

Blake, Michael. *Justice, Migration, and Mercy*.

Oxford: Oxford University Press, 2019. Pp. 280. \$35.00 (cloth).

For several years Michael Blake has been among the most important contributors to the philosophical literature on immigration. This book is therefore greatly anticipated, and develops a number of fruitful arguments. Although I will argue that the account is unsuccessful or incomplete at key points, it's clearly an important work of relevance to those working on immigration, as well as to political philosophers more generally. In particular, Blake provides powerful arguments against the claim that "open borders" are required by liberal principles of justice, develops his own "jurisdictional" account justifying immigration restrictions and the acceptable limits to these restrictions, and, in the most interesting and novel part of the book, discusses the role of virtues and values other than justice in relation to immigration policy, focusing specifically on the virtue of mercy. This last section of the book has potential for starting a rewarding line of research for political philosophers working on many topics, not just immigration.

After a brief introduction, Blake opens with arguments against the idea that open borders are required by liberal principles of justice. Blake considers four arguments for open borders - the argument from "arbitrariness", the argument from distributive justice, an argument based on coherence with other rights of movement, and an argument based on the need to justify coercion - showing that all have significant flaws or weaknesses. The core of Blake's replies to these arguments is closely tied to his own "jurisdictional" account of the right to control migration. A fundamental idea here is that not all rights are human rights, owed to all people as such, and that it's necessary to distinguish between human rights, owed to all people, and civil rights, which apply only within a jurisdiction. The basic flaw of open borders arguments, Blake claims, is to fail to see this distinction, and the corresponding conclusion that a state may owe distinct things to those within its jurisdiction (26).

What justifies the contention that states have different rights and obligations to those inside as opposed to those outside of them? And, given that many people have an (understandable and reasonable) desire to move between states, what justifies the right of states to keep them out? Several proposals have been made in the recent literature, focusing on notions of territory, solidarity among current members, on a supposed property right in a state held by current members, and on associational rights. Blake finds all of these arguments wanting. For lack of space, I won't consider the worries he raises, but will turn directly to his "jurisdictional" alternative.

Blake's "jurisdictional" approach starts with the fact that "it is the state, understood as a political entity, that is the excluding entity, ...and it is the political nature of that state that ought to ground its right to exclude" (67). On this account, a state "is a territorial and legal community, ... within which that state's laws are effective" Furthermore, "one who crosses into a jurisdiction places the inhabitants of that territory under an obligation to extend legal protections to that immigrant's basic rights", thereby "impos[ing] an obligation on those who are present within that jurisdiction" (67). These obligations include, minimally, not violating the rights of the person in question, but more substantively, to "create and support institutions capable of protecting and fulfilling the rights of the newcomer" (74). Therefore, the mere presence of an outsider imposes obligations on those in the state, and, "If we are legitimately able to exclude unwanted would-be immigrants, it will be because we have some right to refuse to take on this sort of new obligation" (74).

Why think the mere presence of a newcomer "impose[s] obligations" on those currently resident? Blake says that the mere presence of an outsider does this, even if in a

“very limited way”, and that this is an impingement on our freedom. And, Blake contends, there is a presumptive right to be free from others imposing obligations on us without our consent. This right isn’t absolute, but when the imposition isn’t justified, it’s an unacceptable interference with our freedom. One worry that arises immediately is that it seems that obligations are placed on us all the time without our consent via the normal democratic process. Whenever a law is passed, I may be obliged even though, and even if, I have not consented to it. Blake doesn’t address this worry at all, and it isn’t clear to me how he would respond to it.

A more pertinent question is how to understand the relevant scenario. If we are considering individual migrants, one by one, it’s unclear in what sense they can be said to be “imposing obligations” on us. The relevant obligations include not violating the rights of the individual and to create and support institutions that would protect and fulfil the rights of the newcomer. Taken one by one, it’s hard to see how any particular newcomer would impose any burden on anyone else. We already have moral obligations that are completely impersonal not to violate the rights of others, and so it doesn’t matter to whom these obligations are directed. As for institutions, it seems exceedingly unlikely that one more person more or less would make any difference. If our institutions are so fragile that the admission of a single unauthorized person would even be noticeable, then they are almost certainly too fragile to do the job. Blake attempts to address this worry by claiming that he is interested in liberty, not “costs”. He claims that even a very light burden, if wrongfully imposed, is unacceptable (76). But, considered individual by individual, it isn’t clear to me that any particular unauthorized migrant counts as a burden on liberty at all. Any citizen in the country in question is merely doing what they would have to do anyway. Therefore, there is no new obligation and so no burden.

