so convenience does not provide a sufficient motivation for the action-guiding expectation.

In addition to being unmotivated, the action-guidance desideratum may also be unrealistic. Presumably, our actions should be guided by our moral reasons, but an account of the enforceability of moral duties does not provide a comprehensive account of our moral reasons – otherwise it would amount to a complete moral theory. The action-guidance desideratum accordingly seems to express the expectation that it should be possible to determine how we should act, in situations in which others fail in their duties, without having to consult a comprehensive moral theory. Effectively, this desideratum therefore expresses the expectation that there must be some *shortcut* around the work of evaluating all our moral reasons in such situations. This point comes out clearly when Barry and McTernan explain why their preferred solution to

[28] This is why I split Barry and McTernan's third desideratum into the desiderata 3a and 3b in Section 4.1.

the puzzle of enforceability would identify enforceability markers, i.e., intrinsic properties of enforceable duties that clearly mark them out in the metaphysical and epistemic sense. On their account, this type of solution to the puzzle would be ideal precisely because we could rely on such enforceability markers to easily identify our enforceable duties in practical choice-situations without having to engage in further substantive moral reasoning.[29] One key implication of my discussion is that we may never find such enforceability markers, as our enforceable duties may generally have nothing in common except for the extrinsic property of being embedded in enforceability bundles. Depending on our preferred theory of the justification of moral positions, we should potentially even expect *not* to find any enforceability markers. To see this, we can adopt the interest-based perspective outlined above once more to consider the following example:

A and *B* are wealthy citizens of a reasonably just state that is hit by a severe flood. While the government ensures that the flood victims are not in existential need, a fund is set up to collect additional aid. Let us assume now that the balance of all relevant interests supports imposing on *A* and *B* duties to assist their compatriots in need, which are identical, for all intents and purposes, with respect to their intrinsic properties. To determine whether these duties are enforceable, we must now determine whether the balance of all relevant interests also supports holding *A* and *B* liable to the enforcement of these duties. However, being obligated to Φ *and* being liable to be forced to Φ is a greater burden than merely being obligated to Φ. To determine whether the imposition of this additional burden is justified, we must therefore take into account any interests *A* and *B* might have that relate directly to the *enforcement* rather than to the *fulfillment* of their duties (see also Fabre 2006, 24). These enforcement-related interests may, however, differ substantially for *A* and *B*. *A* may simply want to do the right

[29] As Barry and McTernan point out, such shortcuts need not necessarily take the form of enforceablity markers that identify enforceable duties with perfect accuracy. In principle, it would be enough if we could find certain easily identifiable substantive features of moral duties that *statistically* indicate their enforceability with a reasonable degree of reliability, see Barry and McTernan (2021, 250).

thing, and may even appreciate being forced to discharge their duties if they fail to discharge them voluntarily. *B*, by contrast, may greatly value their independence, and may experience significant distress if they were forced to do anything they do not want to do. Once we take their enforcement-related interests into account, we may accordingly conclude that the balance of interests only supports holding *A* but not *B* liable to the enforcement of their duty.[30] If we accept the interest-based approach, duties may therefore differ in their enforceability even if their intrinsic properties are identical, so we should not expect to find any enforceability markers.[31]

Things may, of course, look different if we accept another theory of the justification of moral positions. My account is compatible, for instance, with Jessica Flanigan's (2019) recent broadly contractualist defense of the view that all and only our duties of non-interference are enforceable, so that the property of being a duty against interference provides a perfect enforceability marker.[32] My discussion therefore does not suggest that the search for enforceability markers should be abandoned, but it shows that we need not find such enforceability markers to make sense of the observation that duties seem to differ in their enforceability.

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[30] One may object here that *B's* duty is also enforceable, in principle at least, but that *B* still enojys a *right to do wrong*. I discuss this objection in Section 4.5.2.

[31] In Chapter 3, I emphasize that Hohfeldian moral positions function as moral *rules* – at least according to the interest-based approach to the jusification of moral positions that I invoke here – which always apply to *types* of cases, rather than to individual case *tokens*. I bracket this point here for the purposes of exposition, but the example could easily be adjusted in such a way that *A* and *B* are social groups whose members tend to have the interests I ascribe to them, for instance in virtue of their religious beliefs, so that we are dealing with general rules for distinct types of cases here.

[32] For a critical discussion of Flanigan's argument, see Barry and McTernan (2021, 240–42). Like Barry and McTernan, I have reservations about Flanigan's argument. In particular, I reject her assumption that duty-infringements cannot be justified by agent-relative prerogatives, as well as her assumption that all forms of interference belong to one natural kind. Both assumptions are essential for her argument, as Flanigan acknowledges. However, Flanigan only mentions these assumptions without justifying them, see Flanigan (2019, 349 n.26, 353 n.33).

4.4.2 *Normative Implications*

At this point, some readers may grant that the action-guidance desideratum is too demanding, and that we should not expect an account of the enforceability of moral duties to do the work of a first-order moral theory. However, one may still insist that a satisfying response to the puzzle of enforceability should, at least, identify *some* normative considerations that bear upon the enforceability of moral duties, even if it does not provide an exhaustive list of such considerations. One motivation for this expectation may be the impression that I have misunderstood the question that gives rise to the puzzle of enforceability. When people ask *why* moral duties seem to differ in their enforceability, what they really want to know, according to this objection, is which substantive normative considerations bear upon the enforceability of moral duties.[33] But my discussion fails to answer that question, as it does not identify specific normative consideraetions that explain why certain duties are embedded in enforceability bundles while other duties are not. To be satisfying, my response to the puzzle of enforceability would therefore have to deliver more than it actually delivers.

What exactly would this "more" consist in, and what might a response to the puzzle look like that delivers it? One expectation might be that it should be possible to say more about why moral duties differ in their enforceability from the ecumenical perspective that I have adopted in this chapter and that Barry and McTernan also adopt in their discussion. In other words, one might expect that it should be possible to offer a general account of the enforceability of moral duties that is acceptable to proponents of various moral background theories,

[33] I do not think that I have misrepresented the puzzle of enforceability as Barry and McTernan present it. When they ask *why* duties seem to differ in their enforceability, they are, in the first instance, asking a question about the general *structure* of a satisfying explanation for this observation, and not about the substantive normative considerations that bear upon the enforceability of specific duties. This is made clear by the fact that the three possible explanations they discuss provide different *types* of explanations for this observation, which need not have diverging normative implications. My proposal operates at the same level of theoretical abstraction as these explanations.

but that still provides greater insight into the normative considerations that determine the enforceability of particular duties.

In my view, this expectation is unrealistic because I see no reason to expect that it will be possible to say anything more substantive about why duties differ in their enforceability without committing to a specific moral background theory. After all, proponents of different moral theories disagree profoundly about the kinds of reasons that determine the justifiability of specific moral positions, and they also disagree profoundly about the reasons we actually have. Moreover, the expectation that it should be possible to say more, from an ecumenical perspective, does not seem well-motivated either. From a theory-building perspective, an ecumenical explanation for moral phenomena is not inherently preferable to a sectarian explanation. What matters is that the phenomenon in question can be explained by our best moral theory, but our best moral theory, whatever it may turn out be, may not enjoy any ecumenical appeal.

If nothing more substantive can be said about the normative considerations that determine why duties differ in their enforceability from an ecumenical perspective, then another expectation might be that an informative discussion of the enforceability of moral duties should abandon this ecumenical stance, and should tell us which considerations determine the enforceability of moral duties from the perspective of a particular moral theory. Moreover, one may expect that a satisfying account of the enforceability of moral duties should identify considerations that *generally* bear upon the enforceability of moral duties, so that we are not forced to consider all relevant reasons on a case by case basis.

Of course, I have no objections to the project of solving the puzzle of enforceability from the perspective of specific moral background theories. I already mentioned Jessica Flanigan's contractualist account of the enforceability of moral duties, and it would be interesting to see whether similarly informative accounts can be provided on the basis of competing moral theories. However, I also believe that my ecumenical discussion of the enforceability of moral duties is no less useful, as it allows proponents of competing moral theories to agree about the correct structure of a plausible response to this puzzle. Moreover, the expectation that

a satisfying response to the puzzle of enforceability should identify considerations that *generally* bear upon the enforceability of moral duties strikes me as unmotivated and potentially unrealistic, even if we give up any ecumenical aspirations. Depending on our chosen moral background theory, judgments concerning the enforceability of specific duties may be entirely particularistic, and their validity may depend on a broad range of considerations that do not *generally* indicate the enforceability of moral duties. One may, for instance, favor a pluralistic theory of the justification of Hohfeldian moral positions, according to which some moral positions are justified instrumentally, because they promote important interests, some moral positions are justified non-instrumentally, for instance for status-related reasons, and yet other moral positions are justified simply because their recognition increases the overall coherence of our moral theory.[34] According to this type of view – which I personally favor, although I cannot defend it here – it may simply not be possible to say anything substantive about why duties *generally* differ in their enforceability. Moreover, if my bundle account of the enforceability of moral duties is correct, such enforceability differences are not philosophically puzzling even if their substantive explanation should turn out to be pluralistic and particularistic. As mentioned above, the list of reasons that explains the enforceability of particular duties need not exhibit any systematic unity.

I have argued that my response to the puzzle of enforceability is theoretically satisfying, as there is no clear reason to expect that a general account of the enforceability of moral duties *should* achieve more or *can* achieve more than my bundle account. But while my account is theoretically satisfying, it still leaves us with all the work of figuring out which duties are, in fact, enforceable or unenforceable. And in contrast to some other proposals, my account does not deliver any shortcuts around this work, nor does it suggest that such shortcuts remain to be discovered. To the contrary, my bundle account suggests that the only

[34] For a hybrid account of the justification of moral entitlements that combines interest-based and status-based considerations, see Lazar (2009).

way to determine the enforceability of specific duties may be to evaluate the justifiability of each element in their surrounding enforceability bundles one at a time, which may, admittedly, require finicky and even tedious moral argument. However, Barry and McTernan are surely right to insist that questions concerning the enforceability of particular duties are often too important to ignore. Disagreements over the enforceability of moral duties may, after all, quickly escalate into violent conflict, as the enforcement of an unenforceable duty may itself amount to a violation of an enforceable duty. Any guidance moral philosophy can offer to resolve such disagreements will therefore be of great value.

4.5 OBJECTIONS

I conclude by defending my proposal against potential objections.

4.5.1 *There is No Puzzle*

According to a fundamental objection, my proposal is pointless because moral duties are necessarily enforceable and differ, at most, with respect to the appropriate enforcement costs. This objection comes in several flavors:

One version of this objection is essentially terminological and holds that the word 'duty' properly refers to entire enforceability bundles, not to isolated Hohfeldian duties. Some versions of the will theory of rights support this objection, according to which the term 'right' essentially refers to enforceability bundles (cf. Kramer 2000, 64). If we assume that rights correspond to duties, then 'duty' presumably also refers to such bundles. This objection raises no substantial concerns for my proposal, which could be translated into this alternative terminology.

Another version of this objection holds that the concept of unenforceable moral duties is incoherent, because it "is a part of the notion of Duty in every one of its form", as J.S. Mill suggests, "that a person may rightfully be compelled to fulfill it" ([1861] 2003, ch. 5,

§14).[35] Mill offers this suggestion in the final chapter of *Utilitarianism*, where he defines moral duties as rules in a morally justified system of socially enforced norms. Presumably, some actions may still be morally desirable even if they should not be required by socially enforced norms, and philosophers who accept Mill's conceptual suggestion are, of course, aware of this possibility. But following J.O. Urmson (1958), they typically insist that such actions are merely *supererogatory*.

In response to this objection, let me first point out that Mill's conception of moral duties is highly controversial, not just in contemporary moral philosophy but also in the philosophical tradition (cf. Hruschka 1998; Straumann 2023). Moreover, Mill himself seems to employ a different conception of moral duties throughout the first chapters of *Utilitarianism*, where he seems to defend general duties to promote the good, which should presumably not be included in a system of socially enforced norms (cf. Urmson 1958, 208–9).[36] Before Mill identifies moral duties with justified socially enforced norms, he accordingly seems to suggest that individuals are obligated to do what they have most moral reason to do.[37] But if we identify moral duties in terms of an agent's

[35] Barry and McTernan do not engage with this objection, as they take for granted that "those who maintain that some duties are enforcement-inapt do not seem to make a conceptual mistake" (2021, 231). While I agree with this assessment, I do not think this point can simply be assumed, as Mill-inspired accounts of the nature of moral duties still enjoy some popularity. Whether Mill really defends a sanction theory of moral duties remains controversial, but I take this to be the standard reading of Mill, cf. Lyons (1976).

[36] For a contrary reading of Mill, see Lyons (1976, 113). Urmson explicitly reintroduces the scholastic category of the supererogatory into modern moral philosophy to make sense of morally desirable actions that do not seem enforceable while adhering to a broadly Millian understanding of our central moral concepts. Ironically, he introduces the category precisely in order to deny the utilitarian view that individuals are always morally required to maximally promote the good. So, Urmson could also have solved his philosophical problem simply by rejecting Mill's specific definition of moral duties.

[37] I say "seems to" because Mill's precise claim in the passage partially quoted above is that every duty violation warrants *some* sanction, even if it only warrants the internal sanction of a bad conscience. His overall view may therefore be that we have duties to maximally promote the good, which are *always* enforceable by the "reproaches of [one's] own conscience" ([1861] 2003, ch. 5, §14), and which are *sometimes* enforceable by other people. However, I am interested here only in the enforceability of moral duties by other people.

moral reasons – a version of the rationalist view I have introduced in Section 4.1 – then there is no obvious reason to assume that duties must be enforceable by definition.

A third version of the objection holds that Hohfeldian moral duties in particular are necessarily enforceable because the enforceability of such duties partly explains the fact that they are *owed to* someone else. In other words, this objection holds that *directed* duties can only exist embedded in enforceability bundles.[38] Certain versions of the demand theory of directed duties may motivate this objection, according to which duties are directed just in case they correspond to moral claims, which must be enforceable because moral claims denote justified demands, and demanding is a form of enforcing (see Manela 2015, 161; May 2015, 526).

This is not the place to assess the merits of the demand theory of the direction of moral duties. So, let me just point out that we may still face a puzzle of enforceability even if this theory were true. The demand theory, as sketched here, holds that moral duties are necessarily enforceable through certain communicative means. However, this claim does not imply that duties are necessarily also enforceable, even in principle, by more intrusive means, like physical coercion. In other words, duty-bearers need not be liable to any physical coercion just because they are liable to justified demands, even if both forms of enforcement may result in proportional enforcement costs. Recall here that we can distinguish different *conceptions* of the enforceability of moral duties, and that these conceptions are partially distinguished by how we define genuine enforcement acts. Barry and McTernan, for instance, insist that "relatively mild sanctions, such as refusing to talk to someone if they fail to comply with their duties" do not count as genuine enforcement acts (2021, 233). But many authors in the philosophical tradition go even further and insist that genuine enforcement acts involve coercion, force, or threats of physical violence.[39] Even if all directed moral duties

[38] Hohfeld may have held this view with respect to *legal* duties, but the textual evidence is ambiguous and there are systematic reasons to doubt that legal duties are necessarily enforceable, see Kramer (2006, 187).

[39] The broad definition of "enforcement" that covers purely communicative forms

are enforceable through justified demands, they can therefore still differ in their enforceability through more intrusive means. The intuitions that give rise to the puzzle of enforceability may therefore not disappear once we accept that all directed moral duties are enforceable, in some broad sense, through certain forms of communicative pressure.

4.5.2 *The Puzzle Is Already Solved*

According to a second objection, the puzzle of enforceability has already been solved – despite Barry and McTernan's contrary assessment – so my account adds nothing new. This solution, which I call *Default Enforceability*, holds that moral duties are enforceable by default, although we must deviate from this *default enforceability assumption* in certain well-understood exceptions.

Default Enforceability is rarely made explicit and therefore requires explanation. The assumption that moral duties are enforceable *by default* is intended here in a normative (rather than an epistemic) sense. Duties are enforceable by default in this sense just in case the reasons that justify these duties also provide a *pro tanto* justification for their enforceability. In Hohfeldian terms, duties are thus enforceable by default if the reasons that justify them also defeasibly justify each element in their surrounding enforceability bundle. Here, I call such duties *pro tanto* enforceable to emphasize that such duties are not necessarily enforceable *all things considered*, as some positions in their surrounding enforceability may not be justifiable once all relevant reasons are taken into account. *Default Enforceability* accordingly assumes that all moral duties are pro tanto enforceable, even though some duties may not be enforceable all things considered.[40]

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of social pressure and even pangs of conscience was also introduced by Mill, cf. Anderson (2023, sec. 1.2 & 1.3).

[40] My distinction between the pro tanto and all things considered enforceablity of moral duties resembles Eskens's (2024, 6) distinction between the enforceability of a *type* of duties and the enforceablity of a duty *token*, as Eskens also argues that certain duty tokens may be unenforceable even though they belong to a generally enforceable type. But these distinctions are not co-extensional, as Eskens ties the distinction to the intrinsic properties of moral duties – their

While my explication of *Default Enforceability* is novel, I believe it captures a prominent view among moral and political philosophers. This view comes out particularly clearly in the debate over *rights to do wrong*, as many contributions to this debate start from the assumption that agents who transgress their duties are liable to interference, and then ask whether certain special reasons, like the value of personal autonomy, can justify exceptions to this rule.[41] The main difference between *Default Enforceability* and my account is that my account allows for duties that are not even pro tanto enforceable. In the case of such duties, no special reason is required to explain why duty-bearers have a "right to do wrong", as they were never liable to interference in the first place. My account therefore potentially provides a simpler explanation for the observation that some moral duties seem all things considered unenforceable.

Should we accept that all moral duties are pro tanto enforceable? This is certainly not obvious, as the example of promissory obligations illustrates. The making of a promise is often seen to involve the transfer of moral entitlements from the promisor to the promisee through the exercise of a normative power (cf. Habib 2022, sec. 1.3). Now, it seems plausible to assume that individuals who promise to Φ usually intend to incur unenforceable obligations – otherwise they could sign enforceable contracts.[42] Accordingly, they will normally transfer to the promisee claims to the performance of their promise *without* giving up their

"nature or structure". In fact, Eskens seems to assume that all moral duties are pro tanto enforceable in my sense, and introduces her distinction to indicate that certain types of duties may generally not be enforceable all things considered in virtue of their nature or structure. Although this point does not come out explicitly in her article, Eskens has confirmed to me in personal communication that she accepts *Default Enforceability*, as I characterize this view here, and that her argument presupposes that the burden of proof lies with anyone who is skeptical of the enforceability of particular duty types as well as duty tokens.

[41] I therefore suspect that the core point of contention in the debate over rights to do wrong could usefully be reframed in terms of the distinction between pro tanto and all things considered enforceable duties. On rights to do wrong, see Waldron (1981), Enoch (2002), Øverland (2007), Herstein (2012), and Bolinger (2017).

[42] The relationship between contracts and promises is debated, see Sheinman (2011, 29–34).

claims against interference. Normally, promissory obligations therefore do not even seem pro tanto enforceable, as the justification for their existence – the exercise of the power to promise – does not also justify their enforceability.[43]

Why should we nonetheless assume that all moral duties are pro tanto enforceable? One influential justification for this assumption has the following structure: If some agent has an all things considered duty to Φ, then they are morally unfree not to Φ, and thus lack a valid interest in not Φ-ing. Because rights necessarily protect interests, this agent therefore normally cannot have a right not to Φ. Thus, they lack a valid complaint if they are forced to Φ, and are thus liable to the enforcement of their duty. Arguments that successfully establish all things considered duties therefore also (defeasibly) justify their enforceability.[44]

As stated, this argument is clearly flawed, as duty-bearers may have interests that specifically relate to the enforcement of their duties. Even if we grant that agents who are required to Φ always lack a valid interest in not Φ-ing, we accordingly cannot assume that they also lack a valid interests in not being forced to Φ. These enforcement-related interests are not necessarily limited to interests in personal autonomy either, which tend to be emphasized in the literature on rights to do wrong, as the enforcement of moral duties may result in a range of bodily, psychological, and social harms (cf. Fabre 2006, 25).

Proponents of *Default Enforceability* are naturally aware of these enforcement-related interests, but they tend to suggest that these interests are, to some extent, morally illegitimate, and therefore cannot undermine the default enforceability assumption. The intuition here is that these interests loose much of their moral force once a relevant

[43] Moreover, if promissory obligations were even pro tanto enforceable, many promises would presumably not be made in the first place. The general point here is that we seem to enjoy a great deal of freedom in structuring our moral relationships through the exercise of normative powers, and we routinely seem to use these powers to incur obligations, such as obligations of friendship or spousal fidelity, without incurring any liability to their enforcement. This point stands even if one rejects the normative powers theory of promissory obligations.

[44] I thank Victor Tadros for urging me to respond to this argument.

duty has been justified, as duty-bearers ought to discharge their duties voluntarily anyways. There is, thus, a *moral symmetry* between the costs agents are required to bear to discharge their duties and the costs others may impose on them to make them discharge their duties (cf. Barry and Øverland 2016, 40–41; Tadros 2016, 54). As long as these *enforcement costs* do not exceed the *required costs*, duty-bearers normally have no valid complaint if they are forced to do their duty.

