

# **The Jurisdiction Argument for Immigration Control: A Critique**

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## **Introduction**

What does liberalism entail for immigration justice?<sup>1</sup> A longstanding view suggests open borders. In the domestic sphere liberalism embraces rights, impartiality and diversity. Applied to immigration, these core commitments have often been thought to entail a right to immigrate held impartially by citizens and foreigners alike.<sup>2</sup> Indeed, the link between liberalism and open borders is so strong that the latter view is sometimes termed “global liberalism.”<sup>3</sup> On this account, border control is only justified to the degree required to maintain a functioning welfare state, to prevent a national culture from being truly overwhelmed, or to uphold some other liberal good. Liberalism is widely taken to view the border practices of existing democratic states as “a gross violation of human liberty” and manifestly unjust.<sup>4</sup>

That at least is the standard view. Increasingly however the philosophical literature on immigration sees liberal arguments *for* strong border control. Such views invoke

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<sup>1</sup> I am grateful to two referees for comments that improved the article. One was anonymous, the other was Michael Blake, who requested that his identity be revealed. Blake’s responses to my criticisms were generous and open-minded, for which I am especially grateful. I offer critical responses to Blake’s report in footnotes below.

<sup>2</sup> For statements of this view see Roger Nett, “The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth,” *Ethics*, 81/3 (1971), 212-227; Joseph Carens, “Migration and Morality: A Liberal Egalitarian Perspective,” in B. Barry and R. Goodin (eds.), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (London: Harvester Wheatsheaf, 1992): 25-47; and Michael Dummett, *On Immigration and Refugees* (London: Routledge, 2001).

<sup>3</sup> See the discussion of global liberals in Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democratic States and the Response to Refugees* (Cambridge: Cambridge University Press, 2004), 59–84.

<sup>4</sup> Gibney, *The Ethics and Politics of Asylum*, 60.

liberal commitments such as the right to freedom of association, the need to maintain public goods, or Rawlsian priority for the worst off (understood in national rather than international terms).<sup>5</sup> The jurisdiction argument for immigration control, or *jurisdictionism* for short, is an important new theory of this kind. It maintains that states are justified in restricting immigration due to the fact that immigrants impose a new obligation on the people whose territories they enter, namely an obligation to protect and fulfill their rights. Insofar as this obligation is unwanted, immigrants limit the freedom of the polities they enter. Such polities can therefore be conditionally justified in turning immigrants away, so long as the immigrant are from a country that is capable of protecting and fulfilling their rights. Were someone from Haiti to seek to enter the United States for example, jurisdictionism would not permit forcibly returning her to Haiti, as the impoverished Caribbean nation is not an effective guarantor of rights. Were the immigrant Norwegian, however, the United States could turn her away, as she has access to Norway's rights-protecting institutions.

Jurisdictionism is an ingenious theory. It endorses the thought, widespread among not only global liberals but many other theorists of immigration, that the current entry policies of democratic states commit an injustice against would-be immigrants from poor countries. A widespread feature of contemporary immigration policy is to prioritize the entry of well-off, economically skilled immigrants over their unskilled, impoverished counterparts. Jurisdictionism is refreshing in reversing this priority and viewing poverty as a reason *for* admission. The theory does this due to an underlying

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<sup>5</sup> See respectively Christopher Heath Wellman, "Immigration and Freedom of Association" *Ethics* 119.1 (2008): 109-141; Joseph Heath "Immigration, multiculturalism, and the social contract." *Canadian Journal of Law and Jurisprudence* 10/2 (1997) 343-61; and John Isbister "A Liberal Argument for Border Controls: Reply to Carens," *International Migration Review*, Vol. 34, No. 2 (Summer, 2000), 629-635.

commitment to moral equality. In this way it avoids taking on board anti-egalitarian premises that have plagued previous arguments for border control that were ostensibly liberal (see below).

Jurisdictionism's original twist is to harnesses its liberal features to a significant and extensive form of border control, one that may be less restrictive than current state practice, but nonetheless falls well short of the open borders advanced by global liberals. The means by which the theory does so, citing the obligations that arise when someone enters a new national territory, is an original move that to my knowledge has not previously been made in the debate over border control. The uncontroversial concept of jurisdiction moreover is one that attracts wide support across different theories of justice. Not just liberal, but utilitarian, libertarian and other theories endorse the state as an institution with legitimate authority over a set territory. If true therefore the jurisdiction argument offers a rationale for border control that will potentially have implications for philosophies beyond liberalism.

But is it true? Despite its genuinely appealing features the jurisdiction argument has problems. One of these concerns the theory's account of obligation. According to this account, we sometimes have an obligation to take on a new obligation to someone, as when our spouse becomes ill and we are obliged to take care of him or her. Jurisdictionism maintains that we do not have any equivalent obligation to take on new obligations to would-be immigrants. This view however is mistaken, and overlooks how we can be obliged to take on new duties to would-be immigrants, including ways that, despite its official denial, are endorsed by jurisdictionism itself. Jurisdictionism also seems to employ two different standards when determining whether an obligation exists, one of which is sensitive to consequences, the other not.

A third problem is that the theory mischaracterizes the relationship between obligation and freedom. Jurisdictionism maintains that taking on a new obligation necessarily reduces the freedom of the obliged. Yet it is possible for someone to impose a new obligation on me while increasing my freedom, as when they simultaneously release me from one or more other commitments. Given this possibility, the argument is wrong to necessarily equate the creation of a new obligation with a reduction in freedom. In the specific case of immigrants, the theory overlooks the diverse ways they can lighten the load of a receiving society's existing obligations, as by, for example, creating efficiencies of scale in the delivery of public goods. Jurisdictionism, finally, is not able to satisfactorily address the case of an immigrant from a rights-protecting state who signs a waiver releasing the receiving society of all obligations to him or her. While there are good reasons not to offer such waivers, they are not reasons available to jurisdictionism, which shows there is no automatic link between jurisdictional presence and a right to exclude.

### **The Jurisdiction Argument**

Jurisdictionism is the brainchild of Michael Blake.<sup>6</sup> His project is to derive a right to exclude immigrants from the nature of states, presuming little beyond a background theory of obligation. To that end Blake plausibly posits three features which a state must possess in order to be a state: a government able to exercise control through coercion, a portion of the globe's surface over which that control is exerted, and a local population that is the subject of that control. Given these necessary features, a state is defined by its effective jurisdiction over part of the earth's territory. Blake

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<sup>6</sup> My reconstrual of jurisdictionism follows "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41/2 (2013): 103-130; "The Right to Exclude," *Critical Review of International Social and Political Philosophy* ahead-of-print (2014): 1-17; and "Immigration and Political Equality," *San Diego Law Review* 45/4 (2008), 963-980.

notes that the question of immigration only makes sense if one assumes something like this essential feature is true of states. In a situation of one world government, immigration would not occur.

