ON IMMIGRATION ENFORCEMENT AND EXPULSION STRATEGIES: A MORAL AND POLITICAL DEFENSE OF IMMIGRANT RIGHTS

by

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DISSERTATION ABSTRACT

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Recently, Christopher Heath Wellman has proposed an innovative argument that appears to resolve, at least with respect to immigration, the tension between democratic autonomy (i.e. a people's right to self-determination) and human rights (i.e. respect for individual freedom and universal equality). Wellman argues, from a traditionally liberal point of view, that a legitimate state (i.e. a state that respects human rights) is entitled to self-determination and that part of the definition of being self-determined is having the presumptive right to unilaterally control immigration. In other words, Wellman claims that a state's unilateral right to control immigration can be made compatible with liberal commitments to individual freedom and universal equality.

I aim to raise a novel objection against Wellman's argument, which I hope will also challenge philosophers to think differently about the immigration issue as a whole. My position is that even if Wellman's conclusion is correct, that a state's right to self-determination can be made compatible with human rights, the presumptive right that this generates for a legitimate state to unilaterally control immigration is, at best, limited only to admission and exclusion policies (i.e. to questions about who can be let in and who can be kept out). Wellman's conclusion, however, does not hold for *strategies of*

immigration enforcement and expulsion (i.e. to the questions about how these policies may be enforced or what sort of deportation procedures a state is justified in using). And, in fact, I argue that under Wellman's account, a legitimate state would be restricted in deploying certain strategies of immigration enforcement and expulsion.

My conclusion is that with respect to immigration enforcement and expulsion strategies, the presumptive right is on the side of the immigrant and not the state. This means that if a legitimate state wishes to control immigration, it is the state who holds the burden of proof to show that not only its immigration policies but also its enforcement and expulsion strategies do not violate prior commitments to individual liberty and universal equality. This, I contend, provides a moral and political baseline justification for immigrant rights, which I refer to as a minimalist defense of immigrant rights.

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Dedicado a la memoria de mi querida abuelita Juliana Marin y mi tia Tonia Marin

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CHAPTER I

INTRODUCTION: PHILOSOPHY AND THE ISSUE OF IMMIGRATION

Introduction

While there has recently been a steady rise in the amount of philosophical literature devoted to immigration, it is not unusual for someone to think that this topic is best left to the social sciences. After all, the social sciences, unlike philosophy, produce and then base their conclusions on solid empirical evidence. Public policy is generated and implemented, at least ideally, from such conclusions and evidence. If it turns out that the issue of immigration is simply a matter of empirical evidence, then it is difficult to see what meaningful contribution philosophy could make towards resolving any of the problems associated with immigration.

Contra this view, I will argue that immigration is primarily a moral and political issue. By thinking of immigration in this way, we find that the more significant differences within the immigration debate stem from differences in norms and values and not so much from disputes over the empirical evidence. Empirical evidence is important, but its meaningfulness always requires some interpretation, and this interpretation already presupposes certain norms or values. For example, if the social sciences definitively ascertained one day that increased immigration harms a nation's economy, that empirical conclusion would not by itself generate any sort of prescriptive action (i.e. it would not automatically tell us what ought to be done). In order for this empirical conclusion to play a role in determining what ought to be done, a prior normative argument or value judgment must have already been in place: the wellbeing of a nation's economy *ought* to take precedence over the rights of immigrants.

So while its true that disagreements over the evidence (i.e. over matters of fact) might best be left for the social scientist to resolve, resolving or understanding disagreements over norms and values (i.e. what these facts ought to mean or what ought to be done in view of those facts) is an area where philosophers should make important contributions to the immigration debate. Until recently, however, philosophers have not dealt in any depth with the issue of immigration, despite its increasing prevalence in an increasingly global economy. In this dissertation, I will explain the relationship between philosophy and immigration, laying a groundwork for moral and political principles regarding immigration. In doing so, I will highlight some normative implications for future public policy makers to consider. In particular, I want to present a case for what I call a minimalist defense of immigrant rights. In other words, I want to argue that all persons, including undocumented immigrants, are entitled to certain basic rights that should not be infringed even if respecting these rights compromises a state's ability to control immigration.

Section 1: Overview of the Basic Argument

A principle aim of this dissertation is to bring the various contemporary philosophical texts that deal with immigration into dialogue with one another. While there have been prior attempts to put some of these texts into conversation with each other, this dissertation seeks to expand those efforts. In my reading of these various texts I argue that the current philosophical debate over immigration has been primarily focused on overcoming the "liberty dilemma." To put it another way, this debate has been concerned with trying to reconcile the tension between democratic autonomy or a people's right to

self-determination and human rights or respect for individual freedom and universal equality.[1] Both democratic autonomy and human rights are thought to be necessary in order for a political community to be considered legitimate, yet when addressing the issue of immigration, these two commitments appear irreconcilable. A people's right to determine its national character by limiting immigration seems to be at odds with the right of an individual to free movement and a commitment to treating all persons equally regardless of arbitrary differences, which would include place of origin.

The reality of current immigration laws and public debates over immigration, however, has had a different focus than that which has occupied philosophers. For the most part, public policy debates have revolved around a "security dilemma," wherein the failure to strictly regulate immigration appears to give license to social chaos, while providing the state with the means necessary for strictly regulating immigration can lead to conditions that threaten the safety and basic liberties of individuals. In other words, when it comes to the issue of immigration, public policy makers are stuck trying to avoid falling into a Hobbesian "state of nature," while at the same time trying not to foster the conditions that give rise to a "state of exception."

My own view is that this *security dilemma* within public policy can and should be overcome if we take constitutional democracy seriously. My overall argument is composed of two parts. First, I argue that the liberty concern ought to take precedence over the security concern. Second, I argue that when a concern for liberty is given precedence over a concern for security, the type of political community that this generates will entitle all persons, including undocumented immigrants, to certain basic protections that can override even a legitimate state's right to control immigration. If

these two parts of my argument are sound, then I have established, at the very least, a baseline moral and political defense of immigrant rights. This view is what I call a minimalist defense of immigrant rights.

In order to get to my conclusion, however, I am first going to have to explain what the *security dilemma* and the *liberty dilemma* are, why they are important for philosophers to worry about, and how these dilemmas can be avoided with regard to the issue of immigration. To do this, I begin in Chapter II by defending the following claim: prioritizing a concern for security over a concern for liberty is self-defeating. To make my point, I use the concrete example of the "plenary power doctrine," which is still in effect in the US. This doctrine, which is grounded in Supreme Court cases, allows the US federal government to regulate immigration free of judicial review and thereby, with respect to immigration cases, minimize the constitutional protections afforded to non-citizens. The normative reasoning in support of this doctrine rests on the idea that limiting sovereign authority in immigration matters would undermine a state's legitimacy and thereby could lead to something like a Hobbesian "state of nature."

I point out that in granting the federal government such a broad and unchecked power over immigration, the courts have essentially placed non-citizens in a situation analogous to what Giorgio Agamben has called the "state of exception." In short, giving the security concern such a priority leaves us with the following dilemma: either we accept something like the *plenary power doctrine* and end up with conditions that are conducive to something like an Agamben-ian *state of exception*, or we reject this doctrine and risk conditions that are conducive to something like a Hobbesian *state of nature*. I argue that the way out of this dilemma is to instead give priority to the liberty concern.

We must favor a form of legitimate sovereignty that gives priority to protecting basic liberties (e.g. a constitutional democracy) as opposed to merely prioritizing law and order.

In doing so, we find that all persons, including undocumented immigrants, are entitled to more constitutional protections than the *plenary power doctrine* currently allows. Furthermore, since extending these protections to all persons is more consistent with this type of sovereignty—as this is an essential feature to the checks and balances of political power—curtailing the federal government's control over immigration in this respect will not undermine its autonomy. I therefore conclude Chapter II with the following claim: giving priority to the liberty concern over the security concern will at least ameliorate, if not completely assuage, the more pernicious aspects of the *security dilemma* without having to forgo the possibility of having legitimate forms of political self-determination.

In Chapter III, I trace out the history of the liberty concern, beginning with Machiavelli's *Discourses on Livy* and ending with the work of Jean-Jacques Rousseau. This account is not so much concerned with providing a definitive interpretation of these thinkers, but with recovering some of their key insights with respect to the nature of liberty. As I trace out the history of the liberty concern, I find that, like the security concern, there are different parts to the liberty concern that do not always fit together: a commitment to self-determination (i.e. autonomy), individual freedom and universal equality. I refer to the tension between these different aspects of the liberty concern as the *liberty dilemma*: classical liberalism is able to recover individual freedom, but only at the expense of universal equality and a people's self-determination (i.e. autonomy of the

community); civic-republicanism is able to recover a people's self-determination and universal equality, but only at the expense of individual freedom (i.e. autonomy of the individual).

In that same chapter, I argue that this dilemma arises from there being two different understandings of liberty, a negative and positive notion of liberty. Both of these notions are essential to a constitutional democracy, but are not always compatible. I conclude Chapter III with a slight detour into the work of David Hume, who offers a powerful objection to the very possibility of being able to address the security concern, either directly or indirectly, by giving priority to the liberty concern. This, therefore, leaves us with the following problem: if these two different understandings of liberty cannot be reconciled, our only hope for a stable and well-ordered society might be to adopt something like Hume's conservative option.

In Chapter IV, I present both Immanuel Kant and John Rawls's attempts to overcome the *liberty dilemma*. With Kant, I argue that we find the blue print for overcoming the *liberty dilemma* because he brings together the major insights of the two notions of liberty. Ultimately, however, his account faces strong challenges from both utilitarians and Marxists. I then argue that, following Kant's blueprint, Rawls's two principles of justice manage to resolve the *liberty dilemma*, while also addressing the concerns of utilitarians and Marxists. In doing so, Rawls provides an account of a stable and well-ordered society (i.e. addresses the security concern) that gives priority to the liberty concern.

The problem with Rawls's account, however, is that its ability to resolve the *liberty dilemma* rests largely on the assumption of a bounded society, that is a society we

enter only by birth and exit only in death. This assumption is not possible when we try to take the immigration issue into consideration. Without the assumption of a bounded society, the *liberty dilemma* returns in a slightly new form: either too much freedom of movement (i.e. individual liberty) can prove disruptive in obtaining distributive justice (i.e. political equality of all citizens) or we find that democratic autonomy (i.e. a people's self-determination) might be unobtainable without assuming a deep inequality between members and non-members (i.e. moral equality of all persons).

In Chapter V, I outline how the *liberty dilemma* has played out in various philosophical discussions over immigration. I begin by presenting the communitarian position, which argues that political communities have a unilateral right to control immigration. I then look at the liberal position, which argues that individual freedom and universal equality disallow political communities from closing their boundaries. These two positions give rise to a third alternative, the liberal-nationalist position, which holds that individual freedom and universal equality are actually dependent on a state's ability to control its boundaries. Subsequently, the liberal-nationalist position is challenged on non-ideal grounds by cosmopolitans who a) put into question the liberal-nationalist assertion that the state, as opposed to other political communities, has the unilateral right to control immigration and b) make the case that non-members might have claims against certain foreign states (e.g. claims of restorative justice) that ought to grant them the right to admission regardless of the state's wishes.

In Chapter VI, I look at Christopher Heath Wellman's innovative argument, which appears to provide a resolution to the *liberty dilemma* within immigration. Wellman argues, from a traditionally liberal point of view, that a legitimate state (i.e. a

state that respects human rights) is entitled to self-determination and that part of the definition of being self-determined includes having "freedom of association." According to Wellman, any state that is entitled to *freedom of association* has the presumptive right to unilaterally control immigration. I then go on to look at some of the criticisms raised against Wellman's account and his responses to those criticisms. While I am not convinced that Wellman adequately responds to these criticisms, I am also not persuaded that these three criticisms do enough to seriously undermine Wellman's overall argument. I think that there is a more fundamental objection to Wellman's account, and that is the subject of Chapter VII.

In Chapter VII, I present my contribution to this debate. My contention is that the current framing of the immigration issue, at least within philosophy, has been constrained to debating admission and exclusion polices. Admission and exclusion policies determine which immigrants, if any, are to be allowed to enter the state and which are excluded from legal entry. These policies address questions such as, What are morally acceptable grounds for exclusion? and What admissions policies do not violate the moral equality of all persons? While I concede that this is an important part of the immigration debate, addressing policies of admission and exclusion does not exhaust the complexities of the immigration issue. A more urgent question, at least in the US right now, is what to do about enforcement and expulsion strategies.

Immigration enforcement strategies have to do with the mechanisms of enforcing admission and exclusion policies. How do we insure that only those who are legally considered admissible enter the country? Border control and the range of permissible activities allotted to border patrol agents fall under this category. Immigration expulsion

strategies have to do with the locating, identifying, treating, and deporting of undocumented immigrants. The state of Arizona's infamous SB1070 law and similar "show me your papers" laws fall under expulsion strategies because these laws are concerned with how to remove immigrants who are "out of status" (i.e. are not supposed to be legally present), but are already in the country. I argue that when immigration enforcement and expulsion strategies are taken into consideration, Wellman's proposed resolution to the tension between a state's right to self-determination and a commitment to human rights does not hold up. We find instead that, with respect to the enforcement strategies, a legitimate state's ability to control immigration is checked by a concern for the moral equality of non-members. With respect to expulsion strategies, we find that non-members, including undocumented immigrants, are entitled to protections—which are intended to protect the political equality of all citizens—that can constrain a legitimate state's ability to deploy expulsion strategies.

My conclusion is that if a legitimate state wishes to control immigration, it is the state who holds the burden of proof to show that not only its immigration policies, but also its enforcement and expulsion strategies, do not violate prior commitments to the moral equality of all persons and political equality of citizens. I close this dissertation by presenting a framework for future immigration reform based on a minimalist defense of immigrant rights. My solution consists of a three part-framework that takes into account the past, present, and future implications of immigration reform. This is only an outline, but it is sufficient to show the feasibility of a minimalist defense of immigrant rights, while also laying bare the normative arguments and value judgments that undergird it. I

do not offer this framework as a form of public policy, but I do hope that this might persuade public policy makers to give more consideration to immigrant rights.

Notes

[1] This tension within the immigration debate is also alluded to in the work of Seyla Benhabib, see Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge, UK: Cambridge, 2004), and Eduardo Mendieta, see Eduardo Mendieta, "The Right to Political Membership: democratic morality and the right of irregular immigrants," *Radical Philosophy Review* 14.2 (2011).

CHAPTER II

THE SECURITY CONCERN AND THE SECURITY DILEMMA

Introduction

In order to properly discuss the issue of immigration within moral and political philosophy, it is important to begin with two concerns that have undergirded much of the thinking in these areas of philosophy since the modern era. First, the security concern, expresses the importance of a political system that provides safety for the individual and for law and order in society. Second, the liberty concern, expresses the importance of a political system that provides autonomy for a political community (i.e. a people's right to self-determination), and individual freedom and universal equality for all persons. In this chapter I will primarily deal with the security concern and the internal tension that this concern gives rise to. This tension is primarily that, in creating a force capable of providing law and order (i.e. sovereignty), one will also create a force capable of violating the security of individuals. I will refer to the difficulty of reconciling this tension as the "security dilemma." I will argue that, with regard to the current immigration debate, this tension is best exemplified by the US "plenary power doctrine."

