

# David Miller, 'Is there a human right to immigrate? (final draft)'<sup>1</sup>

*David Miller (Nuffield College, Oxford)*

[david.miller@nuffield.ox.ac.uk](mailto:david.miller@nuffield.ox.ac.uk)

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Centre for the Study of Social Justice  
Department of Politics and International Relations

University of Oxford

Manor Road, Oxford OX1 3UQ

United Kingdom

Tel: +44 1865 278703 Fax: +44 1865 278725

<http://social-justice.politics.ox.ac.uk>

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## Abstract

*The paper critically examines three strategies used to defend a human right to immigrate, understood as a universal right to cross and remain within state borders. The direct strategy looks for essential interests that could ground such a right, but the interests requiring migration are specific to particular persons rather than generic. Instrumental arguments try unsuccessfully to present the right to migrate as necessary to safeguard other human rights. The cantilever strategy holds that it is inconsistent to recognize a domestic right of free movement while denying the corresponding international right. But an extensive domestic right of free movement is necessary to protect citizens from specific threats posed by the state, which are not replicated at international level. Finally three reasons why states and their citizens may have a legitimate interest in controlling immigration are advanced: population size, cultural integrity, and the composition of the citizen body itself.*

Keywords: immigration, borders, human rights, interests, free movement, state

Is there a human right to immigrate? The importance of this question may need no underlining, but just to spell it out briefly: all states in today's world proclaim their right to control their borders, deciding who should be admitted and who should not. Moreover in many cases this right is coercively enforced, through the familiar apparatus of border control, and the harsh measures that await would-be immigrants if they fail to satisfy the legal requirements for entry. If there was indeed a human right to immigrate, all of this would be unacceptable. States would have to open their borders to all-comers unless they could show that there were specific individuals whose admission posed a threat to the human rights of others. So the question I have posed, if answered in the affirmative, would have very radical practical implications. But that is no reason not to explore it. Human rights can make heavy moral demands on us.<sup>2</sup> The fact that acknowledging this right would oblige us to abandon policies that may also serve important ends – if we think that immigration controls are necessary for social cohesion, or preservation of the national culture, or other values –

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<sup>2</sup> This is true of human rights that have already gained widespread recognition, such as the right to subsistence.

would not be sufficient. We would at the very least have to show that these ends are so essential to human welfare that they can justify overriding a human right. But the issue does not arise unless it can be demonstrated that there is a genuine human right to immigrate. How might this be done?

If we tried to answer our question by consulting any of the standard human rights documents, the answer we would get would be an immediate No. A human right to immigrate means, I assume, a universal right to cross the borders of any state and remain within them for as long as one chooses. As I have just pointed out, to accept such a right would deprive every state of one of the powers it currently prizes, namely the right to decide whom to admit to its territory and on what terms.<sup>3</sup> Not surprisingly, therefore, since the main documents in which human rights are encoded have been drawn up and agreed to by states, or their representatives, this particular right is notable by its absence. The *Universal Declaration of Human Rights* of 1948 asserts, in Article 13, that:

- (1) Everyone has the right to freedom of movement and residence within the borders of each State.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

The failure of Article 13 to mention any right to *enter* is mitigated slightly, but only slightly, by article 14, which states that:

- (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.<sup>4</sup>

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<sup>3</sup> States may in certain instances decide to relinquish this right, as the European states that have signed up to the Schengen agreement have done. But note that even here the relinquishing is only partial since the EU as a whole imposes tough controls on immigration from outside its boundaries.

<sup>4</sup> I. Brownlie and G. Goodwin-Gill (eds.), *Basic Documents on Human Rights*, 5<sup>th</sup> edition (Oxford: Oxford University Press, 2006), p. 26.

The rather lengthier *International Covenant on Civil and Political Rights* of 1966 sets out, in Article 12, essentially the same rights as in Article 13 of the Declaration, only pausing to draw them more narrowly by adding a list of grounds ('national security, public order (*ordre public*), public health or morals or the rights and freedoms of others') on which they may be restricted. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950 makes no mention of the issue of migration in either direction (though a Protocol added in 1952 closely follows the wording of the *International Covenant*).<sup>5</sup>

This of course does not settle the matter, since it is widely recognized that these formal documents may well not capture all and only those provisions that deserve to be counted as human rights. If we consider the main philosophical treatments of the idea of human rights, however, the purported right to immigrate is rarely discussed. It does not feature, for example in James Nickel's, *Making Sense of Human Rights*, or in the third chapter ('Human Rights') of Allen Buchanan's, *Justice, Legitimacy and Self-Determination*.<sup>6</sup> James Griffin discusses the right to freedom of movement and residence in *On Human Rights*, but only to argue that even in domestic settings there is no such unlimited right.<sup>7</sup> We are more likely to find the right to immigrate defended as part of a more general argument in favour of open borders, and it is in fact tentatively asserted, although only in passing, in at least two of Joseph Carens' articles on immigration.<sup>8</sup> Something closer to a defence can be found in Michael

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<sup>5</sup> Brownlie and G. Goodwin-Gill, *Basic Documents on Human Rights*, pp. 362, 612-16, 625.

<sup>6</sup> J. Nickel, *Making Sense of Human Rights*, 2<sup>nd</sup> ed (Oxford: Blackwell, 2007); A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004). Buchanan does however mention immigration when discussing 'the place of distributive justice in international law'. He argues that 'the struggle for distributive justice often takes place in areas whose connection to standard conceptions of human rights is unclear or at least indirect, and mentions 'the right to immigrate to states that offer greater economic opportunities' as one such area (p. 194).

<sup>7</sup> J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), pp. 195-6.