This argument raises the following question: If the interests of some prospective duty-bearer X in not being forced to Φ – which are presumably perfectly valid to begin with – loose some or all of their validity once we ascribe to X a duty to Φ, does that mean that we must take these interests into account when we determine whether X has a duty to Φ in the first place? Both possible answers to this question run into one horn of a dilemma: If we deny that *X's* enforcement-related interests are relevant for determining whether X has a duty to Φ, then we effectively discount these interests before we have *ever* taken them into account. Thus, we systematically underestimate the normative burdens we impose on X by assigning them a duty to Φ. This procedure is clearly unfair towards X, so we run into the first horn of the dilemma by introducing path-dependencies into our moral reasoning that systematically disadvantage prospective duty-bearers. We can avoid this problem if we already consider *X's* enforcement-related interests when we initially assess their moral duties. We will then accept that X has a duty to Φ only if the reasons that justify this duty also justify our subsequent discounting of *X's* enforcement-related interests. This procedure is fair towards X, as we will now assign them a duty to Φ only if we *already* have good reasons to accept that this duty is pro tanto enforceable. However, we may now confront cases in which the assignment of a duty to Φ would seem justified *were it not for X's enforcement-related interests*. In such cases, we would now have to conclude that Φ-ing is, at most, supererogatory, even though we would have sufficient reasons to assign X a pro tanto *unenforceable* duty to Φ. This result is rather too convenient for X, so we run into the second horn of the dilemma by letting prospective duty-bearers off the hook too easily.

We can avoid this dilemma if we accept that some moral duties

are not even pro tanto enforceable, as the reasons that support these duties do not justify holding prospective duty-bearers liable to their enforcement. The prevalence of such pro tanto unenforceable duties will, of course, depend on our moral background theories, and I will not defend specific examples here. However, I have already indicated why I believe that many duties that result from the voluntary exercise of normative powers fall into this category. And my earlier discussion of the interest-based justification for Hohfeldian moral positions also suggests that duties will be pro tanto unenforceable whenever the balance of all relevant interests – including the enforcement-related interests of prospective duty-bearers – supports the assignment of a duty without supporting the assignment of a liability to its enforcement.

At this point, one may object that I have not addressed the question at the heart of the debate over rights to do wrong. I have argued that duty-bearers do not, by default, *loose* their rights against interference. However, I have not explained why they would *have* such rights in the first place, so I have not explained why duty-bearers are not, by default, liable to the enforcement of their duties.

In my view, this objection is not convincing for two reasons. First, it presupposes that duties can only be genuinely unenforceable if duty-bearers have rights to do wrong. However, whether rights to do wrong are necessary for duties to be unenforceable depends on one's preferred conception of the enforceability of moral duties. If we accept Barry and McTernan's counterfactual definition of genuine enforcement acts, for instance, then moral duties can be unenforceable even if duty-bearers have no rights against interference, as demonstrated by my discussion of Unconditional Waiver.

Second, I doubt that rights against interference generally need a dedicated justification. Granted, in a Hobbesian state of nature individuals may, by default, lack moral rights against the enforcement of their duties simply because they lack rights against any type of interference. Under such conditions, individuals might be liable to the enforcement of duties that would otherwise seem pro tanto unenforceable – such

as promissory duties to temporarily abstain from wolfish behavior.[45] However, within civil society we typically accept far-reaching rights against interference as part of the ordinary moral baseline. Under normal social conditions, we accordingly accept that the initial burden of proof lies with anyone who wishes to interfere with other people, especially if the interference involves coercion or physical violence. Under such conditions, individuals who transgress duties that are not even pro tanto enforceable simply retain any rights against interference that we recognize as part of the ordinary moral baseline.[46]

4.5.3 *Rule-Utilitarianism Revisited*

My proposal resembles Barry and McTernan's third explanatory strategy – according to which we determine the enforceability of specific duties by considering the "overall benefits and burdens of norms that regard types of duties" as enforceable (2021, 249) – *if* my proposal is combined with a rule-utilitarian theory of the justification of Hohfeldian moral positions. One may therefore suspect that my proposal runs into similar problems.

Barry and McTernan's first objection to this rule-utilitarian strategy holds that it cannot explain why we "ought not enforce a duty in some particular case" if the consequences *in that specific case* would justify

[45] In one sense, all moral duties are therefore all things considered enforceable in a Hobbesian state of nature, whether or not they are also pro tanto enforceable. I already mentioned this result in Chapter 3 when discussing the enforceability of moral duties to obey foreign immigration laws. However, this result potentially also has broader implications that I can only hint at here. It is often said, for instance, that people have natural duties of justice to leave the state of nature and to build legitimate institutions, and that these duties are enforceable, e.g. Stilz (2009, 198). However, the enforceability of such natural duties of justice is rarely defended in any detail. My discussion suggests that the enforceability of such duties may actually need no defense, as such duties are all things considered enforceable by default before legitimate institutions have been created. This result also fits well with the suggestion that the natural duties of justice that we retain once legitimate institutions are in place, such as our "duties of civility", are no longer enforceable, cf. Quong (2011, 42).

[46] For a discussion of rights to do wrong that points in a similar direction, see Enoch (2002, especially at 383).

its enforcement (2021, 251). This objection is effectively a version of the well-known rule-fetishism objection to rule-consequentialist views.[47] The general force of this objection is the subject of a long-standing debate. But I will not revisit this debate here, as this objection does not apply to my proposal when it is coupled to competing theories of the justification of moral positions.[48]

According to Barry and McTernan's second objection, the rule-utilitarian strategy endorses the enforceability of moral duties "for the wrong reasons" because it cannot capture the intuition that there is "something deeply inappropriate, as such, about attempts to enforce" certain duties, such as duties of spousal fidelity (2021, 251). Accordingly, it cannot explain why the enforcement of certain duties seems wrong *in principle*.

This wrong kinds of reasons-objection will clearly not impress committed rule-utilitarians, who will insist that the rule-utilitarian strategy invokes precisely the right kinds of reasons for determining the enforceability of moral duties. This objection therefore only gets off the ground if the rule-utilitarian strategy is recommended to someone who is not a rule-utilitarian. However, my proposal never recommends to any individual reasoner that they evaluate the enforceability of moral duties on the basis of reasons that are irrelevant according to their own preferred theory of the justification of Hohfeldian moral positions. From the perspective of any individual reasoner, my proposal therefore cannot imply the enforceability of moral duties for reasons of the wrong kind.

What about the intuition that some duties, such as duties of spousal fidelity, are unenforceable *in principle*? I share this intuition, and I

[47] I discuss this rule-fetichism objection in Chapter 3.

[48] Barry and McTernan (2021, 251) also argue that the rule-utilitarian strategy is insufficiently action-guiding, as it inherently relies on complex empirical assumptions. As I have rejected the action-guidance desideratum, I obviously do not consider this objection decisive. Moreover, I am also less convinced of the merits of this objection. As Mill already emphasized, "there has been ample time, namely, the whole past duration of the human species" to gather evidence for the empirical assumptions rule-utilitarians must invoke ([1861] 2003, ch. 2, §24). To my mind, rule-utilitarians are therefore entitled be just as confident in the enforceability of duties not to rape, murder, or pillage as anyone else.

believe that any plausible first-order account of our moral duties should explain why it is wrong, in principle, to force people to be good friends or partners, to act virtuously at all times, or to maximally promote the good. Of course, this suggestion is not particularly controversial. What is controversial is the suggestion that these behaviors are nonetheless morally required. As Joachim Hruschka (1998) points out, contemporary moral and political philosophy is divided into two schools of thought on this point, which offer competing explanations for the intuition that certain actions seem morally desirable even though their enforcement seems prohibited. According to one side in this debate, such actions are genuinely required, but these requirements are, in principle, unenforceable. According to the other side in this debate, such actions are not required at all, but merely supererogatory. My account of the enforceability of moral duties does not take sides in this debate (although I personally strongly favor the former view). But that is actually an advantage of my account, as it can provide an ecumenical framework within which this debate can be conducted without getting caught up in meta-linguistic disagreements, which happens all too frequently (as pointed out by Flanigan 2019, 342).

4.6 CONCLUSION

In conclusion, let me briefly return to Barry and McTernan's desiderata for a satisfying response to the puzzle of enforceability.

Can my response accommodate paradigmatic cases of enforceable and unenforceable duties (desideratum 1)? Strictly speaking, my response cannot accommodate or fail to accommodate particular cases at all until it is combined with a specific theory of the justification of Hohfeldian moral positions. However, my response can meet this desideratum in a modified sense, as it can accommodate the paradigmatic status of certain enforceable and unenforceable duties in terms of an overlapping consensus among proponents of competing broader moral visions.

My response to the puzzle of enforceability also explains why the enforceability of many duties remains contested (desideratum 2). After all, moral philosophers strongly disagree about the appropriate method-

ology for evaluating the justifiability of Hohfeldian moral positions. And even philosophers who agree about matters of methodology may still hold widely diverging first-order moral views. My response therefore suggests that we should expect far-reaching disagreements over the enforceability of specific duties.

With respect to Barry and McTernan's third desideratum, the results of my discussion are mixed. On the one hand, my response to the puzzle allows us to draw a metaphysically clear line between our enforceable and unenforceable duties, using the former's extrinsic property of being embedded in enforceability bundles (desideratum 3a). On the other hand, my response is not immediately action-guiding, as we must engage in further substantive moral argument before we can place specific duties on either side of this line (desideratum 3b). This lack of action-guidance is, however, not objectionable, as the action-guidance desideratum was never justified to begin with. My discussion therefore does not solve the puzzle of enforceability – at least not as it has originally been construed – but rather dissolves the impression that there is anything puzzling about the observation that moral duties apparently differ in their enforceability.

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Resistance at the Border, Self-Defense and Legitimate Injustice

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ABSTRACT

All modern states hire officials to prevent unauthorized border-crossings, and these officials routinely harm prospective immigrants. Are migrants entitled to resist officials in order to avert these harms? According to several recent contributions, migrants have a right to resist officials in self-defense whenever these officials enforce unjust immigration restrictions. In this article, I show that this claim is incorrect. I argue that officials can enforce many unjust immigration restrictions without posing unjust threats that trigger a right to defensive resistance. In fact, there is no clear connection between the justice of exclusionary immigration policies and the justifiability of defensive resistance at the border. This result has important practical implications, as it undermines the far-reaching endorsements of violence against immigration officials found in the literature. This result also has broader theoretical implications, as it shows that states can legitimately enforce some unjust immigration restrictions, at least in the thin sense of legitimacy that denotes a liberty right to enforce political decisions.

CHAPTER 5

INTRODUCTION

All modern states hire officials to intercept, arrest, and deport unauthorized migrants. In the process, officials routinely harm migrants, and they also harm migrants by excluding them successfully.[1] Can migrants justifiably resist officials in order to avert these harms?[2] Several recent contributions answer this question using the tools of defensive ethics. They defend the striking result that migrants can resist immigration officials in self-defense *whenever* these officials enforce unjust immigration restrictions. Moreover, this result supposedly holds on *any* reasonable account of justice in migration.[3]

If this result holds up, it would be highly significant for two reasons. First, it would potentially support sweeping endorsements of violence against immigration officials, especially as its proponents also argue that most immigration restrictions are, in fact, unjust. Javier Hidalgo, who defends this result in most detail, accordingly maintains that "resistance to immigration law is usually permissible and even obligatory" (2019b, 4). Granted, any defensive force used against officials must, according to Hidalgo, still be necessary and proportionate. But in practice these conditions may do little to temper the radical implications of his view. Violent resistance may, after all, well be necessary to effectively thwart unjust exclusions. And once we take into account the harms that migrants suffer in virtue of their exclusion, even the use of severe force against officials may routinely be proportionate (Hidalgo 2015, 23).

The result that unjust exclusions always warrant defensive resistance would also be significant because it implies that the enforcement of

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1 On the harms of immigration law enforcement, see Mendoza (2016, ch. 5) and Hosein (2019, ch. 3).

2 This is a central question in the emerging literature on the political ethics of migration, cf. Yong (2018) and Hidalgo (2019a).

3 See Hidalgo (2015; 2019b, 115), Bertram (2018, 100), and Sager (2020, 94). Bertram and Sager both build on Hidalgo's arguments. In contrast to Hidalgo, Bertram focuses on cases in which migrants face threats to their "vital interests". Bertram does not explain his notion of "vital interests", so the precise implications of his view remain unclear. However, given that officials threaten migrants with the use of force, they always seems to threaten their vital interests in physical freedom and bodily integrity.

unjust immigration laws is (almost) always illegitimate (Yong 2018, 463). According to standard theories of legitimacy, exercises of political power normally cannot be legitimate if they warrant defensive resistance, as the moral asymmetry between victims and aggressors that characterizes genuine self-defense scenarios is incompatible with a legitimate right to rule.[4] This result would therefore undermine the broadly accepted view that states have some space for legitimate injustice in the design and implementation of their immigration policies.[5]

The argument for the claim that migrants can always resist their unjust exclusion in self-defense is intriguingly straightforward. It starts with the undeniable observation that officials threaten migrants with the use of force. It then builds on two further premises: A standard principle of defensive ethics, which holds that individuals may defend themselves against *unjust threats* (within certain limits), and the assumption that officials pose unjust threats in the relevant sense *whenever* they enforce unjust restrictions. Both premises initially seem uncontroversial, and together they imply that unjust exclusions warrant defensive resistance.

My goal in this article is to show that this argument fails, despite its initial appeal.[6] In Section 5.1, I first show that the key premise of this argument – that officials who enforce unjust restrictions always unjustly threaten excluded migrants – expresses a substantive moral claim, and not, as one might initially think, a conceptual truism. In the following sections, I then show that this premise is implausible on several prominent accounts of justice in migration. To show this, I first discuss the plausibility of this claim from the libertarian perspective that

[4] In certain exceptional cases, exercises of political power may be legitimate even though they involve justified *infringements* of rights that warrant defensive resistance. I return to this possibility below, but I bracket this possibility here as these cases are, by assumption, exceptional.

[5] For representaitive formulations of this view, see Carens (2013, 270–73), Grey (2015, ch. 5), Yong (2018), Stilz (2019b, 188), and Miller (2023).

[6] For complementary objections to this argument, see Yong (2018) and Steinhoff (2022, 105–10). Yong suggests that this argument fails because unjust immigration laws can sometimes have legitimate authority, while Steinhoff suggests that this argument oversimplifies the complex principle-agent relationship between states and their officials. Both objections are compatible with, but independent of, my argument.

informs Hidalgo's own maximalist open borders position in Section 5.2. In Section 5.3, I then discuss mainstream egalitarian open borders views, and I argue that migrants cannot generally resist their exclusion in self-defense just because their exclusion perpetuates global inequalities. In Section 5.4, I finally address the sufficitarian view that justice mainly requires the admission of refugees, and I argue that even refugees cannot generally resist immigration officials in self-defense. In Section 5.5, I highlight some implications of my discussion for the ethics of resistance at the border, and for the debate over the legitimacy of immigration controls.

Let me highlight two points before jumping in. First, throughout my discussion I focus on the moral relationship between prospective immigrants and excluding states, understood as corporate agents.[7] Accordingly, my primary question is whether excluding states unjustly threaten prospective immigrants through the actions of their officials. For this reason, I treat immigration officials primarily as representatives of their state, rather than as moral agents in their own right. I focus on the relationship between migrants and excluding states here, as this approach allows me to bracket questions related to the principal-agent relationship between states and their official that would distract from my core argument.[8]

Second, my arguments specifically target the claim that unjust exclusions *always* justify defensive resistance. I argue (i) that this universal claim does not express a conceptual truth but a substantive normative thesis, (ii) that no convincing argument has been provided for this normative thesis, even though the burden of proof lies with those who make such universal claims, and (iii) that this normative thesis is

[7] On states as corporate agents, see List and Pettit (2011) and Pettit (2023).

[8] Hidalgo (2015, 456) takes for granted that immigration officials personally act unjustly whenever they enforce unjust policies. However, this assumption may not hold up once we take the principal-agent relationship between states and their officials into account, see Steinhoff (2022, 107). Conversely, immigration officials may sometimes personally pose unjust threats to migrants that are not attributable to the excluding state, for instance when they resort to excessive force in violation of their mandate. Because I focus on the moral relationship between migrants and excluding states, I bracket this possibility.

actually highly implausible. However, my arguments do not suggests that migrants can *never* resist immigration officials in self-defense. In my view, defensive resistance at the border will sometimes be entirely appropriate, for instance when officials resort to excessive violence or humiliating enforcement tactics. Nor do my arguments imply that migrants may not be entitled to resist their exclusion for reasons other than self-defense. To the contrary, I emphasize that some migrants, especially refugees, will normally be entitled to resist their exclusion even when they cannot resist their exclusion *in self-defense*.

5.1 A CONCEPTUAL TRUISM?

The following *Defensive Argument* supposedly shows that unjust exclusions always warrant defensive resistance (Hidalgo 2015, 467):

> Premise 1: Individuals can resist *unjust threats* in self-defense (subject to the constraints of defensive ethics).
>
> Premise 2: The enforcement of *unjust exclusions* always poses an unjust threat to migrants.

Therefore:

> Conclusion: Migrants can *always* resist their unjust exclusion in self-defense.

The first premise of this argument expresses a standard principle of defensive ethics. The second premise is more interesting, as it connects the justice of exclusionary immigration policies to the conditions for justified self-defense. My core claim in this chapter is that this second premise should be rejected, as some migrants who are unjustly excluded do not face unjust threats that warrant defensive resistance. However, at first glance the second premise of the Defensive Argument may seem to express a conceptual truism. In this section, I therefore show that this premises actually expresses as substantive moral assumption.

The Defensive Argument is meant to show that migrants can resist their unjust exclusion in self-defense. Self-defense is a specific justification for harming others in ways that are ordinarily impermissible

(cf. Ferzan 2005; Steinhoff 2019, ch. 2). However, this justification is neither necessary nor sufficient for ensuring that harming others is permissible all things considered. Resistance at the border can therefore be defensive without being permissible, and permissible without being defensive.[9] In this chapter, I focus specifically on the justifiability of resistance at the border *in self-defense*.[10]

Defensive ethicists generally agree that only *unjust threats* trigger the self-defense justification.[11] According to the most influential theory of self-defense, unjust threats are actions that threaten to transgress someone else's *defensible moral rights*.[12] These are rights that are, in principle at least, *enforceable* through appropriate *physical violence*.[13]

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[9] That acting in genuine self-defense can be impermissible all things considered is broadly accepted, see for instance Mapel (2010, 200) and Walen (2019, 13).

[10] My formulation of the Defensive Argument is therefore less ambitious than Hidalgo's, which aims to establish the overall permissibility of resistance at the border. Because acting in self-defense can be morally impermissible all things considered, the Defensive Argument can, at most, establish a *presumptive* case for the permissibility of resistance at the border. Hidalgo seems to be aware of this caveat, as he discusses at length one type of consideration that may render defensive resistance at the border impermissible, namely political obligations to respect unjust immigration laws, see Hidalgo (2015, 460–66). However, resistance at the border may also be impermissible all things considered for any number of alternative reasons, such as consequentialist considerations.

[11] I focus on the triggering-conditions for the self-defense justification here, and therefore bracket the means-conditions for justified resistance, like necessity and proportionality. On the distinction between triggering-conditions and means-conditions for justified self-defense, see Ferzan (2005, 728–32), McMahan (2005), Statman (2014, 348–52), and Fabre (2014, 414–16).

[12] On this rights-based enforcement theory of self-defense, see Burri (2022) and Quong (2022). Proponents of the Defensive Argument also seem to favor this theory, see Hidalgo (2019b, 15) and Bertram (2018, 100). The main competitor to enforcement theories of self-defense are *distributive theories*, which I do not address here because they face significant objections, see Kaufman (2008), Quong (2020, 25–32), and Burri (2022).

[13] I adopt the term 'defensible rights' from Flanigan (2023, 640). Moral rights are enforceable if agents who transgress them become liable to the imposition of enforcement costs, see Barry and McTernan (2021) and my discussion in the fourth chapter of this thesis. In the framework I suggest in this chapter, the defensibility of moral rights can therefore be understood as a specific conception of their enforceability. Some moral rights may not be enforceable, and some enforceable rights may not be defensible. Promissory rights, for instance, are plausibly enforceable, but only through non-violent means. Because defensible rights must be enforceable through proportionate physical force, I use 'defensible

People can also harm each other in ways that do not involve the transgression of defensible rights, for instance through market competition, but such harms cannot trigger a self-defense justification.

We can now see that the Defensive Argument's second premise only expresses a conceptual truth if it is conceptually true that the enforcement of unjust immigration restrictions threatens to transgress the defensible rights of excluded migrants. Whether that is conceptually true depends, in turn, on the precise meaning of the assumption that certain immigration restrictions are "unjust". To determine the meaning of this assumption, a short conceptual excursion is in order.

In a recent article, Peter de Marneffe highlights that political philosophers today commonly employ two distinct concepts of justice, the *perfect duty concept of justice* and the *structural concept of justice*.[14] The perfect duty concept of justice has a long tradition, and is employed by authors such as Locke, Kant, or Mill. In this tradition, justice is conceptualized as a property of specific actions, and actions are just insofar as they do not transgress perfect duties, which are duties that correspond to moral rights. Moreover, advocates of the perfect duty concept of justice typically hold that justice is only concerned with rights that can, in principle at least, be enforced through coercive means – a conceptual convention that is also reflected in the identification of "unjust threats" with threats to defensible moral rights.