The *plenary power doctrine*, which the US federal government has enjoyed since the second half of the 19th century, allows the federal government to regulate immigration without the possibility of judicial review, thereby minimizing the constitutional protections afforded to non-citizens in immigration cases. The justification for this broad and unchecked power is not found in the US Constitution,[1] but comes from a set of Supreme Court decisions in the late 19th century. In these decisions, the Supreme Court found that the power to regulate immigration, meaning the power to admit,

exclude, and expel non-citizens, is a chief attribute of sovereignty and therefore lies outside the scope of judicial review. In this understanding of sovereignty, any limitation on sovereign authority, at least with respect to immigration matters, undermines sovereign legitimacy, which opens society to the threat of something like a Hobbesian "state of nature."

While the risk of falling into a Hobbesian *state of nature* is a serious matter, there is an equally serious downside to granting any sovereign (in this case the federal government) such a broad and unchecked power over matters of immigration. This downside is best articulated in Giorgio Agamben's warning against the "state of exception." The *state of exception* is a situation in which the unrestrained power of the sovereign, which is necessary to ward off the lawless and chaotic *state of nature*, works to undermine rather than protect the life of the individual. I argue that thinking of legitimate sovereignty as an all-or-nothing form of political authority leaves us with the following *security dilemma* with respect to the issue of immigration: without something like the *plenary power doctrine* we risk ending up in a *state of nature*, but with something like the *plenary power doctrine* we risk ending up with a *state of exception*.

This chapter serves as a two-part response to this *security dilemma*. First, I argue that the *plenary power doctrine* is incompatible with the form of sovereignty expressed in a constitutional democracy or a form of political authority that is not completely unchecked. Under a constitutional democracy, non-citizens, even undocumented immigrants, are entitled to protections that the *plenary power doctrine* currently denies them. In this way, constitutional democracies can avoid falling into a *state of exception*. Second, since extending these protections, even to undocumented immigrants, is more

consistent with the type of sovereignty expressed in a constitutional democracy, I argue that curtailing sovereign authority over immigration will not lead to a *state of nature*. In a constitutional democracy, not only can law and order be maintained, and the *state of nature* avoided, without the *plenary power doctrine*, but also its ideals are better served. In short, with regard to immigration, the seduction of the *security dilemma*, which is that all legitimate forms of sovereignty must choose between a *state of nature* or a *state of exception*, is ultimately a false dichotomy.

Section 1: Plenary Power Doctrine

In the US, the *plenary power doctrine* is the result of various Supreme Court cases that concluded with the federal government enjoying complete control over the admission, exclusion, and expulsion of non-citizens. The first set of *plenary power* cases are known collectively as the "1849 Passenger Cases." In these cases, the question before the Supreme Court was whether it was constitutional for states to assess taxes on foreigners who disembarked on their ports. The Court found these taxes to be unconstitutional because they were in violation of the "Commerce Clause," which grants the federal government, as opposed to the individual states, exclusive power to regulate commerce with foreign nations.[2]

Yet, while the central issues in the *Passenger Cases* were taxation and commerce, the decision of the court had a more far-reaching effect. The *Passenger Cases* set the precedent that the federal government, not the individual states, had exclusive authority over the admission of non-citizens.[3] In this regard, the decision in the *Passenger Cases*

established the first component of the *plenary power doctrine*: individual states cannot interfere with the federal government's decisions on the admission of non-citizens.

The other two components of the *plenary power doctrine*—the power to exclude and the power to expel non-citizens—were addressed in what have come to be known as the "Chinese Exclusion Cases." The first of these cases was the 1889 *Chae Chan Ping v. United States* case. In that case, the Supreme Court upheld the constitutionality of the *1882 Chinese Exclusion Act*. This Act prevented any further immigration from China and made all Chinese immigrants ineligible for U.S. citizenship, thereby converting all Chinese nationals who were already present in the US into legal permanent residents (LPRs).[4]

The plaintiff in this case, Chae Chan Ping, was a Chinese LPR who left the US for a visit to China in 1887. At the time of his departure, Ping's visit was permitted under the original version of the *Chinese Exclusion Act*. During his return voyage to the US, however, Congress amended the *Chinese Exclusion Act* such that it would discontinue the policy of return waivers for Chinese LPRs. Subsequently, when Ping arrived at the port of San Francisco, he was refused entry into the US. Ping sued to be re-admitted into the US on grounds that the amendment barring his reentry was *ex post facto* and therefore a violation of his constitutional rights. Ping's case was eventually heard by the Supreme Court, which ruled that:

> …the United States, through the action of the legislative department, can exclude [non-citizens] from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.

> If it could not exclude [non-citizens] it would be to that extent subject to the control of another power.[5]

In other words, because the US is an independent (i.e. sovereign) nation, the federal government not only has the authority to admit, but reciprocally also has the authority to exclude non-citizens free of judicial review. The matter of Ping's exclusion being *ex post facto* was therefore irrelevant in this case.

Four years after the *Chae Chan Ping* case, the *Fong Yue Ting v. United States* case (also known as the *Geary Act* case) went before the US Supreme Court. At stake in this case was the constitutionality of the *Geary Act*, which extended the *1882 Chinese Exclusion Act* for an additional 10 years and required persons of Chinese descent to acquire and carry identification papers. Failure to acquire and carry these papers was punishable by deportation or one year hard labor. Fong Yue Ting, an LPR of the US since 1879, never acquired these papers and was subsequently arrested for violation of this Act. Ting argued that, since he was an LPR, he was constitutionally entitled to due process before he could be deported.

The Court in this case ruled against Ting because besides having the power to admit and to exclude, the federal government was also found to have the power to expel non-citizens without judicial review. Justice Horace Gray, who delivered the majority opinion in the case, stated that: "The power of Congress…to expel, like the power to exclude [non-citizens], or any specified class of aliens, from the country, may be exercised entirely through executive officers…"[6] Furthermore, because deportation is not a punishment, the due process protections of the Constitution are not applicable to cases of deportation. As Gray reasoned:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of [a non-citizen] who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.[7]

This reasoning remained consistent three years later in another of the *Chinese Exclusion Cases*, *Wong Wing v. United States*. In that case, Wong Wing was found to be in violation of the *Chinese Exclusion Act* and was sentenced to hard labor to be followed by deportation to China. Wong Wing objected that this was unconstitutional because his conviction was obtained without a trial-by-jury. The Supreme Court eventually heard the case and ruled that the forced labor provisions of the *Chinese Exclusion Act* were indeed unconstitutional because they constituted a form of punishment, but the deportation aspect was not unconstitutional because it was not a punishment. In short, this case found that while most convictions obtained without a trial-by-jury were unconstitutional, it was not unconstitutional to deport non-citizens, including LPRs, without first giving them a trial-by-jury.[8]

While there are other Supreme Court cases that serve a supplemental role, this set of cases, the *Passenger Cases* and the *Chinese Exclusion Cases,* together form the backbone of the *plenary power doctrine*: the US federal government, as the sovereign authority of a legitimate political community, has a justified ability to regulate immigration free of judicial review. This lack of judicial review means that, with regard to the admission, exclusion, and expulsion of non-citizens, constitutional protections (e.g. right to a trial by jury, right to court appointed legal representation, and freedom from unreasonable searches and seizures) are not applicable. In the following sections, I will present a case as to why this is a problematic conception of sovereignty and why we ought to reject this concept and instead favor one that places checks on political power and guarantees rights to all persons—including undocumented immigrants.

Section 2: Sovereignty as a Response to the State of Nature

In the *Leviathan*, Thomas Hobbes famously made the case that security required the establishment of a unitary and absolute sovereign. In presenting his case Hobbes addressed three aspects of sovereignty: how political power is made legitimate, where it should be located, and to what degree it can be wielded.[9] With regard to the first, Hobbes argued that political power is legitimate if everyone would ideally consent to it, and at the same time, would not be put in a worse position than that characterized by the *state of nature*. As for the other two aspects, Hobbes believed that political power should be absolute, undivided and concentrated in the hands of one body—thus cementing an early modern conceptualization of sovereignty.

Hobbes favored such an extreme form of absolute sovereignty because he felt that anything less would leave society in a *state of nature*. For Hobbes, the *state of nature* was an anarchic situation that none of us would willingly consent to, and Hobbes therefore clamed that living in such a state would be to no one's benefit. Hobbes notoriously described this state as one where "…every man is enemy to every man…men live without other security than what their own strength and their own invention shall furnish them withal…and the life of man, solitary, poor, nasty, brutish, and short."[10] Furthermore, according to Hobbes, the *state of nature* is a state where everyone has a right to everything and everyone is equal, because anyone can potentially kill anyone else. Even the weakest, whether by craft or by ganging up with others, is able to kill the strongest in a *state of nature.* [11] For Hobbes this is the prototypical example of insecurity: a condition of human life that is lacking in both the safety for the individual and law and order for all.

To get out of this condition and prevent its reemergence, Hobbes argued that it would be in everyone's best interest to enter into a state of peace. In fact Hobbes called this impulse the first and most fundamental law of nature: "Seek peace and follow it."[12] Yet, because of the anarchical nature of humanity, Hobbes believed that people are only morally compelled to do anything, including maintaining the peace, if there is a law to coerce them and a power strong enough to enforce that law.

Hobbes claims: "before the names of just and unjust can have place, there must be some coercive power of some punishment greater than the benefit they expect by breach of their covenant." [13] In order for a society governed by law and order to arise, a sovereign must be present to ensure that the laws are kept. This allows for a society to

develop economically, because the only way to ensure that contracts will be kept is to have an outside party to enforce them. Without such a powerful sovereign, there is no guarantee that we can live peacefully, engage in trade, and have individual security.

For Hobbes there can be no such peace "…before the erection of a commonwealth."[14] This commonwealth, according to Hobbes, can only come about through a social contract, that is a consensual agreement among the potential subjects, which brings to fruition a sovereign with absolute authority and undivided power. Hobbes writes:

> The only way to erect such a common power as may be able to [provide security] is [for the subjects] to confer all their power and strength upon one man, or upon one assembly of men…every man should say to every man *I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner*…And he that carrieth this person is called SOVEREIGN, and said to have *Sovereign Power*.[15]

This extreme form of sovereignty was necessary, Hobbes argued, because the *state of nature* is a persistent and ever-present threat that, regardless of whether it has ever actually existed, must constantly be guarded against.[16]

In making the case for such a strong sovereign, Hobbes felt he had neutralized the conditions that give rise to humanity's most pressing concern: insecurity. He notes:

> The Office of the sovereign, be it a monarch or an assembly, consisteth in the end, for which he was trusted with the sovereign power, namely the procuration of the safety of the people…But by safety here, is not meant a

> bare preservation, but also all other contentments of life, which every man by lawful industry, without danger, or hurt to the commonwealth, shall acquire to himself.[17]

In other words, in consenting to such a strong sovereign, Hobbes's believes that the threats to both the safety of the individual and to law and order have been addressed.

With respect to the immigration issue, Phillip Cole argues that there are two versions of the Hobbesian account to consider. The first is the external version, which holds that: "the international 'order' is a Hobbesian state of nature, in which liberal states are rare and vulnerable and are under constant danger from external and illiberal threats."[18] Because of these and/or other external threats, states are justified, independent of other considerations, in doing what promotes their security. This includes having a unilateral right to control immigration.

The second Hobbesian version to consider is the internal account. According to this account "a policy of open borders would create such a level of instability that liberal institutions would be overwhelmed, and so on this particular question liberal states must have Hobbesian powers."[19] In other words, not allowing states to have unilateral control over immigration could have catastrophic internal consequences for a state. For example, the services that a state provides could become overburdened and severely damaged if immigration is not strictly controlled.[20] This, in turn, could lead to an internal *state of nature*. According to Cole, both of these views share one common conclusion: "…individual states have the complete right to determine internal matters, such as immigration regulations, without external interference or constraint."[21]

Before conceding such powers to the state, however, there are at least three different objections that can be raised against the Hobbesian view of sovereignty. The first is the liberal objection, which holds that a concern for liberty, and not necessarily security, should be primary. John Locke is usually credited with first articulating this response to Hobbes. Locke, unlike Hobbes, stressed the point that the *state of nature* is not a state of war, but a place where, at best, liberty reigns supreme and at worst is only an inconvenient place to live when people begin to accumulate private property.[22] Working with this understanding of the *state of nature*, Locke did not believe that there could ever be a reason or need to grant any person, or body, absolute political power.[23]

The second objection to Hobbes is the conservative response, best exemplified by David Hume and Edmund Burke.[24] This response holds that tradition and habit, not consent, provides political regimes with their legitimacy and stability (i.e., law and order). Therefore, according to this response, Hobbes is right in that security is the primary political concern, but his concern with the consent of individuals misses the point. Preserving tradition does the work of addressing the security concern and so the focus should be on that and not on the insecurities of particular individuals.

The third objection to Hobbes, and the one I will focus on in the remainder of this chapter, is the "state of exception" response. In the section that follows I will provide a fuller account of this objection, but here I want to point out what makes this objection different from the other two. First, as opposed to the liberal objection, the *state of exception* objection continues to make security, rather than liberty, its primary concern. This is important because if forced to choose between liberty and security, some people might gladly give up their liberty for security. In those cases, the force of the two

Hobbesian views articulated by Cole—the external and internal justifications for a state's unilateral right to control immigration—would continue to hold sway irrespective of liberal objections. For the moment, I will bracket further discussion on the liberal objection to Hobbes, but I will return to it in Chapter III, when I go into the liberty concern.

Second, unlike the conservative objection and its obsession with law and order, the *state of exception* objection is principally concerned with the lack of safety for the individual. According to the *state of exception* objection, the threat to the individual is never neutralized, but is only aggravated by the adoption of the Hobbesian sovereign. In this case, neither the external nor internal view can provide sufficient justification for a Hobbesian-style sovereign. In other words, neither version would provide the individual with more safety than he or she would enjoy in the *state of nature*.

Section 3: Sovereignty as a State of Exception

The contemporary Italian philosopher Giorgio Agamben best articulates this third objection to the Hobbesian sovereign by describing a situation in which subjects are "abandoned" by the sovereign. By *abandonment*, Agamben means a life that is no longer protected by the sovereign, but yet remains exposed to the violence of the sovereign.[25] The classic example that Agamben provides in his book *Remnants of Auschwitz* is the fate of what he calls the "Muselman." The *Muselman* is the name given to persons in concentration camps, in particular Auschwitz, who live out an existence that "…one hesitates to call them living: one hesitates to call their death death."[26] Agamben is here attempting to make the inverse case to Hobbes. Where Hobbes was preoccupied with the

insecurity of a lawless state, Agamben worries about a legal system that allows sovereign power to go unchecked. In short, Agamben is pointing out that Hobbes's solution for getting out of the *state of nature* only modifies, but does not resolve, the threat to individual safety—the threat of war is basically replaced with the threat of *abandonment*.