In addition to a theory of statehood, jurisdictionism also posits an account of human rights. It is based on the observation that the division of the world into states has ramifications for the implementation of such rights. While human rights are universal, they ascribe different enforcement responsibilities depending on whether human beings are inside or outside a given state's jurisdiction. Thus a familiar division in rights-theory speaks of the tripartite obligation to respect, protect and fulfill rights. States are obliged to *respect* the human rights of everyone. States have additional responsibilities however for the *protection and fulfillment* of the rights of individuals within their jurisdiction.<sup>7</sup>

This view of rights can explain why the U.S. government attracts criticism for launching drone strikes that kill foreign nationals abroad, yet receives no equivalent criticism for refraining from fulfilling the right of French citizens in France to basic health care. Opposition to drone strikes is based on the view that the U.S. should respect human rights universally, even though it is not also obliged to protect and fulfill rights universally. In the case of French citizens, the latter responsibility belongs to the French government. Were a French person to visit the United States as a tourist however, the U.S. government would then be obliged to fulfill her rights, such as the right to be free from assault. The different responsibilities of governments are determined by the location of individuals within different national jurisdictions.

State responsibilities however are also determined by whether or not a foreign national abroad has functioning institutions capable of fulfilling his rights. Indeed, a

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<sup>7</sup> For ease of presentation I will refer to rights fulfillment, presuming it to include rights protection.

crucial feature of jurisdictionism is that states can have obligations to non-citizens abroad whose rights will not otherwise be fulfilled. “American citizens may have obligations to the citizens of Somalia to help create political institutions in that country,” Blake writes, referring to political institutions that not merely respect, but fulfill, the rights of Somalis.<sup>8</sup> But insofar as we have individuals from rights-fulfilling states such as France in mind, other rights-fulfilling states are not obliged to fulfill their rights until they arrive within those other states’ borders. What is true of states is also true of their residents. When a newcomer arrives in my liberal country of residence, I incur some obligation to fulfill her rights, if only by paying to support rights-fulfilling laws and political institutions. I did not have this obligation when she was living in another state with institutions and residents able to fulfill her rights.

If this picture is true then when an immigrant from one rights-fulfilling state enters the jurisdiction of another it triggers a change in obligations. A French immigrant to the U.S. leaves behind the right to have French institutions be the immediate fulfiller of her rights. She retains the right to return to France, but not the right to be subject to French rights-fulfillment while in the U.S. What she loses in regard to the French government she gains from the American one, as U.S. institutions must now fulfill her rights. The same is true of individual Americans. As Blake puts it, they now have both a moral and legal obligation to take some active interest in her rights, which they did not have when she was in France:

[T]hey are obligated to help pay for the police that will defend her physical security, they are obligated to serve on juries that that will serve to convict those who attack her, and indeed, they are obligated to help create and sustain institutions sufficient to protect her basic human rights. This obligation, it should be noted, emerges from the simple fact

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<sup>8</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 114.

of presence; no particular legal status within the jurisdiction is required.<sup>9</sup>

Again, if we have in mind citizens of Somalia and other countries unable to uphold basic rights, the situation is different. In their case it is possible that we may have extensive obligations to fulfill their rights while they are still in Somalia (the answer will depend in part on whether other states have effectively intervened in Somalia). But insofar as we have in mind migrants from one rights-upholding state to another, entering a new jurisdiction entails a new obligation on the part of the receiving state.

This fact provides a rationale for excluding immigrants from rights-upholding states. As Blake summarizes it:

states may refuse to allow immigrants to come in, because the residents of those states have the right to refuse to become obligated to those would-be immigrants. This general right imposes a duty on would-be immigrants to cite some particular reason why these residents have an obligation to become obligated to these immigrants. In the absence of such a reason, it appears that the state has the right to use coercion to prevent the would-be immigrant from entering into the jurisdiction of the state, since it is the simple fact of presence within that jurisdiction that invokes the obligation to protect the migrant's basic rights.<sup>10</sup>

In other words, citizens of liberal states are entitled to refuse the new obligation that immigrants impose on them, as this impinges upon their freedom. Legal obligations limit what we can do without facing certain consequences: if I steal your car it entails that I go to jail. In the case of a moral obligation, it limits the moral right of an obliged individual to do certain things. Promising to look after your children for the night, for example, obviates my right to do anything other than babysit tonight. Either way, the legal and moral obligations triggered by immigrants both

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<sup>9</sup> Blake, "Immigration, Jurisdiction and Exclusion," 113.

<sup>10</sup> Blake, "Immigration, Jurisdiction and Exclusion," 120.

circumscribe the zone of permissible action. In order to avoid these unwanted limits on freedom, citizens of liberal states can be justified in turning immigrants away.

This argument presumes that members of a receiving society possess “a presumptive right to be free from others imposing obligations on us without our consent.”<sup>11</sup> A possible objection is to attack this right, on the grounds that it has absurd implications. When I am walking down the street, for example, if a stranger collapses near me, I am obliged to come to his aid. This obligation, like that which jurisdictionism associates with the arrival of immigrants, can be considered a product of physical proximity. Might we therefor forcibly drive fellow pedestrians away from us, to avoid having to come to their aid? Similarly, when my friends and family have children, they impose new obligations on me in virtue of my relationship with them, beyond that of defending their children’s legal and moral rights. I will now also be obliged to interact with their offspring in various ways, as babysitter, patient listener and shared user of social space. The right to be free of unwanted obligations is a strange right indeed if it implies that we can give birth control to our colleagues to avoid unwanted obligations to their children.

According to Blake, the right to be free of unwanted new obligations avoids these absurd implications. This is because it can be outweighed by other considerations. Our fellow citizens for example have a right to the use of public space that trumps our right to avoid obligations to them. Similarly, in the case of family and friends, their right to bodily autonomy is more important than my right to avoid unwanted obligations. In both cases there is “an existing obligation to acquire such new obligations.”<sup>12</sup> But in the case of someone entering my country from a rights-fulfilling

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<sup>11</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 115.