Some migration ethicists also employ this perfect duty concept of justice. Michael Blake, for instance, defines justice in migration in terms of "perfect duties" that are "susceptible, in principle at least, of being defended by coercive means" (2020, 215).[15] If we follow this conceptual

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rights' to refer to rights that are enforceable in the narrow sense associated with figures like Grotius, Hobbes, Locke, and Kant, and not in the broad sense primarily associated with J.S. Mill, see Anderson (2023, sec. 1.3).

[14] De Marneffe (2023, 95–97) speaks of "social justice", but I follow Estlund in speaking of "structural justice" instead. Like Estlund (2024, 340), I use 'structure' broadly to cover distributive facts.

[15] For similar charactrizations of the concept of justice in migration, see Wellman (2008) and Miller (2016b, 163). Wellman does not make this conceptual point explicit in his work on migration. However, he clearly stipulates that immigration restrictions are only unjust if they transgress migrants' moral rights, and he clarifies elsewhere that he beliefs that all moral rights can "be coercively enforced

convention, then immigration restrictions are, by definition, only unjust if migrants have defensible rights to admission. Thus, the Defensive Argument's second premise would indeed express a conceptual truth. The argument would then be sound, but it would merely highlight the mundane conceptual point that migrants who face threats to their defensible rights may defend themselves against such threats. However, the Defensive Argument is clearly meant to be more interesting than that, so we should assume that its proponents do *not* simply define justice in terms of respect for defensible rights. For the purposes of this discussion, we can therefore set aside the perfect duty concept of justice.

In the decades following the publication of Rawls's *Theory of Justice*, this perfect duty concept of justice has slowly been supplanted by a distinct *structural* concept of justice (cf. de Marneffe 2023, 98). This structural concept of justice does not apply to actions, but to institutions and other social structures – the basic structure of society in Rawls's own view. Such structures are just if and only if they satisfy the relevant *principle of justice* – in Rawls's own theory the principles of justice as fairness. As de Marneffe points out, one key difference between the traditional and the Rawlsian concepts of justice is that "[t]radional injustices entail that someone has been wronged", while "[i]njustice in Rawls' sense does not entail this" (2023, 95). The assumption that specific immigration restrictions are structurally unjust therefore does not entail that migrants who are unjustly excluded suffer a rights-transgression. This assumption does not even entail that excluding states or their officials commit any moral wrong when they enforce unjust immigration restrictions, as structural injustices can, in principle, arise out of complex social interactions even without agential wrongdoing (cf. Young 2010). Particular agents may, of course, still have duties to promote structural justice or prevent structural injustices – which David Estlund (2024, 336) labels "duties of superintendence" – but the

by the right-holder and (typically, at least) third parties" (2017, 7–8). Miller also explicitly characterizes demands of justice in migration as demands which states could be "forced to comply [with], either by refugees [and other migrants] themselves or by third parties" (2016b, 163).

extent of these duties must be determined through substantive moral argument.

On my reading of the migration justice literature, most contributions to this literature employ this structural concept of justice. A comprehensive survey of this literature and its conceptual conventions lies beyond the scope of this paper, but Joseph Carens's influential work illustrates this point. Carens initiated the debate over justice in migration in his classic *Aliens and Citizens* (1987), where his core argument builds on a global extension of the Rawlsian theory of justice. In his more recent work, Carens no longer derives the principles of justice from Rawls, but from a reconstruction of the "broad moral commitments that underlie contemporary political institutions and policies throughout North America and Europe" (2013, 2,). But he still operates with a broadly Rawlsian structural concept of justice, according to which these principles primarily apply to the design of political institutions. Crucially, this structural concept of justice also underlies the current debate over the ethics of resistance at the border.[16] Caleb Yong's definition of justice in migration is representative here, according to which justice provides a standard for assessing "the substantive moral merits and demerits of social and political institutions" (2018, 462).

Migration ethicists naturally disagree about the *content* of the principles of justice in migration. Hidalgo himself defends an unusually demanding account of justice in migration, according to which immigration restrictions are just if and only if they are supported by the balance of all morally salient reasons. Accordingly, he consistently identifies the justice of immigration policies with their overall moral justifiability (2015, 451–53; 2019b, 12, 57). This view is unusual because most migration ethicists treat the principles of justice as a *subset* of the moral reasons that bear upon the design of immigration policies, so that such policies can be unjustified without being unjust. In Carens's words, justice sets a "minimum standard" for morally acceptable immigration policies, but does not "exhaust the moral universe" (2013,

[16] An exception is Steinhoff (2022), who operates with a perfect duty concept of justice.

108). Migration ethicists usually spell out this "minimum standard" either in egalitarian or sufficitarian terms, and I return to these substantive disagreements below. Here, I only wish to emphasize that the Defensive Argument's second premise does not express a conceptual truth as long as the justice of immigration restrictions is understood in structural terms. The assumption that officials who enforce unjust immigration restrictions always threaten to transgress the defensible rights of would-be migrants therefore expresses a substantive moral claim. In the remainder of this chapter, I argue that this claim should be rejected.

5.2 LIBERTARIANISM AND FREEDOM OF MOVEMENT

Libertarian arguments are remarkably influential in the immigration debate, even among theorists who reject the libertarian vision in the domestic political context. These arguments typically have the following basic structure: First, their proponents defend a *presumptive right* to global freedom of movement, which they normally conceptualize as a negative right against coercive interference. Next, they argue that this presumptive right shifts the burden of proof towards theorists who defend the right to restrict immigration. Finally, proponents of these libertarian arguments reject any competing arguments that supposedly establish a right to restrict immigration. Because these arguments for restrictions fail, and because their proponents carry the burden of proof, libertarians conclude that states are not entitled to interfere with the free movement of prospective migrants and their "right to cross borders" (Hidalgo 2019b, 115).[17]

On closer inspection, there are, however, two distinct versions of this libertarian argument, which result from two distinct interpretations of the idea that individuals have *presumptive* rights to global freedom of movement. These arguments often run into each other, but they must be pulled apart here, as they potentially have diverging implications

[17] See for instance Huemer (2010), van der Vossen and Brennan (2018, ch. 2), Hidalgo (2019b, ch. 1) and Sager (2020, ch. 2). For an extended critical discussion of this argumentative strategy, see Steinhoff (2022, ch. 2).

for the ethics of resistance at the border.

5.2.1 *The Presumptive Right to Immigrate*

The idea that individuals have a presumptive negative right to global freedom of movement can be understood in at least wo ways: It could mean that individuals have such rights *prima facie*, or it could mean that individuals have such rights *pro tanto*.[18] This somewhat technical distinction has significant ramifications for the present debate.

Migrants have prima facie rights to freedom of movement if they have such rights *at first glance*. In other words, migrants have prima facie rights to global freedom of movement if certain initial reasons, such as the liberal aversion to coercion emphasized by many libertarians, are sufficiently weighty to justify such rights *in the absence of competing considerations*. But prima facie rights are not really rights, as these initial reasons may, on closer inspection, actually be defeated.[19] To say that migrants have prima facie rights to global freedom of movement is therefore *not* to say that they *actually* have such rights.[20]

Most migration ethicists accept prima facie rights to global freedom of movement, and I will not dispute this point here.[21] But because prima facie rights are not actual rights, their "transgression" cannot

[18] My use of the prima facie/pro tanto distinction follows Reisner (2013) and Kiesewetter (2024). This distinction is not commonly made in the migration literature, but is well-established in the meta-ethical literature on moral rights. My distinction between prima facie and pro tanto rights to global freedom of movement may align with Yong's (2017, 462) distinction between *weak rights* and *strong rights* to freedom of movement. However, it is not clear to me whether Yong's weak rights are prima facie rights or easily overrideable pro tanto rights.

[19] Prima facie rights are therefore best understood not as rights, but as indicators for rights. Note that this terminological convention does not match the way in which Ross originally used the notion of "prima facie duties", a fact that routinely causes confusion, cf. Stratton-Lake (2002).

[20] Huemer (2010, 431), who is among the most prominent proponents of the libertarian case for open borders, also emphasizes this point.

[21] For extended justifications of such prima facie rights, see Huemer (2010, 431–36) and van der Vossen and Brennan (2018). I am personally skeptical of the assumption that individuals have prima facie rights to global freedom of movement, especially if these rights are interpreted as defensible claim rights rather than mere liberty rights. However, I will not press this point here.

justify defensive violence. The assumption that migrants have prima facie rights to global freedom of movement therefore cannot, by itself, support the Defensive Argument.

Migrants have pro tanto rights to global freedom of movement if they actually have such rights, and not merely at first glance. But pro tanto rights are not absolute and can therefore, in exceptional cases, still be *overridden* by especially weighty competing considerations. In contrast to prima facie rights, pro tanto rights are actual rights, so their transgression can justify defensive violence. However, the assumption that individuals have pro tanto rights to global freedom of movement is also highly controversial, a point to which I return below.

The point I wish to emphasize here is that the precise interpretation of the assumption that migrants have presumptive rights to global freedom of movement has important implications for the burden of proof in the debate over resistance at the border. If we accept prima facie rights to global freedom of movement, then critics of the libertarian argument must provide reasons that outweigh the considerations that initially favor the recognition of such rights. However, these reasons do not compete with actual rights to freedom of movement, because at this point libertarians and their critics are still debating whether such rights are justified in the first place. If, by contrast, we understand these presumptive rights as pro tanto rights, then critics of the libertarian argument must show that states can justifiably *infringe* these rights, presumably because they are overridden by competing considerations. However, pro tanto rights are actual rights and rights are generally taken to be largely immune to trade-offs. So, these rights can normally only be overridden by *much* weightier reasons. In other words, pro tanto rights function as trumps, while prima facie rights do not. The assumption that migrants have pro tanto rights to global freedom of movement therefore shifts the burden of proof more dramatically than the assumption that individuals have such rights prima facie.

With this distinction in hand, we can now pull apart two versions of the libertarian argument. According to what I will call the *unconditional libertarian argument*, migrants have largely unrestricted pro tanto rights to global freedom of movement, which states violate when they enforce unjust immigration restrictions. And according to what I will call

the *conditional libertarian argument*, migrants only have prima facie rights to global freedom of movement, but these rights amount to pro tanto rights whenever states implement unjust immigration restrictions. Both arguments potentially support the conclusion that migrants can generally resist their unjust exclusion in self-defense, so I address them in turn.

5.2.2 *The Unconditional Libertarian Argument*

Proponents of the unconditional libertarian argument for open borders insist that migrants have largely unconstrained pro tanto rights to global freedom of movement. Accordingly, they insist that states can justifiably restrict immigration only if they have a special justification for *infringing* these rights, such as a lesser-evil justification. Thus, immigration restrictions can only be justified to prevent moral disasters, which will rarely if ever be the case (Oberman 2016, 33; Hidalgo 2019b, 58).

If the unconditional libertarian argument is convincing, then it straightforwardly supports the claim that migrants can generally resist their unjust exclusion in self-defense. After all, states will only have a lesser-evil justification for infringing migrants' rights to freedom of movement if such restrictions are necessary to avoid harms that are *much more significant* than the harms imposed on migrants (Hidalgo 2019b, 58). However, it generally seems safe to assume that states will not have such a lesser-evil justification when they enforce substantively unjust exclusionary immigration policies, as these policies would presumably be just if they were truly necessary to prevent a lesser evil.[22] When states

[22] This point clearly follows from Hidalgo's own demanding account of the justice of immigration restrictions, which I introduce below. Note that Hidalgo does not distinguish the justice or justifiability of exclusionary immigration polices from the justifiability of their enforcement. However, this distinction is necessary because he conceptualizes the right to freedom of movement, like other libertarians, as a right against coercive interference. This right may undermine the justifiability of the enforcement of exclusionary immigration policies *without* undermining the justice or justifiability of the policies themselves. For this reason, migrants might not be justified in disregarding just immigration restrictions, even if these restrictions are not enforced.

enforce unjust immigration restrictions, we should therefore expect that they unjustifiably violate the pro tanto rights of migrants to global freedom of movement.

Despite its popularity, this line of reasoning faces several well-known objections, as the assumption that migrants have *pro tanto* rights to global freedom of movement is highly controversial. Many migration ethicists argue that the scope of individual rights to freedom of movement is limited, to some extent, by considerations like the value of collective self-determination (Wellman 2008), pre-institutional property rights (Pevnick 2011), or functional requirements of a just global order (Rawls 1999b).[23] These theorists typically accept that migrants have *prima facie* rights to global freedom of movement, but they insist that these prima facie rights are, in many cases, defeated by competing reasons.[24] So, they reject the basic premise of the unconditional libertarian argument.

Let me clarify a point here that might otherwise cause confusion. The unconditional libertarian argument assumes that migrants have pro tanto *claim rights* to global freedom of movement that correspond to duties on the part of states not to interfere with their exercise of these rights.[25] Critics of the libertarian argument deny this assumption, but they are not necessarily committed to the inverse view that states have claim rights to exclude outsiders from their territory. In principle, it is entirely possible that migrants have *liberty rights* to try to cross international borders, while states also have *liberty rights* to attempt to exclude them. In that case, excluding states and prospective migrants may find themselves in a morally symmetrical conflict, in which neither side can, strictly speaking, resort to defensive force in response to an

[23] Or some combination of these considerations, cf. Miller (2007), Angeli (2015), Moore (2015), Miller (2016b), and Stilz (2019b).

[24] For a strong discussion of this point, see Steinhoff (2022, 37–40).

[25] Moreover, these claim rights must be defensible if the libertarian argument is to support the assertion that migrants can generally resist their unjust exclusion in self-defense. To my knowledge, proponents of the libertarian argument for resistance at the border have, so far, not explicitly argued for the defensibility of these rights.

unjust threat.[26]

To simplify my terminology, I will say that states have a *right to exclude* (RTE) certain migrants if these migrants do not actually have pro tanto rights to enter these states, despite having such rights prima facie. In other words, I will say that states have a right to exclude specific migrants if the considerations mentioned above – collective self-determination, ownership of territory, or functionalist requirements of a just global order – defeat the considerations that initially favor a right to unrestricted freedom of movement. For present purposes, I therefore understand the right to exclude purely as a *liberty right*.[27] The reason why I focus here on the right to exclude in this weak sense is that states only need a liberty right to exclude to ensure that migrants cannot resist their exclusion *in self-defense*.[28] After all, immigration officials will normally not pose an unjust threat to migrants if states have such a liberty right to exclude.[29]

The question whether states have an RTE is the subject of a long-standing debate that I will not try to resolve here. But let me highlight a few points that are specifically relevant for the present debate over the ethics of resistance at the border.

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[26] In the migration literature, this broadly Hobbesian view is most strongly associated with Nagel (2005), but see also Lægaard (2010) and Tiedemann (2023). I discuss this type of view in detail in the second chapter of this thesis.

[27] More specifically, I understand the RTE as a Hohfeldian liberty from duties that correspond to *defensible* rights, but I will not always make this explicit. The RTE is sometimes also conceptualized as a claim right, an authority-right, or a complex bundle of Hohfeldian entitlements, cf. Lægaard (2010, 254) and Yong (2017, 463). I make no assumptions here about whether states have claim rights or authority-rights to restrict immigration, but I discuss this question in the second chapter of this thesis.

[28] If a Hobbesian view of the type proposed by Nagel (2005) is correct, then migrants may routinely be entitled to resist their exclusion even though states are also entitled to enforce their exclusion. In that case, resistance at the border will often be permissible without being strictly speaking defensive. I return to the possibility that some migrants may be entitled to resist their exclusion for reasons other than self-defense in Section 5.4.

[29] Even if states have an RTE, their officials may still pose unjust threats to migrants if they employ excessive force, cf. Ip (2022) and Gerver, Lown, and Duell (2023). I bracket this possibility here, because officials will not *always* employ excessive force and the Defensive Argument is meant to support a universal conclusion.

First, recall that the Defensive Argument is supposed to be sound on any reasonable theory of justice in migration, and is therefore not supposed to hinge on controversial normative assumptions (see Hidalgo 2015, 452–53). However, the assumption that individuals have unrestricted pro tanto rights to freedom of movement is highly controversial, and is not broadly accepted in the migration literature. If the Defensive Argument implicitly hinges on this additional assumption, it would accordingly loose its ecumenical appeal.

Second, it is highly questionable whether basic liberal commitments actually support unrestricted pro tanto rights to global freedom of movement, as Hidalgo suggests in his more recent work.[30] After all, liberals usually accept that people's freedom of movement can justifiably be restricted for a broad range of reasons, including – as libertarians routinely emphasize – other people's property rights.[31] And such restrictions are usually not conceptualized as justified *infringements* of an unrestricted right to freedom of movement, but as justified *limitations* of the scope of this right (cf. Yong 2017, 464–66; Steinhoff 2022, 75–76). The endorsement of unrestricted pro tanto rights to freedom of movement therefore actually seems to contradict basic liberal commitments.[32]

Finally, the unconditional libertarian argument seems to show too much, as it suggests that migrants cannot only resist their *unjust* exclusion in self-defense, but also their *just* exclusion. In fact, this argument suggests that migrants can resist their exclusion in self-defense even if their exclusion is fully justified, for instance on lesser-evil grounds. If individuals have unrestricted pro tanto rights to freedom of movement, then officials would, after all, infringe these rights even if they

[30] See also Miller (2005b, 119) and Blake (2020, 43). For Hidalgo's response, see Hidalgo (2014), and for a rejoinder, see Miller (2016b, 188). For a strong rejection of the libertarian endorsement of unrestricted negative right against interference, see also Buchanan (1984, 70).

[31] A point which Hidalgo acknowledges in Freiman and Hidalgo (2022, 272).

[32] The most influential argument for a pro tanto right to global freedom of movement is probably Oberman's (2016) interest-based argument, which also appeals to liberal commitments, albeit less directly. I show that this argument is structurally flawed in the third chapter of this thesis.

act justifiably. Officials would then count as *justified aggressors*, and the mainstream view in the defensive ethics literature holds that justified aggressors may also be resisted in self-defense.[33] The unconditional libertarian argument thus suggests that migrants can *always* resist their exclusion in self-defense, so the justice of the underlying immigration policies drops out of the picture.[34] This radical result seems highly implausible, and I do not think that Hidalgo or other proponents of the Defensive Argument really wish to make this claim. Instead, Hidalgo's thesis seems to be that migrants can resist their unjust exclusion *because it is unjust*, but this thesis requires a different justification.

I believe these objections are decisive, so I now set aside the unconditional libertarian argument for the justifiability of defensive resistance at the border. However, a more subtle version of the libertarian argument still requires discussion.

5.2.3 *The Conditional Libertarian Argument*

The conditional libertarian argument dispenses with the assumption that migrants have unrestricted pro tanto rights to global freedom of movement. Instead, this argument builds on the weaker assumption that migrants have a conditional pro tanto right not to be prevented from entering another state *if* their exclusion from this state would be substantively unjust. This conditional assumption seems less controversial, but still supports the claim that migrants can always resist their unjust exclusion in self-defense.[35] My goal in the remainder of this

[33] Some authors deny this, see especially McMahan (2014). However, McMahan's view that justification defeats liability is clearly a minority position in the defensive ethics literature. For a strong critical discussion of this view, see Steinhoff (2019, ch. 3). For an overview of this debate, see Frowe and Parry (2021).

[34] Note that this problem would not fully disappear even if one denied that justified agressors can be resisted in self-defense. Even under that assumption, we may still find cases in which officials lack a lesser-evil justification for enforcing substantively just immigration restrictions. And in such cases, migrants would presumably still be entitled to resist their just exclusion in self-defense.

[35] Hidalgo seems to defend this conditional libertarian argument in his earlier article, and also at points in his more recent book (2015, 451–53; 2019b, 118).

section is to show that this conditional argument is not plausible either, not even if we accept Hidalgo's own account of justice in migration.[36]

Hidalgo's Cosmopolitanism

In his book *Unjust Borders*, Hidalgo argues that most immigration restrictions are unjust or unjustified (he uses these terms interchangeably). In broad strokes, he supports this thesis with the following argument: First, he argues for a "presumption" in favor of open borders, which derives from basic liberal commitments that provide "strong moral reasons [that] speak in favor of free movement". Hidalgo specifically emphasizes that immigration restrictions "interfere with valuable freedoms, such as freedom of association and occupational choice", and thereby set back important interests (2019b, 12). Next, Hidalgo defends the cosmopolitan view that states may not show any partiality towards their own citizens. Thus, he argues that immigration restrictions are just or justified only if their effects are morally preferable to the effects of open borders, when judged form an impartial perspective. Restrictions are therefore only just if they are necessary to prevent "outcomes that are impartially bad on net for both foreigners and citizens" (73).[37] Finally, Hidalgo concludes that most immigration restrictions are unjust because the "net benefits of open immigration are overwhelming" (73). This last claim clearly depends on further empirical assumptions, but for present purposes I accept this argument for open borders.[38]

[36] To motivate the Defensive Argument, Hidalgo mainly discusses cases involving refugees whose unjust exclusion threatens their basic human rights. But he also emphasizes that *all* unjustly excluded migrants can resist their exclusion in self-defense, not just refugees, see Hidalgo (2015, 454; 2019b, 115). I focus on this universal claim here and return to the case of refugees below.

