

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

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RETHINKING THE BORDER: CONSENT, INCLUSION, AND THE LIMITS OF NATIONALIST JUSTIFICATIONS FOR IMMIGRATION CONTROL

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ABSTRACT

The debate over immigration ethics tends to assume that the states have rights to keep out anyone they want, and that those rights are based on sovereignty, democratic self-government, and national identity. This paper challenges this assumption and concludes that none of the three justifications would justify the exclusive approach. The classical theories of sovereignty were based on consent of the people, not on control over people. The club model is undermined by a democratic notion of inclusion that acknowledges the right to claim the territory of long-term residents who work and live within a society. Collective interests are allowed to trample over individual rights, as liberal nationalist arguments, taken from the work of David Miller, examine balance the interests of citizens and migrants. The paper also suggests that it is impractical to comprehensively control the flow of irregular migrants as a result of economic differences between regions, and that states tend to govern the fear of migrants rather than the flow. Using a comparison of domestic crime and prostitution, it argues for a policy that focuses on the demand of employers and provides a means for residents to become citizens rather than excluded. This is more in line with democratic values and more in line with reality of global markets for labour.

Keywords: immigration ethics, sovereignty, democratic inclusion, nationalism, irregular migration.

INTRODUCTION

The implication is that unauthorised entry is a moral wrong, and this can be used as a justification to deny citizenship to those who knowingly entered the country unauthorized¹. So, questions related to migrants' personal ethics are not simply academic (Weissbrodt & Danielson, 2004). In this paper, the arguments behind such judgments at the state level and determine if they are valid will be examined.

Migration is a universal fact of life. Human beings have been migratory since time immemorial, Davis (1974) noted (p. [93])², and Paleolithic people had made their way to almost every major land mass except Antarctica. Davis also established that there were important regional differences in migration (p. [100]). These include differences in demographics, technology and the environment. A large group of young men, for instance, is a strong push factor, such as from the non-EU Mediterranean and Eastern European countries to the European Union (EU) (see also Malmberg, 1997; Holzmann & Münz, 2004). Migration becomes therefore no by-product of political thinking. It renders abstractions like Rawls's (1993) picture of a closed political society, to which one cannot enter except by birth and exit except by death, appear distant from the reality of how people live³.

Migration is often seen from a political perspective, but economic inequality between regions is one of its key determinants and one that is often overlooked. There are two pillars of modern societies: political and economic, which sometimes work against each other. In the last century, citizenship has been said to have hinged on the two pillars of labor and suffrage, and a person's rights in part on their contributions by labor. The market, both local and national, as well as global, attracts people to the labor force. But overseas, migrants who do take up the same jobs are frequently held responsible for social problems like crime when in fact most are merely caught up in the quest for survival.

A deeply interconnected global economy is too much to close off state walls. They can only project a common human activity into the murky field of illegality. Employers and consumers who rely on migrant workers make politics go their way. No matter what the non-democratic regime does to try to combat irregular migration, its efforts are undermined by its own integration into global markets; and well-developed economies can be served by the informal sector. So, the natural inclination of policy makers is to try to reduce social insecurities without sacrificing economic benefits by tailoring policy to social fears instead of social flows. Where

¹ Labrador's remarks are quoted in Huemer (2019, p. 34)

² Davis, K. (1974). The migrations of human populations. *Scientific American*, 231(3), 92–105

³ Rawls, J. (1993). *Political liberalism*. Columbia University Press.

there is economic necessity and loud professed political principle.

So, let's look at a couple of analogies to understand this collision. The first is between a state's sovereignty over unauthorized immigration to its sovereignty over domestic crime. Modern state is defined as a state that has a monopoly over legitimate violence, but violent crimes are not eradicated. It is legitimate not because it is entirely effective, but because it has a limited power, with the provision of punishment for those who violate it, and it can allow a lot of crime without losing its power. The comparison with immigration is qualified, though, in that the forces that drive migration are supranational, and domestic crime is far less so. There is also a normative statement that says, "Why should there be an irregular immigration and why should states have the legal means that allow them to do so". In practice, it is a poor basis for any serious political theory (cf. Latour, 1993), it may be only half correct, but it does have significance for the self-image of modern societies.

