

## ON THE MILITARIZATION OF BORDERS AND THE JURIDICAL RIGHT TO EXCLUDE

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The first person who, having enclosed a plot of land, took it into his head to say *this is mine* and found people simple enough to believe him, was the true founder of civil society. What crimes, wars, murders, what miseries and horrors would the human race have been spared, had someone pulled up the stakes or filled in the ditch and cried out to his fellow men: “Do not listen to this impostor. You are lost if you forget the fruits of the earth belong to all and the earth to no one!”

—Jean-Jacques Rousseau, Discourse on the Origin of Inequality

On Sunday July 28, 2013, at the San Ysidro port of entry, the border crossing between Tijuana, Mexico, and San Diego, California, a gathering of about one hundred immigrant rights activists and allies (many minors, some undocumented) protested the recent rise in deportations; the increasing incarceration, criminalization and detention of undocumented immigrants; and the militarization of the southwestern segment of the United States border. What started as a simple march quickly escalated into mayhem when protesters approached a small fence providing space for pedestrians to exit the edifice housing the actual port of entry. What happened next serves as a visceral reminder, an almost perfect example, of the recent response to *migratorially disobedient*, “unwanted” immigrants: as if taking a cue from popular demands that call for the construction of bigger and better barriers along the US-Mexican border, United States Customs and Border Protection (CBP) agents literally wielded a small metal fence, the kind that is seen at concerts or parades, to push back and pin down protesters.<sup>1</sup> While it is unclear if the protesters actually crossed the barrier meant to provide ample space for travelers—subsequent explanations for the CBP’s response make note of protesters sitting on the wrong side of the barricade without a permit—the brutal and aggressive reaction was all too apparent. Several protesters were dragged, injured, pinned on the ground, and then arrested. With the help of a metallic fence, officers of the Department of Homeland Security forcefully ended the civil protest, an

event that stands as a microcosm, if you will, for what is actually taking place on the US border with Mexico.

This essay first calls attention to the increasing *militarization* of national borders, a phenomenon that is not exclusive to the US southwestern border with Mexico but is occurring on national divides across the globe, especially those situated between so-called “First World,” developed countries and “Third World,” underdeveloped nations.<sup>2</sup> By “militarization,” I have in mind “the use of military rhetoric and ideology, as well as military tactics, strategy, technology, equipment and forces.”<sup>3</sup> As Karma R. Chávez notes, “militarization suggest the intermingling between police and military forces, so much so that police engage in military functions and the military engages in police activity.”<sup>4</sup> Wayne A. Cornelius provides perspective into the dangers of militarized borders when he writes:

[T]he fortified US border with Mexico has been more than 10 times deadlier to migrants from Mexico during the past nine years than the Berlin Wall was to East Germans throughout its 28-year existence. More migrants (at least 3,218) have died trying to cross the US-Mexico border since 1995 than people—2,752—were killed in the World Trade Center attacks on 11 September 2001.<sup>5</sup>

As Cornelius explains, the possibility of migrants dying en route to the United States nearly doubled between 1998 and 2005. Almost a decade later, U.S. Customs and Border Protection (CBP) recorded over 6,000 deaths between 1998 and 2013 on the southwestern border (probably more since not all bodies are recovered).<sup>6</sup> It is for this reason that the militarization of the border is a major concern voiced by immigrant rights activists today. It is a concern, however, that should trouble anyone who believes that a state has the right to enforce immigration restrictions and articulate policies of exclusion, as this essay will show.

Militarized national divides are what Étienne Balibar refers to as “hyper-borders”: fortified divisions that are meant to enclose and protect national or geopolitical space from perceived threats.<sup>7</sup> The primary targets of hyper-borders are not other states but non-state transnational actors, such as individuals, groups, social and political movements, organizations, and even industries.<sup>8</sup> Hyper-borders render existing walls and divides, as well as the concept of a border itself, “complex and equivocal.”<sup>9</sup> That is to say, amidst their hardening across the globe, the policing of borders increasingly occurs at sites away from the border, at places such as airports, highways, workplace E-verification visa checks, schools and universities (in terms of who is entitled to in-state tuition and who is not), among other places. Borders are not simple lines in the sand or self-evident divides based on historic ethnic/national groupings or geographic topography, but “world-configuring” aspects of modern political organization that perform an assortment of functions, some of which are obsolete and harmful while others remain crucial to the efficacy of political institutions as we know it.<sup>10</sup>