Dummett's *On Immigration and Refugees*, though Dummett draws back from claiming that there is a strong right to immigrate.<sup>9</sup> He does so on the grounds that a genuine, obligation-imposing right must be unconditional, whereas he acknowledges two grounds on which states may justifiably set limits to immigration, one being their people's risk of being 'submerged' by immigrants from a different culture, the other being population density. Dummett therefore argues that the right to immigrate can only be a right in the 'weaker, conditional sense', amounting to a presumption that one should be allowed to enter unless the receiving state can give specific grounds for refusing entry.<sup>10</sup> However nearly all accounts of rights are conditional in this sense, since they concede that catastrophic circumstances may arise in which even basic human rights can justifiably be set aside. I think, therefore, that we may count Dummett as a supporter of the human right to immigrate as normally understood.

An open borders view does not of course need to base itself on the proposition that there is a human right to immigrate. It can be defended in other terms – for example by showing that borders must be open if equality of opportunity is to be realised at global level, or by showing that states lack the authority to exclude immigrants. Nevertheless, given the force of human rights arguments in contemporary political culture, the right in question, if it could be established, would provide the strongest available grounds for removing immigration restrictions. A forthcoming paper by Kieran Oberman that sets out explicitly to defend a human right to immigrate is therefore a welcome development.<sup>11</sup> Nevertheless I remain sceptical, and will try to show in what follows where Oberman's and other arguments go astray.

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<sup>8</sup> J. Carens, 'Migration and Morality: a liberal egalitarian perspective' in B. Barry and R. Goodin (eds.), *Free Movement: ethical issues in the transnational migration of people and of money* (Hemel Hempstead: Harvester Wheatsheaf, 1992), pp. 27-8; J. Carens, 'A Reply to Meilaender: Reconsidering Open Borders', *International Migration Review*, 33 (1999), 1082-1097, pp. 1093-6.

<sup>9</sup> M. Dummett, *On Immigration and Refugees* (London: Routledge, 2001), ch. 3.

<sup>10</sup> Dummett, *On Immigration and Refugees*, p. 57.

<sup>11</sup> K. Oberman, 'Immigration as a Human Right', available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2164939](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164939).

## II

It is important first to clarify what a human right to immigrate would mean. It is to be understood as a universal right held against all states not to prevent those who wish to settle on their territory from doing so. In the background there must be a conception of the rights that someone has as a matter of course merely by virtue of being a resident in the territory in question. This is needed to block the possibility that a state might impose no barriers to entry as such, but immediately consign all the immigrants who arrived to rat-infested dungeons. Clearly this would not count as recognizing a right to immigrate. On the other hand, it is not expected, even by those who favour open borders, that states must immediately extend full citizenship rights to immigrants.<sup>12</sup> The question then is how far immigrants may be burdened, relative to citizens, without violating their proposed human right to immigrate. One way to answer this question is to say that the right to immigrate is fulfilled so long as the *other* human rights of the immigrants are protected in the society they enter. This would rule out the rat-infested dungeons, but leave it somewhat flexible as to how far immigrants are given political rights, extensive rights to welfare, and so forth. Setting the bar fairly low here is intended to be a friendly gesture to those who want to defend the human right to immigrate, since it reduces the justificatory burden they have to bear.

Also friendly is my conception of the right to immigrate as a right not to *prevent* the immigrant from entering, and not as a right to *assist* the immigrant in travelling to her new homeland. In today's world, clearly, a major obstacle to migrating, for many people, is the financial cost of doing so. The arguments used to defend a human right to immigrate (which we will come to shortly) might then seem to entail that receiving states should take positive action to defray these costs. Against this, it could be argued that the burden of assisting migration needs to be shared on some equitable basis between all states, whether or not they are attractive to migrants. To avoid getting into the complexities here, I will interpret the would-be immigrant's human

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<sup>12</sup> See, for example, J. Carens, 'The Rights of Irregular Migrants', *Ethics and International Affairs*, 22 (2008), 163-86.

right simply as a right not to be prevented from entering, again making some tacit assumptions about what the ‘normal’ costs of migrating would be.<sup>13</sup>

At the same time, however, the human right to immigrate must be understood to mean the right to migrate to *any* state, not just to one or a few states. It would not be satisfied by a system in which every human being was entered into a lottery whose results gave them the right to move to one country other than their own, or even by a system that allowed each person to nominate the particular state they would ideally like to join. This underlines the point that the right to immigrate cannot be derived straightforwardly from the right of exit, included as we saw in the UN Declaration. The right to leave one’s present country of residence can be satisfied so long as there is at least one other place that one is not prevented from entering. Of course it can be argued that the reasons underlying the right to leave can also be used to justify a universal right to immigrate.<sup>14</sup> Whether that argument holds remains to be seen. The analytical point is that the right to leave one particular state does not entail the right to enter any state of one’s choosing. Further work needs to be done to justify the latter right.

With these clarificatory remarks concluded, let me now ask how one might set about justifying a human right to immigrate. As I have observed, this cannot be done by appeal to current international law insofar as it is embodied in the major human rights documents. Instead the justification has to appeal to whatever one takes to ground human rights generally. Before examining these grounds in greater detail, however, it is worth distinguishing three justificatory *strategies* that may be used when one seeks to add a new human right to the established list. This is important, because it is not

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<sup>13</sup> This is to avoid the possibility that a state might claim to recognize a human right to immigrate by granting residence only to those who were willing to pay a very high fee, or by forcing airlines and shipping companies to charge potential immigrants extravagant fares etc.

<sup>14</sup> This argument is made in P. Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), ch. 3. See also A. Dummett, ‘The transnational migration of people seen from within a natural law perspective’ in Barry and Goodin (eds.), *Free Movement*.

always clear which strategy is being employed by advocates of a human right to immigrate.