[37] Hidalgo's (2019b, 35) argument against the view that states have special obligations towards their own citizens notably already presupposes that immigration restrictions *actually* (rather than merely *prima facie*) transgress migrants' moral rights. Even though Hidalgo does not frame his substantive account of justice in migration as a specifically libertarian view, this argument will accordingly not convince those who reject the libertarian assumption that individuals have pro tanto rights to global freedom of movement.

[38] In another step, Hidalgo invokes pervasive cognitive biases to explain why most people are wrong about the justice of immigration restrictions. This step is meant to explain why the fact that many people consider his conclusions to

Hidalgo (2019b, 57) acknowledges that his account does not condemn all immigration restrictions. Consider, for instance, the following scenario:

> Ideal Exclusions: Utopia and Paradise are reasonably just democracies. They are equally prosperous and their relationship is free of ongoing exploitation or historical injustice. The Utopians unanimously decide to exclude all Paradisians, and hire officials to enforce this decision. Their decision is based on an impartial assessment of their own interests and the interests of potential Paradisian migrants. The former substantially outweigh the latter, and can only be protected through closed borders.

My description of this case is obviously incomplete, as I did not specify the relevant interests. But my point is merely that we can imagine restrictions that are just according to Hidalgo's account. Next, consider the following variation on Ideal Exclusions:

> Suboptimal Exclusion: Adam is a Paradisian citizen who wants to retire in the Utopian countryside. Adam's interests in moving are not trivial, and his admission would predictably impose no costs on Utopian citizens. Nonetheless, Utopia denies his request for admission.

Adam's exclusion is clearly unjust, according to Hidalgo's account, because the balance of morally salient reasons favors his admission. Because Adam's exclusion is unjust, Hidalgo's view implies that he can resist Utopian officials in self-defense.[39] Is this implication plausible?

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be deeply counterintuitive should not be counted against these conclusions. In Hidalgo's words, most people are reliably wrong about the actual effects of immigration or the moral significance of these effects, especially if they are not sufficiently "highly educated" and lack "high IQs" or "political knowledge" (2019b, 72). I am skeptical of these claims, but they are peripheral to the present discussion.

[39] This suggestion is, of course, highly controversial. However, Hidalgo's account does not seem to allow for a different assessment of this case.

As we saw above, Adam can only resist Utopian officials in self-defense if Utopia does not have a right to exclude him. Now, it may seem obvious that Utopia cannot have a right to exclude Adam if Adam's exclusion is unjust. In fact, this claim may even seem to express a conceptual truth.[40] But this impression is misleading, as it is entirely possible that Utopia has a right to exclude Adam even though Adam's exclusion is unjust. Whether Utopia has a (liberty) right to exclude Adam depends on whether Adam's prima facie right to freedom of movement is defeated by competing considerations here. This may, in principle, be the case even if Adam's exclusion is substantively unjust because it cannot be justified from an impartial perspective. We must therefore determine whether Utopia has a right to exclude Adam on substantive grounds.

Why should we assume that states like Utopia do not have a right to exclude migrants like Adam? At different points, Hidalgo suggests two explanations: that Utopia's RTE must be *specified* as a right to implement only substantively just immigration restrictions, and that states *forfeit* their RTE whenever they implement unjust restrictions.[41] In my view, both explanations fail. To show this, I focus, like Hidalgo, on the self-determination rationale for the RTE, although I believe that similar considerations also apply to the ownership-based rationale and the functionalist rationale.

Specifying the RTE

In its most prominent formulation, the argument from self-determination holds that the value of collective self-determination

[40] At points, Hidalgo also seems to treat this claim as expressing a conceptual truth, see for instance Hidalgo (2015, 451–52).

[41] On the forfeiture explanation, see also Bertram (2018, 108). A third explanation might be that the RTE is *overridden* by morally catastrophic consequences whenever states implement unjust immigration restrictions. However, it seems unlikely that *all* unjust exclusions are morally catastrophic, especially if justice requires largely open borders. These three explanations correspond to three broader frameworks for conceptualizing moral conflicts within deontological ethics, forfeiture-theory, specificationism, and threshold deontology. For an overview of how these frameworks fit within broader debates in deontological ethics, see Alexander and Moore (2021).

supports a right on the part of legitimate states to restrict many forms of immigration. In Christopher Heath Wellman's words, self-determination is a fundamental political value, which provides a "weighty consideration in favor of a state's right to limit immigration" (2008, 119). This value is generally more important than the considerations that support migrants' prima facie rights to freedom of movement. On closer inspection, states are therefore at liberty to exclude most prospective migrants.[42]

Hidalgo argues that this line of reasoning fails, at least when states implement substantively unjust immigration policies.[43] He accordingly argues that the value of collective self-determination cannot support a liberty right to implement unjust immigration restrictions, and he even suggests that proponents of the self-determination argument commit a moral "category mistake" when they try "to show that states have liberty-rights to exclude" (2019b, 54). He supports this objection with the following argument:

First, Hidalgo grants that the self-determination argument may support claim rights against interference with the enforcement of immigration laws (which states may still forfeit). Next, he points out that the balance of morally salient reasons may still require states to open their borders, so that a claim right to choose immigration policies free from external interference could not immunize the chosen policies from moral criticism. Thus, the value of self-determination cannot ensure that immigration restrictions are substantively just or morally permissible. Finally, Hidalgo equates liberty rights and moral permissions, and therefore concludes that the self-determination argument cannot support a liberty right to exclude either, at least not when states implement

[42] This summary only captures the part of Wellman's argument that is most relevant here. Wellman also argues that states have claim rights against interference with their immigration law enforcement. However, my argument does not hing on this claim.

[43] On Wellman's account, the value of collective self-determination supports a right to implement many immigration restrictions that are substantively unjust, at least according to Hidalgo's specific brand of cosmopolitanism, cf. Wellman (2008, 116–17). Wellman expresses this point in terms of a distinction between deontic and consequentialist considerations, as he operates with a perfect duty concept of justice.

unjust immigration policies.[44]

One problem with this objection is that liberty rights are not equivalent to moral permissions. A liberty to Φ is the absence of a *directed* duty not to Φ, while a permission to Φ is the absence of *any* duty not to Φ (see Sreenivasan 2010). Liberties accordingly describe what we owe to each other, while permissions describe what we ought to do all things considered. At least conceptually, it is therefore entirely possible that states have a liberty right to implement impermissible or unjust immigration restrictions.[45] Far from committing a category mistake, proponents of the self-determination argument are defending a perfectly coherent claim, namely that the value of collective self-determination routinely defeats the reasons that support the prima facie right to global freedom of movement.

The plausibility of the self-determination argument naturally remains contested.[46] So, Hidalgo may simply insist that this argument generally fails, so that states never have a self-determination based RTE. However, Hidalgo would then reintroduce the unconditional libertarian argument for resistance at the border, so the objections outlined above would come back into play. For the purposes of evaluating the conditional libertarian argument, I will therefore take for granted that states normally have a self-determination based RTE, at least when they enforce substantively just immigration restrictions. In other words,

[44] The relevant passage reads: "Self-determination is a claim-right against interference. But adherents of the self-determination argument want to show that states have liberty-rights to exclude. A liberty-right is a moral permission — you have a liberty-right to watch television, say, just in case it's morally permissible for you to watch television. So, if states have liberty-rights to exclude immigrants, then it would be permissible for states to exclude them" (Hidalgo 2019b, 54). While this is the most explicit passage, Hidalgo equates moral permissions and moral liberty rights throughout his discussion.

[45] At least conceptually, Hidalgo's (2019b, 54) claim that "if states have liberty-rights to exclude immigrants, then it would be permissible for states to exclude them" is therefore incorrect. Moreover, the RTE here specifically denotes a liberty from duties that correspond to *defensible* rights, and it is certainly possible that states have a liberty right to exclude in this sense even if their immigration policies are morally objectionable.

[46] For critical discussions of the self-determination argument, see Fine (2010), Cole (2011), and van der Vossen (2015).

I take for granted that the value of collective self-determination normally defeats the reasons that support a prima facie right to global freedom of movement when states implement just immigration policies. Accordingly, my question is whether we should accept Hidalgo's claim that the self-determination argument cannot support a liberty right to enforce unjust exclusions, assuming that it usually can support a liberty to enforce just exclusions.

Hidalgo's discussion already highlights why this claim seems implausible. Hidalgo rightly points out that the value of collective self-determination may support a right to make certain decisions, but cannot justify specific exercises of this right (2019b, 54).[47] But this observation cuts both ways, as the unjustified exercise of a right to make certain decisions need not undermine the existence of the right either. According to the self-determination argument, citizens of legitimate states need a "morally privileged position of dominion over their self-regarding affairs" (Wellman 2008, 114), and this morally privileged position is partly constituted by a liberty right to implement and enforce the state's immigration policy. However, if this right was restricted to the choice of immigration policies that are just according to Hidalgo's own account, then this right would effectively be reduced to a right to choose immigration policies that are fully justifiable from an impartial perspective. In a case like Suboptimal Exclusion, the Utopians' realm for autonomous collective decision-making would then essentially disappear, as including Adam is, by assumption, the only justifiable decision.[48] But if the value of collective self-determination is important

[47] In the terminology suggested by Yong, Hidalgo insists that the value of collective self-determination can only ground a *legitimacy right* to exclude, but cannot ground a *justification right* to exclude, see Yong (2017, 463). Hidalgo then equates liberty rights with Yong's justification rights, and accordingly concludes that the value of collective self-determination cannot justify a liberty right to exclude. While I agree with Hidalgo's assertion that collective self-determination cannot ground a justification right to exclude, I reject the identification of justification rights with liberty rights to enforce immigration restrictions.

[48] Akhtar (2023, 9–10) argues that this would not be a problem from the perspective of collective self-determination if states still have a sufficient range of permissible options available. However, given Hidalgo's highly demanding account of the justice of immigration policies, there is no reason to assume that states will

enough to restrict migrants' prima facie rights to global freedom of movement when states adopt fully just immigration policies – which I assume here – then it seems exceedingly unlikely that this value *never* grounds a right to implement less than fully just restrictions.[49]

The broader point here is that the reasons that determine the justice of immigration restrictions are, on Hidalgo's account, primarily outcome-oriented. They concern the effects of such restrictions on the morally significant interests of migrants on the one hand, and the citizens of destination states on the other. However, the reasons that are usually invoked to justify the RTE – collective self-determination, ownership of territory, and functionalist concerns – are primarily process-oriented. They indicate that we ought to let states decide whom to admit to their territory, even if those decisions will sometimes be morally objectionable. Hidalgo is right to insist that these process-oriented reasons cannot render immigration restrictions justified in the outcome-oriented sense. However, the observation that immigration restrictions are not justified in this outcome-oriented sense does not necessarily undermine these process-oriented reasons either. If we accept Hidalgo's brand of cosmopolitanism, we should therefore not specify the RTE as a right to enforce only just immigration restrictions.[50]

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generally have a range of permissible options available. To the contrary, Hidalgo's view suggests that states are required to adopt whichever policies are better than all alternatives, taking all relevant moral considerations into account. So, states would only be entitled to choose between options that are equally good all things considered. In my view, such limited room for choice would not be sufficient for collective self-determination in any meaningful sense.

[49] Note that Wellman would not say that Adam's suboptimal exclusion is unjust or impermissible, but would instead describe his exclusion as suberogatory, as he reserves the terms 'unjust' and 'impermissible' for actions or policies that violate other people's defensible rights, cf. Wellman (1999). However, many IRs that are merely suberogatory on Wellman's account would be genuinely unjust on Hidalgo's account, so my point stands despite this terminological complication.

[50] Freiman and Hidalgo (2022, 282–83) acknowledge that pre-institutional property rights can sometimes also justify the RTE. Their libertarian view presumably also implies that states sometimes have a right to unjustly exclude, as libertarians routinely emphasize that proprietors are entitled to use their resources in ways that cannot be justified from an impartial perspective, cf. Otsuka (2003, 119) and Vallentyne (2006). Like many libertarians, Hidalgo (2019b, 49) ultimately

Forfeiting the RTE

In his earlier article, Hidalgo argues that "states that impose unjust immigration restrictions are liable to resistance" because they *forfeit* their rights to collective self-determination (2015, 470).[51] To evaluate this claim, we must briefly consider the mechanics of forfeiture. Most forfeiture theorists agree that forfeiture usually results only from the (threatened) transgression of moral rights.[52] In Kimberley Ferzan's words, agents who transgress moral rights commit "normative land grabs", and the forfeiture-mechanism restores the "normative balance" between victim and perpetrator (2016, 240).[53] So, we must ask whether Adam suffers a (threatened) rights-transgression here that would explain the forfeiture of Utopia's RTE.

At this point, it would obviously be circular to insist that Utopian officials transgress Adam's right to global freedom of movement, as we are currently asking whether Adam even has such a right. The forfeiture argument therefore only gets off the ground if Utopian officials transgress some other right of Adam's. Presumably, this transgression would concern a specific *right to immigrate* to Utopia, rather than a general pre-institutional right to freedom from coercive interference.[54]

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rejects an ownership-based defense of immigration restrictions. However, his rejection of the RTE assumes that immigration restrictions are not supported *unanimously* by the excluding state's citizenry, and this assumption is, by design, not met in Suboptimal Exclusion.

51 Hidalgo makes this point with respect to self-determination-based claim rights against interference with the enforcement of immigration laws. But his argument implies that states also forfeit their self-determination-based liberty rights, as he insists that self-determination-based reasons are entirely "extinguished" when states enforce unjust restrictions, cf. Hidalgo (2015, 469).

52 On rights-transgressions as a necessary condition for forfeiture, see also Goldman (1979), Boonin (2008, 105), Alm (2019, 338–40), and Kolodny (2023, 413). This idea goes back, at least, to Ross ([1930] 2002, 60–61). For a possible exception to the view that forfeiture typically only results from rights-transgressions, see McMahan (2009, 38). For a brief skeptical discussion of the possibility that forfeiture may not be tied to rights-transgressions, see Wellman (2012, 373, n.3).

53 For a closely related understanding of forfeiture, see Rodin (2014, 288).

54 My distinction between general rights to freedom of movement, understood as rights against coercive interference, and specific rights to immigrate to another state resembles Blake's (2020, 97–103) distinction between *negative* and *positive* rights to immigrate.

Do unjustly excluded migrants like Adam have such a right?

I see no reason to think so, at least not if we accept Hidalgo's view that immigration restrictions are unjust whenever they have negative net effects on morally significant interests. From this broadly welfarist perspective, there is no obvious reason to assume that unjustly excluded migrants generally have moral rights to admission. Welfarist considerations may establish that restrictions are *impersonally wrong*, because they are incompatible with the balance of morally salient reasons. But these considerations cannot straightforwardly establish that migrants are *personally wronged* by their exclusion. After all, moral rights and their corresponding duties describe moral relationships, they are *relational* or *second-personal* moral entities. Moral reasons, by contrast, are not immediately relational or second-personal, nor do the kinds of considerations Hidalgo primarily invokes – values and interests – describe moral relationships. Some additional argument is therefore needed to derive rights to admission from the premise that the balance of morally relevant reasons favors admitting migrants like Adam. Hidalgo does not provide such an argument, and it is not clear what this argument might even look like. Let me emphasize here that I actually agree with Hidalgo that states generally ought to open their borders if doing so promotes human well-being.[55] However, by itself this view does not support the suggestion that states forfeit their RTE whenever they implement immigration restrictions that have, on balance, morally detrimental consequences.[56]

In sum, the conditional libertarian argument for resistance at the

[55] I say "generally" because I am more willing than Hidalgo to grant states some room for partiality towards their own citizens. I discuss this point in more detail in the second chapter of this thesis.

[56] Other theorists also argue that some immigration restrictions are morally unjustifiable even if their enforcement would not transgress the moral rights of migrants. Blake, for instance, defends this conclusion on virtue ethical rather than consequentialist grounds. He argues that states often fail to exhibit the political virtue of *mercy* when they adopt restrictive immigration policies, which grounds "obligations not simply to respect rights, but also to do some things that involve taking care of other people, and which prohibits states from standing on their rights when doing so would be"cruel, callous, vicious, petty, and so on" (2020, 8).

border is no more convincing than the unconditional libertarian argument, at least if we accept Hidalgo's unusually demanding cosmopolitan account of justice in migration. The case of Adam's suboptimal exclusion illustrates the implausibility of the claim that migrants can resist their exclusion in self-defense whenever their exclusion cannot be justified from an impartial perspective. Unless we already take for granted that migrants have unrestricted rights to global freedom of movement, Hidalgo's arguments accordingly fail to show that unjustly excluded migrants can generally resist immigration officials in self-defense.

Hidalgo's account of justice in migration is, of course, unusually uncompromising. This observation naturally raises the question whether the Defensive Argument is more plausible if we accept a less radical open borders view. It seems more likely, after all, that migrants suffer a rights violation when they are unjustly excluded if the demands of justice in migration are less stringent. Of course, I cannot discuss every relevant theory of migration justice here, nor is this the place to defend my own account. In the next step, I therefore generalize my results to two representative types of views in the migration justice literature, which are based, respectively, on egalitarian and sufficitarian accounts of justice in migration.

5.3 GLOBAL EQUALITY AND OPEN BORDERS

The second major line of argument for the claim that justice requires much more open borders appeals to egalitarian accounts of global distributive justice, rather than to negative liberty rights. Global egalitarians argue that justice requires the global equalization of certain morally salient goods. For the purposes of this discussion, I take these goods to be opportunities, as one particularly influential argument for open borders holds that immigration restrictions are generally unjust because they prevent disadvantaged people from accessing opportunities abroad (cf. Carens 1987).[57] The assumption that immigration

[57] More recent egalitarian arguments for much more open borders include Cole (2011), Carens (2013), Bertram (2018), and Holtug (2020). Bertram (2018, 100) adds a strong procedural dimension to the egalitarian case for open borders,

restrictions generally perpetuate global inequalities is, of course, far from trivial (cf. Pogge 1997; Holtug 2020). But for present purposes, I take this assumption for granted.

Consider now another variation on Ideal Exclusions:

> Inegalitarian Exclusion: After successful labor market reforms, Utopia surpasses Paradise economically. Utopians now enjoy substantially higher living standards than Paradisians, whose living standards remain unchanged. In fact, Utopia is now so far ahead economically that Paradise has no realistic chance of catching up. Utopia still maintains its closed borders regime and therefore excludes Eve, who is seeking employment in Utopia.

From the egalitarian perspective, Eve's exclusion is unjust, as it perpetuates global inequalities. I assume that global egalitarians will generally agree on this point, although some may find it necessary to modify the example slightly to reach this result.[58] If Eve's exclusion is unjust, does it follow that she can resist Utopian officials in self-defense?

To answer this question, we must again determine whether Utopia has a right to exclude migrants like Eve. To answer this question, I first argue that Utopia's RTE, properly specified, covers Eve's exclusion. Afterwards, I argue that Utopia does not generally forfeit its RTE by excluding migrants like Eve.

Specifying the RTE

The cosmopolitan egalitarian ideal of global justice is highly demanding, as it requires the creation of a global institutional infrastructure to

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and he accordingly suggests that migrants can resist their exclusion in self-defense *even if* their exclusion is substantively just, as long as their exclusion has been decided upon through unjust procedure. A detailed reconstruction of Bertram's argument lies beyond the scope of this chapter, but I believe that the considerations outlined here also undermine his claims concerning self-defense at the border.

[58] One might object here that Eve's exclusion is not really *unjust* but merely *less than fully just*, a distinction emphasized in Estlund (2016, 21). However, that is not the claim usually made by proponents of the cosmopolitan egalitarian argument for open borders.

ensure that individuals are not structurally disadvantaged in virtue of their morally arbitrary characteristics, like their place of birth or the citizenship of their parents.[59] And this aversion to morally arbitrary inequalities clearly also motivates the egalitarian case for open borders. However, the idea that states only have a right to enforce just immigration restrictions seems implausible precisely because the egalitarian ideal is so demanding.

A key point to note here is that the cosmopolitan egalitarian ideal is primarily outcome-oriented; it condemns exclusionary immigration policies as unjust if and only if these policies effectively contribute to relevant global inequalities. Moreover, in a world as unequal as ours, we should expect that most immigration restrictions will contribute to such inequalities to some extent, even though this contribution may sometimes be fairly minor. That is, after all, precisely the point that proponents of the egalitarian case for open borders emphasize. However, in the previous section I already emphasized that the reasons that are usually invoked to support the RTE are largely process-oriented, not outcome-oriented. According to advocates of the RTE, these reasons reflect the value of collective self-determination, citizens' property-like entitlement to "their" territory, or the functionalist idea that norms that entitle states to decide whom to admit will promote justice in the long run. If we accept that these considerations are usually weighty enough to defeat migrants' prima facie rights to global freedom of movement when states implement just immigration restrictions – which I assume here, again, to avoid returning to the libertarian case for resistance at the border – then it seems highly unlikely that these considerations will never support a right to implement restrictions that fall short of the demanding egalitarian ideal.[60] To the contrary, if we accept the

[59] But this idea is still less demanding than Hidalgo's brand of cosmopolitanism, as it only requires the global abolition of structurally disadvantaged social positions with respect to a limited set of justice-related goods, but not the adoption of institutional arrangements that are, on net, justifiable from an impartial perspective. Adam's exclusion, for instance, may be fully just according to the egalitarian ideal despite being unjust according to Hidalgo's view.