By calling attention to the *militarization* of borders, I contribute to a conceptual re-orientation that is critical of tropes of “border security.” The latter is often a rhetorical ploy wedded to any talk of immigration reform throughout popular discourses in the United States, and meant to generate trepidation when put in the context of national security.<sup>11</sup> This reconceptualization necessitates a renewed and more difficult ethical justification for the building of walls, the continuance of attrition-based enforcement policies, and the devastation of communities in the vicinity of the southern border or immigrant communities across the United States. How does recognizing the border with Mexico as a *militarized* zone change the tone of the immigration debate in the United States? My hope is that the idea (and reality) of the US southwestern border as a militarized zone offers a moment of reflective sobriety that makes the citizenry and government of the United States rethink its attitude toward immigrants, its demeanor regarding international relations, and the need for transborder regional development, which would help ameliorate the social and economic conditions of sending countries. My worry is that some will appreciate the idea of the border as militarized, but for all the wrong reasons, namely the concern that such a response is necessary to deter the hordes of would be “illegals” seeking entry into the United States. At the very least, thinking in terms of militarization repositions public debates on immigration in ways where all participants must justify their stance without relying upon fear-mongering tactics or already conceding the need to wed immigration reform and the building of walls.

In order to explore the relationship between the idea of “militarization” and philosophical discussions of the right to exclude, the second part of this essay critically examines Michael Blake’s jurisdictional theory of immigration restrictions. In light of public debates centered upon “illegal” immigration and the need for a tougher stance at the border, Blake’s juridical framing has much to offer. For him, the right to exclude is best situated within a state’s standing as a sovereign legal institution that must effectively rule a given area and population.<sup>12</sup> It is within the nature and workings of legal sovereignty that there are territorial limits of enforceability, thus borders. Blake’s discussion therefore situates the right to exclude within a theoretical framework where juridical boundaries, the liberty of citizens, the rights of persons, and tempered instances of coercive force are all relevant. I agree with Blake that a theoretical right to exclude does little to justify the practice of walling as it practiced by wealthy states today. Nevertheless, what else could this right permit if not the erecting of barriers and other coercive mechanisms that sufficiently keep out and deter would-be irregular migrants, especially when said right serves to protect the liberties of current members? Can the right to “exclude” really be exercised in a way that does not depend upon coercive force? Although Blake is clear that the contours of the right to exclude remain to be detailed,<sup>13</sup> I believe that his rationale for even a tempered right to

exclude inevitably leads to a reduction of the border to that of champion of liberty, the great barrier against unwanted obligations. The fact that political thinkers are hard-pressed to answer the above questions demonstrates how entrenched political theory and philosophy remain in border practice.

Insofar as popular discourse (and even political philosophy) remains locked in a paradigm committed to “border security,” where borders protect the privileges, advantages, or even the safety of current members, alternative ways of exercising the right to exclude without depending on militarized divides will continue to evade discussion. The shift from rhetoric of border security to that of militarization represents the kind of conceptual reframing that may channel public and scholarly discourses into directions where novel and creative answers to how to “exclude” within political institutions that are geographically constrained but not necessarily fortified becomes possible.

#### CONCEPTUAL FRAMING: FROM BORDER SECURITY TO THE MILITARIZATION OF THE BORDER

Like any other politicized, popular debate, what passes for the “immigration debate” in the United States harbors an assortment of conceptual assumptions that reflect the locale from where this debate occurs. Paul Apostolidis alludes to this when he writes:

[T]he debate about immigration control and reform proceeded then, as it does today, largely through native-born Americans’ statements *about* immigrants and proposals for what to do *to* with and (less often) *for* immigrants. Immigrants, in other words, were then and remain the objects for discussion and analysis, the targets of apprehension strategies, the dangerously inscrutable entities whose likely responses to carrot-or-stick incentives were the subject of predictive calculation and ceaseless debate.<sup>14</sup>

The “immigration debate” takes places within the confines of the *American* imaginary, such that the epistemological underpinnings of this debate favor native-born US citizens, a fact that precludes certain outcomes or responses in favor of others. Proof of this predisposition is visible in the call for tougher *border security*, a need articulated from both sides of the political spectrum. Rarely is this demand questioned. In fact, although it did not survive the House of Representatives, the most recent U.S. Senate Bill dealing with immigration reform, The Senate Immigration Reform Bill (S. 744), would have helped to regularize the status of many undocumented individuals, but it also commanded the use of \$46 billion for a 100 percent increase in border agents (from twenty thousand to forty thousand), the incorporation of more surveillance and unmanned technology, as well as the strengthening of the actual border fence. As the founding director of Border Network for Human Rights, Fernando Garcia, pointed out, “the only

other border that has more than 40,000 or close to 40,000 armed soldiers . . . is the North Korea and South Korea [border],” an area also (inappropriately) referred to as “the demilitarized zone” (the DMZ).<sup>15</sup>

Typical justifications for the “securization” of the US-Mexican border highlight the problems created by the drug trade, the persistence of undocumented immigration, and the ever-present threat of terrorism. Along these lines, both Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) describe their primary mission as “protecting America.” The CBP’s priority is to “keep terrorists and their weapons from entering the U.S. while welcoming all legitimate travelers and commerce. CBP officers and agents enforce all applicable U.S. laws, including against illegal immigration, narcotics smuggling and illegal importation. CBP deploys highly trained law enforcement personnel who apprehend more than 1,000 individuals each day for suspected violation of U.S. laws.”<sup>16</sup> Immigration and Customs Enforcement exists to “promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration.”<sup>17</sup> Both agencies state that their missions were defined in the wake of September 11, 2001. In fact, neither agency existed prior to this event as both grew out what was then Immigration and Naturalization Service (INS).