<sup>12</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 119.



state, it is not at all clear that my right to be free of unchosen obligations should be disregarded. Rather the new obligation is an “unwarranted interference with freedom,” which I can reject, as there is no countervailing consideration outweighing my right to freedom.<sup>13</sup>

An important feature of Blake’s account is the distinction it draws between obligation and cost. There is no presumption that immigrants impose a significant financial cost on their receiving society. In the case of the French woman, we might imagine her to be a millionaire who pays taxes and makes no use of social programs. Yet even a millionaire generates new obligations to uphold her rights when she enters a new jurisdiction. These new obligations may be mild, but Blake argues that this is beside the point. The costs of meeting an obligation are of limited relevance to our overall assessment of the obligation. If two people impose unwanted obligations on us, one of which is much more onerous, we are entitled to protest the more severe obligation to a greater degree. But the issue here is the legitimacy of having to take on a new obligation in the first place, and this question is not answered by reference to the obligation’s cost. “I cannot justify an imposed relationship of obligation with reference to the lightness of its burdens,” Blake writes, “any more than I can justify my breaking into your house with reference to the fact that I am likely to make things tidier for you once I am in there.”<sup>14</sup> Even a burglar who breaks and cleans acts without permission, and so does something wrong. By the same logic, even if the obligations that an immigrant imposes on society are small, society is still entitled to turn her

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<sup>13</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 115.

<sup>14</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 117.

away, as the immigrant “imposes an obligation on those who have no independent obligation to be so obliged.”<sup>15</sup>

On Blake’s account a state has wide discretion when it comes to exercising its right to exclude. It might turn immigrants away to foster cultural solidarity or unity, for example, or some other social good. Not any reason will do, however. It must be the case that “the goods cited in defense of a particular use of the right are, in fact, goods a liberal state is entitled to pursue.”<sup>16</sup> Call this the liberal proviso. It would rule out a blatantly racist immigration policy that favoured members of one race over another. Such a policy violates the proviso by treating prospective immigrants as “morally unequal *to one another*.”<sup>17</sup> It is perfectly consistent with the proviso however to not treat prospective immigrants as equal to citizens when it comes to their right of entry. Rather the state can point to the fact that would-be immigrants, unlike the existing population, generate a new obligation through their physical arrival.

An implication of jurisdictionism is that entities other than states, whether sub-national entities such as California and San Diego, or international entities such as the European Union, also have a right to exclude. Blake accepts this implication, but notes that sub-national entities cease to possess this right when they become part of a national unit that consciously forms a single political community. By the same logic, member states of the European Union no longer have the right to turn away individuals from other member states. One might suggest that the entire world today occupies a common political community, thereby obviating the right of states to exclude anyone according to Blake’s account. But he notes that there is no global

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<sup>15</sup> Blake, ““Immigration, Jurisdiction and Exclusion,” 117.

<sup>16</sup> Blake, ““Immigration, Jurisdiction and Exclusion,” 121.

<sup>17</sup> Blake, “Immigration and Political Equality,” 971.

institutional framework that fosters a common community the way European institutions do. Thus the fact that we do not think it permissible for San Diego or California to police their borders does not prevent the United States and other countries from doing so. As for the EU, its members can turn away individuals from non-EU countries with acceptable rights records, and so on Blake's account it is effectively a single immigration jurisdiction.

### **Why Jurisdictionism Matters**

This then is jurisdictionism. It avoids anti-egalitarian commitments by confining its political premises to those liberal philosophy already endorses. In this way it is superior to other recent arguments for immigration control.

Consider the freedom of association argument advanced by Christopher Heath Wellman. Wellman argues that just as individuals have a right to freedom of association, so do states. Such a right protects not only our interest in associating with certain people, but our interest in *not* associating with others, including others of certain races. As Wellman notes, "if the importance of freedom of association entitles racist individuals to marry exclusively within their race, why does it not similarly entitle racist citizens to exclude immigrants based upon race?"<sup>18</sup>

Wellman's answer to this question distinguishes between members of a racial group who are already present in a particular country and other members of the same race living abroad who might want to move to that country. Members of the group who are already present would be disrespected by an immigration policy that said no further members of their race are welcome. Applied to a racist immigration policy such as White Australia, the problem with such a policy is the disrespect it exhibits toward Asians already present in Australia. For this reason, the actual white Australia

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<sup>18</sup> Wellman, "Immigration and Freedom of Association," 138 (see note one).

policy that historically existed was unjust on Wellman's account. While this is some consolation, it bears noting that racist disrespect exhibited toward immigrants themselves is permitted by Wellman's account. Hence Wellman's admission that a White Australia policy would be just in an alternative universe where "Australia were already composed exclusively of White citizens."<sup>19</sup> Wellman's account would additionally permit a racist immigration policy in an Australia that had many non-white citizens. Just so long as there were no Asians, say, it would be permissible to legally turn away Asian immigrants, as no current Australians would be disrespected.

It will come as no surprise that Wellman's view has attracted criticism.<sup>20</sup> Although it is rights-based, and so deploys a key liberal notion, it endorses an absolute conception of the right to freedom of association, untempered by any commitment to other liberal goods such as anti-discrimination and state-neutrality. Liberalism is traditionally opposed to state-sanctioned racism, which in the national sphere is something it has traditionally sought to rule out categorically, as when Rawls for example rules out racial segregation through the use of the Veil of Ignorance. An unappealing feature of Wellman's account is that it cannot categorically rule out racist immigration policies.

Wellman's argument is not the only case for immigration control that permits some form of discrimination. David Miller for example rejects immigration laws that endorse "discrimination on grounds of race, sex, or, in most instances religion."

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<sup>19</sup> Wellman, "Immigration and Freedom of Association," 140.

<sup>20</sup> Blake, M. "Immigration, Association and Antidiscrimination," *Ethics* 122, (2012), 748-762; Cavallero, E. "Association and Asylum," *Philosophical Studies* (online first), March 2012, 1-9; Wilcox, S. "Do Duties to Outsiders Entail Open Borders?: A Reply to Wellman," *Philosophical Studies* (online first), March 2012, 1-10. For Wellman's reply to Cavallero and Wilcox see "Immigration Restrictions in the Real World," *Philosophical Studies* (online first), April 2012, 1-4.

Miller would however permit immigration policies that discriminate according to religion, so long as a preferred faith “forms an essential part of the public culture, as in the case of the state of Israel.”<sup>21</sup> Perhaps there are considerations in the Israel case, such as Judaism’s status as a minority religion that has historically been threatened, which could somehow render Israeli immigration policy consistent with liberal principles. Miller’s theory however permits religious discrimination even when the religion in question is well represented and not under threat. It would thus permit telling someone they are welcome to live in an officially Muslim or Christian state only so long as they embrace Allah or Christ.

