

A Presumptive Right to Exclude: From Imposed Obligations To A Viable Threshold

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ABSTRACT: In “Immigration, Jurisdiction and Exclusion”, Michael Blake develops a new line of argument to defend a state’s presumptive right to exclude would-be immigrants. His account grounds this right on the state as a legal community that must protect and fulfill human rights. Although Blake’s present argument is valid and attractive in being less arbitrary than national membership and in distinguishing different types of immigrants’ claims, I dismiss it for being unsound due to a lack of further elaboration. The reason for my rejection is that there is a fundamental problem with the third premise as it stands now. Therefore, I contend that Blake’s argument cannot justify a general exclusion of well-protected would-be immigrants. However, in the final part, I will try to defend a modified version of Blake’s argument from imposed obligations by contending that a state has a presumptive right to exclude if the human rights obligations that are imposed on its residents go beyond a viable threshold.

Keywords: *Immigration, right to exclude, global justice, human rights, Michael Blake.*

Introduction

The emergence of a global infrastructure and the increasing inequality in wealth, power, and security between nations have resulted in new waves of migration to affluent countries. This trend and its implications have turned many political theorists’ attention to the question of immigration. While some have argued for open borders,¹ others have defended the state’s presumptive right to exclude would-be immigrants.² Theorists on both sides have done so for different reasons. Joseph Carens made one of the first cases for open borders. He has argued that if one wants to be consistent with the three most prominent liberal approaches to political theory, namely

1 See Arash Abizadeh, “Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders,” *Political Theory* 36, no. 1 (2008): 37-65; Joseph Carens, “Aliens and Citizens: The Case for Open Border,” *Review of Politics* 49, no. 2 (1987): 251-273; Chandran Kukathas, “Why Open Borders?” *Ethical Perspectives* 4 (2012): 649-675; Kieran Oberman, “Immigration as a Human Right,” in *Migration in Political Theory: The Ethics of Movement and Membership*, ed. Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016), 32-56.

2 See Michael Blake, “The right to exclude.” *Critical Review of International Social and Political Philosophy* 17 (2014): 521–37; David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge Massachusetts: Harvard University Press, 2016); Ryan Pevnick, *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* (Cambridge: Cambridge University Press, 2011); Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983); Christopher Wellman, “Immigration and Freedom of Association.” *Ethics* 119, no. 1 (2008): 109-141.

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the Rawlsian, the Nozickian, and the utilitarian, there is little justification for preventing people from immigrating to another state. Other pro-open border proponents like Arash Abizadeh, and Kieran Oberman have focused on democratic theory and human rights instead.

The proponents of a presumptive right to exclude, on the other hand, generally divide into three categories. Political theorists in the first category, like Michael Walzer and David Miller, develop a theory that seeks to justify the right to exclude on the basis that it is necessary to guarantee the social and cultural stability of political communities. Theorists in the second category, in comparison, make arguments for this right on deontic grounds. While Ryan Pevnick's argument is based on the protection of collective property rights, Christopher Wellman has argued that the right to freedom of association requires that states have a right to exclude those with whom they do not want to associate.

Michael Blake also supports the claim for a presumptive right to exclude would-be immigrants. Pointing out some flaws of the previous accounts, however, he adds a new line of argument that is grounded on the state as a legal community that must protect and fulfill the human rights of everyone being within its territory. In this essay, I will first present Blake's argument and then show why I think it cannot, without further elaboration, justify a general exclusion of well-protected would-be immigrants. After having considered a possible response to my criticism in the final part, I will try to defend a modified version of Blake's argument from imposed obligations by contending that a state has a presumptive right to exclude if the human rights obligations that are imposed on its residents go beyond a viable threshold.

Blake's Argument

Blake is a 'statist'. His argument starts from the assumption that states not only have commonly accepted characteristics but also that their existence is justified.³ He defines the state as an institution that has a permanent population and an effective government to rule over a jurisdictional domain.⁴ This definition implies that states are entitled to establish a system of rights and laws on their territory but not beyond. Besides the rights that are exclusively given by the state to its residents, there is a set of rights that is granted to everyone on the territory by virtue of being human. These latter so-called human rights impose three distinct obligations on states: to respect, to protect, and to fulfill.⁵ The state's jurisdictional boundary does not, however, apply to all those human rights obligations. The first one is exceptional because it also extends to people outside of a state's territory.⁶ It entails that states must refrain from violating the human rights of people who reside

3 Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41 (2013): 109.

