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Coercion of foreigners, territory and compensation

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Abstract:

Justifications for state authority are typically directed towards the good of those subject to that authority. But, because of their territorial nature, states exercise coercion not only towards insiders but also towards non-members. Such coercion can take the form of denying outsiders the right to enter a territory or to settle in it permanently, as well as various restraints on trade and association. When coercion is directed at insiders, it often comes packaged with various claims about distributive justice, including claims to the effect that being subject to coercion entitles citizens to certain distributive guarantees (social minimum, difference principle). This paper asks three questions: can states acquire the moral right to coerce non-citizens (including in the form of a denial of the right to traverse or enter territory)? are outsiders ever morally bound to submit to the commands of states along these lines? does the right coercively to exclude outsiders bring with it any distributive obligations similar to those entailed by the state's subjection of co-citizens? The possibility that a right to exclude must be coupled with a duty of compensation to those excluded will be canvassed.

INTRODUCTION

Every year, indeed every hour of every day, people try to move from one country to another in order to seek better prospects and conditions of life for themselves and their families. Some of them are high-paid technicians or people, such as nurses, with much-demanded skills. Others are poor and unskilled, seeking work such as picking crops or in sweat shops, and risk the guards and barriers at the US-Mexican border or arrive at Felixstowe or Dover hidden in vehicles or containers. The first

group of people arrive with the blessing of the receiving state, because their abilities help to alleviate a shortage of native skill; the second are less welcome and, if discovered, face deportation. But in either case the receiving state, like all states, claim the right to authority over its territory and, as a consequence of that right, claims the further right to admit some and to refuse others. Moreover those who speak on behalf of such states often claim that those who are excluded on the authority of their state have a duty to comply with such commands, for such is the law.¹

Liberalism makes a particular claim about legitimate rule. Liberals claim that the coercive power exercised by the state must be used in a way that is justifiable to those who are subject to its authority.² Much has been written about how that justificatory duty might be discharged in relation to the citizens, and perhaps the permanent residents, of a state. Indeed there has recently developed a minor sub-genre of anti-cosmopolitan writing on distributive justice that argues that strongly redistributive obligations – as entailed by principles such as the difference principle – hold only among those who are subject to a common legal authority or to common coercive laws or who inhabit a common institutional structure.³ Needless to say, this line of argument is strongly opposed by those who argue that the system of state boundaries itself constitutes a coercive order of global proportions.⁴ Special problems attend justification to outsiders, since considerations of fairness, reciprocity or the good of those over whom power is exercised, considerations that we might deploy to explain the relationship between citizens and their state, do not straightforwardly apply. So, for example, the thought that one ought to comply with one's obligations as specified under the rules of a fair institutional system explains what people within that system ought to do, but not why and whether people should be granted or denied admission to it.⁵

¹This paper derives from research carried out whilst a British Academy/Leverhulme Senior Research Fellow in 2006–7.

²See, e.g. Waldron (1993).

³See, for example Miller (1998) and Blake (2002).

⁴For example, Van Parijs (2006).

⁵I should address one initial objection. It might be claimed that there is *no* justificatory requirement towards outsiders. Justification is to insiders and relations with those outside are merely a matter of force and not of morality. But that seems an implausible objection. In the first place, states do recognize obligations of justice to outsiders in all kinds of respects, in relation to refugees, to trade, to war, and so on. More substantively, the global state system that now controls almost the entirety of the world's surface is a system where states control territory in ways that are profoundly fateful for the life chances of human beings, as a simple comparison of the prospects of babies born in

Can states say anything, then, to justify exclusion to the excluded? In this paper I suggest that they can, sometimes. But this turns out to be not such good news as it might appear for the anti-immigration parties of the wealthy North. For I shall argue that the justifications that can be offered to the excluded in good faith are rarely available in relation to the people the excluders most want to exclude: the poor unskilled from the South. My central argument will rely first, on the general goods that are made available to people by the existence of a state system involving territorial control. Those goods may be at risk if states do not have the right to control who may and may not migrate to their territory and settle within it. But an argument that exclusion is justified in order to secure those types of goods for insiders must not, normally, be made if outsiders are thereby denied access to those same types of goods. So a justified act of exclusion will appeal to the fact that the excludee is not thereby denied access to important goods or an adequate range of opportunities. In the final section of the paper I shall canvas the idea that states might purchase the right to exclude by compensating the excluded or by making a substantial contribution to the availability of goods similar to those secured for their own citizens to those outside their borders.