Jurisdictionism is impeccably liberal in the way it avoids discriminatory measures such as those permitted by Wellman and Miller. The rationale for excluding immigrants is the desire to avoid unwanted new obligations, which as we’ve seen is compatible with a prohibition on discriminating between immigrants based on racial, religious or ethnic grounds. The theory thus decouples the justification for limiting the *number* of immigrants from any justification for limiting certain *kinds* of immigrants, two considerations that are not separated in the rationales of Wellman and Miller. The jurisdiction rationale is thus an impartial justification for immigration control.

Whereas an egalitarian liberal might shrug in reply to Wellman or Miller: “so much for an absolute conception of freedom of association or a national public culture,” liberalism endorses the notion of territorial jurisdiction. Liberals thus cannot evade jurisdiction’s conclusion by simply rejecting its central premise. It is harder to rebut than arguments for restriction that endorse illiberal discrimination.

Jurisdictional considerations will potentially arise in *any* world divided into territorial states, even a world of perfect international equality. If the theory is correct

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<sup>21</sup> Miller, “Immigration: The Case for Limits,” 204.

it thus forces us to grapple with a right to exclude immigrants “derived simply in virtue of the state’s jurisdictional nature.”<sup>22</sup> As Blake summarizes this central aspect of jurisdictionism, its goal is “to describe a state in its most basic terms, those without which we would not describe the thing in question as a state at all, and then to see what in this image could be used to develop the right to exclude.”<sup>23</sup> Jurisdictionism seeks to make its case presuming the same feature, the existence of states, which makes immigration possible in the first place. This presumption is not one a proponent of free migration between states can dismiss, for obvious reasons.

### **The Obligation to Be Obligated**

Hannah Arendt famously spoke of the right to have rights.<sup>24</sup> Jurisdictionism presents a similar notion in the idea of an obligation to accept a new obligation. Call this a meta-obligation for short. Blake suggests that this is the key feature that distinguishes our relationships involving family and friends from those involving would-be immigrants. This aspect of the theory however faces two problems. One, there is no non-arbitrary way to outline a sphere of meta-obligation that excludes potential immigrants. Two, jurisdictionism actually recognizes meta-obligations to foreigners outside our national borders, despite its official disavowal.

Our friends and family members are not the only individuals who impose new obligations on us through childbirth. So do fellow citizens. Indeed, compared to immigration, reproduction is a far more common way for new individuals to enter a polity. It seems in keeping with both jurisdictionism and reason to think that we stand in a relation of meta-obligation to fellow citizen. This relation may not require us to

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<sup>22</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 108.

<sup>23</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 108.

<sup>24</sup> *The Origins of Totalitarianism* (New York: Schocken, 2004 [1951]), 296-7.

take on as many new obligations as do our bonds of family and friends (not unless we are willing to babysit at a national level). Even so, Blake's example of the duties that come with sharing public space with others suggests the reasonable thought that citizenship, like friendship, is a relation that comes with some obligation to take on new obligations. The fact that political communities have historically imposed new obligations on their subjects, from taxation to conscription, further attests to the plausibility of this view.

Immigrants aside however, citizenship is something most people are born into. Liberalism has historically been skeptical of the idea of grounding claims of justice in accidents of birth. As a liberal argument for border control, jurisdictionism takes such skepticism seriously. In a discussion of oppressive states, for example, Blake asks whether their citizens have a greater responsibility to reform them than non-citizens do, and answers that they do not. "To insist that this relationship [of citizenship] generates duties, then, is something very much like insisting that an ascriptive fact—a mere fact of birth—is sufficient to generate an obligation. This, however, seems to be morally impermissible."<sup>25</sup> Skepticism about the moral relevance of mere facts of birth here is warranted. But by the same token, why should an accident of birth undergird an obligation to take on obligations to co-nationals but not to foreigners? Surely it is arbitrary to say the boundary of citizenship marks the limit of our meta-obligations. Rather we should recognize that we can be obliged to take on new obligations to non-citizens, a category which includes would-be immigrants.

Jurisdictionism appears to recognize as much. As we saw, the theory recognizes that American citizens may have obligations to citizen of Somalia to help create rights-fulfilling political institutions. This is an important feature that distinguishes

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<sup>25</sup> Blake, "Immigration, Jurisdiction and Exclusion," 128.

our relationship with Somalis from our relationship with citizens of France. But if this is the case, it means passages justifying turning away immigrants in the name of our “general right to avoid unwanted obligations where we have no obligation to become obliged,” are not correct.<sup>26</sup> Foreign individuals who might immigrate *are* people to whom we can be obliged to take on new obligations.<sup>27</sup>

Consider someone in an alternative Somalia before it collapsed into anarchy. In this alternative universe, unlike ours, Somalia pre-collapse was a liberal state that upheld its citizens’ rights. On the jurisdiction account, during this period citizens of other liberal states were not obliged to fulfill the rights of Somalis. After the collapse however residents of liberal states become obliged to Somalis. We now must rebuild Somalia or admit them as immigrants. Either way we are taking a step that fulfills, rather than merely respects, their rights.

Now suppose that the alternative Somali government is restored, and again becomes capable of fulfilling its citizens’ rights. A Somali then seeks to immigrate to a liberal state. The reason jurisdictionism cites for turning her away is that residents of the receiving society have “no obligation to be obliged” to her. But this is not true on jurisdictionism’s own account. The theory acknowledges that our relationship to

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<sup>26</sup> Blake, “Immigration, Jurisdiction and Exclusion,” 120.

<sup>27</sup> Such a view is also suggested by Blake’s mention of universal jurisdiction, which holds that certain crimes are of “sufficient gravity” that they can be prosecuted anywhere—including a state in which neither the perpetrators nor victims were citizens, (“Immigration, Jurisdiction and Exclusion,” 112). It is hard to make sense of such a law without granting weight to the thought that such prosecutions *need* to take place, and insofar as our laws endorse universal jurisdiction, our institutions may need to initiate such a trial. If so then we can be “obligated to set up instruments designed to provide tools by which rights-violators might be brought to justice,” even in cases where all the individuals involved are outside a state’s territorial jurisdiction. (“The Right to Exclude,” 11). This would appear to undermine Blake’s claim that the state is “obliged to protect and fulfill the rights of only some humans, namely, those who happen to be present within its territorial jurisdiction” (“Immigration, Jurisdiction and Exclusion,” 111).



potential immigrants *is* one that can involve new binding obligations, whether we want then or not, just so long as a certain condition holds. The condition is that the immigrants' government is no longer able to fulfill their rights.