First, there is the *direct* strategy. Here the argument moves directly from the grounding feature to the right. Suppose one thinks, as a general matter, that human rights are justified by showing that they serve basic human interests (perhaps picked out in a certain way). Then the justification offered in support of a human right to immigrate will be that such a right is necessary to advance the interests in question. The right will stand alongside and be justified in the same way as existing rights to bodily integrity, freedom of speech, subsistence and so forth. Second, there is the *instrumental* strategy. Here the right is justified by showing that its recognition is instrumental to *other* human rights that have already found a place on the canonical list. Unless this new right is recognized, the argument goes, these other rights will not be properly realized, or will be insecure. Thus an instrumental argument for a human right to democracy does not try to show that democratic rights serve their bearers' interests directly, but that they are essential to guarantee other rights such as freedom of speech and subsistence.<sup>15</sup> Third, there is what might be called the *cantilever* strategy. This involves showing that the new right is a logical extension of human rights that are already recognized. The argument is that there is something irrational or arbitrary about recognizing A as a human right, but not recognizing B. In the case we are examining, arguments which claim that it is arbitrary to assert a right to free movement *within* state boundaries without also asserting a right to free movement *across* them (and hence rights to emigrate and immigrate) will qualify as instances of the cantilever strategy. (It remains a distinct strategy provided 'arbitrariness' is not cashed out in terms of the same grounds applying in both domains, in which case it reduces to the direct strategy.) A cantilever argument proper will avoid delving into the grounds on which the right is claimed, and instead focus on the alleged absurdity of recognizing A as a right without at the same time recognizing B.

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<sup>15</sup> For a good example of such an argument, see T. Christiano, 'An Instrumental Argument for a Human Right to Democracy', *Philosophy and Public Affairs*, 39 (2010-11), 142-76.



Of the three strategies for identifying human rights I have distinguished, the direct strategy seems most compelling. The instrumental strategy suffers from the weakness that it rests on an empirical claim about what is necessary for the protection of human rights other than the one at issue; such claims are often contestable. The cantilever strategy faces the difficulty that the assertions it makes about irrationality or arbitrariness may be challenged by those who think the supposed analogy between right A and right B is spurious, or that recognizing B would have (harmful) consequences that recognizing A does not have. Let us begin, therefore, with the direct strategy.

### III

How might a direct argument for the human right to immigrate be constructed?

It would have to meet three conditions. First, it would need to show that the grounds on which the right is being claimed are sufficiently strong. Suppose, as suggested earlier, that the grounding will take the form of showing that the right is needed to protect certain human interests. We can leave it as an open question for present purposes how these interests are to be understood – whether they are interpreted as ‘human needs’ or ‘conditions for human agency’ or ‘conditions for human dignity’ etc. All that matters is that the interests should be ones that all human beings share and that they carry enough moral weight to support human rights.<sup>16</sup> Second, it would need to show that the right was feasible, in the sense that the obligations that would be created by recognizing it were ones that it was possible for other human beings to discharge. How this feasibility condition is to be understood is again something that needs to be left open,<sup>17</sup> since there can be different views about how ‘realist’ or

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<sup>16</sup> This condition rules out grounding human rights on a strong form of autonomy, which otherwise might be used to justify an expansive right to free movement. Autonomy in this sense, which goes beyond the requirements for human *agency*, is highly esteemed by liberals, but cannot plausibly be represented as an interest shared by all human beings. For further elaboration of this point, see my critical discussion of James Griffin’s view in ‘Personhood versus Human Needs as Grounds for Human Rights’ in R. Crisp (ed.), *Griffin on Human Rights* (Oxford: Oxford University Press, forthcoming).

‘utopian’ our account of human rights should be, but it would not make sense, for instance, to claim that there is a human right to a life entirely free from illness simply on the grounds that people would have an interest in enjoying this. Third, the grounding argument must show that recognizing the candidate right would not interfere with other rights that have already been recognized, or if it would, that the relevant human interests are best served by admitting the new right and retrenching upon others. This, then, is a compatibility requirement. We know that the exercise of some rights we might think of as human rights can impact on others, either by imposing costs or by imposing obligations. An unlimited right of free speech may infringe rights to privacy – so we must either limit the former right by disqualifying speech that consists in revealing information about people that they have a strong interest in remaining private, or we must weaken the right to privacy so that speech does not count as infringing it. Or, another case, we might rule out a very expansive right to education or medical care on the grounds that this would impose excessive obligations on those who would have to provide the necessary resources.<sup>18</sup>

The reason for imposing such a compatibility requirement is that we want to avoid trading human rights off against each other if we possibly can. We cannot avoid all such trade-offs, because unusual circumstances may arise where we have to make a choice between infringing right A and infringing right B.<sup>19</sup> But we want the circumstances to be unusual, otherwise there is a danger that the special mandatory quality of human rights will be dissipated. The idea was invented mainly in order to

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<sup>17</sup> For a good discussion of the concept of feasibility in general, see P. Gilabert and H. Lawford-Smith, ‘Political Feasibility: A Conceptual Exploration’, *Political Studies*, 60 (2012), 809-25; also P. Gilabert, ‘Feasibility and Socialism’, *Journal of Political Philosophy*, 19 (2011), 52-63.

<sup>18</sup> I have explored this compatibility requirement more fully in *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 7, and in ‘Grounding Human Rights’, *Critical Review of International Social and Political Philosophy*, 15 (2012), 407-27.