David Aguilar, the former Acting Commissioner for the CBP, explains that “the evolution of the Border Patrol as a risk-based, intelligence-driven law enforcement organization is part of a much larger change in the U.S. Government’s approach to border and homeland security.” He continues: “[T]he Sept. 11, 2001 terrorist attacks initiated a fundamental rethinking about cross-border movements and security, including border security.”<sup>18</sup> I call your attention to Commissioner Aguilar’s use of the term “rethinking.” Customs and Border Protection is very proud of the fact that its approach to “keeping dangerous people and dangerous things away from the American homeland, especially terrorists and terrorist weapons,” is, Aguilar explains, nowadays knowledge-based. Similarly, as Chief Michael J. Fisher explains, “the principle theme of the Strategic Plan is to use Information, Integration, and Rapid Response to meet all threats.” Fisher continues, “We will build upon an approach that puts the Border Patrol’s greatest capabilities in place to combat the greatest risk. We will gather and analyze Information, ensure Integration through operational planning and execution with our international, Federal, state, local and tribal law enforcement partners, and based on risk, deploy the appropriate Rapid Response to the threat.”<sup>19</sup>

To what extent September 11 impacted the militarization of the border remains a contentious issue. Drawing from Timothy J. Dunn, Chávez explains that the militarization of the border has been “the U.S. government’s plan at least since the Reagan administration, and has virtually nothing to do with the events of September 11, 2001.”<sup>20</sup> Chávez offers as example “the Immigration and Naturalization

Services' (INS's) four-phase 'Southwest Border Strategy,' implemented post-NAFTA in 1994, [which] strategically planned to militarize the US-Mexico border in order to deter clandestine crossings."<sup>21</sup> One need only remind of the infamous "Operation Wetback" (1950s), and more recently "Operation Gatekeeper," "Hold the Line" (both 1994), and "Desert Safeguard" (1996) to see that the United States has been in the business of ramping-up border security for quite some time. One can even venture as far back as José Doroteo Arango Arámbula, better known as Pancho Villa, arguably the first great "terrorist" of the early twentieth century, and the infamous Zimmerman telegram, to get a sense for how long distrust has plagued the southern US border.

While it is clear that "border securization" has been taking place prior to recent concerns regarding terrorism, the rhetoric of national security as connected to border enforcement acquired new light after September 11. As Christopher Rudolph explains, "[t]he terrorist attacks on New York and Washington, D.C., in 2001 had a profound effect on how American national security is conceived and the ways that immigration may impact it."<sup>22</sup> Since the early Cold War, Rudolph reminds, immigration and border policies had security implications connected to the United States' economic, geopolitical (i.e., military defense), and societal interests. During the Cold War, when geopolitical risks were high, there was great need to be flexible in terms of immigration policies insofar as they promoted international alliances and served US interests. Similarly, the United States' economic health is best safeguarded when the flow of goods, labor, and resources can pass through borders with ease (the purpose of North American Free Trade Agreement, NAFTA). Post-September 11, however, cross-border flow constitutes a unique threat that the United States cannot afford to take lightly. And while the economy might prefer less obstruction at the border, domestic national safety requires *not* the complete closure of the border, for that would severely hinder our economic well-being, but the establishment of more bureaucracy and policies of regulation, that is, increased screening and tracking abilities.

Regardless of the "newfound" role the border now plays in preventing international terror, insofar as one of goals of such revamped approaches to border securization is stopping unauthorized entry, this border-centric approach has not been as successful. As Cornelius explains, "illegal entries have been redistributed along the south-west border; the financial cost of illegal entry has more than quadrupled; undocumented immigrants are staying longer in the United States and more of them are settling permanently; migrant deaths have rise sharply; and there has been an alarming increasing in anti-immigrant vigilante activity."<sup>23</sup> Cornelius adds that little has been done to effectively curb employment of undocumented people or address the extra-national reasons for immigration. What can explain the persistence of such failed border-centric policies? Cornelius offers three answers: first, political maneuvering so as to not appear to have lost control of the border; second, the symbolism of border security as connected to a commitment

against terrorism; third, an insatiable appetite for cheap, low-skilled labor. He summarizes this last point by saying “much of illegality in low-skilled employment today is ‘manufactured’ illegality: a direct function of unrealistically low [formal immigration] quotas for low-skilled foreign workers, quotas that are set so low for political rather than market-based reasons.”<sup>24</sup>