In the case of individual immigrants, they always retain the potential to give rise to new obligations, even when their government perfectly fulfills their rights. The possibility of our relationship giving rise to a new obligation always holds, even when the condition that activates the new obligation does not. The theory's official account misdescribes what is going on. The immigrant can potentially generate an obligation before ever crossing our border, as the obligation of a state to fulfill rights is not, in fact, "emphatically local."<sup>28</sup>

Is there a way around this problem? One possibility is that jurisdictionism need not go so far as to suggest that we lack meta-obligations to potential immigrants. Instead we may simply have weaker and more conditional meta-obligations to them. Unlike the bond of friendship, which automatically includes the obligation to take on new obligations to our friend's children, regardless of how well-off our friends are, our

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<sup>28</sup> "Immigration, Jurisdiction and Exclusion," 111. In his referee report (see footnote one) Blake accepts that jurisdiction does in fact recognize an obligation to be obliged to Somalis and other non-citizens. "I accept that morality requires something like cosmopolitan regard – we must take humans as fundamental units of value, globally rather than locally – but this does not entail that we much accept the particular obligations to others that make up the basis of political relationships [between citizens]." My Somalia example however is not meant to suggest that jurisdictionism's premises entail that we must extend the obligations of citizenship to non-citizens. My goal rather is the more modest one of showing that jurisdictionism does in fact recognize an "obligation to be obliged" to non-citizens, despite its official disavowal. In response, Blake's report now suggests that what distinguishes citizens and non-citizens is that we have different obligations to either group. This however seems a separate argument than the one I am criticizing. As such it would appear to concede the criticism. Furthermore, the purpose of Blake's argument is to justify different obligations to citizens and non-citizens. This passage of his report however seems to assume the truth of such an idea.

relationship with potential immigrants does not automatically give rise to meta-obligations. Rather they obtain only in narrowly defined circumstances, such that, if we do not admit an obligation to the would-be immigrant, the outcome for them would be disastrous.

Call this construal soft jurisdictionism. It is suggested by a passage in which Blake speaks of a “limited right to refuse to undertake responsibility for others’ rights, when those rights are already protected.”<sup>29</sup> On this construal, what is important is not just a fact about us—the absolute boundary of our meta-obligations—but a fact about the immigrants, the outcome for them if we do not recognize a new obligation.

Soft jurisdictionism can explain why a would-be immigrant from a rights-fulfilling state is different from the other cases cited above. In the case of someone in a failed state, the consequences of our state not fulfilling her rights, either through nation-building or admission, could potentially see her most important human rights go unfulfilled. In the case of someone who wants to move from France to the United States, by contrast, she still has access to her most fundamental rights. It is just that she has to access them in France and not the U.S. One immigrant meets a threshold of need that the other does not. On this construal, what is decisive about the case of the immigrant from a non-rights-fulfilling state is the consequence of our turning her away.<sup>30</sup> In pointing to this consequence she can “cite some particular reason” for admittance particular to her case.

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<sup>29</sup> “The Right to Exclude,” 13.

<sup>30</sup> Construing jurisdictionism as granting weight to consequences is not the same as saying it is consequentialist. In the words of Rawls, a prominent critic of consequentialism, “deontological theories are defined as non-teleological ones, not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.” *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), 30.

I believe this construal of jurisdictionism is more plausible than one that fails to recognize meta-obligations to foreigners. Once this construal is in sight, however, it also faces two serious problems. One, it does not adequately distinguish immigrants from citizens. There will be cases in which turning citizens away at the border will not see their fundamental rights denied either. Two, granting weight to the negative consequences of not meeting an obligation is in tension with jurisdiction's view that an obligation cannot be justified by reference to the lightness of its burden on the obliged. The first problem is unique to soft jurisdictionism while the second also applies to its official "hard" counterpart.

### **Citizenship and Obligations**

Imagine a twist in the case of the French would-be immigrant to the USA. While she was born in France and grew up there, one of her now-deceased parents was American, so she has dual French-U.S. citizenship.<sup>31</sup> This of course is a common occurrence, as many liberal states allow citizenship to be passed on to children born abroad. It is normal to think that such individuals are automatically entitled to live in either country of citizenship. Soft jurisdictionism however is not able to capture this widely accepted aspect of modern citizenship.

In the case of the dual citizen, she has the same access to rights-fulfilling institutions as other French citizens do. Were she to seek to enter the U.S., only to be

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<sup>31</sup> For a criticism of jurisdiction similar to the one made here see Michael Kates and Ryan Pevnick, "Immigration, Jurisdiction and History," *Philosophy and Public Affairs*, 42/2 (2014), 189. Kates and Pevnick take issue with jurisdiction's differing account of obligations to the native born vs. the foreign born. My example of the foreign-born citizen, by contrast, concerns the difference between obligations to citizens and non-citizens. In response to Kates and Pevnick, Blake can emphasize the territorial aspect of his theory, according to which, "the state is instead obliged to protect and fulfill the rights of only some humans, namely, those who happen to be present within its territorial jurisdiction." My example, by contrast, bypasses this aspect of Blake's theory,

turned away, the outcome would thus be the same as in the case of the would-be immigrant from France who lacks American citizenship. We might wonder if the dual national is being cut off from loved ones in the United States, such as her grandparents. Yet something similar could be true of a would-be immigrant. Perhaps for example the French person was seeking to move to the United States to marry someone who was unable to leave the U.S.<sup>32</sup> If political consequences are all that matter, it will thus be permissible for liberal states to turn away both immigrants *and* citizens who have access to rights-fulfilling institutions in other countries.

Against this, a soft jurisdictionist could bite the bullet and hold that a right to enter liberal states is only held by individuals born in them. Alternatively, the theory might seek to cite some factor which extends an automatic right of entry to foreign-born citizens but not to non-citizens. Both moves however generate an obligation of justice from a mere fact of birth, either to where it occurred or the nationality of the parents. Both are ruled out by jurisdictionism's liberalism, which is its most appealing and distinctive feature.<sup>33</sup>

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<sup>32</sup> "The Right to Exclude," 14.