[60] Note that prominent advocates of the egalitarian case for open borders, like Carens (2013, 270–71), seem to reach similar results.

significance of these process-related reasons, then we should expect that these reasons support a right to unjustly exclude in a broad range of cases in which restrictions are unjust, but not so unjust that the moral significance of the injustice drowns out these reasons.

These general remarks clearly cannot tell us whether Utopia has a right to exclude Eve in particular. However, this conclusion seems plausible enough, as the injustice in Inegalitarian Exclusion is exceedingly mild, even from the egalitarian perspective. After all, Paradisians like Eve still enjoy standards of living here that were deemed perfectly acceptable before Utopia implemented its economic reforms. Moreover, Utopia's reforms have not harmed anyone, but have merely increased the overall wealth available, though in a manner that has created distributive inequalities. If the reasons that support Utopia's RTE have any significant weight, then it accordingly seems likely that Utopia has a liberty right to unjustly exclude Eve. In this case, Eve is not entitled to resist Utopian officials in self-defense, as she does not even have a pro tanto right to cross the Utopian border.

Forfeiting the RTE

At this point, one might insist that Utopia still *forfeits* the right to exclude Eve through the coercive enforcement of her unjust exclusion (cf. Bertram 2018, 108). The following argument seems to support this assertion: If Utopia's immigration restrictions are structurally unjust according to the true egalitarian principles of global justice, then it follows that Eve has a moral right to immigrate to Utopia (Premise 1). Utopian officials therefore threaten to transgress this right, and, as a result of this rights-transgression, Utopia forfeits the right to exclude Eve (Premise 2). In consequence, Utopian officials also threaten to transgress Eve's pre-institutional right to freedom of movement – which now amounts to a pro tanto right rather than a mere prima facie right – so she can resist her exclusion in self-defense. This argument is initially compelling, but on closer inspection its first premise is highly questionable.[61]

[61] The second premise of this argument is also questionable due to the so-called *suitability problem* in forfeiture theory, which arises because rights-violators

To some, it may seem obvious that Eve must have a moral right to immigrate to Utopia if the true principles of justice require open borders. This premise follows, for instance, from the influential view that moral rights are themselves among the distribuenda of justice, so that individuals necessarily have rights to all the resources or opportunities that they ought to receive as a matter of justice.[62] If this view is correct, and if justice really requires the global equalization of opportunities, then Eve must have a right to immigrate to Utopia. However, I do not think that this view is sustainable, at least not if we understand rights as claims that correspond to moral duties on the part of specific other agents.

In my view, this close link between justice and moral rights reflects an implausible picture of the relationship between the demands of justice, understood in structural and evaluative terms, and agential deontic requirements. As Estlund points out, accounts of what a structurally just world would look like do not immediately tell us how we might get to such a world, nor do they tell us how specific agents are required to act under non-ideal conditions. At most, such accounts entail the existence of certain "plural requirements" to bring about justice, which apply to sets of agents – for instance the collective of all states and international organizations – but which do not automatically transfer to specific agents in these sets – such as individual states like Utopia (see Estlund 2020, ch. 12).[63] The assumption that Eve's

typically do not forfeit *all* their own rights. If I steal your wallet, for instance, I presumably do not forfeit my rights against torture, see Lang (2014, 49) and Ferzan (2016, 104). Even if we accept that Eve has a moral right to enter Utopia, the conclusion that Utopia forfeits its RTE by transgressing this right accordingly does not necessarily follow. Forfeiture theorists have, thus far, not provided a satisfying solution to the problem of suitability, see Kaufman (2023, 319). Moreover, this problem has not been addressed at all yet in the literature on resistance at the border. The specific forfeiture claims made in this literature therefore remain, at best, speculative.

62 Quong is one of the most prominent advocates of this view, which also informs his account of the the morality of self-defense, see Quong (2020, 4–5).

63 Note that the conceptual and normative gap between justice in the structural sense and agential rights and duties is the reason why Young's (2010, 46) suggestion that certain structural injustices may arise and persist without agential wrongdoing is coherent in the first place. For an in-depth discussion of

exclusion is unjust therefore does not entail that Utopia is required to admit her, nor does it entail that Eve has a moral right to admission, except in some unspecific manifesto sense.

Estlund's point is, of course, not that individual agents, including corporate agents like states, are free to ignore the demands of justice. To the contrary, he emphasizes that specific agents often have moral duties to promote structural injustice and rectify injustices that are *grounded* in the ideal of justice, and which he calls "duties of superintendence" (2024, 336).[64] Moreover, these duties may be owed to specific other agents, in which case I say that they correspond to *rights of superintendence*.[65] Estlund's point is that we must engage in further moral reasoning to determine *how* specific agents ought to promote the ideal of justice. To determine whether Eve has a justice-based right to immigrate to Utopia, we must therefore ask whether Utopia has duties of superintendence to admit Paradisian migrants, and whether these duties are *owed to* migrants like Eve.

To answer these questions, we need a theoretical framework for assigning duties of superintendence. Two such frameworks are particularly influential, which were originally proposed by David Miller (2007) and Iris Marion Young (2010). Both frameworks introduce the notion of forward-looking *political responsibilities* to mediate between the justice of social structures and agential duties of superintendence, and to systematize the factors that bear upon the appropriate assignment of such

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this point, see Estlund (2024).

64 In Estlund's terminology, Rawls's natural duties are one category of such duties of superintendence, see also Rawls (1999a, §19) and Scanlon (2016, 11). However, Rawls's suggestion that all agential duties to promote justice are mediated by institutions has been rejected by theorists who argue that agents also have duties to promote justice directly, e.g. Cohen (1997) and Murphy (1998). At present, I take the mainstream view to be that individual agents can also have duties of superintendence to directly promote just social structures that are not inherently tied to the maintenance or creation of just institutions.

65 Estlund does not speak of "rights of superintendence", and does not discuss the question whether duties of superintendence generally are directed or can be directed. I introduce this terminology, despite its unfortunate lack of elegance, to make clear that I am specifically concerned here with moral claims that agents hold against each other which correspond to moral duties grounded in the value of justice, understood in structural terms.

duties.[66] But as Miller's framework is more influential in the migration literature, I focus on it here.

Is Utopia politically responsible for remedying the unjust distribution of opportunities that has resulted from its labor market reforms? Miller (2007, 100–104) identifies six main factors that determine the responsibilities of particular agents. However, his model provides mixed results here:[67] Utopia is presumably not (i) *morally responsible* for this injustice, as the implementation of successful reforms involves no culpable wrongdoing. Utopia does not (ii) *benefit* from this injustice either, nor, we may assume, do Utopia and Paradise share close bonds of *community* (iii). Utopia does have (iv) *outcome responsibility* and (v) *causal responsibility* for unjust inequalities that result from its reforms, although these are shared with Paradise (assuming that Paradise could have implemented similar reforms). Finally, Utopia presumably has the (vi) *capacity* to remedy this injustice, by opening its borders or by transferring resources directly. Overall, it therefore seems plausible that Utopia has some forward-looking responsibility here, although this responsibility may be rather limited.

Does Utopia's responsibility ground duties of superintendence to admit Paradisian migrants like Eve? This is not obvious either, as theorists of political responsibility highlight that we must engage in further context-sensitive moral reasoning to derive specific duties from a given distribution of responsibility (cf. McKeown 2021, 8). A broad range of considerations will be relevant here, including mundane considerations

[66] On the prominent role of these two frameworks, see also Brock and Hassoun (2023, sec. 10.2). The precise relationship between responsibilities for justice and agential duties to promote justice or rectify injustice often remains implicit. In Miller's work, this relationship is more transparent, and Miller has confirmed my reading of his view in personal communication. In Young's work, this relationship is less clear, as certain passages indicate that she uses the concepts of "responsibilities" and "duties" interchangeably, for instance her discussion of the positions of Murphy and Cohen, see Young (2010, 64–74). However, taking Young's broader argument into account, it seems fairly clear that she does not identify responsibilities with duties, and that responsibilities play the mediating role in her account outlined above. For another reading of Young along similar lines, see Sangiovanni (2018, 467).

[67] See also Miller (2005a) for a detailed exposition of his account of the appropriate distribution of political responsibilities.

of strategy. If a premature open borders policy results in a populist backlash, then Utopia may, for instance, actually be required *not* to open its borders right now. And if Utopia could adopt more effective strategies for securing global justice, for instance by redistributing resources directly, then the pursuit of these alternative strategies may be required instead (cf. Pogge 1997).

Let us still assume that Utopia has duties of superintendence to admit Paradisian migrants. Are these duties *owed to* Paradisian citizens? That is, do they correspond to moral rights? Surprisingly little has been written on the directedness of duties of superintendence.[68] Some theorists suggest that political responsibilities are themselves directed, that they are the kinds of things that agents owe to one another (Neuhäuser 2014, 234). But few discussions of political responsibility have taken up this suggestion, and it remains unclear how we might identify the agents to whom specific responsibilities or duties of superintendence are owed.[69]

These considerations show that we must perform a series of demanding argumentative steps to determine whether migrants like Eve have a right to immigrate, even if we accept that immigration restrictions perpetuate unjust global inequalities. My discussion thus shows that we cannot simply take for granted that migrants have moral rights to admission whenever their exclusion is substantively unjust. The suggestion that Utopia must forfeit its RTE because Utopian officials violate Eve's right to immigrate therefore remains purely speculative, and should accordingly be rejected.

My discussion also undermines a related argument that might be invoked to show that Eve can resist Utopian officials in self-defense. This

[68] Two recent surveys of the literature on responsibilities for justice do not even mention the directedess of such duties, cf. Sankaran (2021) and McKeown (2021).

[69] Neuhäuser (2014, 234) acknowledges that his concept of responsibility may not be representative of the way the concept is generally used in the literature on responsibilities for justice. Note that some authors speak of "relational responsibility" to capture the idea that certain forms of responsibility are grounded in specific relationships, without claiming that the responsibilities themselves have a relational structure, e.g. Gädeke (2021, 185).

alternative argument holds that Eve is directly entitled to defend her specific right to immigrate to Utopia, rather than her general negative right to freedom of movement.[70] The problem with this direct argument for a right to defensive resistance is that it not only presupposes that Eve has a specific right to immigrate to Utopia, but also that this right is defensible. In other words, this argument presupposes that Utopia has a directed duty of superintendence to admit Paradisian migrants, and also that this duty is enforceable through violent means. This direct argument for resistance at the border is therefore even more controversial than the indirect forfeiture-based argument. In my assessment, the idea that migrants like Eve have defensible rights to migrate in order to improve their economic opportunities seems deeply implausible, even if we accept that justice requires the global equalization of opportunities. After all, the Utopian state has not actually harmed Paradisian citizens in Inegalitarian Exclusion, but has merely increased the overall wealth available. Indeed, if egalitarian theories of justice in migration had the implication that all relatively disadvantaged individuals worldwide have defensible rights to migrate in pursuit of economic opportunities, then this result would strike me as a *reductio ad absurdum* of the egalitarian vision.[71] In sum, the Defensive Argument therefore still fails if we accept mainstream egalitarians accounts of justice in migration.

5.4 GLOBAL SUFFICIENCY AND REFUGEES

Global sufficitarians argue that justice demands that all have enough, an idea that is commonly spelled out in the language of human rights. From the sufficitarian perspective, justice mainly requires the admission of refugees whose human rights are under threat unless they are granted

[70] Similar arguments are occassionally discussed in the literature on redistributive wars. For an overview of this literature, see Peperkamp (2023). I do not engage with this literature here, as it largely operates in a sufficitarian human-rights based framework.

[71] In defense of an analogous assessment in the debate over global justice and redistributive wars, see Valentini (2016a).

sanctuary or asylum.[72] In the migration justice literature, this view is often combined with a needs-based conception of human rights, according to which human rights are moral rights that protect the conditions for a minimally decent life (cf. Miller 2016b, ch. 5). From this sufficitarian perspective, the Defensive Argument may initially seem compelling. Surely, refugees can resist immigration officials in self-defense if doing so is necessary to protect their own human rights. However, in this section I argue that even refugees cannot resist their exclusion in self-defense in a non-trivial range of cases.

One of the cases Hidalgo uses to motivate the Defensive Argument provides a useful starting point here:

> Restrictions: "There is a refugee crisis in Dystopia. A large number of refugees want to immigrate to neighboring Utopia to escape violence and economic collapse. But Utopia only admits a few of these refugees and the human rights of the excluded refugees continue to lack protection (other countries also refuse to admit them). If Utopia admitted these refugees, this would impose no net cost on Utopian citizens."[73]

Hidalgo argues that the refugees in Restrictions can resist their exclusion in self-defense, and I agree with this assessment.[74] Moreover, Restrictions captures an important type of real-world case, as many states in the Global North could arguably admit many more refugees without incurring substantial costs. However, the admission of refugees

[72] For the purposes of this discussion, I adopt a humanitarian definition of refugees, see Gibney (2018). Proponents of this sufficitarian view typically argue that justice permits the exclusion of most migrants *unless* they are refugees whose basic human rights are under threat, e.g. Wellman (2011, ch. 6), Miller (2016b, ch. 5) and Blake (2020, ch. 5). For an extended critical discussion of the idea that the claims of refugees differ categorically from the claims of other migrants, see Oberman (2025).

[73] Hidalgo (2015, 468). I adjusted the labels for the states to my naming convention.

[74] Hidalgo then goes on to generalize this result to all unjust immigration restrictions. It should be clear that a case as extreme as Restrictions does not provide reliable evidence in support of the claim that all unjustly excluded migrants can resist their exclusion in self-defense.

often does impose substantial burdens on receiving societies, so we should also consider the following case:

> Restrictions*: Like Restrictions, except now Utopia is a small developing nation that could not admit all refugees arriving at its borders without risking political and economic instability.

Restrictions* also describes an important type of real-world case, as the majority of refugees today seek sanctuary in states in the Global South that are still building strong institutions and economies.[75] But in this case, it is less clear that Dystopian refugees can resist Utopian officials in self-defense. In fact, it is not even clear that the Utopian state is doing anything wrong here.

The idea that states might sometimes be entitled to exclude refugees may initially seem suspect. However, this idea is broadly accepted in the literature, as "it is certainly reasonable", in Carens's words, "for a state to give priority to securing the basic rights of its own citizens and residents, over *comparably urgent basic rights of outsiders*" (2013, 219, emph. added). The real controversy here therefore concerns the conditions under which states can permissibly exclude refugees.

In the cited passage, Carens suggests that human rights trump other concerns, so that states may never prioritize the non-vital interests of their own citizens over the human rights of foreigners. He accordingly argues that states can only permissibly exclude refugees when the human rights of their own citizens come under threat. Effectively, this is only the case when states risk an imminent political or economic collapse if they admit additional refugees. This condition is presumably not met for any state in the Global North, although it is arguably met for certain states in the Global South (see Carens 2013, 218–21). The powerful moral appeal of this position is clear, and I take this to be the most prominent view in the literature.

[75] See the "Mid-Year Trends 2024" report of the UNHCR, available at: https://www.unhcr.org/mid-year-trends-report-2024 (accessed May 10th, 2025).

The most prominent countervailing view is probably defended by Miller (2016b, ch. 5; 2023). According to Miller, states are entitled to exclude refugees as soon as they shoulder their *fair share* of the global refugees protection burden, even if they have the capacity to admit additional refugees without endangering the human rights of their own citizens. More precisely, Miller grants that states still have humanitarian duties to admit additional refugees once they do their fair share to protect refugees (2005c, 76; 2020, 19).[76] However, these humanitarian duties do not correspond to moral rights, and are therefore routinely outweighed by the obligations that states have to prioritize the interests of their own citizens.[77] The precise implications of Miller's view naturally depend on the calculation of the relevant fair shares of the global refugee protection burden. However, it seems reasonable to assume that many states in the Global South already take on more than their fair share of this burden, while most states in the Global North fail to do so. Miller's view is therefore less radical than it is commonly portrayed, but it potentially still allows states to exclude refugees in a broader range of cases than the view articulated by Carens.

Personally, I favor an intermediary view. Like Carens, I believe that states may not prioritize the non-vital interests of their own citizens over the human rights of foreigners. However, I do not believe that states are required to accept *equal levels of risk* for their own citizens and for foreigners. In this respect, I believe that states may show a substantial degree of partiality towards their own citizens.[78] Accordingly, states can permissibly close their borders long before the human rights of their own citizens are *equally insecure* as the human rights of refugees seeking admission. This observation is particularly relevant, again, for states in

[76] Miller characterizes these duties as "duties to take up the slack", as they are duties to "secure the basic rights of people when others have failed in their responsibility" (2005c, 74).

[77] For an insightful critical discussion of Miller's view, see Owen (2016).

[78] This is not the place to defend this position in detail, but I expect that only the most committed cosmopolitans will disagree. Given that the core function of modern states is the protection of their citizens' human rights, I find it difficult to imagine a political morality that accepts the existence of states but does not entitle them to prioritize the human rights of their own citizens to some extent.

the Global South that already struggle to protect the human rights of their own citizens. I suspect that such states may routinely be entitled to exclude refugees, especially if the excluded refugees face uncertain statistical threats.[79] Granted, the precise level of risk that states must accept before they can permissibly exclude additional refugees is hard to determine. But it is worth noting that many citizens of the Global South already face levels of risks to their human rights that most citizens of the Global North would likely find entirely unacceptable.

Note that these three views plausibly converge when we consider states in the Global South that already do their fair share to protect refugees, and that cannot admit additional refugees without incurring significant risks of institutional instability. For the purposes of this discussion, I accordingly focus on these uncontroversial cases, which I will refer to as *tragic cases* (taking up a suggestion from Miller 2016b, 93). In such tragic cases, states can permissibly exclude refugees even though the exclusion of these refugees is profoundly unjust, as the human rights of these refugees will go unprotected if they are not admitted. Can refugees resist their exclusion in self-defense in such tragic cases?

To answer this question, we must determine whether the permissible exclusion of refugees in such tragic cases constitutes an unjust threat. I do not think so, but this is certainly not obvious, as there are four main theoretical options for how we might understand these cases. I address these options in turn to explain why I do not think that refugees can resist their exclusion in self-defense in such tragic cases.

According to the first interpretation of such tragic cases, states and refugees find themselves in a morally asymmetrical conflict in which refugees effectively play the part of justified aggressors, as excluding states have claim rights against unauthorized border-crossings. Miller

[79] Like Miller, I believe that there are also cases in which states are not required to admit additional refugees as a matter of justice, but nonetheless have humanitarian duties to admit additional refugees. But to avoid undue complication, I focus on cases in which the exclusion of additional refugees is fully permissible. Even in such cases, the admission of additional refugees may still be supererogatory, especially if the citizens of excluding states democratically mandate their states to admit additional refugees at substantial risk to themselves.

seems to defend this view in a recent article, although he also emphasizes that refugees have a necessity-based justification for *infringing* their duties not to immigrate without authorization (Miller 2023; see also Mancilla 2020).[80] On Miller's account, refugees can therefore permissibly resist their exclusion if they must do so to protect their human rights. But they cannot resist their exclusion *in self-defense*, as they are, technically, in the role of justified aggressors.

In my view, this interpretation is not convincing because I fail to see why states might have claim rights vis-à-vis refugees against unauthorized border-crossings. Miller's own account builds on natural duties of justice to obey foreign immigration laws, but others have already pointed out that it seems dubious that refugees have natural duties to support institutions that do not effectively protect their human rights (see Lee 2016; Hidalgo 2019b, 124). Of course, there might be other arguments for such claim rights, for instance based on collective self-determination or neo-Lockean theories of territorial rights. But I believe these arguments also fail in the case of refugees, although I will not defend this assessment here, as I am primarily arguing against proponents of the Defensive Argument who presumably reject the existence of such claim rights on independent grounds.

According to a second interpretation of such tragic cases, states and refugees find themselves in a morally asymmetrical conflict in which states justifiably infringe the rights of refuges on lesser-evil or necessity grounds. More precisely, states might infringe the negative rights of refugees against interference with their freedom of movement, or they might infringe the human rights of refugees that will go unprotected unless they are admitted. If this interpretation is correct, then states take the role of justified aggressors, against whom refugees can resort to defensive force.

This second interpretation strikes me as equally unconvincing. In Section 5.2, I already rejected the libertarian assumption that individu-

[80] Miller does not make explicit whether the duties of refugees to accept their exclusion are directed and *owed to* excluding states. But taking into account Miller's broader theory of the legitimacy of immigration restrictions, this seems to me to be the most plausible interpretation of his argument.

als have unrestricted negative rights against coercive interference. And it seems implausible to me that refugees should have rights against being stopped at the border of states which cannot admit them without imposing undue burdens on their own citizens. Moreover, I do not think that excluding states infringe the human rights of refugees in such cases either. Recall that I operate here with Miller's influential conception of human rights. For Miller (2005c, 73–77), human rights are important moral goals, which *ground* various Hohfeldian rights and duties depending on the context. However, one of Miller's central points is precisely that the human rights of refugees do *not* ground Hohfeldian claim rights against excluding states in tragic cases, and in that respect I agree with Miller's analysis.