In making his case, Agamben relies heavily on the work of Walter Benjamin. Agamben argues that Benjamin is prophetic in showing the link "…between the violence that posits law and the violence that preserves it."[27] Here, Agamben is referring to what he calls the paradox of sovereignty, which "…consists in the fact that the sovereign is, at the same time, outside and inside, the juridical order."[28] In other words, the sovereign is the creator and enforcer of laws, and yet is also not subject to them. This idea of sovereignty can be traced back to the 16th century work of Jean Bodin, who writes that:

> the distinguishing mark of the sovereign [is] that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject, abrogates law already made, and amends obsolete law. No one who is subject either to the law or to some other person can do this. That is why it is laid down in the civil law that the prince is above the law, for the word law in Latin implies the command of him who is invested with sovereign power.[29]

This ability to be outside the law is necessary for the sovereign to establish law and order, but it is also what makes the *state of exception* possible. As Carl Schmitt, whom Agamben refers to throughout *Homo Sacer* and *State of Exception*,[30] points out: "Sovereign is he who decides on the exception."[31]

The exception provides the sovereign with a free hand in both identifying the threat and doing what is necessary in order to address the threat as quickly as possible. This exception is supposed to be reserved for states of emergency, where the sovereign's ability to maintain law and order is in peril, but what is supposed to be a brief exception tends to become the norm, and thereby itself becomes a threat to security—in particular a threat to individual safety.

A specific example that Agamben takes up is the use of Article 48 of the Weimar Constitution in 1933.[32] The use of this article in Germany, which was originally aimed at dealing with an economic crisis, suspended constitutional rights, gave Hitler and the fascists absolute power, and ultimately became the norm instead of an exception. This shows, that according to Agamben, that the establishment of a sovereign, which was originally supposed to resolve the *security concern*, can generate as big of, if not bigger, security problem than we have in its absence.

Agamben is here not only presenting a powerful critique of sovereignty, but a potentially debilitating one as well. If we take Agamben's critique seriously, one conclusion we might draw is that we ought to dispense with the concept of sovereignty and resort to subverting, as much as possible, all forms of concentrated political power and coercive authority. If we were opt for this alternative, however, it would only seem to re-open the *state of nature* threat: how would we then establish and maintain law and order? As Agamben has shown, however, if we do nothing the possibility of a *state of exception* will constantly loom over our heads. In short, it seems that Agamben has brought us to the very unpleasant conclusion that a solution to either aspect of the security concern—individual safety and law and order—are mutually exclusive. We

might be able to solve one or the other, but never both at once, so we might never be able to address the *security concern* as a whole. This is a claim about the very nature of sovereignty—any power that is strong enough to enforce law and order is also strong enough to threaten individual safety. This conclusion is what I refer to as the *security dilemma*: we are left to choose between living with the threat of the *state of nature* or the threat of the *state of exception*.

What does this mean for immigration policy? As already mentioned, the US federal government has enjoyed *plenary power* over immigration since at least the second half of the 19th century. *Plenary power* allows the federal government to admit, exclude, and expel non-citizens as it sees fit. One way to understand this power is that, with regard to immigration cases, non-citizens are basically *abandoned* by the US government and therefore live under a constant *state of exception*. Most people should, and I think rightfully so, be aghast at this possibility and would hope that something could be done to protect all persons against such absolute and arbitrary power. As we saw in Section 1, however, the Courts have determined that limiting the power of the federal government (i.e. the sovereign) would potentially undermine its legitimacy and, at least as we have been using the concept, this would threaten to leave the US vulnerable to the *state of nature*.[33]

It's too premature to succumb to such a grim conclusion. I will make the case that non-citizens, including undocumented immigrants, should be afforded more protections then they currently enjoy, and these protections can shield them from the *state of exception*. Furthermore, granting such protections to non-citizens does not foreclose the possibility of there being a legitimate sovereign, but granting such protections can be

more consistent with certain forms of legitimate sovereignty. If this is true, then it means that avoiding the threat of the *state of exception* does not necessitate the possibility of falling into a *state of nature* or vice-versa. In order to make this case, however, there are two horns that must be addressed. In the following sections I will address both of these in reverse order from how I have presented them here. First, I will address Agamben's worry about the *state of exception* and then I will address the Hobbesian worry about the *state of nature*.

Section 4: The State of Exception Horn of the Security Dilemma

My general response to the first horn of the *security dilemma*—how to avoid a *state of exception*—is that constitutional protections and judicial review can ameliorate many of the worries associated with being *abandoned* by the sovereign. By constitutional protections I mean at minimum the right to equal protection and due process under the law; and by judicial review, I mean that coercive actions by the executive and legislative branches of government are always subject to possible invalidation by the judiciary branch if they fail to protect the rights expressed in the constitution.

These two recourses against the excesses of sovereign power are currently available to all citizens of the US, so the first question to ask in attempting to avoid the *state of exception* horn is the following: are constitutional protections and judicial review sufficient to prevent the federal government from reducing the lives of its citizens to a condition reminiscent of Agamben's notion of *bare life*? If the answer to this question is no, then judicial review and constitutional protections are insufficient to avoid the *state of exception* horn and we will need to find something else. If the answer is yes, which I

think it is, then we have a solid starting point on which to build on and work towards avoiding the *state of exception* horn with regard to immigration.

In support of the claim that constitutional protections and judicial review are sufficient to prevent the federal government from reducing the lives of its citizens to a condition reminiscent of Agamben's notion of *bare life*, I cite the1898 *United States v. Wong Kim Ark* case. As mentioned before, the *Chinese Exclusion Acts* denied Chinese subjects the possibility of becoming US citizens, but this denial of citizenship did not extend to their children, if their children were born in the US. According to the first section of the Fourteenth Amendment to the U.S. Constitution, known as the *Jus Soli* clause (i.e. literally, "right of soil," meaning in this case "birthright citizenship"), all children born in the US are guaranteed US citizenship. The relevant part of the amendment reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[34]

The *Wong Kim Ark* case essentially put into question the constitutionality of the *Jus Soli* clause of the Fourteenth amendment. The case itself involved Wong Kim Ark, who was a US citizen by birth. Ark was born in San Francisco to Chinese parents and was returning to the US from a trip to China in August of 1895. In attempting to re-enter

the US, Ark was denied re-entry on grounds that his citizenship had been revoked. Ark's case eventually went before the Supreme Court. In that case, the Court first had to consider if it could even hear the case. The *plenary power doctrine*, if we recall, had already established that the Court could not hear cases concerning immigration policy. The Court, however, determined that in this case the main issue was not immigration, but citizenship and the two issues were not the same.

The next question before the court was whether the federal government, beyond having a free hand to determine immigration policy, also had the right to revoke or suspend birthright citizenship. The Supreme Court found that it did not. The Fourteenth Amendment applied in this case and Wong Kim Ark had indeed acquired US citizenship at birth, regardless of his parents' nationality or ineligibility for US citizenship, and it was not within the power of the federal government to revoke or suspend this clause. The Fourteenth Amendment's *Jus Soli* clause was, and continues to be, interpreted in this manner.

But while the federal government cannot revoke or suspend birthright citizenship, another question to consider is whether it is possible that the federal government can suspend or revoke naturalized citizenship. This was the question before the Supreme Court in the 1967 *Afroyim v. Rusk* case. In this case Beys Afroyim, a naturalized citizen from Poland, went to Israel and voted in an Israeli election. When he then reapplied for a US passport the state department denied his request on the grounds that he had lost his citizenship because of a stipulation in the *Nationality Act of 1940*—voting in an election outside of the US was sufficient for renouncing one's US citizenship. Afroyim argued that this stipulation in the *Nationality Act of 1940* violated his right to due process and

furthermore that while the US Constitution grants Congress exclusive power over the naturalization process, it does not give it the power to revoke citizenship once it has been acquired.

The Court in this case agreed with Afroyim stating that:

> we reject the idea…that…Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot…be sustained as an implied attribute of sovereignty possessed by all nations.[35]

This ruling, therefore, further affirmed the limited scope of the *plenary power doctrine*; the federal government's *plenary power* is restricted to cases of immigration and cannot be applied to cases of citizenship.

But while the *plenary power doctrine* might not allow the federal government to revoke or suspend citizenship, one might then ask if it is possible for the federal government to revoke or suspend citizenship through other means. For example the federal government might be able to revoke the citizenship of individuals who have committed serious offenses. In this regard, the 1958 *Trop v. Dulles* case serves as an excellent example.

In *Trop v. Dulles*, the US government attempted to strip Albert Trop of his US citizenship as part of his punishment for deserting the US Army. The Supreme Court ruled, however, that stripping individuals of their citizenship was a violation of the 8th Amendment (i.e. protection against cruel and unusual punishment). Chief Justice Warren, delivering the majority opinion, reasoned, in this long but important passage, that as a form of punishment taking away one's citizenship would constitute:

> the total destruction of the individual's status in organized society[and] is a form of punishment more primitive than torture.…The punishment strips the citizen of his status in the national and international political community.…In short, the expatriate has lost the right to have rights…This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.[36]

In this case we see that not only was the law on the side of the potential *Muselmann* (Agamben's exemplar of *bare life*), the law ruled against the sovereign, limiting the power of the sovereign to turn even a convicted army deserter into *bare life*.

These cases seem sufficient to show that constitutional protections and judicial review *can* prevent the federal government (i.e. the sovereign) from reducing its citizens to a position paralleling Agamben's notion of *bare life*. These cases, however, are not sufficient to show that that constitutional protections and judicial review can protect non-citizens with respect to the wrath of the sovereign. So the next question to address in attempting to avoid the *state of exception* horn is the following: can constitutional protections and judicial review be sufficient to prevent the federal government from

treating non-citizens in a manner reminiscent of the way that Agamben claims that subjects may be *abandoned* by the sovereign? I think they can and as evidence I will point out two specific cases where the rights of undocumented immigrants (i.e. immigrants not authorized to be present in the state) took precedence over appeals to a state's interest.

The first of these cases is the 1982 *Plyer v. Doe* case. This case questioned the constitutionality of a 1975 Texas provision allowing the state of Texas to withhold funds from schools that enrolled children lacking legal immigration status. The Supreme Court's ruling was that the Texas provision violated the Fourteenth Amendment's equal protection clause. The Court found that undocumented immigrants fell under the category of "persons" and in denying persons an education the state was placing them at a severe disadvantage (i.e. what according to Agamben is a *state of exception*). In striking down the Texas provision, the Supreme Court set a precedent that is still in effect to this day: all persons, including undocumented immigrants, have access to emergency medical care and have a right to education through grade twelve.[37]

The *Plyer v. Doe* case shows that constitutional protections and judicial review might be sufficient to prevent the sovereign (in this case the state government) from infringing on certain basic liberties guaranteed to all persons, but it actually tells us very little about the issue of immigration itself. As we saw at the beginning of this chapter the *plenary power doctrine* allows the federal government to deport non-citizens, including LPRs, at any time and without need for justification. So can constitutional protections and judicial review help ameliorate immigration cases such that non-citizens are not reduced to *bare-life* with respect to these cases?

With regard to this question the 2001 *Zadvydas v. INS* case is insightful. Kestutis Zadvydas, a non-citizen convicted of burglary and other drug offenses, was ordered by the Immigration and Naturalization services to be deported from the US. The problem with deporting Zadvydas was that he was born in a displaced-persons' camp and essentially had no country to be deported to. Normally, when a person is given deportation orders the US federal government has 90 days to deport them. If the person is not deported in those 90 days, then the person must either be entered into post-removal-proceedings, the length of which should be reasonable, or the person must be set free. Because his deportation was unforeseeable, Zadvydas filed a writ of habeas corpus and demanded to be set free as opposed to being placed indefinitely in post-removal-proceedings.

This case went before the Supreme Court where the question before the Court was whether the federal government has the power to indefinitely hold a non-citizen in post-removal proceedings. The Court's answer was no. According to Justice Breyer, who delivered the majority opinion of the Court, "the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States [and] does not permit indefinite detention…once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute."[38] Zadvydas was subsequently set free and this case has served as a precedent under which thousands of other non-citizens have been set free.[39]

The US Supreme Court is not perfect, beyond reproach, and always on the side of the most oppressed. There are obviously hundreds of cases that make this point clear

enough. Still, contra Agamben, constitutional protections and judicial review are, at times, sufficient to protect the most vulnerable from the full wrath of the sovereign's power, and often the Supreme Court's upholding of constitutional rights is the *only thing* protecting those most vulnerable. Granting for the moment that constitutional protections and judicial review might be sufficient to ameliorate many of the worries associated with the *state of exception*, we come to the second horn of the dilemma: does extending constitutional protections and judicial review to immigration cases that involve non-citizens undermine sovereignty? Well, it most certainly does undermine the *plenary power doctrine*, but as I will argue in the next section it does not necessarily undermine all forms of sovereignty.

Section 5: The State of Nature Horn of the Security Dilemma

In this section I present the claim that the Hobbesian notion of sovereignty is not the only, or even the best, possible notion of sovereignty. If this can be shown to be the case, then extending constitutional protections and judicial review to non-citizens in immigration cases might not undermine, but might in fact be more consistent with, certain notions of sovereignty. In order to make this case, however, we need to look more closely at the notion of sovereignty. In fact, I would like to begin by looking at a long quote from Jean Bodin, because Bodin is usually credited with developing the modern notion of sovereignty.

The following passage comes from Bodin's 1576 *Six Books of the Commonwealth*, published in 1576, and it presents us with his definition and explanation of sovereignty:

> Sovereignty is that absolute and perpetual power vested in a commonwealth...I have described it as perpetual because one can give absolute power to a person or group of persons for a period of time, but that time expired they become subjects once more. Therefore even while they enjoy power, they cannot properly be regarded as sovereign rulers, but only as the lieutenants and agents of the sovereign ruler, till the moment comes when it pleases the prince or the people to revoke the gift. The true sovereign remains always seized of his power…If it were otherwise, and the absolute authority delegated by the prince to a lieutenant was regarded as itself sovereign power, the latter could use it against his prince who would thereby forfeit his eminence, and the subject could command his lord, the servant his master. This is a manifest absurdity, considering that the sovereign is always excepted personally, as a matter of right, in all delegations of authority, however extensive…A perpetual authority therefore must be understood to mean one that lasts for the lifetime of him who exercises it.[40]

The key insight of this passage is the distinction Bodin draws between a true sovereign and those who might merely enjoy political authority. In his chapter entitled "Binding Sovereigns," from the book *State Sovereignty as Social Construct,* Daniel Deudney further explicates this distinction between being sovereign and merely exercising political authority. Deudney argues that political authority, while related to the notion of sovereignty, is not the same as sovereignty. Political authority has to do with issues of political power. For example, an important question of political authority would

be the question of how best to maintain or hold on to political power. In contrast, sovereignty, in the true sense of the term, has to do with three issues or questions: (1) how is political power legitimated as opposed to simply maintained? (2) where should political authority be located? (3) how political power should be wielded?[41]

As we saw in Section 2 of this chapter, Hobbes's answer to the first of these questions is that legitimate political power is what everyone would ideally consent to and such power would not put them in a more disadvantaged position then they were before the establishment of the commonwealth. With regard to the second and third questions, Hobbes's answer was an absolute sovereign, whose power was undivided and concentrated in the hands of one body.[42] Deudney's insight is that, while Hobbes's notion of sovereignty has received much attention, Hobbes's notion does not exhaust the range of possible responses that might be given to these three questions of sovereignty, and therefore the Hobbesian account also does exhaust the different possible notions of sovereignty.