4 *Ibid.*, 109-10.

5 *Ibid.*, 110.

6 *Ibid.*, 110-111.

outside its borders.

However, Blake's argument focuses on the second and third obligations which relate only to those who are within a state's jurisdiction. He points out that these two positive obligations have important implications. The protection and fulfilment of human rights demand some active effort on the side of states, namely the establishment of a variety of political institutions that can monitor the human rights situation, investigate violations, and educate people (*Premise 1*).⁷ But states cannot do it alone; their residents are obliged to support them in protecting and fulfilling the human rights of everyone within the territorial boundaries (*P2*).⁸ Hence, by setting foot on the jurisdictional domain of a state, immigrants also impose positive obligations on its current residents (*P3*).⁹ Blake, however, thinks that the imposition of obligations needs to be justified because people generally have a pro tanto right not to have their freedom be infringed upon without giving consent (*P4*).¹⁰ He assumes that the imposed obligations necessarily eliminate a set of options available to the current residents. In other words, residents cannot enjoy certain activities and fulfill their obligation towards immigrants at the same time.¹¹ This leads to a situation in which people's right to immigrate stands against the residents' rights to freedom of choice. Blake elaborates on this condition by referring to Judith Jarvis Thomson's example about a needy violinist. Although the violinist and would-be immigrants have different characteristics and there are good reasons to condemn the former that do not apply to the latter, the analogy still shows that although people have a strong right to be protected, they are not free to choose who should fulfill that right.¹² If their rights are already protected by the home state, there is no justification for infringing upon the freedom of another state's residents.¹³ The conclusion from all this is that states have a presumptive right to exclude would-be immigrants in order to prevent them from imposing positive human rights obligations on their residents as long as there is no good reason to do otherwise (*C*).

In the final part of the essay, Blake considers two partly correct objections, namely the argument from federalism and the argument from oppression, that provide two conditions for when the presumptive right to exclude immigrants is defeated. The first objection tries to extend Blake's argument from the state to its federal subunits. Blake rejects this extension, however, by pointing out that although the federal subunits might exercise partial jurisdiction they are bound to the central government's legal framework.¹⁴ But this response allows two lines of criticism that think of the state, in analogy to the federal

7 Ibid., 11.

8 Ibid., 114.

9 Ibid.

10 Ibid., 115.

11 Ibid.

12 Ibid., 116.

13 Ibid., 117.

14 Ibid., 122.

subunit, as a subject to a greater authority. The stronger version argues that a global political community has evolved which prohibits the exclusion of immigrants. However, Blake dismisses this argument as well because it is implausible to assume that there are sufficient state independent institutions on the global level.¹⁵ This is not the case for the weaker version. It provides the first condition for when the presumptive right to exclude is defeated. Blake acknowledges that there are in fact transnational political communities, e.g. the European Union, that have the means to restrict their member state's right to control the movement across their borders.¹⁶

The second objection is based on the argument from oppression. It notes that states cannot justify restrictions against insufficiently protected would-be immigrants.¹⁷ Although Blake concedes to strong critique by making it the second condition for when the presumptive right to exclude is defeated, he points out two limitations. While all unprotected would-be immigrants have a general right to immigrate, they are also not free to choose any particular host country.¹⁸ In other words, they have no right to insist on permission in a Scandinavian country when being accepted in an Eastern European country. Moreover, would-be immigrants might have a duty to stay at home in order to assist their compatriots.¹⁹ But Blake denies such a special obligation towards the residents of one's home country. He thinks that would-be immigrants only have a duty to stay if all citizens of the world provide comparable assistance. However, as long as this condition is not met, the argument is irrelevant.²⁰

A summary of Blake's argument and its six premises looks like the following:

- (P1) A state is responsible for respecting, protecting and fulfilling the human rights of only those people present within its territorial jurisdiction.
- (P2) Each resident of a state is obligated to support its state's capacity for human rights protection and fulfillment within this scope, and not beyond.
- (P3) Immigrants impose obligations of this sort on current residents.
- (P4) People "have a presumptive right to be free from others imposing obligations on them without their consent". Hence, an argument is required for defeating this presumption.
- (P5) The presumption in (P4) is defeated if the would-be immigrants are not enjoying adequate human rights protection where they are.
- (P6) The presumption in (P4) is also defeated if it applies to would-be immigrants that migrate within a transnational community, e.g. the European Union.
- (C) A state has a presumptive right to exclude would-be immigrants, not fall-