Rather than view increases of border agents, drones, and the building of walls through the lens of “border security,” an idea that allows for tropes of terrorism and national security to tantalize the latent xenophobia and jingoism of *nation-states*, “the militarization of the border” marks a conceptual shift in thinking about current responses to cross-border traffic and immigration. “Militarization” reveals an *analectical re-orientation* that represents how those on “the underside of the immigration debate,” that is, those on the receiving end of current immigration enforcement policies and initiatives, think about what is happening at the border *and* in communities across the United States.<sup>25</sup> The argument for this conceptual re-orientation has to do with (1) the impact the act of militarization has upon immigrant and citizen identities, (2) the increasing dangers caused by heightened militarized policing of the border, and (3) the failures of a border-centric immigration enforcement strategy. Drawing from Cornelius and Rudolph, I laid out a brief explanation of the last two points above; Balibar’s comments on the “production of strangeness” assist with the first.

As he explains, the militarization of the border blurs the line between “enemy,” those whom *militarized* borders are meant to keep out, and “stranger,” those residents or members of a polity who resemble outsiders, a kind of guilt via racial, ethnic, linguistic, or even religious association. For Balibar, the slippage between the “enemy” and “stranger” leads to the production of a perpetual kind of “strangeness” that works to alienate certain groups from ongoing nation-formations in places like the United States.<sup>26</sup> This phenomenon gives rise to what Mae Ngai refers to as “alien citizens,” individuals assigned perpetual foreigner status regardless of their standing as citizens.<sup>27</sup> Balibar suggests that the creation of alien citizens may be “inherent to the structure of the nation-state, and periodically activated by situations of cold or hot war.”<sup>28</sup> Borders play a role in the production and reproduction of national imaginings, which, in conjunction with the production of strangeness, often take on racial, ethnic, and religious dimensions. While borders are supposed to demarcate territorial boundaries, when militarized, they often stand in as divides for racial, ethnic, or linguistic differences between peoples. Borders are thereby supported or bolstered by such things as racial, ethnic, or religious difference, even when such differences are the product of national imaginaries. When borders assume these contexts, they become more than just lines in the sand; they become “color lines.”<sup>29</sup>

Thinking about the border as a militarized zone where local, state and federal agencies align themselves against external (and thus internal) threats should generate some concern regarding the US stance on international relations, its



investment in transborder local regional development, and the country's attitude toward immigrants and the citizens who do not fit the racial, ethnic, or religious normativity of American identity. The militarization of the border is proof of what Phillip Cole considers to be "a Hobbesian attitude" amongst political communities at the international level.<sup>30</sup> This attitude does not require actual war,<sup>31</sup> but a *realpolitik* that "atomizes" each polity and denies the historical relations between existing states, historical relations that may have created conditions that led to influxes in immigration from poorer states. In light of the history of almost every border in the world, such a militarized stance is not surprising; almost every border in existence is the remnant of colonial/imperial projects or war. As Jorge Valadez put it, "[I]t is historically well established that practically all nation-states acquired their territories through conquest, invasive settlement, broken treaties, partitioning between imperial powers, and other morally illegitimate means. Even those nation-states that might have acquired their territories peacefully and without displacing pre-existing communities cannot claim to have acquired their territorial powers legitimately, since they did not obtain the consent of the world community to obtain exclusive control of their land and natural resources."<sup>32</sup> Thus there is something inherent to national boundaries leading to the creation of "war-like" atmospheres. Borders begin from an understanding of national sovereignty and state membership where inter-state peace is not the primary starting point.

The idea of the border as a militarized zone places the onus upon the US government to justify its actions without fear-mongering tactics that prime a particular ideological response. As Chávez points out, "[i]f more people understood how militarization works and the careful way that the rhetoric of security disguises its material impacts, it is likely that the US government would be forced to be more accountable to its people."<sup>33</sup> For Chávez, "the problem with the emphasis scholars place on analyses of the rhetoric of security is that it enables state apparatuses and conservative ideology to dictate the framing of discussions and debate."<sup>34</sup> I cannot underscore this last point enough. Nevertheless, I am not only concerned with the ways in which conservative ideology dictates the terms of the immigration debate. The more we remain stuck within a paradigm of security, the more borders will be thought of only in ways that remain connected to the well-being and prioritization of the interests of the nation or citizenry that comprise a state. This prioritization should be untenable, since it primarily privileges those benefiting from historical contingency.<sup>35</sup>