Deudney concedes that Hobbes's answer to the legitimacy question is on target—that some form of consensus is ultimately necessary to make political power legitimate—but he doubts that we must have such a pessimistic view of what is necessary to gain security. With respect to the second question of sovereignty—where should political authority be located—Daniel Deudney suggests two places where it could principally rest: with the state or with the people.[43] With regard to the third question of sovereignty—how should political power be wielded—Daniel Deudney suggests another set of possibilities: political power can be engaged or recessed. With respect to engagement, Deudney states that: "The sovereign is engaged when it actually wields

governmental authority."[44] With respect to recessed: "The sovereign of a polity is recessed when the exercise of authority has been delegated to some other body or bodies."[45]

While Deudney's account of sovereignty might not be exhaustive either, it is at least enough to show how diverse and complicated the notion of sovereignty can be. If we stay with Deudney's account, it is possible to have up to four different types of legitimate sovereignty: an engaged state, a recessed state, an engaged public, and a recessed public.[46] Of the following, only the first, an engaged state, matches the Hobbesian model, which Agamben rightfully critiques on its own terms. Yet, there remain at least three different possible forms of legitimate sovereignty, including a constitutional democracy.

Deudney goes on to say that the first model (i.e., an engaged state) refers to a type of sovereignty that many thinkers trace back to the 1648 Peace of Westphalia, while the fourth model (i.e., a recessed public) is exemplified in the US Constitutional Convention of 1787. Generally speaking, the Westphalia peace agreement is important in world history because it brought an end to the religious wars in Europe, which ensued from the disintegration of the Holy Roman Empire and the social and political uncertainty initiated by the Protestant Reformation (e.g. the questioning of the Pope as the highest authority in all of Christendom).

Without getting too much into the details of the Thirty Years War or its resolution, it is sufficient for our purposes to note two things about the Peace of Westphalia. First, it solved, to some degree, the religious question that had been the cause of most of the wars in Europe during this time. The question of what religion

dominated in any given part of Europe was answered by having all the parties involved agree to respect the doctrine of *cuius regio, eius religio*. This doctrine states that the ruler of the territory determines the religion. Secondly, this treaty gave rise to a system of states that we now take for granted. This meant that states, as opposed to religious leaders, nobles, and even kings, were now recognized as the principle political actors on the world stage.

In contrast to the Westphalian model, Deudney presents the Philadelphia model. This model is guided by the spirit of the 1776 US Declaration of Independence and is exemplified by the US Constitutional Convention of 1787. One possible reason for why these two models are different might be that they arose under different circumstances. The New England colonists who rebelled in 1776 against Great Britain did so not because their sovereign failed to provide security, but because they felt that the sovereign had unjustly infringed on their liberty. This concern with liberty was the driving force behind the US War for Independence and the establishment of the US Constitution a decade later. The final version of the US Constitution was at its core a liberal-republican document; liberal in that it granted constitutional protections in the form of a Bill of Rights; republican in that it established checks on governmental power (e.g. it provided judicial review of the federal government).

This model, therefore, turned the original thirteen colonies into "these" United States. This is considerably different to what would have happened under a Westphalian model, where the colonies would have either become thirteen distinct states within a new state-system or would have conglomerated into one new state that would have functioned within the old state-system of Europe. The reason for this difference, I believe, is that

where the Westphalia model primarily looked to put an end to a state of war, the Philadelphia model primarily looked to put an end to a state of tyranny—even if that meant having to enter into a state of war in order to do so.

If it can be said that both of these models represent forms of legitimate sovereignty, then it seems that the notion of sovereignty is not reserved exclusively for addressing the security concern, as Hobbes's and Agamben's account might lead us to believe. Instead, the notion of sovereignty can also aim to resolve the liberty concern, as the liberal and republican traditions within political philosophy have maintained. If this is the case, then limiting constitutional protections and judicial review might in fact undermine, rather than preserve, a Philadelphia model of sovereignty (e.g. a constitutional democracy). In short, it seems that we might have found a form of legitimate sovereignty (i.e. a Philadelphia model of sovereignty) that can avoid both horns of the *security dilemma*. In order to obtain this form of sovereignty, however, priority must be given to the liberty concern. Giving priority to the liberty concern, as we will see in the next chapter, raises its own set of problems, which will have to be addressed.

Conclusion

I will conclude this chapter by returning to the issue of the *plenary power doctrine* and the puzzle that remains: how did a Philadelphia model of sovereignty, which forms the basis for US sovereignty, come to condone something like the *plenary power doctrine* in the first place? Here it might be fruitful to take a slight detour and compare the *Plessy v. Ferguson* case (i.e. the separate-but-equal case) with the *Chinese Exclusion Cases*. In doing so we will be able to better see why the *plenary power doctrine* goes against

constitutional democracy and also how and why the *plenary power doctrine* should be repealed.

One obvious connection between *Plessy v. Ferguson* and the *Chinese Exclusion Cases* is that the same court rendered the decision in all of these cases. An even more insidious parallel, however, is that all of these cases were aimed at finding ways to circumvent the equal protection clause of the Fourteenth Amendment. For example, in *Plessy v. Ferguson*, the question before the Court was whether racial segregation, at least within state law, constituted an infringement on the privileges and protections of the Fourteenth Amendment. The Supreme Court ruled that it did not.

The case itself involved Homer Plessy who was arrested on June 7, 1892 as part of a planned challenge to the *1890 Louisiana Separate Car Act*. Plessy, who was of mixed-race ancestry and could pass for white, was arrested when he took a seat in a "whites only" train car and refused to move to a car reserved for blacks. Plessy's case went before the Supreme Court, where the Court agreed that the Fourteenth Amendment was intended to establish racial equality before the law. That said, the Court argued that: "…in the nature of things [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races unsatisfactory to either."[47] In other words, The Court ruled that having separate facilities for blacks and whites was consistent with the Fourteenth Amendment, so long as the facilities were equal. This ruling set the precedent for the infamous "separate-but-equal doctrine," which condoned segregation not only on railroad cars, but also in schools and to voting access.

The *Plessy v. Ferguson* decision was eventually recognized as the grave mistake and the *separate-but-equal doctrine* was eventually overturned in the landmark *Brown v. Board of Education* case in 1954. In that case the Court concluded the following: "…we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[48] In short, the *separate-but-equal doctrine* was overturned because it was not only inconsistent with constitutional democracy, but also undermined its ideals. The type of segregation that the *separate-but-equal doctrine* produced jeopardized the political equality of all citizens. In a recessed public, where political authority rests with the people and political power is not concentrated in the hands of the federal government, jeopardizing the political equality of all citizens undermines the self-checking mechanism of the Philadelphia model of sovereignty. Without this self-checking mechanism we are back with the problem of the *state of exception*.

With respect to the *plenary power doctrine*, however, the same outcome has not occurred. This is the case even after the *Chinese Exclusion Act*, the legislation that is at the heart of all three *Chinese Exclusion cases*, has been repealed and is now recognized as having been a horribly racist mistake.[49] One explanation for why the *separate-but-equal doctrine* was repealed and *plenary power doctrine* remains in place might be that the former primarily affected citizens, while the later primarily affects non-citizens. This justification has a certain intuitive appeal: citizens should be treated politically equal, but non-citizens can be treated differently in key circumstances. If sovereignty means anything, it means having the ability to be self-determined, and what else could self-

determination entail if not having the unilateral right to admit, exclude, and expel non-citizens? If this is the case, then there is no contradiction in maintaining that: in violating the political equality of all citizens, the *separate-but-equal doctrine* was unconstitutional, but the *plenary power doctrine*, which does not violate the political equality of all citizens, is not unconstitutional.

This would be the case if constitutional democracy only needed to be concerned with self-determination, as is the case in the Westphalian model of sovereignty. However, as we saw in Section 5 of this chapter, a Philadelphia model of sovereignty (e.g. a constitutional democracy) also needs to show respect for individual freedom and universal equality. Individual freedom and universal equality are NOT exclusively reserved for citizens, but extend to all persons. This is why the US Supreme Court, for example, has protected the rights of undocumented immigrants in the two cases already mentioned above (i.e. *Plyer v. Doe* and *Zadvydas v. INS*).

My contention is therefore that the *plenary power doctrine*, just like the *separate-but-equal doctrine*, goes against the principles of constitutional democracy. If this is the case, then we have two choices. We can reject constitutional democracy and maintain the *plenary power doctrine* or we can reject the *plenary power doctrine* and maintain constitutional democracy. If we choose the former we will find ourselves endorsing a *state of exception*. This would be unacceptable to virtually all contemporary political theorists, conservative as well as liberal. So the plenary power doctrine is unacceptable.

Favoring constitutional democracy as the better alternative does not deny that problems remain in actually existing constitutional democracies, which will be the focus of the rest of this dissertation. From this chapter, we can conclude the following. With regard

to the issue of immigration, the *plenary power doctrine* represents an example of the security concern getting priority over the liberty concern. When this happens, we find ourselves in a *security dilemma*. In order to avoid the *security dilemma*, priority must instead be given to the liberty concern over the security concern. If in addressing the liberty concern we wish to retain some notion of legitimate sovereignty (as opposed to anarchy or despotism), then we ought to opt for something like a constitutional democracy. Unfortunately, and as I will point out in the next chapter, this move only raises the specter of the "liberty dilemma." This dilemma centers on the tension between self-determination, individual freedom, and universal equality. These commitments do not always cohere well because they are based on different notions of liberty, and yet their cohesion is necessary in order for a constitutional democracy to be legitimate. As I will go on to show, this tension reaches a fever pitch when dealing with the issue of immigration.

Notes

[1] The Constitution only, and very indirectly, mentions the issue of immigration twice. See "The Constitution of the United States," Article 1, Section 8, Clause 4, and Article 1, Section 9, Clause 1.

[2] *Smith v. Turner; Norris v. Boston*, 48 U.S. 283 (1849)

[3] Ibid.

[4] "Chinese Exclusion Act of 1882," ch.126, 47th cong., 1st Sess. (1882).

[5] *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

[6] *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

[7] Ibid.

[8] *Wong Wing v. United States*, 163 U.S. 228 (1896).

[9] I borrow this reading of Hobbes from Daniel Deudney, "Binding Sovereigns: Authorities, Structures, and Geopolitics in Philadelphian Systems," *State Sovereignty as Social Construct*, ed. Thomas Biersteker and Cynthia Weber (Melbourne, Australia: Cambridge University Press, 1996).

[10] Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994), 76.

[11] Ibid., 74.

[12] Ibid., 80.

[13] Ibid., 89.

[14] Ibid., 89.

[15] Ibid., 89.

[16] Ibid., 117-119.

[17] Ibid., 219.

[18] Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration*, (Edinburgh, Great Britain: Edinburgh University Press, 2000), 165.

[19] Ibid.

[20] Ibid.,168. For an excellent rebuttal to this claim see Ryan Pevnick, "Social Trust and the Ethics of Immigration Policy," *The Journal of Political Philosophy* 17. 2 (2009): 146-167.

[21] Cole, *Philosophies of Exclusion*, 18.

[22] John Locke, *Second Treaties of Government*, ed. C.B. Macpherson (Indianapolis: Hackett Publishing, 1980).

[23] Ibid., 72.

[24] See David Hume, "Of the Original Contract," *Political Writings*, ed. Stuart D. Warner and Donald W. Livingston (Indianapolis: Hackett Publishing, 1994), 164-181; Edmond Burke, *Reflections on the Revolution in France* (London: Penguin Books, 2004).

[25] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 159.

[26] Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive*, trans. Daniel Heller-Roazen (New York: Zone Books, 1999), 44.

[27] Ibid., 63.

[28] Ibid., 15.

[29] Jean Bodin, *Six Books of the Commonwealth*, trans. M.J. Tooley (Oxford: Blackwell, 1955), 29. It should be noted that this view of sovereignty is slightly different from Hobbes in the following way. For Hobbes, obtaining consent is an important feature of sovereignty, but for Bodin it is not. For Bodin: "the principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent" (Bodin, *Six Books of the Commonwealth*, 33).

[30] Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: The University of Chicago Press, 2005), 1.

[31] Carl Schmitt, *Political Theology* (Chicago: The University of Chicago Press, 1985), 5.

[32]Agamben, *State of Exception*, 14-16.

[33] Agamben would likely be a little unhappy with the framing of this paragraph as he would note that, while non-citizens are abandoned, they merely represent the potential that we all face of becoming abandoned. In other words, just because citizens technically have Constitutional rights at the moment, it does not mean that these rights cannot be thrown out in a state of exception.

[34] U.S. Const. am. 14., sec 1.

[35] *Afroyim v. Rusk*, 387 U.S. 253 (1967).

[36] *Trop v. Dulles*, 356 U.S. 86, 70 (1958).

[37] *Plyler v. Doe*, 457 U.S. 202 (1982)

[38] *Zadvydas v. Davis*, 533 U.S. 678 (2001)

[39] Jon Feere, "Reining in Zadvydas v. Davis: new bill aimed at stopping release of criminal aliens," *Center for Immigration Studies* May 2011, accessed August 15, 2011, http://www.cis.org/stopping-release-of-criminal-aliens

[40] Jean Bodin, *Six Books of the Commonwealth*, trans. M.J. Tooley (Oxford: Blackwell, 1955), 25-27.

[41] See Daniel Deudney, "Binding Sovereigns: Authorities, Structures, and Geopolitics in Philadelphian Systems," *State Sovereignty as Social Construct*, ed. Thomas Biersteker and Cynthia Weber (Melbourne, Australia: Cambridge University Press, 1996).

[42] Hobbes, *Leviathan*, 110-118.

[43] Daniel Deudney, "Binding Sovereigns: Authorities, Structures, and Geopolitics in Philadelphian Systems," *State Sovereignty as Social Construct*, ed. Thomas Biersteker and Cynthia Weber (Melbourne, Australia: Cambridge University Press, 1996), 196.

[44] Ibid.