The second analogy is with prostitution and it is an admission that this one doesn't work for everyone. As in Sweden, where buying sex is illegal, and selling sex is not, the state interested in reducing the demand for migration ought to take its focus on those who create the demand rather than on those who respond to it⁴. A corresponding fairness measure would enable migrants to be trapped-when-trapped, provided that they have worked for a period of time. The analogy fails in regard to social value. Unlike prostitution, irregular migrants make valuable contributions to the formal and informal sectors of the economy but are rarely seen as a public good. While there are many states that try to discourage prostitution, few states are truly interested in removing illegal workers from agriculture, food service, and other service industries. Prostitution is seldom seen as a public good, but migrant labour contributes a lot.

These analogies fail, and suggest a contemporary problem for liberal economies in global economies. The actual challenge- how difficult anti-migration policy is to actually implement and what it actually means to motivate state responses- is obscured by a number of assumptions about sovereignty, democracy, and nationality.

In this paper, it is argued that prevalent interpretations of the relationship of these three values to immigration policy are incorrect, and that other interpretations of each value are superior. The absolute sovereignty of state does not belong to a sound theory of sovereignty, but rather comes from the consent of the individual during naturalization. The premise of a sound theory of democracy is not exclusionary controls but democratic inclusion. Nationalism is a concept

⁴ Ekberg, G. (2004). The Swedish Law that Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings: Best Practices for Prevention of Prostitution and Trafficking in Human Beings. *Violence Against Women*, 10(10), 1187-1218. <https://doi.org/10.1177/1077801204268647>

that typically is considered to be pro-natives and anti-immigrants, but is weakened when analyzed in detail. The rethinking of these values would enable policies that are genuinely cost-effective in terms of restriction and more realistically manage migration pressures. When there is no choice but to do so, concepts will need to bend where forces collide with rigid concepts.

SOVEREIGNTY

Consent, Representation and Political Obligation

The thinkers that influenced the early modern European state (Grotius, Selden, Hobbes, Locke, Pufendorf, Rousseau, and Kant) have produced extensive writing on the topic of sovereignty and political obligation yet relatively little on the subject of immigration. Their main question was: What is the obligation of people to obey the state? The answers varied, but many included the requirement of either representation or consent. In this tradition consent referred to an agreement between individual persons to form a sovereign and a political community. It did not mean that the sovereign or the community gave its approval for any specific person.

As individual consent is at the heart of this doctrine, one should read the theory of sovereignty as providing assistance to naturalization rather than blocking it (see, for example, Bauböck 1991). Nor did these theorists make birth a requirement for membership. Even Rousseau, who believed that a people require a common manner of living to create a general will, believed that manner of living meant customs, traditions, and language and not descent. Neither did early modern rulers and philosophers' base sovereignty on immigration control. It was based on dynasty or to a certain degree, on constitution, regardless the population.

It is very important to differentiate sovereign from power. States have been controlling migration and asserting their authority over it for a long time. In U.S. legal practice, in **City of New York v. Miln (1837)**, the state was allowed to regulate the passengers on arriving ships, and in **Chae Chan Ping v. United States (1889)**, the U.S. Supreme Court ruled that the power to exclude foreigners was inherent in sovereignty, and boundless by previous treaties or legislation. But immigration control, as a component of sovereign powers does not make it the essence of sovereignty, or of its relation to individuals. The reasons for exclusion have, historically, been related to policy, and to "national interest," but not necessarily to any theory on sovereignty. The means of control that would be required, administrative mechanisms like passports and mechanisms of identity documentation, are themselves a modern phenomenon (Caplan & Torpey, 2001).

Sovereignty is one of the concepts that play into the politics of immigration. Two others are democracy and nationality, both of which have also changed the nature of the understanding

of migration.

DEMOCRACY

Exclusion and Democratic Inclusion

Michael Walzer (1983) contended that “admission and exclusion are at the core of communal independence” (p. [62]). From this perspective, a democratic community is an association with self-governing authority that has the right to choose its members, like a club. The claim has an ancient parallel in Athens, where citizenship was tightly guarded and supposed to be falsified claims to it were prosecuted in court.

The Athenian case, however, is a poor example for Walzer’s analogy. The citizenship of the Athenians was mostly hereditary, and the Assembly sometimes granted citizenship to the resident foreigners (stratigraphers) by a lengthy process, but the citizenship of the demos was considered fixed by birth. The concept of a democratic community engaging in deliberation about admission came in with the development of state power, new economic forms and theories of naturalization.

The club model is also not quite in line with economic fact. Outside the most autocratic states, nearly every state attracts migrants by offering them opportunities to make money - legally or illegally. As they settle, work, send their children to school, and get to know their neighbours, a path to citizenship becomes a fair way as well as a practical one, as the all-too-familiar amnesties in the United States and Italy show.