15 Ibid., 123-4.

16 Ibid., 124.

17 Ibid., 125.

18 Ibid., 127.

19 Ibid., 128.

20 Ibid., 129. Kieran Oberman provides another strong counterargument against a special duty to stay. He argues that this duty to stay can only be justified if four conditions are met: See Kieran Oberman, "Can Brain Drain Justify Immigration Restrictions?" *Ethics* 123, no. 3 (2013): 453.

ing under (P5)²¹ or (P6), because they impose positive human rights obligations on its residents that cannot be justified.

Residents, Compatriots and Would-be Immigrants

The following section will show why I think that Blake's argument for a presumptive right to exclude would-be immigrants is unsound due to a lack of further elaboration. My criticism will focus on the third premise which says that immigrants impose positive obligations on a state's current residents; or alternatively that residents are obliged to do something in order to support their home state's capacity to protect and fulfill the human rights of immigrants.

This premise is problematic for three reasons. First, Blake says little about the exact content of the positive human rights obligations which are entailed in the third premise of the argument.²² In a thought experiment, he only mentions three particular ways in which residents are morally and legally obligated to protect and fulfill the human rights of immigrants: they have to pay for the police, serve on juries, and create political institutions.²³

However, the first example, paying for the police, is contradicted just two pages later. By distinguishing the difference between costs and obligations, Blake highlights that having an obligation is not only about paying money to someone.²⁴ The obligated person has to perform an 'authentic' act; it is authentic in the sense that it involves some time and effort. Although the second example, serving on juries, corresponds to this meaning, it is also problematic. While not all countries have a legal system that includes citizens in juries,²⁵ the example is not only a hypothetical but seems also less relevant when applied to the well-protected would-be immigrants that can rightfully be excluded by Blake's overall argument. Besides the more abstract demand for the creation of political institutions, the reader is left floundering what additional 'authentic' acts every individual

21 Hereafter, referred as "well-protected would-be immigrants".

22 In her criticism to Blake, Julie Arrildt also emphasizes that the obligations are vaguely defined. See Julie Arrildt, "State borders as defining lines of justice: why the right to exclude cannot be justified.," *Critical Review of International Social and Political Philosophy*, (2016): 6. However, I think that her point is slightly different. By referring to Blake's definitions of legal and moral obligations [a legal obligation as the elimination of '(...) my freedom to do a certain thing while not suffering a negative consequence' and a moral obligation as the limitation of '(...) my moral right to do a particular thing' (Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41 (2013a): 115)] she argues that Blake does not provide any explanation of the 'things' used in those definitions. Despite this being true, it is not the content of the rights ('things') outweighed by the obligations which need further explanation but rather the content of the imposed obligations, namely the particular action that must be performed to fulfill them. This is because only then, can we judge whether the right to immigrate can trump the residents' right to freedom of choice and not vice versa.

23 Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41 (2013): 113.

24 Ibid., 114-5.

25 There are currently about 55 countries of which many are members of the Commonwealth. See Neil Vidmar, *World Jury Systems* (Oxford: Oxford University Press, 2000), 3.

resident must perform to protect and fulfill the human rights of immigrants. However, this information is necessarily needed if one wants to judge whether the residents' right to freedom of choice can outweigh the right to immigrate.

Second, Blake does also not consider that would-be immigrants have the same obligations as the current residents once they have entered the state and become compatriots. Since not only benefits and burdens,²⁶ but also obligations are reciprocal, residents impose as many obligations on accepted immigrants as vice versa. And they do so immediately; There is not a slight moment in which the accepted immigrants would be free to refuse moral and legal obligations towards their new compatriots. To defend his argument against this criticism, Blake must either take for granted that many would-be immigrants do not have the means to fulfill their positive obligations as new residents or assume that they are more likely to violate the laws which in consequence increases the burden on the side of the state. Although the first correlation could be true, it does not change the essence of the criticism since it only applies to unprotected would-be immigrants that have good reasons to be included in the first place.