<sup>19</sup> It is also true that there can legitimately be some variation when human rights are given precise specification in national constitutions or other instruments. Where exactly the boundaries of a right such as freedom of religion should be set is a matter for deliberation in each society. Nevertheless the process of specification should ensure that as far as possible the resulting rights do not collide with one another.

set strict limits to what states can do to their own populations without attracting moral censure and international condemnation. For this purpose to be achieved, the human rights that we include on our list must serve as trumps in relation to the other policy goals that states may have, such as economic growth or promoting the national culture. But it will also be self-defeating if human rights are constantly having to be set against one another, because this will give states too much freedom to justify rights-infringing policies by appeal to what are claimed to be competing human rights.<sup>20</sup>

If we apply these three justificatory requirements – sufficiently strong grounds, feasibility and compatibility – to the right to immigrate, the feasibility requirement seems least problematic. This is particularly so since I have defined the right to immigrate as a right not to be prevented from entering, and not as a right to be assisted. The main reason for thinking that it would be infeasible to recognize this as a human right is that states, and perhaps their populations, would oppose it; but this is not a relevant reason when we are considering human rights. It would certainly be possible for states to abandon border controls and open their territories to all-comers. Perhaps one can envisage scenarios in which, say, everyone attempted to move to Lichtenstein, and this was physically impossible, but these can be set aside as the kind of exceptional circumstance under which virtually any human right might have to be curtailed.

Compatibility seems likely to be a greater problem, but first let us see whether the grounding condition can be met. As I noted earlier, there are different views about what can ground human rights, so it may be that the right to migrate will qualify on some of these but not others. What the various grounding theories have in common,

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<sup>20</sup> Note that the argument I make here is distinct from the argument typically offered by libertarians in defence of the claim that genuine rights can never conflict – they must all be compossible. This libertarian argument, which has the effect of allowing only negative rights to count as such, relies upon the thesis that every right entails a strictly correlative duty. The argument I offer, in contrast, does not depend upon the correlativity thesis, which I reject, but upon the pragmatic claim that human rights can only play the role that they are meant to play in political argument if their content is such as to make conflicts between them relatively rare.

however, is that they are trying to identify some feature of human beings that is vitally important to them. The general form of these theories is that X qualifies as a human right because if people are not granted X, something of great significance to them is likely to be lost – they will not be able to live in a way that it is morally essential for humans to live. So it is worth asking why migration might have this kind of importance in human life.

On the face of it, it seems unlikely that it could have. We can distinguish two aspects of migration. First there is the very act of moving across a border; then there is the resulting change of environment – one moves into a society whose physical features, economy, legal system, culture, etc are to a greater or lesser extent different from those of the society one has left. Let us consider these in turn. How important could it be just to move across a border? There are certainly ways of life – nomadic ones – in which movement as such is valued. It is also possible that a border might run across the traditional pathway that is followed by those who embrace such a way of life. Members of the Sami people of northern Scandinavia, for example, have to cross the borders between Norway, Sweden and Russia as they follow the annual migration route of their reindeer herds. This would give those involved a contingent reason to demand a right to cross the border in question, but the very contingency of the case – the fact that it appeals to a culturally specific way of life – shows that a universal human right to immigrate could not be justified on this basis.

The second aspect seems much more promising. Most people who move across borders do so because of features of their new place of residence that were not available in the old. Many of these migrations, however, will best be understood in terms of personal preferences rather than vital interests. Rather than there being some essential interest that could not be satisfied in the original country of residence, the reason for moving is that the new country offers an opportunity not available before (which might take the form of satisfying an essential interest in a preferred way – for example moving to a better job).

For some people, on the other hand, migration may well be only the way to satisfy an essential interest even at minimal level: this is especially likely in cases where the

migration is from a very poor country to a much richer one in which adequate food, medical care, etc are available. Does this provide the basis for a human right to migrate? Notice that the argument in this form has become instrumental in character. It is not claimed that the migration in and of itself is necessary if the essential interests in question are to be fulfilled. The claim is rather that, given the prevailing circumstances, the only way in which rights that are already agreed to be genuine human rights – to food and medical care – can be realised is by recognizing an additional right, the right to migrate, whose exercise will allow those primary rights to be fulfilled. As such, it is vulnerable to the observation that there are other ways in which the primary rights can be secured – adequate food and medical care might become available in the original country, through aid in the short term and economic development in the longer term. Given these alternatives, to establish migration as a human right one would first have to apply the compatibility test, asking which way of realizing the primary rights involved least interference with the other rights of those who would bear the corresponding obligations (to admit migrants and to supply development aid respectively).

If the argument for a human right to migrate is to be more than merely instrumental, it needs to prove that there are essential interests that cannot be fulfilled *except* by establishing such a right. Oberman tries to show this by claiming that we have a basic interest in being ‘free to access the full range of existing life options’, and he uses several examples to show how these life options may not be accessible in the state in which a person currently lives. These include: falling in love with a person who resides in another country; wanting to practise a religion that does not have adherents in the place where one lives; and having political aims that require travel abroad for research or to engage in political discussion.<sup>21</sup> (To make these examples watertight, we need to assume that there is some reason why such interests cannot be satisfied without migration – some reason why the loved one cannot move, etc. – but let’s grant that this condition is met.)

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<sup>21</sup> Oberman, ‘Immigration as a Human Right’, pp. 5-9.

Notice, however, two things about these examples. One is that they depend upon the subjectively strong interests of particular persons, not on the essential interests of human beings as such. Or rather, to put the point more exactly, interests that may in themselves be universal here take a form that is specific to one person. We all share a basic interest in having the opportunity to form a long-term loving relationship with another human being, but only I, perhaps, have an interest in forming such a relationship with Amélie specifically. Clearly the conditions that are required to realise the aggregate set of such specific interests are much more demanding than those needed to realise the shared general interest. Can a human right be such as to fulfil these demanding conditions? Consider by way of analogy the human right to food, and consider the position of someone in whom that basic interest takes the form of a passion for top-quality raw fish. Are we to say that the human right to food must be understood in such a way as to include the conditions that will make it possible for this person to obtain high-class sushi? Suppose highly restrictive legislation to preserve fish stocks is introduced, pushing the price of raw fish beyond the person's means. Has his human right to food been violated?