[45] Ibid.

[46] Ibid., 197

[47] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[48] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[49] The *Chinese Exclusion Act* was officially repealed by the *1943 Magnuson Act*, but was not repealed in practice until the passage of the *Immigration and Nationality Act of 1965*.

CHAPTER III

PRIORITIZING THE LIBERTY CONCERN

Introduction

In the last chapter, I provided a brief outline of what I call the security concern. In providing this outline, I summarized Thomas Hobbes's attempt to address this concern by establishing a legitimate and absolute sovereign. I then used Hobbes's account to understand Giorgio Agamben's *state of exception* objection. The *state of exception* objection, I argued, revealed that Hobbes's notion of sovereignty may fail to provide the individual with more protection than the individual would find in the *state of nature*, an actual failure in some contemporary immigration cases. This result seemed to show that any attempt to address the security concern through a Hobbesian notion of sovereignty is subject to end up in a *security dilemma*: a situation in which any attempt to address the threat posed by an internal or external *state of nature* will not be compatible, and at times will conflict, with attempts to address the threat posed by the *state of exception*. With regard to immigration, I claimed that this dilemma is currently exemplified in the justification provided for *plenary power doctrine*.

My conclusion at the end of Chapter II was that the *plenary power doctrine* could, and should, be overturned and furthermore that this could be done without falling into a Hobbesian *state of nature*. My argument for this rested on the possibility of there being different forms of legitimate sovereignty, specifically forms that are geared primarily towards addressing the *liberty concern* as opposed to the *security concern*. I claimed that constitutional democracies (i.e. Philadelphia models of sovereignty) represented an example of this type of sovereignty, and therefore offered the possibility of being able to

abolish the *plenary power doctrine*, while not foreclosing the possibility of there being a legitimate form of sovereignty.

In this chapter, my aim is to introduce what I call the liberty concern and outline how philosophers have historically addressed it. I want to show that, just as was the case with the security concern, there is an internal tension to this concern. This tension, which I refer to as the "liberty dilemma," consists of the difficulty in reconciling a commitment to a people's self-determination (i.e. autonomy) with a commitment to individual liberty and universal equality (e.g. human rights). Both of these commitments are essential to a Philadelphia model of sovereignty, yet they do not always cohere well. In this chapter I will try to explain where the lack of coherence stems from—namely, two different notions of liberty—and leave open the possibility that maybe liberty is either a fiction or a dangerous proposition. This chapter will set up Chapter VI, where I will then look at how philosophers have addressed the *liberty dilemma*, while still prioritizing the liberty concern and avoiding both an internal or external *state of nature* (i.e. providing a stable and well-ordered society) and a *state of exception* (i.e. respecting individual freedom and universal equality).

Section 1: Machiavelli and the Civic-Republican Option

In Book One of Plato's *Republic*, the character of Thasymachus propounds the view that justice is always what is in the interest of the stronger and that perfect injustice in that sense is really a virtue and not a vice.[1] By the end of the *Republic*, Thrasymachus's argument—that the good action and the virtuous action are not always coextensive—

appears to be soundly defeated by the character of Socrates. Centuries later, however, Thrasymachus's defeated argument finds new life in Niccolo Machiavelli's *The Prince*.

In *The Prince*, Machiavelli makes the case that politics is, or should be, primarily concerned with obtaining, exercising, and keeping political power. Machiavelli defends this thesis by arguing that successful sovereigns are those, and only those, who effectively exercise authority to their benefit. Following Thrasymachus's line of argument, Machiavelli states: "…a prince, and especially a new prince, cannot observe all those things which are considered good in men…he must have a mind disposed to adapt itself according to the wind…not deviate from what is good, if possible, but be able to do evil if constrained."[2] Machiavelli is here rejecting the idea that the virtue of ruling is one of the traditionally recognized values or qualities that are praised by philosophers like Plato. Instead, Machiavelli defends the claim that the virtue of ruling is the ability or skill of maintaining political power in the face of constant adversity.

According to Machiavelli, in order for a prince to maintain political power he or she would require both good laws and good arms. Yet, if only one of these is possible, Machiavelli argues that a virtuous ruler should always prefer good arms "as there cannot be good laws where there are not good arms, and where there are good arms there must be good laws."[3] In other words, good laws do not enforce themselves and are therefore worthless if they cannot be backed by force, or at least by the threat of force. For this reason, Machiavelli provides the following answer to the question of whether it is better for a ruler to be loved or feared:

> …one ought to be both feared and loved, but as it is difficult for the two to go together, it is much safer to be feared than loved, if one of the two has

> to be wanting…for love is held by a chain of which, men being selfish, is broken whenever it serves their purpose; but fear is maintained by a dread of punishment which never fails.[4]

In short, Machiavelli's argument in the *The Prince* is that people obey their rulers, not out of loyalty or a sense of obligation, but out of fear, particularly fear of the ruler's ability to wield force against them.

In its emphasis on political power and its praise of a ruler's dexterity in exercising coercive force, Machiavelli's *The Prince* shifted the discourse of political theory away from inquiries about the essence of the "Good" (as Plato attempted to do in the *Republic*), teleological accounts (as Aristotle attempted to present in the *Politics*), and away from the orthodoxy of the Catholic Church (to which medieval philosophy typically deferred). This shift in political theory, which took political power and the exercise of coercive force as its central focus, set the stage for Thomas Hobbes's *Leviathan* and the *security concern*, which we looked at in the previous chapter.

There is, however, a counter-valence to Machiavelli's political thought as described so far: his under-appreciated defense of the republican tradition in his *Discourses on Livy*. In that work, Machiavelli puts forth the argument that politics ought to be primarily concerned with the issue of liberty, and specifies why and how he believes that liberty is best established and maintained through a republican form of government.[5] In presenting this argument, Machiavelli's sympathies for the civic-republican tradition—a tradition known for favoring civic engagement, deploring corruption, and establishing checks on political power—are made evident.

In the *Discourses*, Machiavelli provides two general and interrelated reasons for giving precedence to the *liberty concern* over the *security concern*. The first is found in chapter II of Book Two, where he argues:

> [I]t is easy to understand whence that affection for liberty arose in the people, for they had seen that cities never increased in dominion or wealth unless they were free,"[6] while its opposite, tyranny, serves as a fetter to "…the advance of the city in its career of prosperity, so that it grows neither in power nor wealth, but on the contrary rather retrogrades."[7]

Machiavelli's claim is that the flourishing of social and political institutions depends largely on the amount of liberty that exists within a given society. In other words, one of the benefits of promoting liberty is that it helps us avoid an internal *state of nature*.

Yet, interestingly enough, Machiavelli devotes the rest of Book Two and a significant amount of Book Three to the issue of war, and in particular to the causes of war and how war is most effectively waged. Liberty, for Machiavelli, not only promotes the flourishing of social and political institutions, but also addresses the worry of an external *state of nature* in a very direct way. Machiavelli gives these two reasons in favor if prioritizing the *liberty concern* because, as he writes, "…a small part of [a people] wish to be free for the purpose of commanding, whilst all the others, who constitute an immense majority, desire liberty so as to be able to live in greater security."[8] In other words, even the vast majority of people who desire internal and external security more than they desire their own freedom know that long-standing security is not attainable (e.g. we will find ourselves in a *security dilemma*) without first insuring liberty. In short, the civic-republican option is the

following: security ultimately depends on liberty and it therefore makes no sense to address the *security concern*, without first adequately addressing the *liberty concern*.

Section 2: Locke and the Classical Liberal Option

As mentioned in Chapter II, the strength of Hobbes's notion of sovereignty is that it takes the *security concern* very seriously and it addresses the most precarious form of insecurity, which for Hobbes was exemplified in the *state of nature*. One of the major flaws with Hobbes's notion of sovereignty was already pointed out in Chapter II, that this response to the *security concern* only introduces the potential for the *state of exception*. In this section, however, I want to focus on a different problem with Hobbes's notion of sovereignty: the constant and ever-present threat it holds for liberty.

Hobbes's account, much like Machiavelli's, rests on the belief that a proper response to the *security concern* requires the establishment of a stable and well-ordered society. Unlike Machiavelli, however, Hobbes's account is only able to derive a stable and well-ordered society at the expense of liberty. As briefly mentioned in Chapter II, it is on this point that John Locke's *Second Treatise of Government* can be read as a critique of Hobbes.[9] This critique of Hobbes rests on a different understanding of the *state of nature* (i.e. what human nature is like in the absence of government). For Locke, the *state of nature* is not a state of war, as it was for Hobbes, but a place where at best liberty reigned supreme (anarchy in the more positive sense) and at worse, an inconvenient place to live with the advent of private property but without a police force or impartial judges.[10]

Working with this understanding of the *state of nature*, Locke does not believe that there could ever be a reason or need to grant any person, or body of people, absolute

political power, because the *state of nature* is not the insecure place (i.e. the state of war) that Hobbes believed it to be. As Locke states:

> It cannot be supposed that [those who enter into the social contract] should intend…to give to any one, or more, an absolute arbitrary power over their persons and estates, and put a force into the magistrate's hand to execute his unlimited will arbitrarily upon them. This were to put themselves into a worse condition than the state of nature….[11]

In short, a Locke-ian objection to Hobbes seems to be that a person would actually be better off living in a *state of nature* (i.e. a merely inconvenient state of anarchy) than under a sovereign with absolute authority and undivided power. This objection specifically undermines Hobbes's account in the following way.

Recall from Chapter II, under Hobbes's account a legitimate sovereign must meet two criteria. First, everyone could or would consent to the arrangement of political power. Second, this arrangement would not make people any worse off than they were without it. In other words, life under a legitimate sovereign should be an improvement over the *state of nature* and not a worsening of this original condition. The genius of the Locke-ian critique lies in showing that, even if a Hobbesian sovereign were able to obtain the needed consent of the people, those party to the social contract would not be made better off by Hobbes's arrangement of political power—in fact they would be worse off.[12] Under this view, the Hobbesian sovereign turns out to be illegitimate on Hobbes's own terms.

Based on his version of the *state of nature*, Locke instead presents a different social contract than the one proposed by Hobbes. For Hobbes, the social contract aimed to establish security by creating a third party, the sovereign, who was given political power as

an irrevocable gift.[13] For Locke, the social contract instead gives rise to a legitimate commonwealth, whose political authority is held in trust, which is subject to be revoked if the sovereign overreaches his prerogative. As Locke states:

> there can be but *one supreme power*…[yet] there remains still *in the people a supreme power to remove or alter the* [sovereign], when they find the [sovereign's actions] contrary to the trust reposed in them: for all *power given with trust* for the attaining an *end* [and] whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.

This essentially marks the important difference between the two contracts. Locke's version allows for legitimate revolts against the sovereign, which he outlines in the last chapter of the *Treatise*.[14] For Hobbes, revolts against the sovereign could only be justified in very exceptional cases (e.g. when the sovereign literally put the life of the individual in immediate danger). The reason for this restriction on legitimate revolts in Hobbes's account is that Hobbes was mainly trying to establish peace (i.e. get out of a state of war) and was not trying to make a case for liberty. So long as the end is to establish peace, it is basically impossible for a Hobbesian sovereign to overreach his or her prerogative. For Locke, "great and *chief end…is the preservation of [an individual's] property*,"[15] which in Chapter V of the *Treatise* he describes as an extension of liberty.[16]

Under Locke's version of the social contract, individuals do not lose their freedom (i.e. rights that they had in the *state of nature* and given to them by God), but have their freedom more efficiently protected under government. For Hobbes's, all parties to the

contract must give up most of their freedoms in exchange for the sovereign's protection. In Hobbes's account there is therefore no meaningful distinction between being a subject of the sovereign and being a citizen of the state. To be a citizen under a Hobbesian sovereign simply means being subject to the sovereign's laws and protections. In Hobbes's account, the important political distinction is between those who are subjects and he who is sovereign. The sovereign promulgates and enforces the laws, while the subjects have no role in their creation, but if they wish to enjoy the sovereign's protection, they must obey them.

Locke's account, by contrast, is more concerned the difference between being a citizen and being subject to the law. For Locke, being a citizen means that one's individual freedom may not to be infringed upon by the sovereign. Again, this is primarily because the *state of nature* for Locke is not a state of war. For Locke, if everyone in the *state of nature* follows the moral law a stable and well-ordered society is possible without a social contract. Moreover, we should keep in mind that for Locke, society endures if a government collapses, whereas for Hobbes, the destruction of a government is also the destruction of society. The social contact, for Locke, aims to protect and promote individual freedom.[17] Locke's response to Hobbes exemplifies what we might call the classical liberal option.

The classical liberal notion of citizenship provides the individual with more than what a subject can expect from a Hobbesian sovereign, but it also does not entitle anyone to anything beyond protection of their individual freedom (i.e. protection of basic liberties and private property). This notion of citizenship is therefore not very robust; it primarily

informs the citizen of what other individuals or the government may or may not do to them and what they may or may not do to other individuals or the government.[18]

This classical liberal notion of citizenship is significantly different from the more robust notion of citizenship found in the civic-republican tradition championed by Machiavelli in his *Discourses*. The difference between classical liberal citizenship and civic republican citizenship rests on a distinction best articulated as the difference between positive and negative liberty, usually credited to Isaiah Berlin in his famous essay "Two Concepts of Liberty." In that essay, Berlin argued that negative liberty, which is the sort of understanding that Locke championed, "…is the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be, without interference by other persons."[19] In other words, liberty in the negative sense is a lack of restrictions and nothing more.

In contrast, positive liberty requires the presence of something, as opposed to its mere absence. This later type of liberty is the one championed by Machiavelli and the rest of the civic-republican tradition (e.g. Aristotle and Cicero). This view of liberty holds that an individual is self-determined or has self-mastery (i.e. autonomy), only to the extent that they participate in, and not avoid, ignore or are prevented from performing, their political duties and obligations. Liberty in this positive sense requires the empowerment of the individual, which is impossible without the help or support of a civic community. According to the civic-republican tradition, an essential attribute of citizenship is political agency. The civic-republican notion of citizenship is not so much concerned with the sovereign leaving the citizen alone as much as it is concerned that citizens actively hold the sovereign accountable. This different understanding of citizenship ultimately stems from

civic-republicans having a different understanding of liberty, which I will say more about in the next section, than do classical liberals.

Here we have found the kernel of the *liberty dilemma*: constitutional democracy (i.e. a Philadelphia model of sovereignty) requires liberty in both the positive (i.e. self-determination) and negative (i.e. individual freedom) sense, yet these two understandings of liberty might not always be compatible. The greater the civic republican model of positive, engaged citizens flourishes, the more classical liberals may worry that the sovereign has the power to infringe on negative liberties. In the following section I will explore part of the foundation for civic republican notion of liberty by looking at the work of Jean-Jacques Rousseau.