Finally, Blake points out that people impose moral obligations on one another all the time but that their extent differs by distance to the right bearer.²⁷ A person who is closer to the right bearer, e.g. a resident to a compatriot compared to a resident to a would-be immigrant, seems to have a greater set of obligations.²⁸ However, this is already a claim that must be defended. The extent of what is demanded might be less about the actual distance to the right bearer than about the ability to help in a given situation (See Singer 1972).²⁹ Blake acknowledges that distance and partiality cannot be the primary criteria for whether people have obligations towards one another or not. Residents have distinct obligations towards each other because they authorize and share liability to the state's coercive mechanisms.³⁰ This does not, however, exclude the necessity to fulfill even unwanted obligations, if the other's right in question outweighs our freedom to refuse.³¹ Despite egalitarianism and the elimination of relative poverty being only required within the domestic context of state coercion, sufficientarianism and the elimination of absolute poverty is still demanded in the international arena.³²

However, state coercion does not provide a good justification for prioritizing residents

26 Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41 (2013): 117.

27 *Ibid.*, p. 118.

28 Michael Blake, *Justice and foreign policy* (New York, NY: Oxford University Press, 2013), 20.

29 See Peter Singer, "Famine, Affluence, and Morality," *Philosophy & Public Affairs* 1, no. 3 (1972): 229-43

30 Blake, M. "Distributive justice. State Coercion, and Autonomy," *Philosophy & Public Affairs* 30, (2001): 258.

31 Michael Blake, "Immigration, Jurisdiction, and Exclusion," *Philosophy & Public Affairs* 41 (2013): 119.

32 Michael Blake, "Distributive justice. State Coercion, and Autonomy," *Philosophy & Public Affairs* 30, (2001): 264-5.

over would-be immigrants since the latter are also subject to state's coercive regime of border control.³³ Although this is a strong counterargument, it cannot entirely challenge Blake's distinction because its focus is not on state coercion itself, but rather on the residents' consent to the coercive mechanisms. One could, nonetheless, argue that would-be immigrants' foundation for having political obligations is much stronger than those of most residents as they have all given explicit consent to state authority by crossing its borders. However, this does also not necessarily apply to all types of would-be immigrants. It is questionable whether unprotected immigrants really have a free choice when they make such a decision.³⁴

A distinction between the often so-called special and general obligations is primarily irrelevant here because residents of a state already have the same positive human rights obligations towards their compatriots.³⁵ At this point, it is hard to see how these obligations towards compatriots are in any sense different from the ones that are imposed by accepted immigrants. A state that already promotes human rights domestically will necessarily have and support the required political institutions. But if this is the case, the state's current residents do not need to perform any additional 'authentic' act to protect and fulfill the human rights of accepted immigrants. Hence, would-be immigrants do not impose any additional human rights obligations on current residents that could justify their exclusion.

Defending a Modified Argument from Imposed Obligations

One could respond to all this in defense of Blake's argument for a presumptive right to exclude would-be immigrants by arguing that although they do not impose any additional obligations there is a quantitative increase in what is already demanded.³⁶ This argument assumes that there is a positive correlation between the number of people whose human rights can be protected and fulfilled by a political institution and the resources that such protection and fulfillment would require.³⁷ This brings us back to the question of what

33 Arash Abizadeh, "The Special Obligation Challenge to More Open Borders," in *Migration in Political Theory: The Ethics of Movement and Membership*, ed. Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016), 112-13.

34 David Hume makes a similar point about the link between consent and emigration. He argues that residents do not have the opportunity to show discontent with their government by leaving the country since they might lack the capacity to do settle somewhere else. David Hume, *An Enquiry Concerning the Principles of Morals*, in *Enquiries*, ed. L. A. Selby-Bigge (Oxford: Oxford University Press, 3rd ed., 1975), 475.

35 Michael Kates and Ryan Pevnick, "Immigration, Jurisdiction, and History," *Philosophy & Public Affairs* 42, (2014): 188.

36 *Ibid.*

37 Jan Brezger and Andreas Cassee contend that Blake's argument from imposed obligations cannot justify a difference in treatment between would-be immigrants and resident citizens' offspring. (See Jan Brezger and Andreas Cassee A., "Debate: Immigrants and newcomers by birth – Do statist arguments imply a right to exclude both?" *The Journal of Political Philosophy* 24, (2016): 267-8.) However, I do not think that their criticism can challenge the overall argument since it does not consider that Blake distinguishes two types of immigrants: unprotected and well-protected. While the former immigrants are not, the latter are very much different from newborn in that their subsistence is not dependent on others.

exactly residents must do to support the state's political institutions that protect and fulfill human rights. The most likely answer is to pay higher taxes. However, this objection fails for the same reasons as before. Blake has already denied that his argument is only about bearing higher costs since a fair share of the well-protected would-be immigrants might be financial blessing to the new host country.