I am, of course, not denying that refugees often face unjust threats in tragic cases. Consider Hidalgo's (2015, 456) example of Mahmoud, a Libyan refugee who is trying to enter Spain from Morocco. If Mahmoud stays in Morocco, his human rights are threatened by criminal gangs and corrupt police. Still, Spanish immigration officials prevent Mahmoud from entering Spain. Let us assume, for the sake of the argument, that this is a tragic case in which Spain cannot admit additional refugees without imposing unreasonable risks on Spanish citizens. Under that assumption, my view is that Mahmoud does not have a right to cross the Spanish border, so that he cannot resist his exclusion in self-defense. But Mahmoud clearly still faces unjust threats at the hands of the criminals and corrupt police in Morocco, and he is fully entitled to resort to defensive force against them.[81] However, in truly tragic cases these threats cannot be attributed to the Spanish state or its officials in any meaningful sense.

According to a third interpretation, excluding states and refugees find themselves in a morally symmetrical conflict in which they justifiably wrong each other, so that both sides can resort to defensive force. This option faces all the objections to both previous interpretations,

[81] Moreover, Mahmoud may, under certain circumstances, have a necessity-justification for harming Spanish officials as a side-effect of defending himself against these threats. But he is then still defending himself against these third parties, while Spanish officials are merely harmed as innocent bystanders.

and it also runs into more general puzzles that have recently been discussed in the defensive ethics literature with respect to symmetrical conflicts of this type (see Mapel 2010; Kershnar 2017). Moreover, I am not aware of any position in the migration ethics literature that suggests this view, so I will not discuss it further.

According to the fourth and, in my view, correct interpretation, excluding states and refugees find themselves in a morally symmetrical conflict in which neither party wrongs the other, so that neither party faces an unjust threat that justifies defensive force. In other words, this interpretation of tragic cases holds that states have liberty rights to try to exclude additional refugees, by force if necessary, while these refugees also have liberty rights to attempt to cross the border, by force if necessary.[82] In my view, this fourth option is the most plausible because the "space of rights" effectively seems to break down under sufficiently non-ideal conditions. As Alec Walen puts it, under such conditions the answer to the question what specific agents may do "is no longer limited by the rights of others" as the "harmonization" of competing claims that rights-based moral reasoning presupposes falls apart (2019, 119). In tragic cases, a Hobbesian state of nature therefore reasserts itself, which is characterized by the universal liberty to resort to force according to one's own best moral judgment.[83] Let me emphasize that my view is not that morality is silent in tragic cases, as I believe that even tragic conflicts are governed, at least, by

[82] Symmetrical conflicts of this kind have received little attention in the defensive ethics literature, but see for brief discussions Steinhoff (2011, 12–13) and Quong (2020, 28–29). Steinhoff and Quong both speak of defensive force in such cases. By contrast, I believe that it is misleading to use the language of self-defense here, as the term "self-defense" is usually used in the literature to denote a specific justification for the use of force that applies only when agents face unjust threats. By assumption, this is not the case in symmetrical conflicts in which both sides have liberty rights to act as they do. Granted, in ordinary language it also makes sense to say, for instance, that someone uses defensive force against a wild animal, even though wild animals cannot pose an *unjust* threat in any interesting sense. However, a more regimented use of language seems appropriate for the purposes of moral theorizing.

[83] With respect to such tragic cases – but only with respect to such cases – my analysis therefore converges with Nagel's (2005) Hobbesian view. I discuss this point in more detail in the second chapter of this thesis.

consequentialist considerations. But our normal deontological categories no longer seem to apply in such cases, so we cannot meaningfully speak of unjust threats or aggressors under truly tragic circumstances. Thus, the deontological logic that underlies most contemporary theories of self-defense does not apply here.

If my analysis is correct, then states have a liberty right to exclude additional refugees in tragic cases, and they can also exercise this liberty permissibly. When immigration officials resort to reasonable force to exclude additional refugees, they accordingly do not pose an unjust threat, as they do not threaten to transgress the defensible rights of these refugees. Moreover, because states are not acting wrongfully when they exclude refugees in these cases, they do not forfeit any of their rights either. In tragic cases, refugees therefore cannot resist their exclusion in self-defense, even though they suffer a profound injustice. The idea that unjust exclusions always warrant defensive resistance is therefore implausible even if we accept a sufficitarian account of justice in migration.

My analysis of these tragic cases and the conclusions I draw from it may raise the following objection: If states cannot admit additional refugees without incurring unacceptable risks to their own citizens – however these risks are determined – then the exclusion of additional refugees is not really unjust. In such cases, the circumstances of justice simply do not obtain, as the condition of moderate scarcity is not satisfied.[84] In cases like Restrictions*, it is therefore misleading to say that an injustice has occurred, except in some purely cosmic sense.

This objection would be convincing if the condition of moderate scarcity was not met globally. If, say, a novel pest were to destroy much of the world's food production, meeting everyone's basic needs may simply not be possible. And I agree that such a situation may not be "unjust" in any interesting sense. The problem in Restrictions* and in the tragic cases I have considered here is, however, not a global lack of resources, but the distribution of these resources, and the fact that the burden of rescuing refugees falls disproportionately on a small number

[84] On the circumstances of justice, see Rawls (1999a, §22).

of overburdened societies. Taking this wider context into account, we can see that refugees in such cases suffer a profound injustice.[85]

In sum, I have argued that states sometimes have a right to exclude additional refugees, namely when they cannot admit additional refugees without imposing undue risks on their own citizens. In such cases, refugees cannot resist immigration officials in self-defense, as these officials are not threatening to transgress their moral rights. Is my view then that these refugees must simply accept their fate? No, outside truly exceptional circumstances, I do not believe that individuals can be required to sacrifice themselves for the sake of others. I therefore believe that refugees are normally entitled to resist their exclusion, even if excluding states can, in tragic cases, justifiably attempt to keep them out. As mentioned above, this assessment is shared even by prominent advocates of the right to limit immigration. My discussion accordingly suggests that resistance at the border will sometimes be permissible *without* being defensive.[86]

5.5 CONCLUSION

In this chapter, I have rejected the claim that migrants can always resist their unjust exclusion in self-defense. My discussion shows that mainstream theories of justice in immigration leave ample room for cases in which migrants are excluded unjustly, but do not face unjust threats at the hands of immigration officials. In fact, there does not seem to be any clear connection between the justice of exclusionary

[85] One may grant here that the refugees in Restrictions* *suffer* an injustice, but one may still insist that their exclusion is not really unjust, because Utopia is not *committing* an injustice by excluding them. After all, Utopia presumably does not have any duties of superintendence here to admit additional refugees. Generalizing this point, one may argue that refugees can resist their exclusion in self-defense whenever states have duties of superintendence to admit them, see for a view along these lines Yong (2018, 470). This view may be correct, although I actually suspect that states sometimes have duties of superintendence to admit additional refugees that do not correspond to defensible rights, so that a failure to discharge these duties does not justify defensive resistance.

[86] I emphasize this point, in part, because it matters *why* resistance at the border is permissible, for instance for the amount of harm migrants can permissibly inflict without violating the proportionality constraint, cf. Steinhoff (2019, 285–89).

immigration policies and the justifiability of defensive resistance at the border. This result undermines the sweeping endorsements of defensive violence against immigration officials found in the literature.

I have also pointed out that resistance at the border can be permissible without being defensive. While I have emphasized this possibility in the case of refugees, my arguments are even compatible with the view that most migrants can permissibly resist their exclusion. However, this possibility does not undermine the relevance of my results. When resistance at the border is genuinely defensive, this has far-reaching implications for excluding states, their officials, and even ordinary citizens. In such cases, states normally ought to refrain from enforcing their unjust policies, while officials ought to quit their jobs or disobey orders in order to avoid complicity in unjust aggression against migrants. Moreover, citizens ought to assist unauthorized migrants in crossing the border, as long as they can do so at reasonable costs to themselves, and they may also be permitted or even required to resist officials in other-defense (cf. Hidalgo 2019b, ch. 7; Sager 2020, 92–99). When resistance at the border is permissible without being defensive, these broader implications do not follow.

In closing, let me return to the broader theoretical implications of this discussion. In the Introduction, I have mentioned that the Defensive Argument implies that states normally cannot legitimately enforce unjust immigration restrictions, because only illegitimate exercises of political power warrant defensive resistance. If this argument had been successful, it would therefore have supported a highly controversial "mere injustice principle", according to which immigration laws are illegitimate as soon as they are unjust, even if the injustice is relatively minor (Yong 2018, 463).

My arguments show that this "mere injustice principle" is implausible, at least if we understand political legitimacy, as some authors suggest, as a *liberty right* to exercise coercive political power (Zhu 2017). This liberty-conception of legitimacy is rather thin, as it does not presuppose the moral authority to make morally binding laws, nor any claim rights against interference with the enforcement of these laws. But this thin conception of legitimacy is still normatively interesting, in part because a liberty right to rule can immunize officials from de-

fensive resistance, and in part because this thin form of legitimacy is a plausible precondition for more demanding forms of political legitimacy. My arguments suggest that states often have the right to legitimately rule over their borders in this thin sense, even if they enforce unjust immigration policies, as I have argued that states often have a liberty right to enforce unjust immigration restrictions.

6

Denizenship and Democratic Equality

ABSTRACT

Democracy is assumed to require the equal political inclusion of denizens, as sustained political inequalities between members of society seemingly undermine the democratic ideal of equal freedom. This assumption is prominently expressed by Walzer's Principle of Political Justice, according to which democratic institutions must attribute equal political rights to denizens in order to sustain their equal protection from domination and the recognition required for free agency. This paper rejects this influential assumption. We argue that denizenship constitutes a social position in which equal freedom can be enjoyed without political inclusion on equal terms to citizens. Many denizens are citizens somewhere else, and enjoy status, rights, and protections in virtue of their external citizenship, which can protect them from domination and provide them with the recognitional basis of self-respect. The cross-border relationships between denizens and their home country, as well as between the host country and the home country, must therefore be considered when evaluating claims to political inclusion. Accepting the democratic legitimacy of the partial political inclusion of denizens allows us to focus on the most pressing political claims, such as those of refugees and stateless persons. Partial inclusion schemes can also make less restrictive immigration policies more rational and desirable for citizens.

CHAPTER 6

INTRODUCTION

According to the latest United Nations Migration Report, approximately 281 million people live outside their country of origin, often for extended periods.[1] Host countries pursue different strategies for politically including these foreign residents, or *denizens*.[2] Countries such as Denmark and Switzerland favour a *partial inclusion* model. They quickly include denizens to some extent in democratic decision-making, for instance through local voting rights, but make full political membership virtually inaccessible. Other countries, such as Canada, favour an *all-or-nothing* model of inclusion: They do not grant partial political rights but encourage denizens to go on a path to citizenship. Many political philosophers share an abiding commitment to "citizen-making" and believe that only the all-or-nothing model is democratically legitimate (cf. Kymlicka 2022, 247; Song 2018, 158; Torresi 2009, 24).[3] By contrast, we argue that the partial inclusion model can also be compatible with democratic commitments, and thereby reject the widely shared assumption that territorial admission must escalate to full political inclusion.

The all-or-nothing model prohibits states from offering prospective migrants territorial admission without a path to citizenship, even if some migrants would gladly accept such offers, and even if such offers

[1] Available at: https://publications.iom.int/books/world-migration-report-2022 (accessed July 16th, 2023). This chapter is co-authored by Suzanne A. Bloks and is included here in its published form, except for several additional notes that reflect only my own views.

[2] Hammar (1990, 12) introduced the terminology of "denizenship" to refer to settled non-citizens whose residence-status is *legally secured*.In line with the current debate, we use the term to refer to settled foreign residents irrespective of their legal status (cf. Benton 2014). Proponents of the all-or-nothing model must posit some threshold for the period of residence after which denizens have a claim to full democratic inclusion, a fairly typical proposal sets it at five years (cf. Carens 2013). We exclude tourists, visiting students or academics, and temporary workers on (non-renewable) short-term contracts from our discussion.

[3] Some argue that denizens must be given the *option* to naturalise (e.g. Owen 2011), whereas others argue for *mandatory* naturalisation (e.g. De Schutter and Ypi 2015).

genuinely provide them with additional options.[4] This prohibition creates a tension between democratic requirements and aspirations of global justice, which comes out clearly in the "numbers-versus-rights trade-off": while increased labour migration may promote global justice, citizen support for it decreases if immigrants are entitled to full political inclusion (Bauböck and Ruhs 2022, 535; Blatter, Michel, and Schmid 2022, 1215; Van Parijs 2022, 609). Our arguments dissolve this apparent tension between democracy and global justice, as we show that territorial admission can legitimately be decoupled from full political inclusion and access to citizenship. Our arguments thereby expand the space of democratically legitimate policy options.

Many republican theorists share a commitment to citizen-making and consider the naturalisation of denizens to be the only way to ensure the equal political status of all members of society.[5] Most influentially, Michael Walzer voiced the concern that the (partial) political exclusion of denizens renders them vulnerable to *domination* and denies them the *recognition* that constitutes their social basis of self-respect.[6] Denizens are thereby relegated to a form of second-class citizenship, an inferior social position reminiscent of the *metics* of ancient Athens (Walzer 1983, 60). Recently, several contributions have questioned this commitment to citizen-making in the case of migrants who pursue *temporary* migration projects.[7] We argue that some denizens pursuing *open-ended* migration

[4] We assume that such offers can be genuine, viz., provide potential migrants with additional options to which they are not entitled. The precise content of these offers depends on whether states have a *right to exclude*. For purposes of exposition, we assume that states have a *territorial* right to exclude, but our argument can also be formulated under the assumption that states only have the right to exclude from full political membership.

[5] We operate here with a broad notion of republicanism that covers republican views in the Italo-American tradition as well as republican views in the Franco-German tradition. On these two republican traditions, see Pettit (2013).

[6] See Walzer (1983, xii-xiii). The recognitional dimension of republicanism has recently been emphasised again, cf. Schuppert (2014) and Garrau and Laborde (2015). This recognitional dimension has also been emphasised by liberals and communitarians, cf. Rawls (1999a), Honneth (1996), and Wilson (2019). The commonalities between liberal, communitarian and republican concerns with recognition and self-respect are highlighted by Rostbøll (2023, 98–102).

[7] See Ottonelli and Torresi (2022) and Bauböck and Ruhs (2022).

projects need not be fully politically included either, as their *external citizenship* protects them from domination and provides them with a secure social basis of self-respect. External citizenship denotes the extra-territorial status, rights and protections provided by the home state (cf. Bauböck 2009). Unlike, Athenian *metics*, denizens who enjoy external citizenship in a democratic polity and occupy a secure and recognised guest status in their host state are not confined to an inferior status. Indeed, Walzer already hinted at the idea that "the original citizenship of guests" could function as a substitute for their full political inclusion, but we develop this idea systematically (1983, 60).

Some denizens profit more from their external citizenship than others. Expats from stable and powerful democracies enjoy significant extraterritorial rights and protections, as well as recognition of their status as moral and political agents. By contrast, stateless persons and many refugees lack external citizenship altogether. Such differences must be taken into account when determining the degree of political inclusion that denizens need in order to enjoy an equal political status. Accordingly, we argue that denizens have differentiated claims to political inclusion. While a path to citizenship should be secured for the most vulnerable – refugees and stateless persons – local voting rights or other partial inclusion schemes may be appropriate for citizens from powerful and stable democracies. Thus, republican democratic commitments permit political rights-differentiation between denizens and citizens, and also among denizens.

We proceed by situating our argument in the debate on democratic equality in Section 6.1. Subsequently, in Sections 6.2 and 6.3, we discuss Walzer's concerns with non-domination and recognition – in their most prominent contemporary explications – for the case of denizens who effectively profit from their external citizenship.[8] We conclude, in Section 6.4, by considering the political potential of our position in light of its implications for denizens who profit less from their external citizenship.

[8] We do not rely on Walzer's explications of domination and recognition, as they are tied to his distinctive theory of justice, cf. Walzer (1983, ch. 1 & ch. 11).

6.1 EQUAL FREEDOM, CITIZENSHIP, AND A DEMOCRATIC SAY

The widespread view that territorial admission must escalate to full political inclusion derives from two premises: the *democratic inclusion* thesis, according to which denizens must be included in the democratic process, and the *democratic equality* thesis, according to which all who are included in the democratic process must receive an equal democratic say. We argue that (some) denizens may be partially politically included, and thereby deny the *democratic equality* thesis. In this section, we situate our argument in the debate on citizenship and democratic equality.

The *democratic inclusion* thesis draws support from standard principles of political inclusion, like the *all-affected interests* and *all-subjected* principles. As denizens are clearly affected by and subjected to the rule of their host state, these principles imply that denizens should be democratically included (Beckman 2006; Lenard 2015; Song 2009). Traditionally, republicans emphasise the connection between democratic participation rights and citizenship, and accordingly hold that those who are democratically included must be "set on the road to citizenship" (Bauböck 2006, 50; Walzer 1983, 60). They worry that the extension of a democratic say to non-citizens would undermine the *value of citizenship*. However, the value of citizenship does not solely derive from rights to democratic participation. Citizenship denotes a legal status that comes with a bundle of rights (as well as duties), which typically include rights to a democratic say, to reside on and re-enter a states' territory, and to diplomatic protection abroad (cf. Benton 2014, 65). While citizenship may be a sufficient ground for political inclusion, sustained territorial presence also provides strong reasons for inclusion (cf. Carens 2013, 158–59; Lenard 2015; Song 2018, 173–88).[9] Territorial models of enfranchisement ensure that all who are subjected to the state's rule have a right to a democratic say, even if they are not citizens. According to these territorial models, denizens can thus have

[9] Some also argue that citizens should be enfranchised *only* if they are territorially present, e.g. López-Guerra (2014, ch. 4).

claims to political inclusion *as* denizens.

While standard principles of political inclusion tell us *who* should be included in the democratic process, they do not obviously require everyone's *equal* inclusion. Both principles allow for a range of different interpretations, some of which permit, or even require, differentiated political rights. They could, for instance, be interpreted as requiring political inclusion to the degree to which individuals are affected by or subject to political decisions (Brighouse and Fleurbaey 2010; Goodin and Arrhenius 2022). The *democratic equality* thesis, therefore, needs further justification.

A natural strategy for evaluating the *democratic equality* thesis is to ask whether and how it reflects the underlying *value of democracy* (Lippert-Rasmussen and Bengtson 2021, 1028–30). In the republican tradition, the value of democracy is typically considered to lie in upholding the (maximum) *equal freedom* of all who are subject to the state's rule.[10] In line with recent republican thought, we assume that non-domination as well as social relationships of mutual recognition are necessary conditions for individual freedom (cf. Schuppert 2014). The ideal of equal freedom, in turn, motivates prominent principles of democratic inclusion, including Walzer's *Principle of Political Justice*, according to which "the processes of self-determination through which a democratic state shapes its internal life, must be *open*, *and equally open*, to all those men and women who live within its territory, work in the local economy, and are subject to local law" (Walzer 1983, 60; see also Brighouse and Fleurbaey 2010; Beckman and Rosenberg 2018). However, substantive egalitarian commitments, like the commitment to equal freedom, may find expression in a wide range of institutional arrangements (Beitz 1989, 17; Pevnick 2011, 182).[11]

[10] Many traditions of democratic thought share the commitment to equal freedom as the foundational democratic ideal (while endorsing different conceptions of freedom), see the essays collected in Darwall (1995). On the central role of the ideal of equal freedom in the republican tradition, see also Pettit (2013). The main competitor to equal freedom views are equal status views, e.g. Wilson (2019). We share the concern with equal status, but believe that it derives from a concern with equal freedom.

[11] In the Introduction to this thesis, I also invoke the ideal of equal freedom

Our discussion complements rather than contradicts the literature on democratic equality for citizens. Like many democratic theorists, we accept that there are good reasons to uphold the *democratic equality* thesis for citizens, at least as a default assumption, because citizens are subject to far-reaching legal, social, and (arguably) moral duties and expectations that otherwise compromise their equal freedom (Wilson 2019, 18–26).[12] However, this rationale does not necessarily support the

to explicate my ideal of justice, so I should explain how I conceptualise the relationship between justice and the ideal of democratic legitimacy. In short, my view is that the ideal of democratic legitimacy specifically identifies the procedural aspects of a broader ideal of equal freedom. In other words, I effectively use the concept of democratic legitimacy to denote what other authors, including Rawls, may call "procedural justice". Some theorists worry that the "Rawlsian approach of articulating the demands of social justice and procedural justice in a comprehensive package" as two aspects of the same ideal may lead us to conflate questions of justice and of political legitimacy, and may accordingly lead to a "downgrading of legitimacy and democracy" (Pettit 2012, 186). I take this concern seriously, but my approach avoids this problem because I do not think of "democratic legitimacy" as as species of "political legitimacy". Instead, I always use "democratic legitimacy" as a technical concept that denotes a specific political ideal, namely the procedural aspect of the ideal of equal freedom, and not a form of political legitimacy, understood deontically as denoting a right to rule. Accordingly, I do not assume that a regime that possesses democratic legitimacy must therefore also be politically legitimate, i.e., that it must possess a right to rule, or that a regime that lacks democratic legitimacy must therefore be politically illegitimate. This conceptual convention is somewhat awkward, but it is difficult to avoid while still using the language of contemporary democratic theory.