<sup>33</sup> In his referee report Blake moots a different possible reason why it is not permissible to turn a citizen away at the border. Doing so fails to take into account the citizen's "project of agency," which includes his "understand[ing of] himself as a continuing agent," an understanding which includes a view of himself as a member of his society of citizenship. Even if the citizen were relocated to another country that fulfills his rights, therefore, he would still be denied something fundamental to his identity. As Blake puts it, "The citizen, on my view, has interests in the life he has already built in his country of residence, and does not hold those interests wrongly; we would undermine his ability to understand himself as a continuing agent, if we were to take from him access to all those resources and relationships he has built within his society."

I do not think this response succeeds, for two reasons. One, it fails to take into account immigrants who have a similar project of agency, according to which they also see themselves as rightful members of a country of immigration. To take but one example, I might be born in the Dominican Republic, but have as my central project of agency immigrating to the United States in order to play major league baseball.

## **The Cost-Benefit Asymmetry**

Hard and soft jurisdictionism disagree on the nature of our meta-obligations to citizens. Both construals however grant weight to the potential consequences for the immigrant when determining if she can justifiably be turned away. This consequence-sensitive aspect of the theory poses its own problem. It sees the theory employ two different standards when determining whether an obligation should obtain.

In the case of the immigrant, the deprivation she experiences in being turned away counts as morally relevant. If that deprivation is significant enough, as it is in the case of someone forced to return to a non-rights fulfilling state, a liberal state must let her in. As we saw however, jurisdictionism does not apply any similar test to determining when members of the host society must take on a new obligation. This is why it does not matter if the French immigrant is a millionaire who will impose miniscule burdens on the receiving society. On the jurisdiction account, an obligation cannot be justified by reference to the lightness of its burdens.

This is strange. For both parties, the immigrant and the host, there are costs and benefits to recognizing an obligation to admit, and to rejecting such an obligation. Such costs and benefits are not just financial, but include the negative and positive consequences in general. The potential costs to the immigrant in the transaction are crucial, but not the costs, or lack thereof, to the host. There is a threshold of severity that automatically generates a duty to admit the immigrant; but there is no reverse-equivalent threshold of burdenlessness on the other side that can automatically permit

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Insofar as immigrants can and do have self-understandings of this kind, appeal to the project of agency does not justify turning them away while admitting citizens. Two, Blake equates citizens with current residents, but these are distinct categories. A foreigner might live in the United States for several years, on a diplomatic or student visa for example, and come to have domestic “resources and relationships.” Conversely, a citizen of a given country might be born abroad and have never set foot in that country.

entry. A receiving society can always turn away an immigrant from a liberal state, even if the cost of admitting them is miniscule, or even if they gain from the immigrant's arrival.

It is hard to see this asymmetry as justified. In one case the cost is borne by the subject of a potential obligation, in the other case the bearer. It seems more consistent with the moral equality underlying jurisdiction to say that costs to both parties matter when determining whether an obligation obtains.<sup>34</sup> On such a view, we would make room for the thought that an obligation can be so minimal that we have no grounds to reject it.

Blake argued against this idea by citing the example of someone who breaks into our home and cleans rather than steals. The fact that the consequence is positive, he maintains, does not oblige us to condone their action. Yet the housekeeping burglar example does not seem to the point. Having an uninvited person in our home changes the nature of what we might do there. Whereas before we may have enjoyed eating junk food in our underwear, or other activities we prefer to keep private, now we might feel embarrassed. Additionally, insofar as we expect to be in control of who enters our home, this sense of security is lost even in a case when an unwanted intruder cleans rather than steals. As a result, the housekeeping burglar scenario does not seem relevant to an analysis of obligations with minimal burdens, as the imposition the housecleaning burglar makes on us is fairly high, depriving us of a realm of privacy and security.

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<sup>34</sup> Blake makes the fair point that moral equality does not always entail political equality. See his paper "Immigration," in *A Companion to Applied Ethics*, R.G. Frey and Christopher Heath Wellman eds. (Oxford: Blackwell, 2003), 226. My point is that the cost-benefit asymmetry is inconsistent with moral equality. In this way I go beyond

There are many reasons why someone from one liberal state might want to immigrate to another. As mentioned above, they may have fallen in love with someone with deep ties to the receiving state. Or perhaps they dream of joining an industry that is centralized in one country, the way Hollywood is in the United States or Sumo wrestling is in Japan. It is no small matter to turn away would-be immigrants with these “ground projects,” as Blake notes.<sup>35</sup> The entire direction of a life can be at stake, and being denied the opportunity to make life-defining choices can be devastating. Given this, it seems more consistent with jurisdiction’s recognition of moral equality to shift the burden of proof from the would-be immigrant to the state seeking to turn her away. On this view we start with a presumptive right of inclusion, and the burden of proof falls on the state seeking to deny the immigrant’s freedom. It would need to cite the possible negative effect on their welfare state or national culture, or some other genuinely liberal good cited in previous arguments for border control. The purpose of jurisdictionism however was to offer an argument that did not depend on case-by-case contingent considerations of the kind, but instead an automatic grounds for turning away immigrants from other liberal states. Once the costs, or lack thereof, of admitting immigrants are deemed relevant to assessing whether we have an obligation to allow them entry, we have left jurisdictionism behind.

### **Obligation Reconsidered**

So far I have argued that jurisdictionism is not able to cogently demarcate an obligation to take on new obligation to fellow citizens but not foreigners; that the theory does in fact recognize such an obligation to non-citizens despite its explicit disavowal; that the softer construal of the theory avoids these problems but is not able

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<sup>35</sup> “The Right to Exclude,” 14.

to justify turning away immigrants without also repelling citizens; and that because the theory grants moral weight to the consequences for immigrants of being excluded from a liberal state as, it employs an implausible asymmetry in determining whether obligations obtain, insofar as the consequences for the host society are given no equivalent normative weight. These are significant shortcomings. However, even if these issues could somehow be overcome, jurisdictionism would still suffer from an even bigger problem.

Jurisdictionism portrays a new obligation as *necessarily* reducing our freedom.<sup>36</sup> The possibility of taking on a new obligation that frees us from other pre-existing obligations, however, shows that a new obligation need not reduce overall freedom. In other words, even if immigrants do generate a new obligation on the part of the receiving society, a reduction in freedom does not necessarily follow. If lost freedom is the issue, there will often be no grounds to turn immigrants away, even if they are from a liberal state.

It seems undeniable that the arrival of new immigrants does generate new obligations on the part of resident citizens. Blake however does not distinguish between two different ways of coming under a new obligation which, when separated, call into question the notion that new obligations always reduce freedom.