This doesn’t necessarily show a fatal weakness in Blake’s account, but what it does show, I’ll contend, is that, when considering the justice of immigration rules, what we need to look at is the expected outcome of policies, not individual cases. That is, we have to look at aggregate outcomes and typical cases, as those are the basis of policy decisions. What we should consider is whether the policy, taken as a whole, is acceptable or not. Looking at individual cases will often mislead us here. When we see this, Blake’s jurisdictional account becomes more plausible, but several of his more specific sub-conclusions become problematic. I will focus on his discussion of refugees, the undocumented, and family migration.

On Blake’s jurisdictional account, states may exclude unwanted outsiders when their rights would be adequately protected in their home state. But, many people face situations where their rights are not protected. So, if one’s rights are not protected somewhere, then there may be an obligation to grant entry (103). A narrow account of whose rights are not adequately protected might focus on those who count as refugees under the UN refugee convention. But, Blake notes, many people who are not convention refugees also do not have their rights adequately protected, and there are many threats to rights beyond persecution. Therefore, we need to consider a broader group than that picked out by the refugee convention for protection.

This claim is plausible, but it’s less clear what it comes to in practice. One worry is that Blake makes little distinction between different threats to rights, and what sorts of remedies are appropriate for them. But, as David Owen and I have each argued, this is essential for understanding our obligations. Importantly, many threats to rights do not obviously require permanent or indefinite admission, while others do. Blake’s account seems insensitive to this matter. Additionally, Blake’s own examples here seem unhelpful in

another way. He uses examples of people leaving mid-income countries with significant pockets of poverty, such as Mexico or China, for wealthy countries such as the UK or the US, for economic reasons. But, in both cases, internal options are possible, even if the expected return to the migrant would not be as high. This seems relevant for evaluating if international movement and admission is necessary to protect rights. Without more detailed discussion, it's difficult to know how far the proposal differs from the status-quo.

In relation to those who face persecution Blake plausibly argues that they are owed more positive help than is typically given now, but again, it's unclear what this comes to in practice. Blake invokes the idea of the so-called "responsibility to protect", but this doesn't seem helpful to me. "R2P" has largely remained a slogan, and in the few cases where it may have had an impact, such as in Western intervention in Libya, the results are deeply discouraging. I have earlier argued that, in many cases where refugee protection is appropriate, this is because direct intervention would be too costly or dangerous, and with predictably bad side-effects. Nothing Blake says here encourages me to change my view.

Consider next the unauthorized population in a country. Blake rightly notes that this is a heterogeneous group, some of whom may have a right based in justice to remain, but many of whom won't. If we focus on those who would have at least minimally adequate rights protection at "home", who would not face a serious risk of having their "agency destroyed" if returned, and who did not enter the state without effective agency (such as so-called "dreamers" in the US), we are still left with a large group. Two well-known arguments purport to show that even this group may gain a right to stay with the passage of time (due to Joseph Carens) or so as to respect their agency (due to Adam Hosein.) Blake rejects both of these arguments.

On the jurisdictional account, entry by those in this group is made "without right" (151). (Importantly, that the undocumented are present without right doesn't, on Blake's account, imply that they have a bad character or are morally depraved in any way (184)). And, Blake holds, it's no injustice to interfere with the plans or projects of others when they are made without right. Therefore, many long-term unauthorized migrants may be removed without injustice. On Blake's account, unauthorized entry is wrongful because it imposes obligations on others without right. Blake illustrates the idea with an example of a person who paints a mural on the side of another's barn. In such a case, he contends, the painter cannot legitimately complain if the mural is destroyed, if it was painted without permission. This conclusion may be too quick. Notions such as detrimental reliance, equitable estoppel, and effects on third parties may be relevant for deciding the issue, and may be relevant in the case of unauthorized migration as well. But, an important dis-analogy must also be noted. If I paint a mural on the side of your barn, you must typically either accept it or remove it. My painting excludes the possibility of you not having a painted barn. It isn't obvious that the presence of an unauthorized person works this way. It might be that the presence of a very large undocumented population excludes certain options. But here we'd need again to look at the impact of general policies, not particular cases. Even this isn't obvious. We need more detailed analysis to know if the comparison holds up. If it doesn't, it's again not obvious how the mere presence of the unauthorized impermissibly wrongs (let alone harms) us. If this is so, then the jurisdictional account may not have the implications in relation to the undocumented that Blake suggests.

Next consider family unification. In practice, this is one of the most important grounds for migration all over the world, but on the basis of his jurisdictional account, Blake argues that there is no general requirement in justice to provide it, except in the case of children who need access to their parents (159). In such cases the "agency of the child" is