Section 3: Rousseau and the Two Horns of the Liberty Dilemma

Much like Hobbes and Locke, Jean-Jacques Rousseau's political philosophy begins with an assumption about human nature. Rousseau's view of human nature, however, is significantly different from either. For Rousseau, humans are originally good and compassionate beings whose corruption arises from social and political institutions. He blames social and political institutions for aggravating unnatural inequalities to the point that they become fetters on individual freedom. This concern is expressed in Rousseau's often-quoted opening line to *The Social Contract*: "Man is born free, and everywhere he is in chains."[20]

While both Locke and Rousseau's critique of Hobbes center on the subordination of the liberty concern to the security concern, they question the legitimacy of Hobbes's sovereign on different grounds and for different reasons. Locke, as mentioned in the

section above, argued that subjects under a Hobbesian sovereign are not made better off, but in fact find themselves in a worse condition than that offered by the *state of nature*. Rousseau's civic-republican critique of Hobbes's, however, goes in a different direction. Rousseau's critique of Hobbes centers on the issue of consent and in particular why people consent to social and political relationships that enslave rather than empower them.

Rousseau's answer to this paradoxical question is found in his earlier work, *The Discourse on the Origin of Inequality*. In that work, Rousseau argues that people consent to enslaving relationships, because those relationships appear natural and people believe that anything that is natural, such as an inequality of height, is not something that anyone has the ability to consent to or reject. With regard to oppressive social and political institutions, Rousseau points out that "…it is easy to see that among the distinctive differences between men there are several that pass for natural but are solely the work of habit and the various ways of life that men adopt in society."[21] In other words, there are many oppressive social and political institutions that we would reject, or at least not consent to, if we knew it was within our power to do so; if we knew that they were what we might today call "social constructions" rather than natural occurrences.

The point of all this is that, for Rousseau, not all forms of consent is sufficient for legitimizing political power. Here Rousseau is not only disagreeing with Hobbes, but also with Locke, who famously endorsed the notion of tacit consent as a valid way of legitimizing political power.[22] In short, for Rousseau the real political concern is not insecurity or the restrictions on individual freedom, but domination by arbitrary powers

that present themselves as natural. As Rousseau concludes in *The Discourse on the Origin of Inequality*:

> Such was [Hobbes and Locke's social contract], which gave new fetters to the weak and new forces to the rich, irretrievably destroyed natural liberty, established forever the law of property and of inequality, changed adroit usurpation into an irrevocable right, and for the profit of a few ambitious men henceforth subjected the entire human race to labor, servitude and misery.[23]

So despite their differences, Rousseau is arguing that the social contracts of both Locke and Hobbes are simply a validation of Thrasymachus's argument—in reality justice consists of convincing the weaker to obey laws that are in the interest of the stronger. Therefore, with respect to the liberty concern, Locke's social contract represents the first horn of the *liberty dilemma*: classical liberalism is able to recover individual freedom from the Hobbesian sovereign, but it does so at the expense of universal equality, which in turn serves to undermine self-determination (i.e. autonomy).

Rousseau leaves this problem unaddressed in *The Second Discourse*—what can be done to remedy this oppressive and deceptive social contract—but he returns to it in his work entitled *The Social Contract*. In that work, Rousseau outlines the requirements for a truly just social contract that would constitute a society in which social and political institutions could unite its citizens and at the same time allow for, instead of fetter, a meaningful sense of liberty. Like all prior social contracts, Rousseau's social contract begins by postulating an original state of nature, which serves as a proxy for

understanding human nature and thereby allows him to begin by "…taking men as they are and laws as they might be."[24]

As mentioned already, Rousseau's view of human nature is by far the most optimistic of the traditional social contract theorists, as he writes: "nothing is so gentle as man in his primitive state, when, placed by nature at an equal distance from the stupidity of brutes and the fatal enlightenment of civil man."[25] For Rousseau, people in the state of nature are all equally free and do not live in fear of one another. This natural liberty is jeopardized, however, with an increase in human population. This increase eventually forces humans to both depend on and compete with each other. This dependence and competition brings social and political institutions into existence, and leads to the extermination of the original state of nature. As Rousseau states: "as soon as one man needed the hekp of another, as soon as one man realized that it was useful for a single individual to have provisions for two, [this state of nature] disappeared, property came into existence, labor became necessary."[26]

Once the original state of nature goes out of existence, and here Rousseau's view significantly differs with that of Hobbes and Locke, we can never return to this state.

> [T]he soul and human passions are imperceptibly altered and…change their nature…with original man gradually disappearing, society no longer offers to the eyes of the wise man anything but assemblage of artificial men and factitious passions which…have no true foundation in nature.[27]

With no recourse to this original state we have no recourse to this original freedom—freedom as a lack of restrictions and therefore liberty in the negative sense. The best that

can be hoped for is the freedom of the "general will" (i.e., freedom in the positive sense). This freedom is achieved through a social contract, as Rousseau explains:

> What man loses through the social contract is his natural liberty and an unlimited right to everything that tempts him and that he can acquire. What he gains is civil liberty and the propriety ownership of all he possesses. So as not to be in error in compensations, it is necessary to draw a careful distinction between natural liberty (which is limited solely by the force of the individual), and civil liberty (which is limited by the general will)…which alone makes him truly the master of himself. For to be driven by appetite alone is slavery, and obedience to the law one has prescribed for oneself is liberty.[28]

The *general will* for Rousseau is an extreme form of democratic autonomy, where self-determination might at times entail that the interest of the individual conform to the interest of the people—they must, as Rousseau famously says "…be forced to be free."[29] The conditions necessary for this type of democratic autonomy might seem rather authoritarian, insofar as it allows for the interests of individuals to be sacrificed for the common interest. For Rousseau, however, this is the only means by which some semblance of liberty, in this case the ability to prescribe the law to ourselves, can be maintained in a situation where we are both dependent on others, but also have competing individual interest.

As we gathered from his criticisms in *The Second Discourse*, Rousseau's positive notion of liberty also requires a certain degree of equality. Rousseau addresses this issue by saying:

> Regarding equality, we need not mean by this word that degrees of power and wealth are to be absolutely the same, but rather that, with regard to power, it should transcend all violence and never be exercised except by virtue of rank and laws; and with regard to wealth, no citizen should be so rich as to be capable of buying another citizen, and none so poor that he is forced to sell himself…Equality is said to be a speculative fiction that cannot exist in practice. But if abuse is inevitable, does it follow that it should not at least be regulated? It is precisely because the force of things tends always to destroy equality that the force of legislation should always tend to maintain it.[30]

So where Hobbes would design society in a way that would best address insecurity, and Locke would design it in a way that would best protect individual freedom, this last passage shows that Rousseau would design society in a way that would best promote universal equality. This is because, for Rousseau, unjust inequalities are at the heart of both the worries that drive Hobbes and Locke's projects: unjust inequalities make possible both the potential for violence (i.e. insecurity) and the possibility for one person to buy another (i.e. slavery).

A common worry about Rousseau's view, however, is that his solution to the *liberty* concern (i.e. the *general will*) entails too strong a sense of collectivism. How, for example, can Rousseau say that one is truly free when at any moment they might be asked to sacrifice their personal interests for the common interest? Rousseau's social contract therefore represents for us the second horn of the *liberty dilemma*: civic-republicanism is able to recover self-determination (i.e. autonomy) from the Hobbesian

sovereign by promoting universal equality, but in doing so it serves to undermine individual freedom.

We now have the two horns of the *liberty dilemma*: classical liberalism's notion of negative liberty can provide us with individual freedom, but (and this is Rousseau's point in the *Discourse*) only at the expense of universal equality and self-determination (i.e. autonomy); civic-republicanism's notion of positive liberty can provide us with self-determination (i.e. autonomy) and universal equality, but (and this is the problem of the *general will* in Rousseau's *Of the Social Contract*) only at the expense of individual freedom. The Philadelphia model of sovereignty is based on a resolution of these two horns, but so far we do not have an adequate account for how to resolve them.

This, however, is not the only problem with attempting to give priority to the *liberty concern*. Another problem centers on the issue of sovereign legitimacy itself. As we saw, all social contract theorists believe that legitimacy requires the consent of those ruled. These notions of legitimate sovereignty, as different as they are from each other, are all susceptible to a critique leveled against them by David Hume. Hume's objection questions the very possibility of being able to address the *security concern*, whether directly or indirectly, by giving priority to the *liberty concern*. According to Hume, if law and order is the desired outcome, then the *security concern* should be given priority. Furthermore, the *security concern* is addressed by establishing tradition and habit, not by adherence to abstract principles (e.g. a people have a right to be self-determined). In the following section, we will examine Hume's objection more closely. That will serve to set up the work of Immanuel Kant and his attempt to resolve the *liberty dilemma*, which will be the focus of the next chapter.

Section 4: Hume and the Conservative Objection to Social Contract Theory

In order to adequately appreciate David Hume's political philosophy, it should be noted that Hume's aim was to help quell the political factionalism that plagued the politics of his day. According to Hume, political factions had various sources, but the most pernicious of these arose from what he called "abstract speculative principles."[31] For Hume, the two most insidious speculative principles were (1) the belief in the divine right of kings and (2) the belief that government was founded upon the consent of the people.[32] I will mainly focus on Hume's critique of the latter, because it presents an interesting challenge both to the social contract tradition as a whole, but specifically to my claim that there can be a legitimate form of sovereignty, geared primarily towards addressing the *liberty concern*, that can also address the *security concern* without falling into a *security dilemma*.

As we have already seen with Hobbes, Locke, and Rousseau, the social contract tradition is committed to the view that in order for a sovereign to be legitimate, it must have the consent of those who will be subject to its law. Hume puts this view into question, in his essay entitled "Of the Original Contract," by stating that:

> Almost all the governments, which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent, or voluntary subjection of the people.[33]

Not only were governments of his time founded on violence and not consent, but also Hume notes that the idea that political legitimacy is dependent on the consent of the governed is relatively new. This idea is supposedly founded on reason itself, and yet it

did not gain widespread support until the 18th century. As Hume writes: "It is strange, that an act of the mind, which every individual is supposed to have formed…should be so much unknown to all of them, that, over the face of the whole earth, there scarcely remain any traces or memory of it."[34] In short, Hume is raising two strong and interrelated objections to the whole of social contract theory. First, that consent is not necessary for political power to be legitimate. Second, that it is possible to establish and maintain law and order without depending on, or having to resort to, any notion of consent. Both of these objections, Hume contends, are in accord with historical facts.

To fully appreciate Hume's objection, we need to begin by pointing out that Hume's political philosophy rests on the premise that justice is not a natural virtue, but an artificial one. By saying that justice is an artificial virtue, Hume is not saying that justice is unimportant or that it is unreal. Rather, Hume is saying that justice is not an original disposition in humans, although it nonetheless arises from and is consistent with original dispositions in all humans. Hume's argument for how justice arises is that justice finds its origins "…from the selfishness and confined generosity of men, along with the scanty provision nature made for his wants…"[35] That is, humans have certain selfish interests (e.g., food, clothing, and shelter), but those interests are such that no one individual can adequately satisfy them all by him or herself. Furthermore, it turns out that the most efficient way for individuals to meet these selfish interests is by forming and maintaining a society.[36]

Yet, a society cannot arise or be maintained without some sense of justice, or more specifically, a respect for private property. Respect for private property is essentially what Hume reduces justice to, when he reasons:

> [I]n the state of nature, or that imaginary state, which preceded society, there be neither justice nor injustice, yet I assert not, that it was allowable, in such a state, to violate the property of others. I only maintain, that there was no such thing as property; and consequently could be no such thing as justice or injustice.[37]

In arguing that there is no justice in the state of nature and that justice is therefore artificial, Hume appears to come fairly close to the Hobbesian view. Especially when Hume states that: "…without justice, society must immediately dissolve, and every one must fall into that savage and solitary condition, which is infinitely worse than the worst situation that can possibly be supposed in society."[38] What differentiates Hume from Hobbes—and in fact from all social contract theorists—is his rejection of the idea that justice arises from a promise or contract. According to Hume, the notion of a promise or contract is already parasitic on a sense of justice. For Hume, this reveals a vicious circularity in the reasoning of all social contract theorists. In their accounts, justice is supposed to provide the moral underpinnings for the notions of promise and contract, yet these same theorists rely on notions of promise and contract to explain the origin of justice.

Instead of resorting to this kind of circular reasoning, Hume makes the case that our sense of justice arises from "the general sense of common interest"[39] or from the realization that it is in the best interest of all to do certain things, even when those things are not in our immediate self-interest. In those cases, our natural disposition to promote our own self-interest can be restrained because we come to understand that in the long run we benefit by acting in a certain way and we begin to form the habit of calling such

action "just." For Hume, this does not mean that justice is something we can simply ignore if it does not serve our immediate interest, as Machiavelli in the *Prince* might have argued, but neither is it something that has meaning beyond a system of private property, as Locke's natural law account of justice might seem to imply.

In opposition to social contract theorists, Hume argues that something like the following is a more likely account of how political power comes to be legitimated:

> Time, by degrees, removes all these difficulties, and accustoms the nation to regard, as their lawful or native princes, that family, which, at first, they considered as usurpers or foreign conquerors. In order to found this opinion, they have no recourse to any notion of voluntary consent or promise, which, they know, never was, in this case, either expected or demanded. The original establishment was formed by violence, and submitted to from necessity. The subsequent administration is also supported by power, and acquiesced in by the people, not as a matter of choice, but of obligation. They imagine not, that their consent gives their prince a title: But they willingly consent, because they think, that, from long possession, he has acquired a title, independent of their choice or inclination.[40]

According to Hume, what binds us to our rulers (and to large and powerful property owners) and the reason we fulfill our obligations as citizens (i.e. maintain law and order) is that, at best, it is in our common interest to do so and, at worst, it is done simply out of habit. Because of this, those who presently hold political power—regardless of how they originally came into power, which Hume admits is more likely than not to have been

from usurpation or conquest—have a distinctive advantage in maintaining this power (i.e. remaining legitimate authorities). The advantage stems from the likelihood that removing them from power would likely lead to worse consequences than leaving them in power.[41] This brings us back to Hume's original warning against political factions based on "abstract speculative principles." Such principles, for Hume, are myths that have no ground in reality, and dogmatic commitments to such myths only functions to disrupt social and political stability.

In summary, Hume's objection to contract theory is that an original social contract is impossible on both empirical and logical grounds: empirically, there is no historical evidence that political power became legitimate through a social contract; logically, the type of legitimation required by social contract theory is based on circular reasoning. The binding force of the contract only makes sense within a civil society (i.e. in a place where notions of "mutual exchange" and "fair play" are already established), yet this is the very thing the social contract is supposed to establish. So instead of providing us with some moral and political insights, social contract theory, at best, provides us with an unattainable fiction and, at worst, presents us with a dangerous idea that can potentially lead to the disruption, rather than stabilization, of society at large.