GENERAL AND SPECIFIC JUSTIFICATIONS OF TERRITORIAL CONTROL

This paper will inevitably labour under a limitation. Justifications for state control and jurisdiction over territory are of two kinds, general and specific, which mirror in some respects a distinction from the justification of property. General justifications appeal to the necessity of territorial control for the production or assurance of certain important goods. So the justification goes, roughly, that states are necessary for us to achieve certain valuable things – security, justice – and that, consequently, whatever is necessary for the very existence of the state is also justified, at least *pro tanto*. States need territorial control in order to secure security, order and justice for their citizens, so territorial control is justified. That is an excessively simplified and brief version of the argument, but I use it only to provide a contrast with the specific justification that aims to ground a particular state's claim to a particular bit of land.⁶ Clearly we need both

Burundi to those born in Boston Massachussets will show.

⁶For an attempt to give a Lockean account of how states might come to have legitimate jurisdiction over territory, see Simmons (2001).

of these elements, but I shall rely mainly on the general justification in my positive argument and say little about the specific justification.

That this is a real limitation can be seen from the many cases where the specific tie between a state and the land is controversial. The Palestinian who wishes to return to the family farm that lies inside the borders of Israel and the Argentinian who wants to settle in the Falkland Islands will not be satisfied by the arguments hypothetically addressed to the excluded in this paper, because when they ask what gives a particular state the right to exclude them from the particular piece of territory they wish to have access to, their focus is on a set of issues that I cannot properly address here. I shall take as a given that there are states, that they do exercise territorial control and that some of their claims to do so are justified because of a past history of control, settlement and the recognition of other states. The jurisdiction of the UK government over Kent is not controversial in the way that its jurisdiction over the Falkland Islands is.

TERRITORY, RESOURCES AND JUSTICE

Entitlement and fairness arguments

Borders, and the territory they surround, give states and their citizens privileged access to the resources found within that territory. It is probably helpful to say something about what the nature of those resources will typically be. We can make a rough and ready division between two types. On the one hand we find the resources that occur naturally within a given space, on the other there are its social resources.⁷ This division is not a straightforward and uncontroversial one since it may only be in virtue of features of the social that some natural resources come to have value and to be seen as “resources” at all – uranium deposits counted for little in medieval times – but it will do for my purposes in this paper. Those who find themselves in position of being citizens of a state with valuable natural or social resources located within its borders are thereby advantaged (other things being equal, which they often are not); those who are citizens or inhabitants of resource-poor countries are thereby worse off.

⁷As one influential paper on justice and immigration has it: “. . . we can distinguish between two categories of goods access to which is affected by restrictions on entry to states. The first consists of land and other natural resources that are located within a state’s territory. The second comprises goods that depend for their existence on the activities and way of life of the people living within the state.”Perry (1995) p.94.

Natural resources include the land, water, minerals, plant, wild animals (including fish) and so on found within a territory together with, perhaps, its climate and its location in relation to other territories. There may be room for a good deal of controversy about which of these are truly “natural”, of course, since much land will have been the object of improvement and manipulation over many generations. Assuming that we can come up with some kind of enumeration of the natural resources occurring on the face of the earth we can notice, with Charles Beitz,⁸ that the distribution of such resources is an arbitrary fact and that some peoples, states or nations have been more fortunate in their endowment of natural resources than others have been.

Social resources, by contrast, will comprise the institutions that exist on a territory. The political constitution of a state, legal systems, institutions such as economic markets, welfare services, social networks, educational systems etc. We can add to these many features of the physical infrastructure of a country that are the result of social co-operation over time: roads, railways, canals, airports, bridges, telecommunication systems, and so on. All of these resources that are available to one people and not to another are, it might be claimed, a result of their collective creative effort.⁹

The division just drawn between natural and social resources might form the basis of an argument for the right to exclude outsiders from a territory of the following form. It is true, it might be conceded, that the distribution of natural resources across the surface of the earth is arbitrary and unequal and that some peoples have been more fortunate in that distribution than others. But the fact that some peoples are better off in terms of natural resources than others are bears a very very weak relationship to their differences in wealth, which are overwhelmingly due to social and institutional facts, which are more properly the responsibility of peoples. Peoples should have the right to jurisdiction over the territory they occupy, including the right to admit or to exclude outsiders,

⁸Beitz (1979).