The answer to these rhetorical questions is, I assume, obvious. The human right to food is the right to have access to an adequate quantity of nourishing food, regardless of any preferences the right-holder may have for particular types of food. It can be satisfied by many different combinations of foodstuffs. The right is based on generic interests, not specific ones. So in what way are the rights that are generated by our interests in being able to form loving relationships, or to practise a religion, different? There is clearly one relevant difference here: potential partners and religions are not substitutable in the way that foodstuffs are. I may prefer bluefin tuna to hake, but that is just a strong preference, whereas if I cannot cohabit with Amélie or participate in Sutrayāna practices in Tibet, that is an absolute loss – there is no alternative that is merely a less good version of the same thing. The interest that we have is an interest in being able to form a relationship with the particular person whom we love, or to participate in the religion whose tenets we have come to believe. Such interests are not satisfied merely by the state providing us with an approved list of marriage partners or state-sanctioned religions. The rights we have to form relationships or practise religion demand more than that. Notice, however, that while they prohibit the

state from deliberately imposing obstacles that would prevent us from exercising these rights, they do not require states to take positive steps to make the corresponding opportunities available.<sup>22</sup> Suppose that a small religious sect holds its weekly services in London. A potential adherent who is dependent on a low-wage job in Glasgow may find it impossible to attend. Unfortunate though this is, it is not a violation of the human right to freedom of religion. A person so placed has to search for another way to pursue her underlying interest in faith.

It is also worth noting here that the specific interests that are being cited in defence of a human right to migrate are interests that require the co-operation of others to fulfil, so they are anyway vulnerable to refusal on the part of these others. Amélie may decline to have me, and the Tibetan monastery whose teaching path I wish to follow may be unwilling to take me in. We would be inclined to say that they have the right to refuse. But would we say that so confidently if it were really the case that human beings were so made that they could not live minimally decent lives unless they were able to form relationships with just one identifiable other, or to engage in one specific religion? If human beings were like that, in general, wouldn't we say that there was an obligation to associate with them when they regarded this as essential unless doing so came at such high cost that the associate's own decent life was put at risk?

It might be said in reply here that there is a big difference between my hoped-for relationship with Amélie being blocked by Amélie's contrary inclinations, or in the other case by the preference of Tibetan monks not to have to cope with an ignorant Westerner, and these relationships being prevented by the border controls of a state. There is indeed a difference, but I think it resides in the fact that whereas the mere wishes of Amélie or the monks are sufficient by themselves to exclude me, the state cannot prevent me from immigrating on a mere whim – it must have solid grounds for

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<sup>22</sup> Just how far a state must go by way of providing opportunities in order to protect the right to freedom of religion is a difficult and disputed question. I have addressed some aspects of the question, with respect to liberal states, in 'Liberalism, Equal Opportunities and Cultural Commitments' in P. Kelly (ed.), *Multiculturalism Reconsidered* (Cambridge: Polity Press, 2002), reprinted in D. Miller, *Justice for Earthlings: essays in political philosophy* (Cambridge: Cambridge University Press, 2013).

refusing me entry. Which grounds should count is a matter to be addressed later. For the moment, the conclusion that I wish to draw is that the direct human rights argument cannot justify a right to migrate. So long as the state in which I reside provides a range of opportunities that is adequate to meet my generic human interests, the fact that I may also have specific interests that cannot be satisfied unless I reside in another country gives me only a reason, not a full-blown right, to move there.

But what if the range of opportunities available to me where I am currently living is *not* adequate? Here we encounter the instrumental argument in favour of the right to migrate. For many people, clearly, moving across borders may provide the only chance they have of living a minimally decent life. By acknowledging the right to migrate, we bring it about that one obstacle at least to fulfilling other human rights, such as the right to subsistence and the right to freedom of conscience, is removed. But this argument, although valid, is limited in a number of ways. First, it holds only as long as we assume that the other human rights that provide the conditions for a minimally decent life *cannot* be secured without migration – that is, we rule out the possibility of transforming conditions in the originating society so that decency is achieved. Second, we have to be alive to the possibility that migration may provide the route to a decent life for some people while making conditions worse still for those left behind. This is a difficult empirical issue that essentially revolves around the question of whether the so-called brain drain effect is real and, if it is, whether it is adequately compensated for by remittances and other benefits flowing back to the originating country as a result of migration.<sup>23</sup> Third, the instrumental argument cannot be used to justify migration between societies all of whom already provide their members with an adequate range of opportunities, and in the case of those that don't, it justifies only a more limited right to move to *some* society that does provide

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<sup>23</sup> For analysis and evidence, see D. Kapur and J. McHale, *Give Us Your Best and Brightest: The Global Hunt for Talent and its Impact on the Developing World* (Washington, D.C.: Center for Global Development, 2005); R. Faini, 'Migration, Remittances and Growth' in G. Borjas and J. Crisp (eds), *Poverty, International Migration and Asylum* (Basingstoke: Palgrave Macmillan, 2005). For a critical discussion of appeals to the brain drain phenomenon in debates about immigration, see K. Oberman, 'Can Brain Drain Justify Immigration Restrictions?', *Ethics* (forthcoming).



that range. So a world in which Canada, say, opened its doors to everyone who wanted to move from societies that because of poverty and/or political repression failed the decency test, but in which everywhere else kept them shut, would satisfy the instrumental argument without recognizing a human right to migrate as I have defined it.