Suppose you are a lifeguard at a beach where I go for a swim. Just by being there I have generated a new obligation for you: at a minimum, you have to watch me while I

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<sup>36</sup> Kates and Pevnick dispute Blake's claim that jurisdictionism's notion of increased obligation does not boil down to increased costs. As they put it, "it seems as if the primary way that immigration affects the freedom of a state's current inhabitants is by increasing the *costs* (financial and otherwise) of upholding certain existing institutions," *Immigration, Jurisdiction and History*, 188. While Kates and Pevnick's criticism is well made, it does not dispute, as I do here, the idea that the arrival of immigrants must decrease, rather than increase, the freedom of members of the receiving society.



go in the water, and possible also rescue me. But now imagine that I swim on a day that you are facing other pressing obligations: your lifeguard tower has broken and your boss says you have to fix it; someone you owe money to is coming to collect the debt; and you are planning to drive your children to an important medical appointment after your shift, only to discover that your car has broken down. Suppose I am so pleased with your lifeguarding that I undertake to release you from all these obligations. I fix the tower, repay the debt and drive your kids to the doctor while you wait for roadside assistance. In both scenarios my presence generates an obligation, to at least watch me swim. But in the second scenario my presence has the additional effect of relieving you of other, more onerous, obligations.

In short in both scenarios you face a new obligation, but only in the first has your overall freedom been limited. In the second the overall scope of your obligations has been reduced and your freedom has increased. This illustrates the difference between a new additive obligation and a new obligation that, in taking it on, relaxes ones overall obligatory burden. Jurisdictionism does not distinguish between these different senses of taking on a new obligation, and instead assumes that every new obligation must reduce freedom. But given that the same person to whom our new obligation is owed can ease the burden of our other obligations, or even discharge them entirely, it follows that a new obligation does not necessarily reduce our freedom.

Blake may want to reply that his concern is with new unwanted obligations, all else being equal. This reply would be to the point if his argument were to the end of outlining an ethics of obligation. His concern however is with immigration, and the new obligations immigrants generate will not always be equal. Indeed, they never will be. I do not mean that some immigrants will impose unique burdens on a receiving

state, as when the immigrant from France requires expensive medical treatment, which others do not. I mean that the obligations immigrants generate through their proximity are not the only change that occurs when they arrive. Their arrival has additional consequences that can and often does increase the freedom of resident citizens.

Consider Blake's example of jury duty. While it is true that I could serve on a jury in a trial of an accused immigrant, the person who immigrates can also serve as a jury member. The more people there are in the national pool of eligible jurors, the less likely that I will be selected. So while it is true that the immigrant increases the number of potential people who might become subject of trials which I have to jury, she simultaneously reduces the probability that I personally will have to serve as a juror in someone else's trial.<sup>37</sup> This reveals that a person who enters the jurisdiction of our state creates both new obligations and new freedoms.

Immigrants increase the pool of people resident citizens might marry or start businesses with or learn languages from. To view them as creating a new obligation with no other effect is simply not true to reality. Before determining how immigrants affect the freedom of resident citizens therefore, we need to consider all the ways immigrants can increase that freedom by arriving. What might some of those ways be?

The most obvious effect immigrants have is increasing a country's population. Economists have noted the many positive effects a large population has when it comes to the provision of public goods such as monetary and financial institutions, a

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<sup>37</sup> Given that one accused can require up to twelve jurors, an immigrant able to serve as a juror will create a greater obligation than he or she relieves me of. But this is a fact about the structure of the U.S. court system, not, as Blake suggests, entering my jurisdiction. (A system in which juries were composed of one person would generate as much possible obligation as it relieved).

judicial system, infrastructures for communication, police and crime prevention, public health, embassies and national parks. “While the costs of many publicly provided goods may increase proportionally with the population,” economists Alberto Alesina and Enrico Spolaore write, “often some aspects of these costs are independent of the number of users or taxpayers. Thus the per capita costs of many public goods generally decline with the number of taxpayers.”<sup>38</sup> Each new immigrant thus brings down the cost each resident must pay for the provision of many important government functions. This increases the freedom of previous residents, who now bear a lesser portion of the cost of supporting public goods.

A second positive benefit of increasing a country’s population through immigration is that it can increase security. Among a country’s public goods is its military. All else being equal, a country is stronger to the degree that it has more people who might be deployed as members of its armed forces. Each uptick in population thus gives a country a marginal increase in potential military resources that it might deploy in any conflict. And just as immigrant can take my place on a jury, they can potentially do the same in a conscription lottery, thereby increasing my freedom by sparing me the possible loss of my life in combat.

In addition to sheer military strength, immigration can also increase a country’s cultural power. All else being equal, two countries with different population sizes will see the larger one more culturally influential than the smaller one. The United States for example has ten times the population of Canada, which is sensitive about the scope of American cultural influence. Were the populations of the two countries reversed, it is the U.S. that would worry about its cultural autonomy. While more than sheer size is required to make a country culturally influential, *ceteris paribus*,

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<sup>38</sup> Alesina, Alberto and Enrico Spolaore, *The Size of Nations*. (Cambridge: MIT Press, 2005), 3.

countries with larger populations will have more secure cultural institutions. Members of their cultural class will be less likely to have to move abroad to find a cultural sector large enough to provide them with a rewarding livelihood, whether that sector be the film industry or academia. Indeed, Blake recounts his own experience as a Canadian immigrating to the United States to complete a PhD, which is in keeping with this phenomenon. The obligation to move to a foreign country to do well in a chosen profession is one that citizens of large countries are less likely to face than citizens of smaller societies. In this way citizens of larger states have greater opportunities that members of smaller societies do not.

A fourth and final benefit of immigration concerns the economy. As Alesina and Spolaore note, the size of a country's market, or the overall amount of wealth and individuals involved in its economy, is influenced by its openness to trade. Smaller countries can participate in large markets when both their economy and that of other nations are internationally open. When the international trading regime is less open to trade, it can significantly restrict the economy of small countries. Countries with larger economies are thus less dependent on the international trade regime, in that their larger population *ceteris paribus* allows them to enjoy the benefits of a larger economy and greater prosperity compared to a smaller nation.

In all four areas, that concerning public goods, military strength, cultural power and protection from the vicissitudes of the international trade regime, countries with larger populations have an advantage over societies that are otherwise identical but have fewer members. In each case, the benefit sees immigrants ease the obligations or of the existing members of the receiving society. The financial and other burdens involved in sustaining domestic goods; the obligation to bear the cost of war; to either work to sustain domestic cultural institutions or to pursue one's chosen profession

abroad; and the obligation to engage in trade treaties in order to achieve a certain level of prosperity; all of the obligations are ones immigration frequently (but of course, not always) reduces rather than increases. To hold that immigration *necessarily* reduces freedom therefore is false. We need to examine cases before making such a judgement. As such, there is no *a priori* justification for turning away immigrants from rights-fulfilling states on the grounds that they reduce our freedom.