⁹Merely considering that last sentence should give serious pause for thought. It is true that, for the purposes of an ideal case in political philosophy, we could imagine a society whose social resources were the result of the autarkic efforts of a people. But that is hardly the normal case, or anything like it. The city I live in, and the city which I visit most often, both grew in the 18th-century as a result of the slave trade. Much of the historic wealth of those cities, as well as many still-extant features of their built environment, are due to that traffic in human beings from another continent to another continent. Latterly, they have profited from the trade in other commodities. But many of those, such as tobacco, have involved global co-operation and the exploitation of many thousands of plantation workers on other continents.

both because granting such a right ensures effective stewardship over scarce natural resources and because the social resources that have been developed on a territory are “theirs”, and they therefore have a right to profit from and to enjoy what they have created. This is a sort of historic entitlement argument, albeit collective in form, and is plainly implicit in a good deal of popular discourse about migration and related matters.

There is much to disagree with in such an argument. The claimed irrelevance of natural resource distribution to comparative wealth might be the object of one line of criticism, but it is easier to concentrate on idea that peoples have an entitlement to what they have created. The first difficulty with this suggestion is that it tacitly presupposes its conclusion that peoples are entitled to jurisdiction over the territory that they occupy. Even if it were true that the social resources created on the territory resulted from their collective effort, the thought that they had the right to go about creating such resources on that territory presupposes their jurisdiction over it and so cannot ground an argument for that jurisdiction. Suppose we wish away this difficulty, perhaps via the thought that a lengthy occupation and use of a territory might somehow ground a right to develop social resources on it, there are still insurmountable difficulties. These difficulties have to do with the claim of collective creation. Because of the legacies of slavery, colonialism and imperialism, it will, in fact, usually be false to say that the social resources on a territory are the exclusive creation of the people residing on that territory. But even if there were a case of pristine accumulation by a people, it would be false to say that the resources on a territory are the creation of the persons actually living on that territory as opposed to outsiders. For much of the social capital of a people will have been accumulated not by the living but by previous generations of that people. Insiders can scarcely claim more credit for the creation of those resources than outsiders can, and whether or not there are grounds for granting the current residents exclusive possession and control, the claim that “we” created those resource is unlikely to be one of them.

An argument, then, that is based on the historic entitlement of a people to their collective creation looks bound to fail. But it may be that some other aspects of social resources will ground better arguments for the right to exclusion. Many of the social resources available within a territory will be public goods, and others will collectively provided and generally available welfare and health services of various kinds. Because of the fact that public goods would be underproduced if left to private provision, they will often be financed by compulsory taxation. Compulsory taxation will also fund the various social services. Some kind of

argument from fairness might therefore try to justify the right to exclude outsiders on the grounds that it would be unfair to permit them to benefit from goods to whose production they have not contributed.¹⁰ But this argument doesn't seem to cut between would-be migrants and insiders in the right kind of way, since there may be many migrants who would contribute to the production of such social resources were they to be admitted and there are many insiders who will contribute nearly nothing but who will consume their whole lives. If fairness is what matters, it is hard to see that it would be right to deny to the former group the opportunity to make a contribution to just institutions whilst permitting the latter group to benefit from those institutions whilst not contributing.

There is a further problem for defenders of the fairness argument. If we defend the right to exclude the unproductive on such fairness grounds then there may be concerns about consistency. This pertains particularly to the labour market and the efforts that states, through their publicly funded educational systems, put into developing skills. An example may help. Suppose there are two would-be immigrants from Poorland who wish to enter Richland. The first of these is unskilled and middle-aged and we anticipate that he is likely to contribute less than he consumes. We therefore judge that he is a potential burden to the taxpayers of Richland and that it would be unfair to them to allow him admittance. His younger sister, however, a nurse, we welcome because she makes up for a skills shortage and provides good value-for-money to Richland's taxpayers. Since the nurse was trained at the expense of taxpayers in Poorland, however, we will have an instance here of some people benefiting from goods to whose production they have not contributed. Of course it is possible to imagine a consistent argument based around fairness considerations, but it is worth noting, if only as a matter of polemic, that groups who obsess about the drain of some potential immigrants on local taxpayers often also declare themselves supportive of the immigration of those who make up for skills shortages, even though they hope to free-ride on the contribution of foreign taxpayers to the production of those skills.