In reply to this it might be said that other human rights cannot be properly guaranteed without an unrestricted right to migrate. Relying on the willingness of Canada to take in all of those suffering from the effects of global poverty is not good enough. Clearly my example is not intended to be realistic, but a system of managed migration in which receiving states co-operated to issue immigration permits, valid only for specified countries, to those who qualified for them on human rights grounds might be. Because migration flows would be controlled under such a system, it could plausibly be argued that it would do a better job than a free-for-all in ensuring that people who currently lacked the opportunity for a decent life were provided for one – for example migrants could be directed to the societies with the biggest labour shortages.<sup>24</sup>

#### IV

So much for the instrumental strategy for justifying the human right to immigrate. We are left with what I have called the cantilever strategy, which tries to show that, given the human rights we already recognize, it is inconsistent not to recognize this one. The most likely version of this strategy begins with domestic freedom of movement, which as we saw was a right included in the original UN Declaration.<sup>25</sup>

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<sup>24</sup> Might there then be a human right to have such a managed migration system in place? No, because there are a number of different ways in which the human rights of people currently living in very poor or oppressive societies might be safeguarded, and even if it could be shown that such a system was likely to be the most effective of these, one cannot claim a human right to everything that is most conducive to the human rights one already has. I discuss this issue in greater detail in ‘Border Regimes and Human Rights’, *Journal of Law and Ethics of Human Rights* (forthcoming).

<sup>25</sup> Here is Carens deploying the cantilever strategy: ‘If it is so important for people to have the right to move freely within a state, is it not equally important for them to

As the cantilever argument is often expressed, since we would regard it as an unacceptable breach of human rights if a federal union like the U.S. or Australia were to prevent people from moving across the boundaries from one constituent state to another (say from Washington to Oregon), why is it acceptable to prevent them moving across the national boundary that separates, say, Washington State from British Columbia?<sup>26</sup>

To evaluate this, it is worth examining why domestic freedom of movement can qualify as a human right. Note to begin with that the right involved is actually quite limited in scope, in the sense that there are many laws, concerning property, traffic regulation and so forth that significantly reduce the portion of domestic space over which a randomly chosen person is free to move.<sup>27</sup> Moreover it is taken for granted, in the official Declarations and elsewhere, that further reductions can be justified on grounds of public order, health, and so forth. On the other hand, for reasons of efficiency, it is obviously beneficial if people are allowed to move domestically in search of work, affordable housing and the like, so states have little incentive to use coercive measures to reduce the scope of freedom of movement still further under normal circumstances. Moreover they have policy instruments available that allow them to affect the incentives that people might have for moving. Negatively, a predominantly national system of taxation and welfare provision means that there is not much incentive to move in order to reduce one's tax burden or obtain a higher standard of health care, for instance. Positively, states can create employment opportunities to counteract migration pressures by siting government offices and other public services in areas that are in danger of losing jobs. They control both ends of

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have the right to move across state borders? Every reason why one might want to move within a state may also be a reason for moving between states.....The radical disjuncture that treats freedom of movement within the state as a moral imperative and freedom of movement across state borders as merely a matter of political discretion makes no sense from a perspective that takes seriously the freedom and equality of all individuals.' (Carens, 'Migration and Morality', pp. 27-8.)

<sup>26</sup> A different way of resisting the cantilever strategy is developed in M. Blake, 'Immigration' in R. Frey and C. Wellman (eds.), *A Companion to Applied Ethics* (Oxford: Blackwell, 2003), pp. 228-9.

<sup>27</sup> See on this Nickel, *Making Sense of Human Rights*, p. 134.

the migration route, so to speak, so they can influence the relative desirability of living at either end.

In the light of this, one might wonder why the right to domestic freedom of movement ever comes under threat, and why therefore it should be necessary to include it in the Declarations and Covenants. The answer, I think, is that for political reasons a state may wish to target a particular group of people by restricting their movement. Under the apartheid regime in South Africa, geographical separation of blacks and whites was used to prevent racial mixing, give whites an advantage in the labour market, and provide blacks with much poorer quality social services. Further back in history, Jewish ghettos were created within European cities that not only enforced religious segregation but also exposed the confined group to economic exploitation and social stigmatization.<sup>28</sup> Discrimination of this kind is likely to harm the essential interests of the targeted group and put others of their human rights at risk. Restrictions on movement may also be placed on political dissenters, to prevent them associating with like-minded others and spreading their message more widely. In this case it is rights of political assembly and free speech that are put in jeopardy. To prevent such policies being enacted, we need a human right to free movement. It gets its value not just from the inherent value of being able to move around in physical space, which by itself might only justify a right of quite limited scope, but from the way it helps support other rights such as those I have just mentioned. Its main purpose is to prevent restrictions of movement being detrimentally placed on some people that are not placed on others.

Suppose now we look at international freedom of movement through the same set of spectacles. Although it may be argued that the economic and other benefits of free movement accrue here much as they do in the domestic case, fewer instruments are available to states to manage the potential flows of people without enforcing border controls. They are able to make their own societies more or less attractive for incoming people to join to some extent, though that extent is limited, at least in democratic societies, by legal norms that require the equal treatment of all residents,

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<sup>28</sup> See, for example, the account of the Venetian ghettos in R. Sennett, *Flesh and Stone: The Body and the City in Western Civilization* (London: Penguin, 2002), ch. 7.

and (justifiable) pressures to admit immigrants to full citizenship status in a fairly short space of time. They cannot control what goes on in the places from which the immigrants are coming. Since tax and welfare regimes vary considerably, there may be strong incentives to move even for people whose essential interests are not being harmed by staying where they are. One can of course imagine favourable circumstances in which relatively few people wished to migrate and/or similar numbers of people wished to move in and out of each particular state, and then there would be little cost to states in recognizing a human right to immigrate. But if the right is to be justified, it has to be robust even under unfavourable circumstances. ‘Unfavourable circumstances’ in this sense prevail in much of the world today.