[12] Moreover, I believe that the *democratic equality* thesis is supported by the idea that citizens of democratic polities should be able to see themselves as co-authors of the law, so that states can rule in the name of their citizens and can represent their political will. For an argument along these lines, see Stilz (2009, ch. 3). My emphasis on the normative significance of the role of citizens as co-authors of the law raises the question whether states effectively rule in the name of denizens once denizens are included to any degree in the democratic process, even if they do not have a path to citizenship. In that case, the view I propose in Chapter 2 may suggest that democratic ideals do not permit the partial inclusion of denizens in the democratic process after all (although democratic ideals may still allow for the complete exclusion of denizens from the democratic process). I do not think so, because I believe that denizens can be included in democratic decision-making for transparently instrumental reasons, for instance to protect them from domination, and not because they are supposed to see themselves as co-legislators. In that case, states may not rule in the name of their denizens, even though denizens are granted a limited say in democratic procedures. In other words, states may

equal inclusion of denizens, who do not have the same duties towards their host state as citizens.[13]

Traditionally, an equal democratic say means "one person one vote" or, more broadly, equality in formal democratic decision-making *procedures*. As this procedural understanding of democratic equality does not account for inequalities suffered by structurally disadvantaged groups, many democratic theorists use the notion of an "equal democratic say" to refer to equality in the broader democratic *process* (Ganghof 2021, 54). On this processual understanding, equality in formal procedures is not sufficient and may not even be necessary (cf. Beitz 1989, 111; Christiano 2008, 295–99; Wilson 2019, 117). Appropriate deviations from procedural equality could involve reserved seats in parliament, weighted voting power or voting rights in local but not in national elections. As we cannot attempt to adjudicate this debate here, we use the notion of an "equal democratic say" ecumenically to refer to whatever the sense is in which citizens should normally be democratically equal.

We argue that the equal freedom of some denizens can be secured without an equal democratic say in the host state. Our argument resembles a familiar justification for deviations from democratic equality among citizens. Most democracies concentrate political power in the hands of legislators, judges, and other officials, who seemingly have a greater say in collective decision-making than ordinary citizens. A prominent justification for such procedural and processual inequalities is that they promote *substantive* equality. Arguably, we need certain privileged social positions to realise equal freedom. Systems of judicial review, for instance, are inherently unequal but protect minorities from tyrannical majorities (Rawls 1999a, §37). Denizenship can be

not necessarily claim to possess the normative power to represent the political agency of their denizens even if denizens can participate to some degree in the democratic process. In practice, it may be difficult to tell whether denizens who are partially democratically included are also included among the set of people in whose names states claim to exercise political power. Different methodologies for approaching such an interpretive task are surveyed in Valentini (2011).

[13] Our argument suggests that dual citizens may have weaker claims to an equal democratic say than mono citizens – a possibility that has not been discussed much, cf. Blatter (2011).

understood as a distinct social position, similar to office-holding in representative democracies. Generally, denizens are citizens somewhere else and maintain relationships with their home country. Recognizing them as members, their home country provides them with status, rights, and protections, including diplomatic protection and the right to return. Beyond those core rights and protections, the majority of democracies also provide expatriate voting rights (Bauböck 2009, 478, 487). The position of denizenship is therefore (normally) characterised by *external citizenship*. Denizens also normally have fewer duties towards the host country than citizens. For example, denizens are generally not liable to jury duty or compulsory military service. The position of denizenship, thus, comes with a distinct set of legal entitlements. In virtue of their social position as citizens of another polity, denizens do not necessarily require an equal democratic say in their country of residence to enjoy equal freedom. They may require extensive social and economic rights, eventually even a right to stay, but not necessarily full political inclusion or a path to citizenship.[14]

Walzer notably alluded to a similar idea when introducing his *Principle of Political Justice*. He pointed out that "host countries might undertake to negotiate formal treaties with the home countries, setting out in authoritative form a list of 'guest rights', [… so that] the *original citizenship of guests* would work for them (as it never worked for Athenian metics)" (1983, 60, emph. added).[15] We take up this suggestion in the following sections and evaluate denizens' claim to political inclusion "in a normative framework that involves both countries of residence and origin" (Bauböck 2009, 477).

Our goal is to show that the territorial admission of migrants need not *always* escalate to their full political inclusion or naturalisation. Accordingly, we first discuss the case of denizens who experience particularly favourable con-ditions, that is, citizens of well-ordered democracies

[14] Insofar as the international human rights regime also provides a source of recognition and protection from domination, it raises the baseline of equal freedom for everyone. We focus on the implications of denizens' external citizenship, as we are concerned with salient differences between denizens.

[15] Most commentators overlook this passage. Torresi (2009, 35) is a notable exception.

with responsive institutions and significant international influence, who currently reside in well-ordered societies with healthy political ties to their home state, and are not forced to move by economic deprivation.[16] We argue that their external citizenship can effectively protect these denizens from domination and ensure their social basis of self-respect. In the final section, we consider the implications of our arguments for denizens who experience less favourable conditions.

6.2 FREEDOM FROM DOMINATION

Denizens are vulnerable to domination by their host state, and republicans generally consider this vulnerability detrimental to their equal freedom. Domination is often understood as continuous subjection to another's arbitrary power of interference. The subjection is continuous if it arises within social relationships of *dependency* and the power is *arbitrary* if it depends solely on the will of another. A standard assumption in republican democratic theory is that citizens need an equal democratic say to ensure their equal freedom from domination. A democratic say reduces the arbitrariness of the power by the state, thereby reducing the domination of citizens by their state.[17] Moreover, it incentivises the state to put reliable safeguards in place against domination by fellow residents, such as protections against economic exploitation (Pettit 2012, 24–25). But this argument for the democratic equality of citizens does not apply equally to denizens, as some denizens are protected from domination by their external citizenship. Their external citizenship not only renders some denizens less *dependent* than citizens on the relationship with their host state, but also reduces the *arbitrariness* of the power exercised by the host state. Accordingly, the partial political inclusion of denizens can be sufficient to ensure their

[16] We take the notion of well-orderedness from Rawls (1999b, 4). In contrast to Bauböck and Ruhs (2022, 18), our favourable conditions entail that host and home states are democratic *and* that the discrepancies in economic and political power between them are not large enough to induce threats of domination and misrecognition.

[17] We speak of the state as a corporate agent, but domination by the state may be reducible to domination by individuals in power, cf. Lovett (2010, 118–19).

equal freedom from domination in their host society.

6.2.1 *Dependency*

According to Philip Pettit's famous eyeball test, a relationship is dominating if one party cannot look the other in the eye without reason for fear or deference (Pettit 2012, 84). When the dominated party cannot leave such a social relationship out of their own accord, they are *dependent* on the social relationship. As Frank Lovett has forcefully argued, dependency amplifies domination wherever it exists. Dependency is a matter of degree and the level of dependency "should be thought of as a sliding scale, varying according to the net expected costs (i.e. expected costs less any expected gains) of exiting, or attempting to exit, a social relationship" (Lovett 2010, 39).[18] When a person has high exit costs and is, accordingly, highly dependent, they are more vulnerable to domination. For this reason, citizens who are "prevented from emigrating are more vulnerable to abuses of state power or *imperium* than citizens of a society with no restrictions on exit" (Benton 2014, 53).

Denizens' external citizenship renders them less *dependent* than citizens on the relationship with their host state by providing a right to re-enter the home state. This right to re-enter the home state in combination with the (human) right to exit the host state gives most denizens a guaranteed exit option. Citizens, by contrast, have no such guaranteed exit options (provided they do not also hold citizenship elsewhere).

The extent to which denizens can make use of this exit option, and thus the degree to which this option reduces their dependency on the relationship with the host country, depends on multiple factors, including the political circumstances in the home country and the time of residency in the host country.[19] Whereas returning to the country

[18] According to Lovett (2010, 39–40), these exit costs include material as well as psychological costs. They quantify a person's beliefs about the dangers of an exit attempt and about their prospects in their home state. We assume that such beliefs must be well-founded.

[19] See Benton (2014, 56–58) for these and other factors that affect dependency.

of citizenship would be an unreasonable option for denizens who have a well-founded fear of persecution, civil unrest, or dire poverty, it is a secure fall-back option for denizens from stable democracies. Moreover, the net exist costs will likely be higher for long-term than for short-term denizens due to the social networks, employment opportunities and special connections that they have built in their host country and have potentially lost in their home country (Owen 2014, 101; Sager 2014). However, even after a considerable time of stay, denizens with an adequate exit option (they can safely return to their home country and build a new life there) remain less dependent on the host country than citizens.

6.2.2 *Arbitrariness*

The host state poses a threat of domination insofar as it can wield its power *arbitrarily*. The precise path by which a democratic say reduces domination depends on how the notion of "arbitrariness" is spelled out. Three explications of arbitrariness are distinguished in the literature: power can be considered arbitrary insofar it is *unconstrained*, *uncontrolled*, or not forced to *track the interests of those subject* to it (cf. Arnold and Harris 2017).

On the first view, power is arbitrary "to the extent that its potential exercise is not externally constrained by effective rules, procedures, or goals that are common knowledge to all persons or groups concerned" (Lovett 2010, 96). These procedures include democratic elections, but also other effective constraints on power, such as the rule of law and systems of checks and balances. On this view, any effective constraint reduces arbitrariness, regardless of *who* controls the constraint or the *substantive direction* in which the constraint forces the power to flow (Arnold and Harris 2017, 58).

By contrast, on a control view of arbitrariness, it matters *who* exercises the constraint (Pettit 2012). The arbitrariness of political

Wealth is another factor, as denizens with few financial resources may not be able to afford the return trip. However, host countries could provide funds for the voluntary repatriation of denizens, cf. Ottonelli and Torresi (2022, 62).

power is only reduced if it is effectively *controlled* by those subjected to it. Political rights then reduce domination because they provide individuals with an unconditioned and efficacious control over political power.

On an interest view of arbitrariness, the way in which power is exercised must *track the interests* of those over whom that power is exercised (Pettit 1997). Political rights, then, do not automatically reduce domination by making power more controlled. Rather, political rights reduce domination by forcing the power to flow in a specific substantive direction, as they enable political rights-holders to articulate their interests and to push for policies that align with those interests.

On all three accounts of arbitrariness, the rights and protections connected with external citizenship can reduce the arbitrariness of political power exercised by the host state over denizens. External citizenship puts *constraints* on arbitrary political power, primarily through (informal) diplomatic protection. States can intervene on behalf of their citizens living abroad, for instance, to protect them from discriminatory taxation, expropriation, or criminal punishments. They can do so by repatriating their citizens or by threatening retaliation. For example, EU nationals were repatriated when the Taliban returned to power.[20] And in the famous case of Michael Fay, the U.S. intervened to protect a citizen from corporal punishment in Singapore and succeeded in reducing his sentence.[21] In practice, the threat of retaliation may often be enough to protect denizens against discriminatory or inhumane treatment.[22]

Besides profiting from diplomatic protection, denizens can also profit

[20] See the November 2021 briefing of the European parliament on the "Evacuation of Afghan nationals to EU member states", https://www.europarl.europa.eu/ (accessed July 22th 2023).

[21] See https://www.huffpost.com/entry/spare-the-rod-spoil-the-c_b_8012770 (accessed February 13th 2023).

[22] A threat of retaliation will be more effective if the country has a strong international presence, and only works as long as the host country has a desire to keep good bilateral relations. When war breaks out, the home country can do little to provide diplomatic protection to their citizens in the host country. The risk of international relations deteriorating must be priced in, and the political inclusion of denizens may have to be reconsidered when relations cool down.

from their home country's lobbying power. Many countries invest in the promotion of trade and culture abroad, through the funding of lobby agencies, entrepreneurs, and cultural institutions. These investments can reduce the arbitrariness of the host state's political power by ensuring that denizens' *interests* are *tracked*. Powerful or rich countries in particular can pull many levers to provide economic and political support to their citizens abroad and will be incentivised to do so as long as expats maintain political clout at home.[23]

Finally, external citizenship can also lend denizens *control* over the laws by which they are governed. While their external citizenship does not provide voice-based empowerment in the host country, it does give them exit-based empowerment (Warren 2011). Denizens can exercise "control by their feet" over the laws by which they are governed. If the host state desires their presence, as is the case with many high-skilled workers, they can also leverage their exit-option into informal political power. In virtue of their external citizenship, denizens are therefore not just less dependent on their host state than citizens but are also less vulnerable to arbitrary exercises of power by the host state than citizens. Accordingly, they do not need an equal democratic say to ensure their equal freedom from domination.

6.3 RECOGNITION AND THE SOCIAL BASIS OF SELF-RESPECT

Rawls famously considered self-respect to be a precondition of equal freedom, and therefore described self-respect as the most important primary good.[24] He argued that democratic institutions provide the "foundation of self-respect in a well-ordered society" (Rawls 1999a, 388),

[23] Generally, home states will not be able to lobby for the specific interests of individual denizens, but can still exert influence to push host states to track the interests broadly shared by their expatriates. For example, the Turkish government has actively lobbied for the (perceived) interests of Turkish citizens in Germany, who play a significant role in Turkish national elections, see Aydın (2014).

[24] A Kantian version of this claims holds that only self-respecting individuals will be motivated to uphold institutions that secure equal freedom (Rawls 1999a, §40), while a Hegelian version of this claim holds that self-respect, sustained through mutual recognition, is constitutive of freedom (Schuppert 2014, 9–17).

and many democratic theorists believe that *citizens* are provided with a secure social basis of self-respect through their equal democratic say. Any deviations from democratic equality are considered to express disrespect for disenfranchised groups and to undermine the positive public recognition of citizens' equal moral status. We argue that *denizens* can enjoy a secure social basis of self-respect without an equal democratic say in the host country if they receive appropriate recognition in virtue of their external citizenship. In that case, the (partial) political exclusion of denizens need not express disrespect and can be sufficient for the positive recognition of their equal moral status.[25]

6.3.1 *Rights-differentiation without disrespect*

Following Rawls, host states undermine denizens' social basis of self-respect by expressing disrespect for one of their two moral powers: their *capacity to form a conception of the good* and their *sense of justice*. Given denizens' distinct social position, we can see that their (partial) political exclusion need not express either form of disrespect.

Host states disrespect denizens' first moral power if they deny the rationality of their conception of the good (Krishnamurthy 2013, 185). By offering denizens' territorial admission without full political inclusion, host states make genuine (albeit conditional) admission offers, and thereby strictly provide prospective denizens with additional options. Genuine offers are generally not disrespectful though, as they empower their recipients to accept or reject them in accordance with their own conception of the good. We are here considering admission offers that enable denizens to live "a life effectively split between two polities" with "a dislocation of social and political spaces, and consequently of the social bases of self-respect" (Ottonelli and Torresi 2022, 43). One concern is that such offers potentially enable denizens to pursue conceptions of the good that may not be stable or coherent (cf. Straehle 2022). The idea that a good life is incompatible with a "divided self"

[25] Denizens presumably require extensive social and economic rights to experience valuable non-political forms of recognition, and these rights have to become more extensive in virtue of the length of stay in the host country.

resonates with the *classic republican* emphasis on civic virtue and the underlying perfectionist Aristotelian conception of human beings as having a political nature. Accordingly, some republicans may worry that states make disrespectful offers by giving denizens the option of pursuing an objectively irrational conception of the good. However, like many contemporary republicans, we believe that the state should remain neutral with respect to comprehensive doctrines of the good. By making genuine offers of territorial admission without full political inclusion, the state leaves the decision of whether accepting such offers is rational to migrants themselves, and does not convey any evaluation of their conception of the good.[26]

Even if genuine offers are generally not disrespectful, one could object that the conditional nature of the specific offers under consideration disrespects some migrants' first moral power, as states fail to *accommodate* the *life plans* that follow from certain conceptions of the good. This objection utilises the *principle of accommodation* – recently defended by Valeria Ottonelli and Tiziana Torresi (2022, 94–105) – according to which states only remain neutral between different conceptions of the good if they effectively allow for the realisation of these conceptions.

Clearly, host states fail to accommodate the life plans of potential migrants wishing to lead an "undivided life" *on the host state's territory* if they offer admission only on the condition of partial political inclusion. Such offers do not violate the principle of accommodation though, as that principle is inward-facing; it only applies to individuals who have already become subject to the host states' rule by accepting its admission offer (Ottonelli and Torresi 2022, 97). States are only required to remain neutral towards conceptions of the good pursued by their subjects, and can permissibly admit migrants *on the condition* that they declare their life plans to be compatible with dislocated social spaces.[27] Over time, some denizens may certainly come to regret settling

[26] See in particular (Pettit 1997). For an extended discussion of republicanism, see Lovett and Whitfield (2016).

[27] Following Miller (2016b, 105), we do not think that relying on migrants' self-proclaimed life-plans as an admission criterion involves objectionable discrim-

in a place where they cannot lead an "undivided life". Whether states are required to accommodate the revised life plans of these denizens depends on how we prioritise two central aspects of moral agency: the capacity to revise one's conception of the good and the capacity to make decisions for our future selves. We believe that the latter should take precedence, as states would treat denizens paternalistically when denying them the capacity to make decisions for their future selves just because they may later come to regret those decisions. By holding them to earlier agreements, states take denizens seriously as moral agents with command over their own lives, and thereby respect their moral powers.[28]

Host states disrespect denizens' second moral power – their sense of justice – if they force them to endure injustices or deny them opportunities to co-operate on fair terms with other members of society (Rawls 1999a, §72). One argument holds that the social positions of citizenship and denizenship are *distributed* unjustly. As Joseph Carens put it, restrictions on access to citizenship create unjust inherited status differences resembling "feudal class privilege" (Carens 2013, 226). The most prominent version of this argument builds on a cosmopolitan reading of the Rawlsian principle of fair equality of opportunity (Rawls 1999a, §14). This argument is controversial in several respects. First, it is debatable whether Rawls' reasons for endorsing equality of opportunity *among citizens* apply to the acquisition of citizenship itself (Miller 2007, 53). It is also questionable whether these reasons outweigh competing considerations based, for instance, on collective self-determination (Miller 2007, 68), or the incentive structure of the global political system (Rawls 1999b, 38–39). Finally, it is unclear whether a globalised fair equality of opportunity principle requires abandoning restrictions on citizenship-acquisition. As Darrel Moellendorf (2006, 307) points out, what matters is whether people have access to social

ination, as such life plans can be relevant for the pursuit of legitimate policy goals. We thank a reviewer for asking us to clarify this.

[28] A cosmopolitan principle of accommodation, which requires states to accommodate the life plans of insiders and outsiders, would be unreasonably demanding as it would enable prospective migrants to unilaterally impose significant burdens on receiving societies.

positions that are *equal* with respect to normatively salient features like status or power, not whether people can access the *same* positions. It is therefore questionable whether restrictions on citizenship-acquisition violate equality of opportunity in the case of denizens who already hold citizenship in sufficiently just and democratic states.

A second argument holds that the social position of denizenship is unjust because the current state system with its distinct citizenship regimes is fundamentally unjust to begin with. Clearly, this controversial idea will neither appeal to proponents of internationalist or *demoicratic* visions of global justice – including Rawls (1999b) – nor to those cosmopolitans who think that states still have a role to play in securing global justice.

A third argument holds that denizens are denied opportunities to co-operate fairly with the citizens of the host state. According to one version of this argument, partial inclusion schemes are unfair *towards denizens*, as denizens contribute to their host society and should receive equal rights in return (Lenard 2015, 127). A contrasting version holds that partial inclusion schemes are unfair *towards citizens*, as denizens "free ride" on the cooperative life established by citizens by remaining in a privileged guest position without sharing the full burdens of citizenship (De Schutter and Ypi 2015). Both arguments highlight differences in the rights and duties of citizens and denizens, but neither argument establishes that denizens' less extensive rights are *unfair in relation to* their more restricted duties. Moreover, both arguments focus exclusively on host states as sites of social co-operation and do not consider other co-operative schemes, like those set up through international agreements on temporary labour migration, from which denizens may profit and to which they contribute by accepting the rights and duties associated with their guest status. Finally, neither argument shows that denizens would be *forced* to endure an unjust social position, as long as they are free to exit and give up their denizenship.

6.3.2 *Expressions of recognition*

Democracy can also positively contribute to the social basis of self-respect through the public recognition of each individual's equal moral

status. Specifically, democratic institutions provide individuals with *equal* avenues for exercising *political agency* that are *legally* recognised, thereby enabling them to experience political decisions as a form of self-rule (Schuppert 2014, 121–26). We argue that some denizens can experience this positive recognition without an equal democratic say in the host state.

Denizens can routinely exercise political agency in three domains: As *citizens*, they can participate in the democratic process of their home state, to the extent that they retain a democratic say while abroad. As *denizens*, they can participate in the democratic process of their host state, to the extent that they receive a democratic say there, for instance through local voting rights. And as *external citizens*, they can exercise agency by taking up denizenship or returning to their country of citizenship.[29] These opportunities for agency are not the same as those enjoyed by citizens, but they can be equally suitable for sustaining the social basis of self-respect. While denizens have less extensive opportunities for exercising political agency in the host state, they have compensatory opportunities to exercise agency in virtue of their external citizenship.

Having political agency is not sufficient to secure the social basis of self-respect. After all, even Athenian *metics* could exercise some such agency through political resistance. Individuals must also experience the legal recognition of their rights to exercise political agency, which confirms their status as moral equals who can *demand*, rather than only *request*, to be taken seriously as sources of moral reasons (Honneth 1996, 120; Rostbøll 2023, 98–110). Denizens can enjoy such legal recognition in all three domains of their political agency. Home states can extend democratic participation rights to their citizens abroad. Host states can also grant denizens rights to participate in their own democratic process. Moreover, all democracies recognise denizens' rights to exit their country of residence and enter their country of citizenship. Home

[29] Lenard and Straehle (2012, 214–15) argue that the choice to accept denizenship often does not constitute a valuable expression of agency, as it involves trading away a moral right to political inclusion for economic benefits. We question whether denizens have such a right in the first place.

and host states can therefore jointly provide denizens with effective legally recognised avenues for exercising their political agency, just as they can jointly effectively protect them from domination.