"Securization" is a simplification of the border, a reduction of complexity.<sup>36</sup> Borders provide an assortment of functions that remain crucial to the workings of political institutions. They demarcate the territory that a state has control over, provide juridical limits to political and legal power, allow for the efficacious dispersal of burdens and benefits for members, and even play a role in the creation of national identities, in addition to other functions. Focusing on security reduces the border to a single function, one that over-determines the prospects



for immigration reform such that no reform is possible without a political and financial commitment to building walls. With the demand for border security in mind, Tim Canova writes:

The proposed separation fence may or may not succeed at walling off “the other,” the would-be immigrant from south of the border, but it does represent a symbol of exclusion, a failure of reformist imagination, and the stifling of any broader discussion about the meaning and boundaries of national citizenship—the very nature of rights and duties of citizens in a time of complex change and globalization. . . . I argue that border control should be part of a far wider discourse, one that draws on multiple disciplines and perspectives to re-imagine the range of creative possibilities for reforming our borders and the boundaries of citizenship. Such inquiry, comparative and historical in nature, requires a degree of humility. It recognizes that how we presently structure relations with our neighbors may not be ideal and we may learn from the experiences of other people in other times and places.<sup>37</sup>

In the next section, I offer example of how political philosophers inadvertently perpetuate the above reduction when justifications for the right to exclude remain locked in paradigms that view the central role of the border as the protection of the liberty of citizens. Ultimately, my goal is to ask if the militarization of the border is a product of the right to exclude, or does the right justify militarization?

#### THE JURIDICAL RIGHT TO EXCLUDE AND THE MILITARIZATION OF THE BORDER

In “Immigration, Jurisdiction, and Exclusion,” Blake provides an argument for a tempered right to exclude, that is, one that cannot discharge the claims of all would-be immigrants, especially those from poorer and oppressed countries, nor can it justify the practice of walling as it takes place today. His argument is predicated on (1) the nature of states as sovereign legal communities, which necessarily implies territorial bounds and a stable population over which laws are enforced; and (2) losses of liberty accrued by current members of a state when its laws recognize the rights of all persons within its territory, regardless of their alienage or citizenship.

I appreciate Blake’s view for two reasons. First, he is critical of deontic assertions of the right to exclude that begin from shared *ideas* of belonging or personal desires regarding whom one wants to associate with or not in civil society. Instead, Blake starts with “facts on the ground,” what *is* the case and not what *ought* to be: political communities as sites of shared liability and obligation that are “bound together by ties of law and politics rather than simply by the shared understanding of its inhabitants.”<sup>38</sup> This appeal to fact provides a legal positivist orientation that will prove to be valuable later on. Blake, however, intends for this to serve as a criticism of Christopher Heath Wellman’s emphasis placed upon

the freedom of association, a freedom that, as Blake points out, is at times tamed by anti-discrimination laws.<sup>39</sup> Second, Blake is attentive to the *fact* that persons and not citizens are the bearers of rights and civil protections in liberal states, a point that is hard to find in most philosophical discussions of the ethics of immigration.<sup>40</sup> Blake recognizes that a state may be under a universal obligation to not violate human rights in general, but it is not under a particular obligation to hold as equal the rights of all persons in the world, just those within its jurisdiction. Blake qualifies this as equality needing “to be made operational in a world of territorial states.”<sup>41</sup> This point also connects to the efficacy of states, since it is easier to control or enforce laws over a portion of humanity and not all of it. Moreover, one cannot enforce laws in areas beyond one’s jurisdiction.

Blake limits his argument to an understanding of the state that does not presume a right to exclude. Instead, drawing from the Montevideo Convention (1934), he begins with an understanding of the state that necessitates it to be an effective government capable of exerting coercive control over a particular part of the world’s surface populated by a particular group of people over whom that control is exercised.<sup>42</sup> He writes: “Whatever else a state may be—a site for culture, a particular sort of self-understanding, a particular historical project—it is at its heart a jurisdictional project, in that it is defined with reference to a particular sort of power held over a particular sort of place.”<sup>43</sup> Lon Fuller said something similar in “The Case of the Speluncean Explorers”: “Jurisdiction rests on a territorial basis. . . . It is feasible to impose a single *legal* order upon a group of men only if they live together within the confines of a given area of the earth’s surface. The premise that men shall coexist in a group underlies, then, the territorial principle, as it does all of law.”<sup>44</sup> The territorial dimension is paramount, and, even though Blake does not mention this, I think that this is especially important to underscore for developing nations as a means of protection from nations with imperializing tendencies, sort of an argument for asymmetrical borders (or perhaps just border symmetry) that protect the developing world from exploitative, neoliberal economic expansion.<sup>45</sup>