So far I have suggested that states can have legitimate grounds for opposing an international right to free movement that they do not have in the domestic case. The other side of the coin is that restrictions on international movement, unlike restrictions on domestic movement, are not targeted at specific groups with the aim of disadvantaging them in ways that put their human rights at risk. The immigration policies pursued by states are of course discriminatory in that they typically privilege particular categories of immigrants, and in some instances do so on indefensible grounds (as in the case of the infamous ‘White Australia’ policy). But even in the worst cases the excluded groups are not made vulnerable in the way that targeted insiders are. Responsibility for protecting their human rights rests primarily with the states that they are seeking to leave, and in some cases the rights they already enjoy may be as valuable as the rights they would gain if they were permitted to enter.

Consider political rights, for example. I argued above that the right of domestic free movement may be essential to support the right to associate politically with others and communicate one’s views to a wide audience. Someone who is prevented from immigrating to society S cannot exercise these rights vis-à-vis the citizens of S, but so long as human rights are recognized in her home society she can do so vis-à-vis her fellow citizens. Do political rights include the right to associate and communicate with *anyone*? Oberman asserts that they do: ‘political life is not fully free if people are prevented from meeting, organizing and protesting as they wish’, which he takes to include engaging in these activities anywhere in the world as may be felt

necessary.<sup>29</sup> If we lived under a world government, that might be true. But since we do not, there is a crucial difference between interacting with fellow-citizens, with whom together we are responsible for controlling the massive apparatus of the modern state, and interacting with people elsewhere with whom one may share aims and interests.<sup>30</sup> As usual, the issue here is not what is most desirable: it may be desirable that, as Oberman suggests, he can travel to and stay in Sierra Leone in order to investigate the effects of British government policies in that country. The issue is what can be claimed as a human right. If I am correct in saying that the right to freedom of movement qualifies as a human right in part because of the way in which it supports other rights such as freedom of speech and assembly, then we need to settle how far these latter rights extend before we can decide how widely or narrowly the human right to free movement should be construed. Once we understand how political rights connect to essential human interests, we will not be inclined to interpret them so widely.

I have been pointing to disanalogies between domestic and international free movement in order to resist the cantilevering strategy used to support a human right to immigrate. By way of conclusion, let us briefly contemplate the nightmare scenario as presented by defenders of that right, in which Washington State does indeed control its border with Oregon in the same way as it does with BC.<sup>31</sup> That would undoubtedly be a huge inconvenience to all those who had become used to crossing that border freely, and for example had arranged to live in one state and work in the other. But that is an effect of the *status quo ante* being one of free movement, which we should therefore discount for purposes of evaluating the arrangement itself. Why would we be disturbed by the border closing once people had adjusted to it? If my

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<sup>29</sup> Oberman, 'Immigration as a Human Right', p. 14.

<sup>30</sup> See here M. Blake and M. Risse, 'Immigration and the Original Ownership of the Earth', *Notre Dame Journal of Law, Ethics and Public Policy*, 23 (2009), 133-65, pp. 147-8.

<sup>31</sup> Griffin contemplates another hypothetical case in which restrictions on domestic freedom of movement do not appear to amount to a human rights violation in *On Human Rights*, pp. 195-6. In his example, Brazil requires new immigrants to settle in the interior of the country rather than in Rio.

analysis above is correct, we would be concerned that the closure was being used for discriminatory purposes (for example to prevent Mexican immigrants who had made it as far as Oregon from moving farther north). We would be worried if, say, Presidential candidates were being prevented by the border controls from addressing public meetings in Washington State. There might be other grounds for concern. But if, for example, these restrictions were simply used to limit the number of tourists taking vacations in the state, how concerned would we be? We assert the right of domestic free movement in its standard form because of an entirely reasonable fear that states may otherwise be tempted to impose restrictions on movement unjustifiably, violating other rights in the process, not because we think that we have an essential interest in being able to move just anywhere, even within national boundaries.

## V

I have argued, against the cantilever strategy, that the oft-cited analogy between the domestic right of free movement and the putative corresponding international right does not hold. On the one hand, states have policy instruments at their disposal that they can use to control internal migration non-coercively that they do not possess in the international case. On the other hand, allowing states to *prevent* (rather than merely discourage) people from moving internally would give them a weapon with which to oppress minority groups or dissident individuals – and again there is no international equivalent to this.<sup>32</sup> Still, to complete the argument against a human right to immigrate, I need to show that states do indeed have good reason to control inward movement across their borders, so that granting such a right would potentially have significant costs. Let me draw attention to three considerations that, depending on the case, may provide such a reason.

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<sup>32</sup> It is possible to imagine a number of states colluding to oppress an unpopular minority group, and using immigration controls to do so, but I cannot think of any real examples of this phenomenon. The expulsion of Roma by a number of European countries at different historical moments – most recently by France in 2009-10 – has been suggested as a relevant case, but it is really a different phenomenon: it does not involve co-ordinated action between states, while on the other hand the ethical issues raised by expulsion are different from those raised by refusing entry.

1. Overall numbers. Unless counter-balanced by emigration, immigration will obviously increase the number of people within the state's jurisdiction. This will matter most immediately when the state has explicitly adopted a population policy that aims to cap that number, in the extreme case by making it illegal for a family to raise more than a specified number of children. Even in the absence of such a policy, however, the state is likely to have set targets for employment, for house-building, for the supply of health services and so forth – perhaps in the future for overall levels of greenhouse gas emissions – which are dependent on the total number of people who fall under its jurisdiction. The point here is not that its interest will always be to hold this number below a fixed ceiling; clearly states have often wanted to encourage immigration for economic and other reasons. The interest is rather in being able to control the number – to increase, diminish, or maintain it as other policy goals require.

2. Cultural shifts. Whereas migration within a modern state will only change the prevailing culture in marginal ways, immigration from outside may change it more radically, and the receiving state and its citizens may have an interest in preventing this. This may be because they do not want to see existing cultural divisions in the society deepening further, or just because they are attached to their inherited culture. Since this claim about the significance of culture is often misunderstood and/or dismissed out of hand, it is worth elaborating a little more fully.