A successful response must rather present some concrete examples. There are at least two human rights that impose positive obligations that require more from a state and its current residents than just additional financial resources: the right to adequate health and well-being, that includes the provision of medical care (article 25), and the right to education (article 26). Both human rights can only be protected and fulfilled if there are enough people who can provide these services. One could respond to this problem by pointing out that a deficiency in human resources could be resolved through market intervention. Given that both doctors and teachers are part of the public-sector workforce, the state could create new jobs to achieve optimal allocation. However, there are also limits to economic theory. First, such state intervention to resolve the market shortage would take some time. Consequently, there would be a period in which not every resident's human rights to medical care and education could be fulfilled. Second, since both jobs require high qualifications, a state might not have the human capital to fill an increased number of vacancies in the education and medical sector. Third, and most importantly, a state's residents cannot be obliged to become doctors and teachers because there is an increasing number of would-be immigrants who want to enter their home country.³⁸

Although this does not justify a general right to exclude a particular type of would-be immigrant, it grants a state a presumptive right to exclude if the human rights obligations that are imposed on its residents go beyond a viable threshold.³⁹ Despite the difference in argument, I agree with Blake that states have good reasons to rank would-be immigrants by their level of protection at home if there is a sudden influx beyond a viable threshold. If a state has the capacity to protect and fulfill the human rights of an additional number of 100,000 would-be immigrants but 200,000 want to enter, it is justified in enacting a need-based prioritization and excluding those who are already well protected outside the transnational community to which it belongs.⁴⁰ This means that regardless whether the viable threshold is reached or not, the presumption is defeated if the would-be immigrants migrate within a transnational community or are not enjoying adequate human right

38 Michael Blake, *Justice and foreign policy* (New York: Oxford University Press, 2013), 23-4.

39 Kieran Oberman who has argued for a human right to immigrate does agree that restrictions might be justified in extreme circumstances in which the acceptance of immigrants leads to high social cost. See Kieran Oberman, "Immigration as a Human Right," in *Migration in Political Theory: The Ethics of Movement and Membership*, Ed. Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016), 33-4. The here presented argument to viable threshold is different in that it grants a presumptive right that is not grounded on cost but on obligations.

40 This example should not create the impression that the viable threshold is always fixed; it correlates with the state's capacity to fulfil and protect the human rights of those people present within its territorial jurisdiction.

protection where they are since there are more immediate basic needs than education and medical care.

The modified version of Blake's argument has six premises and looks like the following:

- (P1) A state is responsible for respecting, protecting and fulfilling the human rights of only those people present within its territorial jurisdiction.
- (P2) Each resident of a state is obligated to support its state's capacity for human rights protection and fulfillment within this scope, and not beyond.
- (P3) Each immigrant imposes cumulative obligations of this sort on current residents.
- (P4) People have a presumptive right to be free from others imposing obligations on them beyond a viable threshold.
- (P5) Regardless whether the viable threshold is reached or not, the presumption in (P4) is defeated if the would-be immigrants are not enjoying adequate human right protection where they are.
- (P6) The presumption in (P4) is also defeated if it applies to would-be immigrants that migrate within a transnational community, e.g. the European Union.
- (C) A state has a presumptive right to exclude would-be immigrants, not falling under (P5) or (P6), if the human rights obligations that are imposed on its residents go beyond a viable threshold.

Conclusion

In this essay, I have dismissed Blake's argument for a presumptive right to exclude would-be immigrants for being unsound. The reason for my rejection is that there are three problems with the third premise as it stands now. First, Blake says little about the exact content of the imposed obligations. However, without such information, it is impossible to judge whether the residents' right to not have their freedom be infringed upon can outweigh the right to immigrate. The second problem is that, compared to what is owed to compatriots, would-be immigrants do not seem to impose any additional human rights obligations which could justify their exclusion. Third, Blake also does not consider that would-be immigrants have the same obligations as the current residents once they have entered the state and become their compatriots. This criticism does not, however, mean that states have no presumptive right to exclude well-protected would-be immigrants. By providing a modified version of Blake's argument from imposed obligations, I have contended that a state has such a presumptive right if the human rights obligations that are imposed on its residents go beyond a viable threshold.

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