This signals another democratic value: Inclusion. According to this perspective, people who are socially connected to a society via an occupation and place of residence gain a right to the opportunity of full citizenship, but not a responsibility to exercise that right (Bauböck). Such a claim would render the state’s power over admission and exclusion not entirely unlimited - and it’s difficult to imagine that power being specifically democratic.

There are two additional ways in which Walzer’s analogy breaks down. Those resources are vital to life, and are not found in private clubs, so no club can exclude and state can. But by making democracy a process of collective decision-making, the analogy hides other aspects of democracy, including inclusion. Inclusion, read in conjunction with the sovereignty account above based on consent, means that those excluding a member of a reasonably just society cannot impose unilaterally upon that member.

NATIONALISM

Cultural Identity and the Limits of 'Balancing'

The three most prevalent arguments for state immigration control are in order: economic, cultural, and nationalistic. John Stuart Mill (1861) noted that in general, free institutions need to have the limits of government respect the limits of nationality (chap. 16). This concept, since the French Revolution and its prevalence throughout Europe, has seemed to come as a no-brainer, though it has never been achieved – states are limited in scope, and some nationalities have been absorbed by others.

The concept of nationality, as a cultural identity, now plays a significant role in immigration issues for both instrumental and ideological reasons. A conservative uses it as a token to be safeguarded. The “liberal nationalists” wonder why it is that liberalism has anything to say for itself in the value and development of national identity as a support of human flourishing. Both approaches are likely to overlook the balance between the value of national belonging to people in an established state and the freedom and opportunity they are seeking as immigrants. With no criterion of comparison, liberal nationalists are happy to take the nation's interests as having weight sufficient to offset, even to supersede, those of immigrants. This assumption is problematic as demonstrated in David Miller's work. History is a further warning against using arguments from nationality in immigration debates. Finally, the standard for measuring immigrants' claims is most readily found in a conception of individual rights, not one of collective interests, as in Weber's (1895) first lecture, which defended restrictions on Polish agricultural labor in eastern Germany in the name of a national interest, and in Barbieri's (1998) account of how German citizenship was based on a conception of national membership that excluded long-settled residents.

Miller in the earlier work, in which he proposed the conception of national identity as a political phenomenon, was optimistic about immigration. In his most recent writing, Miller provides two reasons why liberal democratic states have some control over immigration and can negotiate with immigrants to create a national identity that remains open to change⁵. For this, he starts with an argument that must be examined and he rejects: that migration is a human right.

Miller's first reason is that there is a sense of autonomy that decent states can ensure, which is found in Joseph Raz's (1986) *The Morality of Freedom*. If there are such states, the citizens

⁵ De Schutter, H., & Tinnevelt, R. (Eds.). (2011). *Nationalism and Global Justice: David Miller and His Critics* (1st ed.). Routledge. <https://doi.org/10.4324/9781315878539>

have no need to migrate to exercise their autonomy or to get adequate opportunity. Refugees are only those who are in non-decent states. The "decent state" is too comforting a term, however. The state can provide for the bare minimum of rights and have no part in their enforcement. Other states provide no rights or rights to only certain groups. It's a cause of harm to people in poor countries if rich country citizens feel they have plenty of choices and therefore deny them freedom of movement, or it's a form of hypocrisy and paternalism. And the term 'refugee' is too limited an umbrella for those caught in non-decent jobs because many are not being persecuted rather being neglected by the authorities as it would be defined in international law.

Miller's second reason is characteristic of those who prefer to limit the scope of their obligations to the nation or state rather than cosmopolitanism. Debates over rights to migrate typically occur in the context of justice, he says. If there is no claim, which the receiving people consider justifiable, then the receiving population has the right to refuse the would-be migrants. Some cosmopolitans also have denied responsibility for universal right to migrate, as it is a bad way to achieve global justice, because the duty to help the poor applies to all and not just migrants. Miller believes that states can strike a balance between their own interests and those of those who want to cross the border. He cites two state interests that are valid and legitimate to restrict: public culture and environmental impact of population. The balance, he says, must be struck by discarding "morally irrelevant" or "demeaning" factors like sex, race, or hair color. A country can then allow the interest of the restriction to outweigh the interest of non-refugee migrants to come in within those boundaries.

This argument can be contested. Everyone has a stake in public culture as it impacts on the choices available to them. However, the broad interest in the widest possible choice may be more significant, as wider choice is an element of human security even if one's own situation is limited. This is particularly the case when considering the above weak "decent states" assumption.