Consequentialist arguments

If entitlement and fairness provide an insecure foundation for state coercion of foreigners, perhaps arguments that look more directly to the benefits of such practices stand a better chance of success. States require

¹⁰For arguments of this kind see, e.g. Perry (1995) and Heath (1997)

borders and stable jurisdictions, and these, together with the right to exercise control over who comes in and out, make possible all kinds of valuable social developments. With states in place we can develop systems of property, legal systems more generally, and the kind of redistributive institutions that command the attention of philosophers interested in distributive justice. States provide fora for democratic decision-making, allow people to enjoy the goods of citizen participation, and allow some collective control over matters like economic policy and land use.¹¹ States also permit a kind of cultural continuity and national narrative that may be the source of a sense of identity, attachment and pride. States therefore provide their citizens with access to a range of extremely valuable goods some of which may be essential components for leading any kind of decent life.

If states, with the territorial jurisdiction that is essential to their nature, do indeed have such importance, then that provides solid consequentialist support for their existence and for whatever is necessary to secure their existence. This consideration seems to leave the door open to the following thought: that states might reasonably refuse admission to outsiders where their doing so is necessary to secure and protect the valuable goods that the state makes possible. So if the uncontrolled admission of outsiders would plausibly undermine social order or cohesion, would undermine the viability of welfare or health systems, would cause great damage to the environment, would endanger economic growth and stability or would so alter the cultural character of a polity that a state would become unrecognizable as that state, that might provide plausible grounds for the coercive exclusion of some outsiders.

The difficulty with arguments of this kind, however, is that they often purport to show more than they actually do. The reason for this is that they are often voiced from an insider perspective rather than from an impartial one, whereas it is from the impartial perspective that the consequentialist argument must succeed if it is going to. Arguments, for example, that uncontrolled Mexican immigration into the United States will prove economically or culturally damaging to Americans are, if true, not inadmissible on principle. The problem is that if they are to succeed, they also have to take account of the access to those same valuable goods of the would-be Mexican immigrants (and, for that matter, of everyone else). Indeed, insofar as we are disposed to give more weight to the interests of the least advantaged, it can be argued that the interests of the

¹¹On the territorial state as a prerequisite for democratic control over patterns of land use, see Kolers (2002).

typical Mexican would-be immigrant have greater importance than the interests of the adversely affected American.

Analogies between nations or peoples and families often create more difficulties than they resolve. But there is a parallel that may be useful here to get the point about impartiality and justice across. Families make available to their members certain goods that it is difficult or impossible to get access to outside of family relationships. The value of such goods is sometimes thought to support the justified partiality of some family members to other family members. But this can give a misleading impression. The importance of such goods means that we must take account of them when we formulate a theory of justice, and try to enumerate the reasonable interests that individuals will want to pursue. A just society, then, will give parents scope to display attitudes to and develop relations with their children which are relations of appropriate partiality and exclusiveness. But a concern to give everyone access to such valuable goods does nothing to license the pursuit of those goods by some at the expense of others enjoyment of those same goods, nor indeed at the expense of other vital interests that they may have. Parents may use the resources they are entitled to in some ways that favour their children, what they may not do is to favour their children using more than their fair share of resources. Justice must find a place for legitimate partiality, but legitimate partiality does not license the commission of injustice. Similarly with nations: the goods of shared citizenship, democracy, a shared political and cultural narrative and so on are genuine goods and reasonable aspirations. Appeal to such considerations could give *pro tanto* support to measures including the restriction of immigration. But the person whose right to immigrate is in question also has a genuine interest in enjoying those very same goods either within the new society to which they are immigrating or within the one they contemplate leaving. To deny a person a right to enter a territory by citing the importance of certain goods and the need for the preservation of such goods, whilst showing no interest in the effect that such exclusion has on the prospects of the excluded enjoying those very same goods, it is to show enormous bad faith.