The categorical extension of legal protection to all persons that are within the boundaries of a state is also crucial to Blake’s view. As a site for the flourishing of a particular group of humans, a view akin to Aristotle’s understanding of the purpose of the state, states must preserve the liberty of their current members as much as possible while also respecting the rights of those persons within its jurisdiction. Insofar as a state recognizes the rights of *nonmembers* within its jurisdiction and does not limit rights to current members or citizens only, all people within the boundaries of the state are capable of articulating rights-claims (think in terms of equal protections as found in the Fourteenth Amendment). These claims truncate the liberty of current members by imposing obligations upon them, thereby impinging on their freedom. He writes: “[O]ne who enters into a jurisdiction imposes an obligation on those who are present within that jurisdiction: an obligation, most crucially, to create and support institutions capable of

protecting and fulfilling the rights of the newcomer, and then to act within these institutions so as to ensure that they do in fact defend these rights.”<sup>46</sup> Insofar as legal institutions may rightfully enforce these obligations when one does not comply, coercion remains an option. Blake focuses not on the morality of *being obliged* but on *the act of obliging others*. Immigrants impose upon others when they enter into the premises of a state, and as such, they ought to be prepared to provide a compelling rationale.<sup>47</sup> As a result, current members of a state have a license to avoid accruing further obligations whenever possible. Blake is adamant that this is not about the accrual of financial costs, but moral and legal obligations. “If we are legitimately able to exclude unwanted would-be immigrants, it will be because we have some right to refuse to take this sort of new obligation.”<sup>48</sup> This is seemingly where the territorial dimension becomes relevant again, since not being within a jurisdiction (either because one was denied entry or perhaps removed) would free up the accrued obligation.

In sum, when immigrants, wanted or not, enter the premises of a liberal state, they are afforded basic rights and protections that truncate the liberty of current members. The current inhabitants of a state have a license to prevent unwanted migrants from entering into their domain, especially when not doing so truncates their liberty. The right to exclude stems from the right to not accrue additional rights-claimants or be placed under unwanted obligations. Blake insists that this right will not be as effective in excluding those from oppressive and underprivileged regions since these will amount to compelling reasons for their imposition.<sup>49</sup> He also explains that appealing to improvements to society made by would-be immigrants who nonetheless impose additional obligations does not work.<sup>50</sup>

At this point, I worry that there is a bit of slippage in Blake’s argument. All along, he is cautious not to presume a right to exclude but wants to deduce it from the understanding of the state posited above, that is, the state as “an effective government able to exert political and legal control over a particular jurisdiction.”<sup>51</sup> In articulating the right to exclude, however, Blake infers this right from the fact that a state is obliged to respect the rights of all those who fall within its jurisdiction.

Why safeguarding the freedom or liberty of current members takes priority over nonmembers remains an open question. I do not mean to suggest that states should take the freedom of nonmembers as seriously as members. This is impractical, as states are under an obligation to recognize the rights not of all humans but only those within its borders. Nonetheless, why do current members have a privileged status in Blake’s argument such that we should worry about their loss of freedom? Does their current standing as members drive their privilege status? If so, this must be ethically justified. Similarly, while pointing out that one does not have a right to enforce limits on childbirth even though every time a child is born in my state, I lose a bit of my freedom, Blake admits that there are certain obligations we cannot help but accrue. Why co-members are the relevant

community for moral consideration remains to be seen. Again, appealing to the parents' standing as members begs the above question.

More poignant to this paper is the question regarding how to enact or enforce a right to exclude. As Blake writes:

Even if legitimate states have a right to exclude unwanted would-be immigrants, much work needs to be done to figure out the contours of that right. It is possible for us to have the right to exclude, after all, and still question whether or not that right is able to ground a particular exclusionary policy. We might ask, after all, whether the right to exclude allows the use of a particular program of enforcement; the militarization of the southern border of the United States, for example, might be morally problematic even if the United States is permitted to exclude migrants.<sup>52</sup>

I appreciate these comments greatly, especially since they ask about the possibility of exclusionary tactics that do not rely upon militarization. However, insofar as the goal of a right to exclude is to maintain the freedom of current members, what else could this right entail if not the creation of walls and other coercive mechanisms that hinder the freedom of movement of migrants? Again, it is the movement of people across tracts of land claimed by states that leads to the loss of freedom for current members. What else besides stopping their movement can the right to exclude lead to? While Blake may not want to justify the practice of walling as it is practiced by wealthy states today, I do not see how he can avoid it in light of the territorial basis of contemporary states. What makes things worse is that for Blake, the right to exclude is fundamentally about protecting the liberty of existing members of a polity. I worry that this all too easily falls prey to a model of securization that justifies morally problematic practices of walling on account of protecting the nation. While one way of putting it might be to argue that the rights of persons within a jurisdiction, regardless of the alienage or status, impinge on the liberty of members, another way to phrase it is to say that the liberty of members depends upon the exclusion (and perhaps even removal?) of those who would impose new obligations. While the former sounds better, the latter is where problems arise.