Conclusion

So after tracing out the *liberty concern*, beginning with Machiavelli's *Discourses on Livy* and ending with the work of Jean-Jacques Rousseau, we have found ourselves in another dilemma: a constitutional democracy (i.e. a Philadelphia model of sovereignty) requires self-determination (i.e. autonomy), individual freedom, and universal equality, but these

commitments do not always cohere well together. Part of the reason for this incoherence is that there are two different, and at times opposed, understandings of liberty at work here. These understandings of liberty arise from the political traditions of civic-republicanism and classical liberalism. The first notion of liberty we can refer to as positive liberty, and it tends to give greater weight to a people's self-determination and universal equality at the expense of individual liberty. The other notion of liberty we can refer to as negative liberty, and it tends to favor individual freedom at the expense of universal equality and a people's self-determination.

The problem that this dilemma poses is that if these two different understandings of liberty cannot be reconciled, then the conclusion from Chapter II might not hold up. In other words, it might be impossible to find a legitimate form of sovereignty that is geared primarily towards addressing the *liberty concern*, which can also address the *security concern* without falling into a *security dilemma*. In the last section of this chapter we saw, in the work of David Hume, an alternative form of legitimate sovereignty. This alternative made it possible to address the issue of law and order without requiring the consent of those who will be subject to its laws. While Hume's option seems to be the least idealist (in both the theoretical and desirable sense of the term) option, if the *liberty dilemma* cannot be reconciled this might be the best we can do.

With this in mind, in the next chapter we will turn to the work of Immanuel Kant and John Rawls. Kant's work is essential because it provides a response to both the charge of collectivism leveled against the civic-republican tradition (e.g. Rousseau's *general will*) and to Hume's conservative objection to the whole of social contract theory. Rawls's work, building off of Kant, responds to both the utilitarian and Marxist

objections leveled against Kant's account of autonomy. More importantly, with his two principles of justice, Rawls's theory of justice is able to provide an amicable resolution to the *liberty dilemma*.

Notes

[1] Plato, *The Republic*. Found in *Plato: Complete Works*, ed. John M. Cooper, trans. G.M.A. Grube (Indianapolis: Hackett Publishing Company, 1997): 971-1223, 988.

[2] Niccolo Machiavelli, "The Prince," in *The Prince and the Discourses*, trans. Luigi Ricci (New York: Random House,1950), 65.

[3] Ibid., 44.

[4] Ibid., 61.

[5] Niccolo Machiavelli, "Discourses on the First Ten Books of Titus Livius," in *The Prince and the Discourses*, trans. Christian E. Detmold (New York: Modern Library, 1950), 121.

[6] Ibid., 282.

[7] Ibid., 283.

[8] Ibid., Pg 163.

[9] See, for example, John Locke, *Second Treaties of Government*, ed. C.B. Macpherson (Indianapolis: Hackett Publishing, 1980), 48-50.

[10] Ibid., 8-16.

[11] Ibid., 72.

[12] Ibid., 48-50.

[13] Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994), 110-111.

[14] See Locke, *Second Treaties of Government*, 107-124

[15] Ibid., 66.

[16] Ibid., 18-30.

[17] Ibid., 68.

[18] See Robert Nozick's interpretation of Locke in *Anarchy, State and Utopia.* New York: Basic Books, 1974.

[19] Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (London: Oxford University Press, 2002), 121.

[20] Jean-Jacques Rousseau, "On the Social Contract," in *The Basic Political Writings*, trans. Donald Cress (Indianapolis: Hackett Publishing, 1987), 141.

[21] Jean-Jacques Rousseau, "Discourse on the Origin of Inequality," in *The Basic Political Writings*, trans. Donald Cress (Indianapolis: Hackett Publishing, 1987) 58.

[22] Locke, *Second Treaties of Government*, 63-65.

[23] Rousseau, "Discourse on the Origin of Inequality," 70.

[24] Rousseau, "On the Social Contract," 141.

[25] Rousseau, "Discourse on the Origin of Inequality," 64.

[26] Ibid.,65.

[27] Ibid.,80.

[28] Rousseau, "On the Social Contract," 151.

[29] Ibid.,150

[30] Ibid.,170-71

[31] David Hume, "Of Parties in General," *Political Writings*, ed. Stuart D. Warner and Donald W. Livingston (Indianapolis: Hackett Publishing Company, 1994), 161.

[32] David Hume, "Of the Original Contract." *Political Writings*, ed. Stuart D. Warner and Donald W. Livingston (Indianapolis: Hackett Publishing Company, 1994), 164.

[33] Ibid.,168.

[34] Ibid.,168.

[35] David Hume, "Of the Origin of Justice and Property," *Political Writings*, ed. Stuart D. Warner and Donald W. Livingston (Indianapolis: Hackett Publishing Company, 1994), 15.

[36] Ibid., 7-8.

[37] Ibid., 20.

[38] Ibid.,17.

[39] Ibid., 11.

[40] Hume, "Of the Original Contract," 171-72

[41] Ibid.,180-81.

CHAPTER IV

RESOLVING THE LIBERTY DILEMMA

Introduction

In Chapter III, I explored the *liberty concern* by looking at two possible ways to address it: the civic-republican option and classical liberal option. What we found was that, like the *security concern*, the *liberty concern* leaves us in a *liberty dilemma*: classical liberalism is able to recover individual freedom, but only at the expense of universal equality and self-determination (i.e. autonomy); civic-republicanism is able to recover self-determination (i.e. autonomy) and universal equality, but only at the expense of individual freedom. In this chapter, I want to look at two attempts to resolving the *liberty dilemma*. The first is Immanuel Kant's account of autonomy, which ultimately provides the correct blueprint for overcoming the *liberty dilemma*. Kant's account, however, comes up short on some of the details. Those details are exposed in utilitarian and Marxist critiques of Kant. I conclude this chapter by looking at the work of John Rawls and arguing that his two principles of justice provide a viable resolution to the *liberty dilemma* that can address the worries of both utilitarians and Marxists alike while maintaining the core of Kant's resolution to the *liberty dilemma*.

Section 1: Kant's Account of Autonomy

As mentioned before, a legitimate form of sovereignty for Hobbes has two requirements: first, it must have the consent of its subjects and second, it must offer an improvement over, or at least not a worsening of, the conditions found in the *state of nature*. In contrast to this view, Immanuel Kant presents a notion of legitimate sovereignty that does

not require the consent of those subject to the sovereign and that is independent of its consequences. As Kant explains:

> [T]he point at issue here is not the happiness that a subject can expect to derive from the establishment and administration of the commonwealth; instead, the foremost issue is the rights that are thereby secured for everyone, which is the supreme principle, limited by no other, from which all maxims concerning the commonwealth must be derived.[1]

In other words, for Kant, a legitimate sovereign is founded on the principles of right. These principles for Kant cannot be taught by experience, but are instead *a priori* and derivable from reason alone.[2] This aspect of Kant's political philosophy is deeply influenced by his moral theory, so it would be fruitful to start our examination of Kant's philosophy there.

According to Kant, the failing of most moral theories is that they are grounded on something external to the "will," for example happiness, divine perfection, or the threat of damnation. Over and against these heteronymous views of morality, Kant argues that the autonomy of the will is the supreme principle of morality. By autonomy of the will Kant means that, as free rational beings, we give (i.e. legislate) the moral law to ourselves, and this is what binds us to morality, not external effects or inclinations. Morality for Kant is therefore not conditional and cannot be grounded on sentiments, but is to be "…sought a priori solely in the concepts of pure reason."[3] Kant here is specifically rejecting David Hume's claim that reason is the slave of the passions and that morality is derived from the sentiments alone, in particular the sentiments are self-interest and altruism.[4]

Kant's concept of morality has essentially three parts that come from his three formulations of the categorical imperative—that is the imperative that ought to direct our action in order for it to be moral and rational. His first formulation of the categorical imperative states that one should "Act only according to that maxim whereby you can at the same time will that it should become a universal law."[5] This is the universal part of Kant's moral theory. Morality demands a law under which all cases can be subsumed, as opposed to a set of ad hoc rules that only function in particular cases. Kant objected to the idea that morality could be derived from experience, because experience can only provide particular instances and never a general or universal law.

This leads to the second part of his moral theory, that morality is derived from, and has as its final end, rationality itself (i.e. rationality is an "end-in-itself"). Humanity, for Kant, is equivalent to rational nature, and this is expressed in his second formulation of the categorical imperative: "Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means."[6] In other words, we may never treat ourselves or any other person as a mere tool, as a mere object, or a means towards our own ends. Though we often must treat others as means, say when we get our coffee from our barista, if we fail to recognize that that person also is an end-in-herself, we violate this law. That is, we must always see that humans have the ability to choose goals for themselves and plan and execute these goals.

To put it a different way, due to its rational nature humanity has a dignity that all are bound to respect. For Kant, this respect would be epitomized in a "kingdom of ends." The *kingdom of ends* represents for Kant what a free and well-ordered society would be

like. Kant tells us that in the *kingdom of ends* "..each person remains at liberty to seek his happiness in any way he thinks best so long as he does not violate that universal freedom under the law and, consequently, the rights of other fellow subjects."[7] The *kingdom of ends* therefore holds out the promise that respect for the dignity of all individuals can be made consistent with law and order.

The trouble, however, is that Kant's notion of the *kingdom of ends* appears to leave us with similar difficulty as Rousseau's *general will*—we seem to be forced to be free. This is especially apparent when Kant writes:

> [The *kingdom of ends*] is the limitation of each person's freedom so that it is compatible with the freedom of everyone, insofar as this is possible in accord with a universal law…Now since every limitation of freedom by the will of another is called coercion, it follows that the civil constitution is a relation among *free* men…who yet stand under coercive laws, for reason itself…wills it so.[8]

This difficulty brings us to the third part of Kant's moral theory his principle of autonomy:

> [E]very rational being as an end in himself must be able to regard himself with reference to all laws to which he may be subject as being at the same time the legislator of universal law, for just this very fitness of his maxims for the legislation of universal law distinguishes him as an end in himself.[9]

In other words, acting in accordance with the moral law is not acting in accordance with an external standard (i.e. heteronomy), but is acting in accordance with a law that we legislate to ourselves (i.e. autonomy). This view forms the heart of Kant's third formulation of the categorical imperative: "…every rational being must so act as if he

were through his maxim always a legislating member in the universal kingdom of ends."[10] This explains how the coercion demanded by the *kingdom of ends* is not a heteronymous restriction on individual freedom, but an expression of that freedom. Individual freedom is expressed when one acts in accordance to reason, acting contrary to reason is a rejection of freedom.

This brief excursion into Kant's moral theory provides us with the basic outline of Kant's notion of freedom, but in order to fill in the details we need to also look at Kant's notion of Enlightenment. In "What is Enlightenment?" Kant puts forth the view that immaturity—to be ruled by external powers in a manner analogous to the way that a parent controls their child—is "…the worst *despotism* we can think of…"[11] For Kant, the virtue of the Enlightenment's commitment to rationality was, therefore:

> *Enlightenment is man's emergence from his self-imposed immaturity*. *Immaturity* is the inability to use one's understanding without guidance from another. This immaturity is *self-imposed* when its cause lies not in lack of understanding, but in lack of resolve and courage to use it without guidance from another.[12]

Kant, therefore, addressed the *liberty concern* by advocating maturity (i.e. the ability/courage to think for oneself) and rejecting immaturity (i.e. relying on the thinking of others). This means that, for Kant, reason, freedom, and moral accountability were all three intimately related to each other in the following ways. If a person is not free (i.e. cannot act otherwise), then that person cannot be held morally accountable—an "ought" implies "can." In Hume's account that people are driven to act solely by heteronymous impulses (i.e. emotions) and the role of reason is subordinated to mere calculation,

morality and justice would not be possible. For Kant, if morality and justice are to be possible, the opposite must be the case; individuals need to be free to act in accordance with principles of the right (i.e. reason) and not be driven to always act by heteronymous impulses (e.g. emotions). Therefore, to assume that morality and justice are possible is to also assume that persons are both rational and free because if persons are not free then we cannot hold them morally accountable, and being free means acting rationally.

With this account of moral autonomy in place, I return now to the question of legitimacy: why and when does a sovereign authority deserve to be respected? The general answer that social contract theorists had given to this question was that we were bound to respect sovereign authority when bound by a contract. Yet, as we saw in Hume's objection, this answer might entail either a dangerous fiction or vicious circular reasoning. Kant's response to Hume's objection is to say that the social contract is "…a *mere idea* of reason, one, however, that has indubitable (practical) reality."[13] In other words, the social contract is a heuristic device, similar to the categorical imperative, which reveals to us what our political rights and duties are. So even if Hume is right—that there never was and never could ever be an original social contract—we can still think of the social contract and the obligations it entails as dictates of reason. If this is the case then, as autonomous beings, we have a duty to fulfill those obligations. If we do not fulfill those obligations then we are acting against our freedom, and assuming we are free we can be held morally accountable.

Apart from responding to Hume's objection, Kant's account of autonomy also provides us with an account for how to overcome the *liberty dilemma*. Recall here that prior to Kant's *kingdom of ends*, freedom in Rousseau's *general will* consisted of mastery

over oneself because "…to be driven by appetite alone is slavery, and obedience to the law one has prescribed for oneself is liberty.[14] In paralleling Rousseau's account, Kant is able to avoid the first horn of the *liberty dilemma*: classical liberalism's surrender of self-determination and universal equality.

Yet, as we saw at the end of the Rousseau section, Rousseau's account is able to overcome the classical liberal horn of the *liberty dilemma*, but the collectivism of his *general will* leaves his account susceptible to the other horn of the *liberty dilemma*. The difference is that Kant's account of autonomy, unlike Rousseau's, makes specific references to the individual, specifically the idea that an individual should strive to obtain maturity and that all rational individuals have a dignity that cannot be transgressed. This recovery of the individual makes Kant's account of autonomy less susceptible to the charge of collectivism and therefore allows Kant to avoid the second horn of the *liberty dilemma*: civic-republican's surrender of individual freedom.

In this respect, Kant's account of autonomy provides us with a way out of the *liberty dilemma*, but it is not without its problems. In the next two sections I want to look at two objections raised against Kant's account of autonomy. The first is a descriptive objection that comes from the utilitarian tradition. This objection is a recovery of the Humeian position, arguing that liberty is actually more closely aligned to utility (i.e. to a notion of the good) than to a notion of the right (i.e. reason). This objection begins with the view that human flourishing is closely tied to the attainment of pleasure and the avoidance of pain.

The second is a normative objection that comes from the Marxist tradition. This objection accepts Kant's civic-republican notion of human flourishing (i.e. humans have

an intrinsic dignity and are by nature political animals), but argues that living in an irrational society (e.g. capitalism) people become irrational (e.g. susceptible to false consciousness). This means that, in order for people to be free (i.e. to act in accordance with reason), society ought to first become rational itself (e.g. communist).