JUSTIFIED GROUNDS FOR EXCLUSION?

The suggestion I am initially making here, then, is that one might reasonably deny a would-be migrant the right to enter a territory on the grounds that permitting such a migrant to enter would undermine the

access of insiders to valuable goods, just so long as the would-be migrant's access to those same goods is not undermined by the same act of refusal. That principle demands a qualification, however. It is this, that the existence of liberal and democratic institutions is a good not only to those who are lucky enough to be citizens of them, but also to those outside their borders who aspire to creating such institutions of their own. Imagine a world in which one small and not very prosperous liberal republic is surrounded by tyrannies. In such a world the liberal republic might reasonably have quite a restrictive immigration policy if the alternative would be to endanger its very existence. Such a state might reasonably say to the refused outsiders that although it was denying them access to the goods enjoyed by insiders it was doing so so that some, at least, could enjoy those goods and in the hope that, in the future, others might. In other words, though the refusal would work to the benefit of insiders and to the disbenefit of some actual outsiders, the reason behind the refusal is one of impartial concern and could be justified in such terms to everyone.

The central idea here then, is that if a state wishes to coercively deny foreigners access to its territory it must be able to show that their interests are not thereby seriously damaged. The principal way in which this could be done is to demonstrate that there are options available to those denied access that are sufficiently good. This raises a number of questions. First, why adopt a sufficiency standard here? Why not, instead, require that the options available to them be as good as those that they are denied? Second, what would count as meeting this standard? Third, if a state refuses admission in the absence of such options, is that enough to convict it of injustice or are there other means available to it to meet its obligations.

The reason not to adopt the more stringent standard that would require that options be as good as those denied is that such a demanding standard would seriously compromise the democratic autonomy of advanced states whilst also threatening the position of indigenous peoples. The compromise to the democratic autonomy of advanced or wealthy countries would arise because it would preclude them from pursuing policies that would make them attractive locations of resettlement to citizens of other advanced countries in the case where different societies choose different developmental paths. Not that they are not free to admit such settlers, but where those settlers have adequate options and the real opportunity to participate in political decisions at home, it seems wrong that there should be a strict obligation to admit them. The position of indigenous peoples would be threatened by a more stringent

standard because would-be settlers on their territory even from wealthy states would be able to claim that exclusion worsened their life prospects compared to how they might have been.

To illustrate these cases, we can imagine three states Euphoria, Mediocria and Indigenia. Euphoria is a high-growth advanced capitalist economy with a liberal-democratic constitution and a strong commitment to the work ethic; Mediocria is a somewhat poorer liberal democratic state which provides its citizens with a high standard of education and health care and a short working week; Indigenia is a poor state almost wholly inhabited by its Indigenous tribespeople who eke out a living on their spectacularly beautiful island paradise through a mixture of fishing and farming. Imagine further that Euphoria and Mediocria had very similar standards of living until some time in the recent past, when their respective democratic governments decided on different paths of economic development: the Euphorians went for growth; the Mediocrians went for leisure.

Consider now two different migration paths. In the first, ambitious Mediocrians want to leave home and pursue a new life in Euphoria. In the second, wealthy Euphorians want to buy second homes and retire to the island of Indigenia. If we adopt the more demanding standard then we shall require both the Euphorians and the Mediocrians to admit the would be settlers from Mediocria and Indigenia. The more demanding standard says that Mediocrians who are denied access to Euphoria and Euphorians who are denied access to Indigenia have a complaint because the refusal to admit leaves them worse off than they otherwise would have been. Of course Euphorians may well welcome Mediocrian settlers, but it is hard to see that they are required to do so. They may point out that the Mediocrians had similar political options available to them and chose differently, that there is now severe pressure on Euphorian housing densities and welfare services, and that Mediocrians have a perfectly satisfactory range of options back home. Similarly, Indigenians may well welcome Euphorian tourists and even a few settlers, but given the pressures on their island homeland and on their traditional way of life they may reasonably choose not to and can point out that Euphorians have a perfectly good range of life options available to them and that the fencing off of Indigenia, while it may worsen their lives compared with some possible outcomes, does not do any serious damage to their vital interests.