So as to assist in providing for novel and creative answers to this last question, I have tried to resituate philosophical discussions of the right to exclude in theoretical and practical paradigms that disembark from rhetoric of national or border security—again, I think security makes it too easy to rationalize such practices. The question remains: How does the fascination and fetishization of borders confine theoretical work and perhaps even public policy to ways of thinking that are limited by border practice? The geographer, John Agnew, put it best when he wrote that “[borders] trap thinking about and acting in the world in territorial terms. They not only *limit* the movement of things, money, and people, but they also *limit* the exercise of intellect, imagination, and political will. The challenge is to think and then act beyond their present limitations.”<sup>53</sup>

My own view is that the militarization is indicative of the *contrived* nature of borders. By “contrived,” I have in mind the way in which borders are artificial divides that require continual safeguarding. This way of thinking about borders, as Agnew put it, is to view them as “artefacts [*sic*] of dominant discursive processes that have led to the fencing off of chunks of territory and people from one another.” He continues: “[Borders are] complex human creations that are perpetually open to question.”<sup>54</sup> This is not to suggest that borders are unreal in any way; in fact, this work views borders as all-too-real, especially to the migrants who die while trying to cross them. My point is that borders are the sites where political, juridical, and sovereign power suddenly begins or ends. On one side, the state is all-powerful; on the other side, this is no longer the case.<sup>55</sup> Borders thus represent the ideals, aims, and aspirations of nations and/or states. By demarcating the territory that is supposed to be under the exclusive domain of a particular legal, sovereign order, borders reveal an image of what a state or political institution thinks itself to be. It takes tremendous power and might to uphold the ambitions that borders delineate, and therein resides much vulnerability that only coercive force can compensate for when noncompliance abounds, be it internal or external noncompliance. If national divides demarcate the juridical limits of political institutions *as legal sovereigns*, then borders are the sites where legitimately coercive forces meet. When these coercive institutions cannot rely upon their status as such, militarized divides make up for any shortfalls in status. In this sense, every border has the potential to be hyper-emphasized. Curiously, only some are.

All this lays the ground for the following distinction (which, for spatial constraints, I will only briefly touch on). I think an argument can be made that separates the *validity* of immigration restrictions or the right to exclude from the possibility of *just* exclusionary practices. Laws and policies derived from “a right to exclude” may bear sufficient pedigree in terms of their legal validity, meaning that we can recognize immigration policies as articulated by their rightful, legitimate authors, but does that in anyway render them *just*? My goal is not to resuscitate the debate between positive and natural law or the 1958 Hart-Fuller debate. I argue that most theorists who posit that a state has the right to demarcate the limits of political membership and enforce its borders speak from a perspective concerned with the *validity* of such law. In the context of the United States, the federal government maintains the exclusive power and ability to enforce its borders and determine immigration levels. Those who are critical of this view—or at the minimum, wish to constrain a state’s right to exclude and enforce its borders, perhaps even limit this immigration law to its proper place<sup>56</sup>—represent a perspective that does not easily separate ethics from law. At the very least, this essay offers the distinction between legal validity and justice in immigration law in order to demonstrate how many of the disagreements in the contemporary discussion of the ethics of immigration are products of this divide. One consequence of

this division is the ability for immigrant rights activists to situate and voice their protests in ways consistent with the history of civil disobedience in the United States. Thus border militarization may be lawful, but so were racial segregation and Jim Crow laws. How do we begin to think about borders that are not simply lawful, but just?

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### NOTES

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1. <http://www.youtube.com/watch?v=7VRrq14fLRI> (accessed December 15, 2014; video).

2. At the onset of *Philosophies of Exclusion*, Phillip Cole explains that the movement of people attempting to follow the flow of wealth to places where it pools is an important context in which political theory must reckon with the reality of human migration. See Cole, *Philosophies of Exclusion*, 1, 13–14, 165–91. In addition, as Cole explains, when the borders between developed and developing nations are emphasized (and militarized), they serve to perpetuate colonial divides. Thus, a thorough decolonial analysis of borders remains necessary.

3. Dunn, *Militarization of the U.S.-Mexico Border*, 3.

4. Chávez, "Border Interventions," 50.

5. Cornelius, "Controlling 'Unwanted' Immigration," 783.

6. <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Statistics%20SWB%20Sector%20Deaths%20FY1998%20-%20FY2013.pdf> (accessed December 15, 2014). Fiscal year 2014 had the lowest number of deaths in the past decade and a half, with only 307.