### **Waiving Rights**

I come now to the final problem for jurisdictionism. It concerns the hypothetical possibility of immigrants willing to wave their entitlement to having their rights protected and fulfilled.<sup>39</sup> Perhaps they sign a contract, for example, relieving the receiving society of its responsibilities regarding rights fulfillment. On a conceptual level, such an arrangement would break any link between sheer presence and rights fulfillment, and so would call into question jurisdictionism's central argument.

Blake anticipates this objection. "I believe it would be morally objectionable to accept such terms, and even more impermissible to make the offer to a would-be immigrant."<sup>40</sup> A key question however is *why* it would be immoral for a would-be immigrant to waive his or her entitlement to rights-fulfillment.

In the case of a migrant from a developing country such as Mexico or Haiti, it is clear why a waiver would be morally objectionable. Immigrants from such countries are commonly motivated to leave by poverty. Allowing them to stay in a rich country

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<sup>39</sup> The immigration literature contains proposals for immigrants to waive some rights. See Michael Huemer "Is There a Right to Immigrate?," *Social Theory and Practice* 36.3 (2010), and Chandran Kukathas, "The Case for Open Immigration," *Contemporary Debates in Applied Ethics*, Andrew Cohen and Christopher Wellman (eds.), (Malden, Mass: Blackwell, 2005), 213. Huemer and Kukathas restrict their proposals to waiving a right to the provisions of the welfare state, not to rights enforcement as such.

<sup>40</sup> Blake, "Immigration, Jurisdiction and Exclusion," 120.

such as the United States only on the condition that they waive their entitlement to a minimum level of right fulfillment can potentially see them agree to such a proposal out of desperation. Jurisdictionism however seeks to exclude only immigrants from countries capable of fulfilling rights. Migrants from these nations would not be forced to choose between guaranteed rights fulfillment and baseline economic security. So why should they be excluded on a jurisdictional account?

“On a jurisdictional account” bears emphasizing here. It is easy to think of negative results that would come from requiring some immigrants to waive away the legal enforcement of their rights. Such an arrangement might lead to the inefficient execution of government functions and wrongs done to individuals who never waived any rights. When paramedics arrive at an accident and take people to the hospital, it would add a laborious step if they had to identify who was entitled to rights-fulfillment before or during the victims’ recovery. Additionally, the new need to make such a determination would create the possibility of a rights-bearing citizen being mistaken for a waivee. The rights-bearing population would therefore have a prudential reason not to allow waiver arrangements. Finally, waivers would also establish a precedent for the notion that some lives are worth less than others. Why stop at immigrants? The next step might be to allow some other group, such as convicted felons, to sign waivers, perhaps in exchange for reduced prison time. Or perhaps revoking legal protection might become a form of punishment itself, offered instead of prison sentences.

Consideration of this kind however are not available to jurisdictionism. This is because they do not generate a right to exclude “derived simply in virtue of the state’s jurisdictional nature.” It is possible for a state to provide services inefficiently, to make mistakes about which individuals are entitled to rights-fulfillment, and to

devalue human life, all while remaining a state. Objections of the kind canvassed involve additional normative commitments, above and beyond those associated with statehood as such, and so defeat the point of a theory that seeks to derive a right to exclude from the jurisdictional nature of states and a background theory of obligation.

A possible response to the waiver objection is for jurisdictionism to argue that a wrong is done to the immigrant from France who signs a waiver. But on what grounds, exactly, would it be wrong for her to waive her rights? There are cases in which we do permit individuals to occupy territory where their access to a government able to fulfill their rights is effectively non-existent. Antarctica for example is not a state and no state is obliged to fulfill the rights of everyone who ventures there. While people in Antarctica remain subjects of concern of their home governments, their remote location makes it impossible for their government to protect them. Historically however explorers, scientists and other individuals have been permitted to venture there. Individuals who make round the world sea voyages similarly travel beyond the effective reach of states and thus occupy positions in which for all practical purposes there is no law available to protect them. It seems as best conditionally rather than inherently immoral for individuals to voluntarily place themselves beyond the reach of human rights law. If that is the case, why not permit well-informed individuals to place themselves beyond the reach of the law inside existing states?

In sum it does not seem obvious that a waiver arrangement should be prohibited due to an obvious automatic wrong *to the immigrant*. If that is so then jurisdiction does not derive a right to exclude from the jurisdictional nature of states: anyone willing to sign a waiver can be admitted. Alternatively, there may in fact be a wrong to the immigrant that I have been unable to identify. But it will require some

additional normative content. This will again defeat the purpose of jurisdictionism, which seeks to confine its central premises to the essential features of states and a background theory of obligation.

### **Conclusion**

A major issue in the immigration debate is where the burden of proof should lie. Should immigrants be thought to have a right of entry, placing the burden on the state to justify their exclusion?<sup>41</sup> Or should states be thought to have a right to exclusion, placing the burden of proof on the immigrant to justify her admission? Despite its many differences from the immigration policies of contemporary liberal states, Jurisdictionism agrees with them on a fundamental point: the burden of proof is on immigrants to justify their admission, not on the state to show why immigrants should be excluded. Strictly speaking, nothing that has been said here challenges this idea at a general level. But if the burden is in fact on the immigrant, it is not because of the reasons that jurisdictionism claims. The theory does not successfully establish that immigrants are excluded from the sphere of meta-obligation that extends to fellow citizens. Indeed, on its own account it recognizes such an obligation. When the theory is construed as recognizing new obligations to immigrants, it is not able to reject immigrants at the border without also rejecting some citizens. The theory seeks to justify turning away immigrants from rights-fulfilling states by judging the outcome for the immigrant using a consequence-sensitive test. Such a move however is not consistent with the theory's rejection of any such test concerning whether receiving societies should be obliged to admit immigrants. Finally the theory employs an implausible understanding of the relationship between obligation and freedom that

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<sup>41</sup> For a defense of such a view see Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013).



does not adequately recognize how immigrants can increase the freedom of receiving societies. And in the case of an immigrant from a rights-fulfilling state who waives his claim to legal protection, the theory cannot offer grounds for exclusion consistent with the goal of deriving such grounds from the nature of states. In the matter of immigration, the theory must ultimately be regarded as lacking moral jurisdiction.

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