This is rhetorical, rather than actual, "balance" between national and immigrant interests, however, for Miller. It conceals the conflict of interests with the individual right to not face discrimination. Immigrants are still protected from exclusion by frivolous reasons, like hair color, but the model permits the interests of the states to prevail over their more important interests in liberty, opportunity, and security. As Waldron (2003) has pointed out, the use of the metaphor of balance masks the question of who is paying the price when a number of one kind is sacrificed for another. The exclusion of hair color is an odd description of a "balancing" of state interests and immigrant interests. The point is not that immigration can be on the basis

of discrimination. It is not just because it would be a morally questionable exercise of trade-offs between aggregate interests and such grounds, but because doing so is a democratic procedure and a matter of fundamental rights. Inclusiveness and other democratic procedural values are autonomous and override the false notion that immigration can be decided by the majority opinion, or that public culture warrants state regulations. It is not national interests that should be balanced against immigration, it is actual individual interests only that can be balanced, not collective interests under the guise of individual interests.

CONCLUSION

This paper has affirmed that the commonly given arguments supporting immigration restrictions are less than compelling. Carefully read, each raises the question of a more open and inclusive stance. First, sovereignty. The early modern theorists laid the foundation for political obligation on the consent of the people rather than on the power of the state to determine who can enter. The capacity to exclude is an historical attribute of the state and not a logical consequence of the theory of sovereignty.

Second, democracy. The understanding of the state as a club which is open to and rejects individuals cannot explain those who have lived, worked and raised families in a society for many years. Democratic inclusion assumes that these residents have a right to full membership and that's why amnesties and naturalization paths come and go even in restrictive states. Third, nationalism. Liberal nationalist arguments purport to balance between the interests of citizens and migrants. In practice they allow for the override of individual rights by aggregate cultural interests, and they take the principle of non-discrimination as an exception to democratic process rather than a rule.

An empirical one is added to these normative points. There are significant regional disparities in income, which drive migration, and policies that curtail migration often end up leading to unauthorized migration. The parallels with crime and prostitution point out the direction in which policy should go. States do not have the means to eliminate irregular migration but they do have the means to make it harder for employers than workers to obtain it, and to provide a path for long term residents to obtain regular status and citizenship.

The most powerful argument is the freedom of association and a community's right to determine who they will accept. That counter-argument should be comprehensively addressed, and it indicates the next argument that should be pursued in this research: Whether the right to exclude is defensible without relying on sovereignty, democracy, national identity as grounds. If it cannot, the burden of proof in immigration discussions falls on the exclusionists.

REFERENCES

1. Barbieri, W. A., Jr. (1998). *Ethics of citizenship: Immigration and group rights in Germany*. Duke University Press.
2. Bauböck, R. (1991). Migration and citizenship. *New Community*, 18(1), 27–48.
3. Bauböck, R. (in press). Citizenship and political integration in comparative perspective. In J. Palme & K. Tamas (Eds.), *Global migration regimes*. Institute for Futures Studies.
4. Caplan, J., & Torpey, J. (Eds.). (2001). *Documenting individual identity: The development of state practices in the modern world*. Princeton University Press.
5. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).
6. *City of New York v. Miln*, 36 U.S. 102 (1837).
7. Davis, K. (1974). The migrations of human populations. *Scientific American*, 231(3), 92–105.
8. Holzmann, R., & Münz, R. (2004). *Challenges and opportunities of international migration for the EU, its member states, neighboring countries and regions: A policy note*. Institute for Futures Studies.
9. Latour, B. (1993). *We have never been modern* (C. Porter, Trans.). Harvard University Press.
10. Mill, J. S. (1993). *Utilitarianism; On liberty; Considerations on representative government; Remarks on Bentham's philosophy* (G. Williams, Ed.). Dent. (Original work published 1861)
11. Rawls, J. (1993). *Political liberalism*. Columbia University Press.
12. Raz, J. (1986). *The morality of freedom*. Oxford University Press.
13. Waldron, J. (2003). Security and liberty: The image of balance. *Journal of Political Philosophy*, 11(2), 191–210.
14. Walzer, M. (1983). *Spheres of justice: A defense of pluralism and equality*. Basic Books.
15. Weber, M. (1994). The national state and economic policy [Inaugural lecture, Freiburg, 1895]. In P. Lassman & R. Speirs (Eds.), *Political writings*. Cambridge University Press.
16. Weissbrodt, D., & Danielson, L. (2004). Ethical dimensions of immigration practice. University of Minnesota Human Rights Library. <http://hrlibrary.umn.edu/immigrationlaw/chapter15.html>