7. Balibar, "Strangers as Enemies," 3.

8. Brown, *Walled States, Waning Sovereignty*, 21.

9. Balibar, "Strangers as Enemies," 3.

10. Balibar, "What Is a Border?," 79; see also John Agnew, "Borders on the Mind," 175–76.

11. Cornelius, "Controlling 'Unwanted' Immigration," 777.

12. Blake, "Immigration, Jurisdiction, and Exclusion," 104, 109 (particularly Blake's discussion of the Montevideo Convention).

13. Ibid., 121.
14. Apostolidis, *Breaks in the Chains*, xiii.
15. Garcia's comments can be found in the transcribed version of the interview in *Democracy Now!* (Garcia, "Senate Bill Creates Path").
16. <http://www.cbp.gov/border-security>.
17. <http://www.ice.gov/overview>.
18. U.S. Customs and Border Protection, "2012–2016 Border Patrol Strategic Plan," 4.
19. Ibid., 6.
20. Chávez, "Border Interventions," 49.
21. Ibid.
22. Rudolph, "Immigration and Security in the United States," 211.
23. Cornelius, "Controlling 'Unwanted' Immigration," 784.
24. Ibid., 789.
25. I borrow the ideas of "analectical thought" and "underside" from Enrique Dussel. See Dussel, *Philosophy of Liberation*, 158. Dussel's use of "analectical" is derived from the Ancient Greek particle *ano* ("beyond" or "from above") and *logos* ("rational account of" or "science of"). One can think about analectical thought as "the reason or rationality that comes from beyond" or "the rationality that generates analectically, that is, from somewhere beyond the self." For Dussel, this necessitates that it be "the reason from an Other," where this Other is subjected to oppressive social relations, a necessary condition for analectical thought, that is, the "underside."
26. Balibar, "Strangers as Enemies," 2–4.
27. Ngai, *Impossible Subjects*, 8.
28. Balibar, "Strangers as Enemies," 2.
29. See Silva, "Embodying a New Color Line."
30. Cole, *Philosophies of Exclusion*, 13–14.
31. Here, I use "war" and "warlike" similar to Thomas Hobbes's characterization of war in *The Leviathan*:
 

WAR consists not only in battle or the act of fighting, but also in the tract of time when it is sufficiently known that there is the will to contend in battle. The notion of *time* is to be considered in the nature of war as it is in the nature of weather. The nature of foul weather does not lie in a shower or two of rain, but the inclination of rain for many days together. In the same way the nature of war consists not in actual fighting, but in the known disposition to fight. (83)
32. Valadez, "Immigration and the Territorial Powers," 9.
33. Chávez, "Border Interventions," 49–50.
34. Ibid., 48.



35. In his now famous essay, "Aliens and Citizens: The Case for Open Borders," Joseph Carens makes this point. He writes: "Citizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely" (Carens, "Aliens and Citizens," 252).

36. Balibar, "What Is a Border?," 75.

37. Canova, "Closing the Border," 343.

38. Blake, "Immigration, Jurisdiction, and Exclusion," 107.

39. *Ibid.*, 107.

40. *Ibid.*, 111.

41. *Ibid.*

42. *Ibid.*, 109.

43. *Ibid.*, 108.

44. Fuller, "Case of the Speluncean Explorers," 620–21; emphasis added.

45. While it may be the case that developed countries have less of a right to exclude those from poorer or oppressed nations, since the reason for obliging current members of a state would be rather compelling (see Blake, "Immigration, Jurisdiction, and Exclusion," 128), I think there may be more of an argument for poorer developing nations to be more stringent on members of developed states entering their premises. Not that poorer or oppressed states should keep the rich out, but the asymmetry of passports should not be what it is today. In addition, borders should work to assist developing nations from exploitative nations.

46. Blake, "Immigration, Jurisdiction, and Exclusion," 114.

47. *Ibid.*, 118.

48. *Ibid.*, 114.

49. See Blake, "Immigration, Jurisdiction, and Exclusion," 128–29.

50. *Ibid.*, 117.

51. *Ibid.*, 11.

52. Blake, "Immigration, Jurisdiction, and Exclusion," 121.

53. Agnew, "Borders on the Mind," 176; emphasis in original.

54. Agnew, "Borders on the Mind," 176.

55. This is somewhat of a simplification. I understand that international organizations, alliances, or compacts, and other inter-state agreements may extend jurisdictional powers. Part of what Balibar terms the "complexity" of the border implies the fact that the practice of walling that accompanies borders frequently takes place away from the border and even beyond the territorial jurisdiction of a political institution. See also Flynn, "Where's the U.S. Border?," 2–21.

56. See Bosniak, "Membership, Equality."

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