First, it is often pointed out that existing liberal democracies are all to a greater or lesser extent multicultural, and immigration does nothing to alter that fact.<sup>33</sup> Even if a majority of citizens hanker after a culturally homogenous society, that particular horse has bolted so far away as to be irretrievable. But although complete cultural

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<sup>33</sup> This criticism has been made not only by open borders advocates but by some of those who regard immigration controls as justified, including Michael Blake in 'Immigration', pp. 232-4 and Ryan Pevnick, *Immigration and the Constraints of Justice* (Cambridge: Cambridge University Press, 2011), ch. 6, both of whom also contend that invoking culture as a ground for restrictions risks demeaning current citizens who do not form part of the majority culture.

homogeneity is unachievable even if it was believed to be desirable, this does not exclude some degree of cultural convergence among people living in multicultural societies – convergence, for example, in language use, in political values, and in norms of socially acceptable behaviour. Such convergence can be valued both for instrumental reasons – it allows people to interact with less friction, it helps to generate trust, which in turn supports active democracy, and so forth – and also intrinsically: people simply feel more at home when they live in a cultural milieu that they recognize as their own. Bringing the necessary cultural integration about, however, takes time and is not costless; in general it will be easier to achieve when the rate of immigration is steady and relatively low, so that integration mechanisms – language classes for new immigrants, and so forth – can be put in place.

Second, it is often said, correctly, that societal cultures are always in flux, and that preventing immigration in order to ‘freeze’ a culture at a particular moment of time is therefore absurd. But from the point of view of the people whose culture it is, it makes a difference whether the sources of change are internal or external. Sometimes, of course, people may welcome the introduction of new elements of culture from the outside, but this is different from having changes forced upon you by external factors that you cannot control. The point I am making here is not about the *actual* effects of immigration over the last couple of generations, but about possible effects of institutionalizing an unlimited right to immigrate. Even authors who are favourably disposed towards open-borders policies, such as Dummett and Carens, recognize the normative relevance of claims about culture.<sup>34</sup> Dummett, for example, acknowledges that all nations have the right not to be ‘submerged’ by invading cultures, and spends some pages explaining the importance to people of having a native land whose culture is such that they can feel it to be uniquely theirs. This, as was noted earlier, explains why for Dummett there cannot be an unqualified right to migrate. But while complete submergence is unlikely to occur for the reasons that he gives, citizens may still have an interest in resisting externally-generated cultural

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<sup>34</sup> See Dummett, *On Immigration and Refugees*, esp. pp. 15-21; Carens, ‘Migration and Morality’, pp. 36-40.



change, and retaining control over immigration is one of the levers that allows them to do this.

3. The composition of the citizen body.<sup>35</sup> If we assume that immigrants will in due course be able to apply for full citizenship rights, then their admission will change not just the size, but to a greater or lesser extent the political complexion, of the citizen body. (Again there is a contrast with internal migration, whose political effects are only localised.<sup>36</sup>) This will matter most in democratic systems that are evenly balanced between, say, rival ethnic or religious groups. Even if one thinks that the membership of any demos is ultimately an arbitrary matter,<sup>37</sup> an established demos may still have the right to determine its own future membership, so long as it does so in a way that is consistent with recognition of the basic rights of those who will be affected by its decisions.<sup>38</sup> This seems to be an essential part of what it means to be self-determining: if a democratic body is entitled to take decisions on policies whose impact will be felt in decades to come, it is also entitled to resist changes in its own composition that might have the effect of reversing these policies (it cannot of course guarantee that the policies will not be changed, since successors may have different ideas, but it can legitimately try to make this less likely to happen).

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<sup>35</sup> This aspect is also stressed in C. Wellman, 'Immigration and Freedom of Association', *Ethics*, 119 (2008), 109-41, esp. pp. 114-16 and in C. Wellman and P. Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011), pp. 38-41.

<sup>36</sup> This is not *strictly* true, if national elections are held in local constituencies. It would be possible to invent a case in which movements of voters between constituencies determined the outcome of a closely fought election. But the point is that if the overall composition of the electorate remains the same, then the political impact of internal migration will only be marginal.

<sup>37</sup> As I do not: see D. Miller, 'Democracy's Domain', *Philosophy and Public Affairs*, 37 (2009), 203-28, for thoughts about the principles that should guide the creation or alteration of a demos.

<sup>38</sup> The qualifying clause is needed to block the possibility that a citizen body might decide to change its composition by expelling a sub-set of its members, or denying admission to the offspring of existing members as they reached voting age.

VI

In this paper, I have been asking whether there is a human right to immigrate that would make the border restrictions that we see everywhere in the world today morally problematic. I have concluded that there is no such right. At the same time, existing border regimes do raise serious human rights issues, some of which I have discussed in detail elsewhere.<sup>39</sup> These have primarily to do with the way that immigrants, and especially refugees, are treated when they approach the state asking to be let in. A number of procedural safeguards must be put in place to ensure that human rights are not violated, either directly by the receiving state, or indirectly by sending immigrants to places where their rights are forfeit. There are also human rights questions to be asked about the criteria used to select immigrants who do not qualify as asylum seekers, although the answers to these are less obvious. So my view is not that human rights have no place in discussions of immigration policy – quite the reverse. But these discussions get off on the wrong foot if they assume, openly or tacitly, that there is a general right to free movement that all border controls violate. By making that assumption, we rule out the very idea of a just immigration policy (other than a free-for-all), since a necessary condition of such a policy is that it should be human rights compliant. If the argument offered here is correct, no such assumption should be made.

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<sup>39</sup> See Miller, ‘Border Regimes and Human Rights’.