One may question whether recognition can be distributed between different sources in the same way as protections against domination. Recognition manifests in specific relationships, and the relationship that matters most in denizens' daily life is that between denizens and the host state (and indirectly its citizens). So, one may worry that a lack of recognition experienced in this relationship cannot be compensated by recognition experienced elsewhere.[30] However, host states can recognise denizens *as citizens* of another self-governing polity. Democracies generally recognise the rights of citizens of other democracies to jointly govern themselves, as is codified in international law, for instance in the principle of self-determination, and confirmed in numerous international agreements. Through the medium of international law, host states thereby recognise denizens' political agency *in their home state*. Denizens, in turn, can recognise the same rights on behalf of the host state and its citizens, by recognising the authority of the democratic process in the host state. In this way, denizens can engage in valuable relationships of mutual recognition with their host state and, by extension, its citizens.

Recognition mediated by international law differs from the recognition of rights to exercise political agency in domestic law, as it generally does not take the form of *subjective rights* but rather of *collective rights* to self-government. The recognition of collective rights can still express recognition for individuals' moral agency though, if it hinges on the existence of subjective rights to political participation in the home state – as is the case with recognition mediated by international organisations that sanction democratic backsliding in their member states, like the European Union or the Commonwealth. Host states and home states can further strengthen the recognition of denizens'

[30] Ottonelli and Torresi (2022, 56–58) seemingly focus on *temporary* denizenship out of a similar concern. However, while they assume that denizens trade-off their equal status for opportunities to pursue their life plans, we reject that denizens are necessarily assigned an inferior status in the first place.

moral agency through explicit agreements that govern the status of denizens and codify their rights and duties. Through such agreements, host states can directly recognise denizens' subjective rights to political participation in their home state and underwrite their commitment to the moral equality of denizens. This commitment is expressed through a legally recognised and secured guest status, rather than through full inclusion in the domestic democratic process.

In a similar vein, Rainer Bauböck and Martin Ruhs (2022, 542) suggest that binding international agreements can secure the equal status of denizens. However, they insist that such agreements must be reached through transnational democratic decision-making procedures, in which denizens can make their voices heard directly, rather than through intergovernmental negotiations.[31] But why would the direct representation of denizens in transnational decision-making procedures constitute a general democratic requirement?[32] Consider the situation of German and Icelandic denizens in the Netherlands. Both groups occupy a legally recognised guest status, which comes, *inter alia*, with local voting rights in the host state, democratic participation rights in the home state that are enshrined in binding agreements, exit-rights and re-entry-rights, and protections against deportation. These rights are secured for German denizens (in part) through supranational agreements at the European level, where German citizens have direct representation in the European parliament. By contrast, these rights are secured for Icelandic citizens through intergovernmental agreements, including the *Schengen Agreement*, the *European Convention on Human Rights*, and the *Convention on the Participation of Foreigners in Public Life at the Local Level*. If German denizens are recognised as political equals

[31] Bauböck and Ruhs (2022) argue that fairness requires giving denizens dedicated representation, because they are disproportionally affected by international agreements governing their status. However, many international agreements, like trade agreements, affect some groups more than others. Yet, the intergovernmental negotiation of trade agreements does not seem to constitute a democratic deficit.

[32] Bauböck and Ruhs (2022) focus on temporary labour migration between countries of the Global North and Global South. In this specific case, transnational democratic fora may be required to counter-balance economic inequalities.

in the Netherlands, then Icelandic denizens seem to enjoy the same status. International agreements can thus provide a source of genuine recognition of individual denizens, even if they are reached through intergovernmental negotiations.

In sum, the (partial) political inclusion of denizens in the host state's democratic process can be compatible with their recognition as moral equals, and thus with their social basis of self-respect.

6.4 THE POLITICAL POTENTIAL OF PARTIAL POLITICAL INCLUSION

We have questioned the deep commitment in political philosophy to "citizen-making" and to conjoining territorial admission and full political inclusion. We have argued that upholding the equal freedom of denizens does not necessarily require their political inclusion on equal terms with citizens. States are permitted to implement partial inclusion schemes for denizens under favourable external citizenship conditions. Denizens enjoy such favourable conditions when their home state is democratic and has responsive institutions, they have social and political ties to their home state, their home state has a strong international presence, and their home and host states have good bilateral relations. Under those conditions, denizens' external citizenship can systemically contribute to their protection from domination and their social basis of self-respect, and thereby address two of the major threats to their equal freedom.

Of course, the situation of many denizens deviates markedly from this ideal. Many denizens are forced to leave their country of origin as refugees, are deprived of their original citizenship, or cannot effectively exercise political rights in authoritarian systems. Those denizens are dependent on their host country and need political voice to avoid domination. Moreover, they cannot be recognised as moral equals in their role as citizens of another self-governing democratic polity. Denying such denizens equal political rights relegates them to a second-class status.

The theoretically challenging cases lie between these two extremes. They concern denizens from countries with questionable democratic credentials or little influence on the world stage. In today's world, many

temporary labour migrants fall in this category. On the one hand, they often come from semi-democratic states with international economic dependencies. On the other hand, host and home states generally profit from temporary labour migration and are therefore incentivised to uphold agreements that codify their rights and thereby contribute to their equal status.[33] Denizens in these semi-favourable conditions can be placed on a spectrum according to the degree to which their external citizenship protects them from domination and contributes to their recognitional basis of self-respect. They require different degrees of political inclusion to secure their equal freedom depending on where they fall on this spectrum. This conclusion does not justify complacency, as existing partial political inclusion schemes rarely provide adequate inclusion for these denizens.

In practice, states are often unable to inquire into the situation of individual denizens, and would therefore have to rely on broad categories in the implementation of partial inclusion schemes. To define those categories, states could employ a range of criteria, including the home state's democracy index, the quality of its relationship to the host state, the kind of migration projects denizens are pursuing, or the (intended) duration of their stay in the host state. For each of these categories, host states have to determine the appropriate forms of political inclusion. For example, they could choose to give a particular category of denizens weighted voting power in national elections, voting rights in local elections only, or political weight through non-governmental organizations, trade unions and migrant worker organizations (cf. Ottonelli and Torresi 2022, ch. 7).

The imposition of categories on a more complex underlying normative reality poses the risk that some denizens may not be adequately included.[34] Despite this risk, partial political inclusion schemes are

[33] On international protections provided to temporary labour migrants, see Ottonelli and Torresi (2022, 128–31) and Lenard and Straehle (2012).

[34] The all-or-nothing model of political inclusion also poses normative risks, as citizens could face threats of domination and misrecognition if denizens who already benefit from their external citizenship are fully included in the host state's democratic process. These risks seem particularly salient when denizens hold citizenship in countries that dominate their host state on the international

worth considering, because they potentially enable states to open their borders further. As the "numbers-versus-rights" trade-off highlights, citizens may be more willing to accept immigration when they have to give migrants fewer political rights. The partial political inclusion model can therefore render increased immigration more acceptable for citizens, as citizens do not have to give up a share of political control over their countries' future – including its future immigration policies – by including newcomers in the democratic process. Increased immigration, in turn, enables migrants from economically worse-off states to seek employment abroad, acquire skills, and send back remittances.

When states and their citizens want to pursue global justice goals even further without sacrificing their capacity for collective self-determination, they can seek international co-operation. As Walzer already suggested, increased international co-operation can provide a democratically legitimate substitute for the political inclusion of denizens. States can work together by entering international agreements concerning the status and rights of denizens, by setting up multilateral institutions that empower less influential home states, or by transferring competencies to transnational democratic fora that provide denizens with additional voice. Such co-operations can provide denizens with additional protections from domination and sources of recognition. International co-operations can therefore support the democratically legitimate decoupling of territorial and political admissions.

stage or actively undermine their democratic process. They also arise when a relatively large population of denizens retains strong social and political ties to their home state as, for instance, in Monaco, where only 20% of the population are Monegasque. Partial inclusion schemes might therefore actually be a democratic requirement. Alternatively, states may have to co-ordinate to implement dormant citizenship policies, so that denizens will not be fully included in the democratic process in two states.

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Appendix: Summaries and Declarations

SUMMARY

This thesis contributes to a central debate in the political philosophy of migration over the legitimacy of the imposition and enforcement of exclusionary immigration policies. It consists of five chapters, which develop arguments that stand on their own but also contribute to a broader account of the legitimacy of immigration restrictions.

In the chapter "Claiming Authority across Borders", I defend the central tenets of my account of the legitimacy of immigration restrictions. This account constitutes a novel intermediary position in the long-standing debate between statists and cosmopolitans, which is why I describe it as a "cosmopolitan statism". My central thesis is that states can legitimately enforce immigration restrictions, but only if they claim that migrants are required to obey their immigration laws, and if these claims are actually valid. In contrast to many cosmopolitans, I argue that migrants are often required to obey foreign immigration laws, so that states can routinely make valid claims to legitimate authority vis-á-vis prospective migrants. But in contrast to many statists, I argue that states subject migrants to their political rule once they expect them to obey their immigration laws, and that the political subjection of migrants grounds additional obligations towards them that are substantially more demanding than statists usually acknowledge.

My defense of the legitimacy of immigration restrictions assumes that individuals do not have a moral right to global freedom of movement. But this assumption is controversial, as prominent open borders advocates defend such a right. In the chapter "Rights, Interests, and the Problem of Generality", I develop a constructive critique of the methodology that informs the most influential arguments for a moral human right to immigrate, the interest-based approach to the justification of moral rights. The critical part of my discussion revolves around a methodological challenge that I call the "problem of generality", which undermines most interest-based arguments, including the arguments for a human right to immigrate. The constructive part of my discussion shows that the problem of generality can be solved, although this solution significantly complicates interest-based arguments.

The notion of enforceable moral duties plays a central role in discus-

sions of justice and of political legitimacy. My account of the legitimacy of immigration restrictions also invokes this notion, as I argue that migrants have enforceable moral duties to accept their exclusion if states have the authority to impose morally binding immigration laws. However, we still lack a convincing philosophical account of the phenomenon of enforceable moral duties, which is why a recent contribution diagnoses a "puzzle of enforceability". I address this puzzle in the chapter the "The Bundle Account of Enforceable Duties", where I argue that duties are enforceable just in case they are embedded in specific bundles of Hohfeldian moral positions. The puzzling question why certain duties are enforceable therefore dissolves into smaller non-puzzling questions concerning the justifiability of specific moral positions.

In the Chapter "Resistance at the Border, Self-Defense and Legitimate Injustice", I respond to an influential argument in the migration literature, according to which unjustly excluded migrants can always resist their exclusion in self-defense. I respond to this argument because it implies that unjust immigration restrictions are generally also illegitimate, as legitimate exercises of political power normally do not justify defensive resistance. I show that this argument fails because states often have a liberty right to rule over their borders, even when they exercise this liberty right to enforce substantively unjust immigration policies. This result then also informs my cosmopolitan statist account of the legitimacy of immigration restrictions.

A widely held view in the migration literature holds that all migrants whom states admit territorially must be put on a path to citizenship within a reasonable time frame. This view is typically based on the assumption that denizens – resident non-citizens – will be subjected to domination and will be deprived of the social basis of self-respect unless they are fully included in the democratic process. In the chapter "Denizenship and Democratic Equality", Suzanne Bloks and I argue that the original citizenship of some denizens can function as a substitute for their full democratic inclusion, as it can effectively protect them from domination, and provide them with the social bases of self-respect. We accordingly conclude that a politically passive guest status for denizens can, even in the long-run, be fully democratically legitimate, at least for denizens who are themselves citizens of democratic polities.

ZUSAMMENFASSUNG

Diese Dissertation trägt zu einer zentralen Debatte innerhalb der politischen Philosophie der Migration bei, deren Gegenstand die Legitimität restriktiver Einwanderungsgesetzgebungen ist. Sie besteht aus fünf inhaltlichen Kapiteln, in denen jeweils eigenständige Beiträge formuliert werden, die zusammen allerdings auch zur Entwicklung einer breiteren Theorie der Legitimität von Migrationsbeschränkungen beitragen.

Im Kapitel „Claiming Authority across Borders“ verteidige ich die zentralen Elemente meiner Theorie der Legitimität von Migrationsbeschränkungen. Ich schlage eine neuartige Zwischenposition in der Debatte zwischen kosmopolitischen und im Englischen als „statist“ bezeichneter Positionen vor, die ich als „cosmopolitan statism“ beschreibe. Meine zentrale These besagt, dass Staaten legitimerweise Migrationsbeschränkungen durchsetzen können, aber nur dann, wenn sie gegenüber einreisewilligen Menschen behaupten, diese seien moralisch dazu verpflichtet, die Migrationsgesetzgebung des Staates zu respektieren, und wenn diese Behauptung auch tatsächlich zutrifft. Im Gegensatz zu vielen Vertreter:innen kosmopolitischer Positionen argumentiere ich, dass Migrant:innen tatsächlich in vielen Fällen dazu verpflichtet sind, Migrationsbeschränkungen zu respektieren, sodass Staaten berechtigterweise gegenüber diesen Migrant:innen die Autorität ihrer Migrationsgesetzgebung behaupten können. Im Gegensatz zu vielen Vertreter:innen von „statist“ Positionen argumentiere ich zudem, dass Staaten versuchen potenzielle Migrant:innen ihrer politischen Herrschaft unterwerfen, sobald sie behaupten, diese Migrant:innen seien moralisch verpflichtet, ihre Einwanderungsgesetze zu respektieren. Ich zeige, dass dieser Versuch der politischen Beherrschung von Migrant:innen moralische Verpflichtungen diesen gegenüber begründet, die deutlich über jene Verpflichtungen hinausgehen, die Anhänger dieser Positionen üblicherweise anerkennen.

In meiner Verteidigung der Legitimität von Migrationsbeschränkungen gehe ich davon aus, dass Menschen kein allgemeines moralisches Recht auf globale Bewegungsfreiheit besitzen. Diese Annahme ist allerdings umstritten, da manche prominente Befürworter offener Grenzen für die Existenz eines solchen Rechts argumentieren. Im Kapitel „Rights,

Interests, and the Problem of Generality“ untersuche ich die philosophische Methodologie, die den einflussreichsten Argumenten für ein Recht auf globale Bewegungsfreiheit zugrunde liegt – der interessensbasierte Ansatz der Begründung moralischer Rechte. Ich entwickle eine konstruktive Kritik dieses methodologischen Ansatzes, in dessen Mittelpunkt eine methodologische Herausforderung steht, die ich als das „Problem des Allgemeinheitsgrades“ bezeichne. Im kritischen Teil meiner Diskussion zeige ich, dass die meisten interessensbasierten Argumente für die Existenz bestimmter moralischer Rechte schwere methodologische Mängel aufweisen, und diese Beobachtung trifft auch auf das Argument für ein allgemeines moralisches Recht auf globale Bewegungsfreiheit zu. Im konstruktiven Teil meiner Diskussion zeige ich, dass das Problem des Allgemeinheitsgrades gelöst werden kann, dass die Lösung dieses Problems aber dazu führt, dass interessensbasierte Argumente für spezifische moralische Rechte eine deutlich komplexere Struktur aufweisen, als ihre Befürworter in der Regel behaupten.

Die Kategorie erzwingbarer moralischer Pflichten spielt eine zentrale Rolle in der philosophischen Diskussion von Fragen der Gerechtigkeit und der politischen Legitimität. Meine Theorie der Legitimität restriktiver Migrationspolitiken greift ebenfalls auf diese Kategorie zurück, da ich behaupte, Migrant:innen hätten erzwingbare moralische Pflichten, Migrationsbeschränkungen zu respektieren, zumindest wenn ausschließende Staaten die moralische Autorität zur Implementierung dieser Beschränkungen besitzen. Allerdings wurden bisher keine überzeugendenden philosophischen Erklärungen des Phänomens erzwingbarer moralischer Pflichten vorgeschlagen, weshalb jüngst in der Literatur ein „puzzle of enforceability“ diagnostiziert wurde. Im Kapitel „The Bundle Account of Enforceable Duties“ formuliere ich eine Antwort auf dieses philosophische Puzzle. Ich argumentiere, dass moralische Pflichten genau dann erzwingbar sind, wenn sie in bestimmte „Bündel“ Hohfeld'scher moralischer Beziehungen eingebettet sind. Die scheinbar rätselhafte Frage, warum bestimmte moralische Pflichten erzwingbar sind, lässt sich daher in eine Menge kleinerer Fragen herunterbrechen, die jeweils die Rechtfertigung einer der Hohfeld'schen Beziehungen in diesen Bündeln betreffen. Auf diese Weise lässt sich das „puzzle of enforceability“ letztlich auflösen.

Im Kapitel „Resistance at the Border, Self-Defense and Legitimate Justice“ widerlege ich ein einflussreiches Argument in der Migrationsliteratur, dem zufolge Migrant:innen, die zu unrecht daran gehindert werden, in ein anderes Land einzuwandern, sich gegen ihren Ausschluss in Selbstverteidigung zu Wehr setzen dürfen. Ich diskutiere dieses Argument da es impliziert, die Durchsetzung ungerechter Migrationsbeschränkungen sei normalerweise auch illegitim, da die Ausübung politischer Herrschaft in der Regel nicht legitim sein kann, wenn diese Wiederstand in Selbstverteidigung rechtfertigt. Ich zeige, dass dieses Argument fehlschlägt, da Staaten in vielen Fällen über Hohfeld'sche Freiheitsrechte verfügen, auch ungerechte Migrationsbeschränkungen durchzusetzen. Dieses Ergebnis unterstützt ebenfalls meine spezifische Theorie der Legitimität von Migrationsbeschränkungen.

Einer breit akzeptieren Ansicht in der Migrationsdebatte zufolge begründet die physische Präsenz auf dem Herrschaftsgebet eines Staates im Laufe der Zeit einen Anspruch auf vollwertige demokratische Mitbestimmungsrechte. Die territoriale Aufnahme von Migrant:innen lässt sich dieser Ansicht zufolge also nicht langfristig von ihrer Aufnahme in das politische Gemeinwesen des Staates entkoppeln. Diese Ansicht beruht in der Regal auf der Annahme, dass sogenannte *denizens* (ansässige nicht-Bürger:innen) politischer Unterdrückung ausgesetzt sind und die sozialen Grundlagen des Selbstrespekts entzogen bekommen, wenn ihnen die Teilnahme am demokratischen Prozess verweigert wird. Im Kapitel „Denizenship and Democratic Equality“ argumentieren Suzanne Bloks und ich gegen diese Annahme. Wir zeigen, dass die Staatsbürgerschafts des Heimatlandes mancher ansässiger nicht-Bürgerinnen als Ersatz für ihre vollwertige Einbeziehung in demokratische Entscheidungsfindungsprozesse dienen kann. Auf dieser Grundlage schlussfolgern wir, dass ein politisch passiver Gaststatus für manche Migrant:innen auch langfristig vollständig mit demokratischen Idealen vereinbar sein kann, zumindest dann, wenn diese Migrant:innen selbst Bürger:innen demokratischer Staaten sind.

PUBLICATIONS

The following publications are included in this dissertation:

- Häuser, D. and S.A. Bloks. Denizenship and Democratic Equality. *Critical Review of International Social and Political Philosophy* 2025. 28(1), 60–80. (Chapter 6)

DECLARATION

I hereby declare that I, Daniel Häuser, have not received any commercial consultation on my doctoral thesis. This thesis has not been accepted as part of any previous doctoral procedure or graded as insufficient.

Hamburg, 28 May 2025	
Place, Date	Signature of doctoral candidate

AFFIDAVIT

I, Daniel Häuser, hereby declare under oath that I wrote the dissertation titled "Essays on Migration and Legitimacy: Towards a Cosmopolitan Statism'' myself and in case of cooperation with other researchers pursuant to the enclosed statements in accordance with Section 7 subsection 3 of the Doctoral Degree Regulations of the Faculty of Humanities dated 7 July 2010. I have used no aids other than those indicated.

Hamburg, 28 May 2025	
Place, Date	Signature of doctoral candidate

PERSONAL DECLARATION
for
DISSERTATION BY PUBLICATION

Concept/planning Formulation of the fundamental academic problem, based on previously unanswered theoretical questions, including a summary of general inquiries that can be answered on the basis of analysis or experiments/investigation. Planning of the experiments/analyses and formulation of the methodological approach, including decision about methods and independent methodological development.

Implementation Degree of integration in the concrete investigations or analyses.

Creation of the manuscript Presentation, interpretation, and discussion of sought-for findings in the form of an academic paper.

Calculation of personal contribution proceeds according to a point system of 1–100 percent.

The candidate has made an independent contribution of 100 percent to FIVE of the papers.

For a SIXTH paper (Chapter 6), the candidate's personal contribution breaks down thus:

Concept/planning:	50 %
Implementation:	50 %
Creation of manuscript:	50 %

My co-author has agreed to the above percentages for my own contributions.

Hamburg, 28 May 2025

Place, Date

Signature of doctoral candidate