What counts as meeting the standard? If a state is to reasonably deny access to foreigners it must show that they are not thereby being denied an adequate range of life options. Clearly the options denied by the re-

fusal of access of citizens from one state to another state will be a function of the character and wealth of those particular states and sometimes of the position of individuals within those states. The options denied to a poor Mexican by a refusal to admit her to the United States are different from those denied to a citizen of France or Germany. The West European has prospects which, assessed in capability terms, are comparable to citizens of the US; the Mexican does not.¹²

COMPENSATION AS AN ALTERNATIVE

The guiding idea has been that access may reasonably be refused just so long as the refusee is not thereby denied an adequate range of options. But suppose such options do not, in fact, exist. Is the argument then at an end, and have we established that states must then admit as many as wish to come, up until the point where the options inside have become no more attractive than the options outside? In this final section I should like to canvas a further possibility: compensation. States that coercively deny foreigners access to their territory might compensate those that they coerce for their loss of opportunity.¹³ All kinds of difficulty accompany this proposal and I shall not be able to resolve them here. The difficulties include the valuation of the opportunity denied and the problem of identifying to whom compensation is owed. The valuation of the denied opportunity will be nearly impossible because of the enormous indeterminacy about the nature of what is being valued. If a person is denied access to a country wealthier than their own, we should need to know the value of their opportunities back home and the value of the opportunities back home in order to reach a net figure and the value of the opportunity denied will depend on whether we assess it against the background of what this person might expect if they were allowed in (and everything else held constant) or whether we ask what their opportunities might have been under an open borders policy where all those similarly situated would also have a right of immigration. And who would be entitled to compensation? Clearly if everyone who declares an intention to immigrate to the United States is entitled to a payout, there would be a strong incentive to declare such an intention. (Perhaps these factors would work together to reduce the amount, since the value of immigration to the US

¹²My guess is that something like a capability standard will provide us with the right measure here. I argue this in another paper: Bertram (2005).

¹³My thinking along these lines was stimulated by reading Hillel Steiner's Lockean thoughts on these matters: Steiner (2001).

would be very low if every person who declared such an intention in the hope of compensation were imagined to immigrate.)

The sheer impracticality and indeterminacy of individualized compensation suggests another possibility. That states that wish to assert the right to exclude those without comparable options to those available to insiders might justly do so if they make a fair contribution to the availability of such sufficiently good options. The idea here would be that the price of asserting the right to exclude would be that states would help to bring about economic and political development in those parts of the world that people wish to leave. This might take the form of bilateral agreement between states, with the United States making a substantial contribution to Mexican development as the price of its decision to exclude many poor Mexicans from its territory, or it might take the form of some contribution towards a multilateral development effort. In this case the hypothetical justification offered to the coerced would-be immigrant would not be that they have adequate options elsewhere, but rather that the coercer recognizes that opportunities are inadequate and is prepared to make a substantial effort to rectify that deficiency. I am far from sure that such a collectivized version of compensation will succeed in providing an adequate justification to coerced individuals, but if it is to do so it must aim at the securing of adequate conditions of life for all within a reasonably short timescale, perhaps as short as one generation. It will not be satisfactory to exclude individuals today in the name of adequate opportunities for other individual in the very distant future.¹⁴

A final point is needed. I have argued that in order to be justified in coercively excluding individuals from their territory, states must be able to say that those individuals are not thereby denied adequate life opportunities or, perhaps, that they may exclude provided they compensate the excluded in some manner. There remains the difficulty of working out what the obligations of states are in the light of the policies that other states pursue. The criteria I have suggested mean that wealthy states would normally only be at liberty to exclude those who have adequate options elsewhere. But those people are just the people that states have little real interest in excluding. Rather it is the unskilled, the poor and the vulnerable that self-interest suggests should be excluded. But do states have an obligation to implement such principles if other, similar, states are determined to act unjustly? One answer might be that states committed to justice should work towards the establishment of global norms to

¹⁴An alternative mode of collective compensation might be through a global basic income financed from a Global Fund.

govern population movement that would be binding on all states. Such norms would cover the right of movement, settlement, and ultimately of citizenship. Pending wide agreement on such norms, perhaps it is unrealistic to expect unilateral implementation. But a substantial relaxation of existing restrictions is certainly required: those excluded under current policies are the victims of an exercise of coercive force by the state that cannot be justified to them.

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