threatened with “destruction”. This conclusion applies, Blake says, even to spouses of citizens. The jurisdictional argument appears strongest when we consider the position of the would-be migrant. Viewed purely from his or her perspective, it isn’t clear why the would-be migrant’s plans need to be respected more than the plans of someone who wants to migrate for employment or religious purposes. However, as I have shown, family migration differs from many other sorts in that it necessarily involves the plans and rights of current insiders – a citizen who wishes to live with his or her spouse. Blake presents arguments against this account, but they seem to me to be unconvincing. We might ask why preventing a fellow citizens from living with his or her foreign spouse is any different from (presumptively unacceptable) bans on interracial or same-sex marriage, which Blake accepts failed to respect some citizens as equals. So, why is the foreign spouse different? Blake has two arguments, but neither works. First, he says that it’s still open to the citizen who wishes to marry a non-citizen to do so – they simply cannot live together. But, when we consider our comparison cases, the unacceptability of this answer is obvious. If states had told mixed-raced or same-sex couples that they could marry, but only so long as they lived apart, saw each other rarely, and in general didn’t make a life together, the absurdity of this “answer” would be obvious. It isn’t clear to me why the same would not apply to mixed-citizenship couples. Blake next notes that we do sometimes place restrictions on relationships, citing rules against relationships between professors and students, supervisors and subordinates, and adults and minors. These cases are not closely analogous to the case of mixed-citizenship relationships, and so cannot throw light onto that situation. First, these rules are in place to prevent harm to one party or a larger society. Second, the restrictions are temporary – students graduate, minors come of age; or can be changed at will by the parties – a worker may change jobs. Neither of these factors apply to mixed-citizenship couples. Indeed, if this argument worked against mixed citizenship couples, it isn’t clear why it wouldn’t also apply to same-sex or interracial couples. But few people, including Blake, would accept this. The argument against migration rights for spouses seems to me, then, to be a failure. Blake also raises worries about how far such a right would need to extend. I have addressed this question elsewhere and so won’t consider it now.

We may worry that, with the possible exception of refugees and others in need of aid, Blake’s account is very strict, and might give reassurance to immigration restrictionists. The last, most interesting and novel, section of the book addresses these worries. Blake argues, with significant plausibility, that political philosophy has taken an unduly narrow approach by focusing only on questions of justice. Even if justice is the first virtue of political institutions, it not the only one, and our political philosophy will be richer, and able to deal with more cases, when we take account of this. Blake focuses almost entirely on the virtue of mercy, but it’s plausible that other virtues such as generosity, liberality, friendship, or others are also relevant. Here, however, only mercy gets significant focus.

“Mercy”, Blake tells us, is “the virtue of not giving someone the harsh treatment we are permitted in justice to provide them, out of a moral concern for the effect of that treatment upon the recipient”, or, giving someone the “lenient option rather than the harsh option” when there is otherwise some reason to give the harsh option (189). Given the discussion above, we can see how mercy could play an important role in immigration policy. This is perhaps clearest in relation to the undocumented. Even if such people have no claim in justice to remain in a particular country, in many cases it would be unmerciful – and so in some clear way morally deficient – to remove them. Mercy may also sometimes be relevant in admission cases, when someone who doesn’t fully or technically meet an admission requirement, or would face an exclusion ground, might be admitted anyway so as to avoid a

particularly harsh or unpleasant result for the person in question. At least in these cases, considering how mercy fits in immigration policy seems plausible and useful.

It's unclear to me that mercy is the appropriate virtue for dealing with all of the cases we have looked at, or others we may want to consider. Returning to Blake's account of spousal migration, and assuming for now that the argument is successful, Blake suggests that "mercy" may tell in favor of admitting spouses, even though justice doesn't require it. This seems odd to me. Recall that mercy is about not giving someone "harsh treatment", perhaps especially treatment that they deserve in some way. But in this case we are not giving "harsh treatment" or a "harsh option", but simply refusing to give a benefit. This may be vicious – it might be mean or stingy – but that is different from being unmerciful. This matters, and isn't just a terminological issue, because different values and virtues have different normative structures, and apply in different ways and to different cases. Arguably, generosity would be the relevant virtue here. But, applications of generosity, if they are to be virtuous, must be made in ways that don't negatively impact the rights of or what is owed to others. You cannot properly be generous with resources that do not belong to you, or that you are required to maintain for others. So, if generosity is what underlies some immigration policy, it will be necessary to make sure it doesn't adversely impact the welfare or advantage of citizens, especially not ones who may oppose the policy. This differs from obligations of justice, and, most likely, mercy, where we may have an obligation to engage in the act even if it makes some people less well-off than they might have been. Blake has made an important advance by showing how virtues other than justice are relevant for immigration policy (and for political philosophy more generally), but the narrow focus on mercy seems to me to be misplaced and distorting.

I have not been able to discuss all of the important arguments and issues in this rich book. In particular, Blake's discussion of grounds for selecting immigrants is much deeper than I have been able to indicate, and will provide fertile ground for discussion and debate. Despite the misgivings I have noted, this is one of the most important books on immigration policy in the last few years, and should be read by those with an interest in the topic, as well as by people hoping to develop accounts of virtues other than justice in political philosophy.¹

Matthew Lister, Deakin University School of Law

¹ Thanks to Luara Ferracioli for helpful comments on an earlier draft of this review.