Section 2: The Utilitarian Objection to Kant's Account of Autonomy

The utilitarian objection to Kant's notion of autonomy arises out of Hume's position, so I will highlight the important utilitarian precursors in his thought. Hume's skepticism toward most moral and political systems stemmed from his descriptive account of people: people are fundamentally creatures of habit and not rational beings. In other words, humans are moved to act out of emotion and custom and not out of reason. Kant's account of autonomy never disproves Hume's descriptive claim. Instead, what Kant showed was that if morality and justice were to be possible, then freedom would be necessary; and if freedom were to be possible then it must be guided by, or expressed in, rationality.

While Kant's reasoning is valid, his argument never proves that humans *are* in fact motivated by, or *can* be made to act in accordance with, reason. Kant offers only a normative, and not a descriptive, response to Hume. So while it might be the best of all possible worlds if humans could act in accordance with reason as opposed to being moved to act merely out of emotion or custom, it might be the case that humans *cannot* be motivated to act by reason alone. It is on this point that utilitarianism takes up its critique of Kant's account of autonomy.

Utilitarianism is a school of thought that is very suspicious of rights-based discourse—specifically universal rights. For example, the founder of utilitarianism, Jeremy Bentham, is famous for having said that: "Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts."[15] This puts the utilitarian tradition at odds with the social contract tradition, which has predominantly worked under some form of rights-based discourse—for Kant, this discourse privileges the inherent dignity of persons. The utilitarian tradition instead takes utility as its first and most basic principle. This principle is understood as the maximizing of pleasure and the minimizing of pain.[16] John Stuart Mill articulates this position best when he claims to forgo:

> …any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.[17]

In this quote, there are two important points to note. First, Mill is not simply dismissing the notion of rights. Rights, for Mill, are important and something that ought to be protected, but only to the degree that they are based on and help to promote utility. As Mill rhetorically states: "If the objector goes on to ask, why it ought? I can give him no other reason than general utility."[18] The second point is that not just any type of utility should be promoted, but utility that, as Mill puts it, advances "…the permanent interests of man as a progressive being."[19]

To understand this last phrasing of utility, we need to mention that utilitarianism, as Mill concedes, has always been open to the critique that it is "…utterly mean and groveling, as a doctrine worthy only of swine…."[20] Mill's response to this objection is to argue that not all pleasures are equal. Some pleasures, he argues, are higher and others are lower. The higher pleasures ought to be preferred over the lower because the higher ones promote the betterment of humankind. Obtaining the higher pleasures make us better people and that translates to more utility. This ranking of pleasures might seem to move Mill away from utlitarianism, but he responds that:

> It is quite compatible with the principle of utility to recognize the fact that some kinds of pleasure are more desirable and more valuable than others. It would be absurd that, while in estimating all other things quality is considered as well as quantity, the estimation of pleasure should be supposed to depend on quantity alone.[21]

While this is a very rough outline of Mill's utilitarianism it is sufficient to provide enough of a context to make sense of Mill's response to the *liberty concern*. Mill provides this response in his work *On Liberty*, where he writes that:

> "…the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[22]

This principle has come to be called the "harm principle" because of its obvious implication: everything is permissible, including harming oneself, so long as no one else is harmed.

For Mill, the *harm principle* is primarily aimed at protecting the opinions of numerical minorities from the tyranny of the majority. For Mill, no point of view, so long as it does not violate the *harm principle*, can or should be totally shut out of a democratic society. For Mill, a wider variety of views will lead to better understanding, and if a particular view were shut out it would be problematic for two reasons. "If the opinion is right, [we] are deprived of the opportunity of exchanging error for truth: if wrong, [we] lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[23] Mill thought that since democracies would only continue to grow in number, it is imperative that societies be on guard against the suppression of minority opinions.[24] This threat to liberty is substantially different from Rousseau's, who was primarily focused on how the will of a minority can come to dominate the will of the majority. In this sense, the utilitarian notion of liberty is a subset of the classical liberal variety (i.e. negative liberty).

The upside of Mill's account is its ability to defend a notion of liberty, while still taking seriously Hume's descriptive account that emotion and habit, not reason, is what actually motivates us to action. Mill's conclusion can therefore be summarized as follows: even if what initially motivates us to act are our sentiments (i.e. our desire for happiness) and not reason, we can still be free so long as we are not harmed by others and we use our reason to determine the greatest good. By undercutting the notion of dignity and replacing it with utility, utilitarianism undermines Kant's resolution of the *liberty*

dilemma. Under utilitarianism, self-determination, individual freedom and universal equality can all cohere with each other, so long as they work to promote the greater good.

Section 3: The Marxist Objection to Kant's Account of Autonomy

The second challenge to Kant's account of autonomy comes from the work of Karl Marx. Marx, unlike the utilitarians, is not so much concerned with maximizing overall utility and pleasure as he is with combating exploitation and alienation. In this regard, Marx's view of humanity is consistent with the Kantian notion of dignity, especially if we read Marx as demanding that workers to be respected as ends in themselves. Furthermore, Marx's notion of liberty comes from the civic-republican tradition (i.e. it's a positive notion of liberty). We can see this in Marx's description of the realm of freedom:

> The realm of freedom really begins only where labour determined by necessity and external expediency ends; it lies by its very nature beyond the sphere of material production proper. Just as the savage must wrestle with nature to satisfy his needs, to maintain and reproduce life, so must civilized man, and he must do so in all forms of society and under all possible modes of production. This realm of natural necessity expands with his development, because his needs do too; but the productive forces to satisfy these expand at the same time. Freedom in this sphere, can consist only in this, that socialized man, the associated producers, govern the human metabolism with nature in a rational way, bringing it under their collective control, instead of being dominated by it as a blind power; accomplishing it with the least expenditure of energy and in conditions

> most worthy and appropriate for their human nature. But this always remains in the realm of necessity. The true realm of freedom, the development of human powers as an end in itself, begins beyond it, though it can only flourish with this realm of necessity as its basis. The reduction of the working day is the basic prerequisite.[25]

In this long passage from Marx, we see his agreement with, but also his critique of, Kant's account of autonomy. Marx and Kant are in agreement that freedom requires a rational society that respects humans as ends in themselves. Marx and Kant differ, however, on what is supposed to come first: acting in accordance with reason or establishing a rational society. Recall that for Kant, if we are free, then we ought to be moved to act by principles of right (i.e. reason) and in doing so we work towards a *kingdom of ends*—an ideal which we might never get to. In short, acting in accordance with reason for Kant helps bring about a rational society.

Marx, however, points out that societies that exploit and alienate people in their attempts "to maintain and reproduce life" are societies that generate irrational individuals (i.e. individuals who are unable to act in accordance with reason). Marx's argument in the passage above seems to be that if we want people to be free (i.e. to act in accordance with reason) we need to first construct a rational society (i.e. a society free of exploitation and alienation). This is, therefore, an inversion of Kant's prescriptive account.

In large part, Marx's argument is simply an expansion on Rousseau's social critique. Recall that for Rousseau, even if everyone is considered to be formally free, unjust inequalities can act as fetters on an individual's freedom. The key to obtaining freedom, for Rousseau, was to act in accordance with the common interest (i.e. the

general will). Similarly, Marx points out that class society perpetuates unjust inequalities and therefore fetters the freedom of individuals. For Marx, it is only by understanding the social and historical conditions that have given rise to class society and class antagonisms, by appealing to empirical reality, that the universal interest can be deciphered. Marx's conclusion is that, under the capitalist mode of production, the interest of the working class represents the universal interest. If we look at the history of economic development empirically, we will find that there is no necessity in the system that we have now. Much like Rousseau argues, we will find that the deep class inequalities present in capitalism are products of a social order that is changeable, not natural. These inequalities are due to an irrational social organization, and it is this organization that we must change because the irrational social organization makes it impossible for individuals to be rational. In short, in order to obtain real freedom, according to Marx, we must first fight for the emancipation of the working class.

Capitalism not only prevents individuals from being rational and free, which under Kant's own terms is a violation of their dignity, but it also contains two key contradictions. These contradictions, according to Marx, manifest themselves in two different types of crises: overproduction and the tendency of the rate of profit to fall. Both of these contradictions would lead to economic crises, which would appear like, and have an effect similar to, natural disasters. Marx argued that these inherent crises would ultimately resolve themselves in one of two ways: "either in a revolutionary reconstruction of society at large, or in the common ruin of the contending classes."[26] In other words, capitalism, by its nature, is an un-free and irrational system that is also self-destructive.

To summarize, Marx is making two important points. The first is a Rousseauian point, that in order to develop a stable and well-ordered society (i.e., address the *security concern*), the issue of class inequality must be addressed, and not simply dismissed as the byproduct of some natural process. Addressing the issue of class inequality, however, requires the development of a rational system of production (e.g. democratic control of the means of production). While this has also been a rather brief account of the Marxist view, it has been sufficient to make the relevant point. For Marx, individuals can only start to become autonomous in the Kantian sense when class society is overthrown and a free and rational society (i.e. communism) takes its place. To do this, it is not sufficient to ask people to just act rationally because class society, especially capitalism, is an irrational society that makes us act irrationally. For this reason, it is important to understand, empirically and not just *a priori*, how class societies have functioned and why they are exploitive and alienating (i.e. irrational). Only then can we see why the emancipation of the working class represents the universal interest.

These abbreviated accounts of utilitarianism and Marxism suffice to show that, even after Kant, there remains an important tension within the *liberty concern*. Utilitarians argue that the interests of the collective are best and most efficiently met when individuals are allowed to freely pursue their own best interest. In contrast, the civic-republican tradition (i.e., Rousseau and Marx) argues that only by pursuing a more universal interest (e.g., the *general will* or the interests of the working class) will self-determination and universal equality be possible. In the next section, I will present John Rawls's attempt to resolve the *liberty dilemma*, which, with his two principles of justice, provides a viable resolution to the *liberty dilemma*.

Section 4: Rawls's Justice as Fairness

John Rawls's groundbreaking book, *A Theory of Justice,* can be read as an attempt to achieve four principle tasks: (1) concede to Hobbes that, with respect to the issue of security, rational people will indeed hedge their bets; (2) continue Kant's project of redeeming the social contract tradition with Hume's objections in mind; (3) respond to the utilitarian objection against Kant that a well-ordered society is based on principles of the good as opposed to principles of the right and; (4) present a brand of liberalism that takes seriously Rousseau and Marx's insight that structural inequalities can be both unjust (e.g. a form of slavery) and socially destabilizing (i.e. a primary cause of insecurity).

With this in mind, I will start with a passage from Rawls that summarizes his notion of a stable and well-ordered society.

> [A] society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice. That is, it is a society in which (1) everyone accepts and knows that the others accept the same principles of justice and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles."[27]

Rawls is still working within the Hobbesian paradigm because he is concerned about order—the society that we build must turn out to be stable. Also, a just society cannot be designed simply to advance the good of its members—an outright rejection of utilitarianism. Finally, Rawls takes seriously—if not outright agree with Rousseau and Marx—the view that societies held together by false or misleading ideologies are un-free societies. This is the reason Rawls argues that a just society is held together by a "public"

conception of justice, which should be contrasted with societies that are held together by lies, violence, or raw power.

In appealing to a "public" conception of justice Rawls, like Kant before him, is trying to salvage what he finds redeemable from the social contract tradition. For Rawls, the redeemable aspect of social contract theory is the idea of fairness: arriving at the principles of justice through an original agreement we would all find acceptable.[28] This aspect of fairness, Rawls claims, can be retained if instead of beginning our political theories from some mythical state of nature, we begin with what he calls the "original position." The original position is a thought experiment that allows rational beings to uncover the principles of a just society. This experiment is similar to deciding on the rules of a game before the game starts or any of the potential players know which particular positions they will find themselves in. Again similar to Kant's categorical imperative, the original position is an attempt to determine universal principles that are grounded in reason, as opposed to developing ad hoc rules that only work in particular situations, because then individuals can justify pursuing self-interest to the detriment of others. Also, the original position, in determining fair principles that are agreeable to all, will create a stable society because no one will be able to object. This is a re-iteration of the civic-republican idea that a society that protects liberty will have an easier time maintaining law and order.

Rawls's original position asks us to imagine a rational being that goes behind a "veil of ignorance." This veil functions like a filter and leaves the rational being with knowledge of only a very general set of facts, but with no specific facts. For example, under the veil one might know about the Holocaust and its destructive affects, but they will

not know if in this society they are themselves Jews, Christians, Allied soldiers, Nazis or something else. Following Hobbes's insight into human nature, Rawls believes that rational beings in such a position would hedge their bets. Rawls surmises that from behind the *veil of ignorance* rational beings would derive the type of principles that would prevent, not just the specific act that was the Holocaust, but also all projects that have similar outcomes.

Rawls concludes this thought experiment by deriving two fundamental principles of justice, which all rational beings would come to from within the original position.[29] The first is that all persons are entitled to the same set of basic liberties. In Rawls's words: "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others."[30] These basic liberties are fundamental rights that are non-negotiable; they cannot be taken away, either by a private entity, government, or democratic vote; and they also cannot be traded away by those who posses them. As Rawls states: "Each person posses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others."[31]

For Rawls, the first principle is a direct response to utilitarianism (specifically the hedonistic utilitarianism of Henry Sidgwick[32]), which gives priority to the notion of utility over the rights of individuals. This principle has clear ties to Kant's idea of the human as rational and deserving of dignity. No one in the original position would agree that the collective's well being should always come before the dignity of an individual. Part of the reason is that he or she might turn out to be that individual after society is created, but the

main trust of Rawls's point here is that untilitarianism is not as consistent with our intuitions as is the notion of intrinsic human dignity.

For our purposes, Rawls's first principle, as a safeguard of liberty, accomplishes two things: first, it avoids one of the potential pitfalls leading to a *liberty dilemma* (i.e. the surrender of individual freedom); and second, it guards against an Agamben-ian *state of exception* (e.g. allowing sovereign prerogative to infringe on the basic liberties of individuals). It does so by appealing to a notion of human dignity that is made apparent when individuals, who do not know their place in society, would consistently choose Rawls's first principle. This principle is commonly referred to as the liberty principle and it gets us half way to our ultimate goal.

Rawls's second principle, also known as the difference principle, is his attempt to address the issue of inequality and the social instability that follows from it. The question Rawls is attempting to answer here is something like the following: if there is to be social and economic inequality, how much inequality is too much, such that it starts to infringe on the basic liberties of individuals and/or begins to destabilize society? In the original position, Rawls claims that we would have to consider the possibility that we might be on the bottom of any social hierarchy. In taking this possibility seriously, Rawls argues that rational beings would hedge their bets and come to the following conclusion: "Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."[33]

Another way of putting this is that if some inequality is unavoidable in society, then it should be set up in such a way that the inequality benefits, more than it harms,

those who will be in the worst position. While this might seems like a justification of inequality, Rawls's second principle is mainly a shifting of the burden of proof. According to this principle, we must assume that any inequalities are unjust unless those who benefit the most from them can justify why these inequalities are to the advantage of everyone and also leave opportunities open to all rather than close them off to a few. In other words, egalitarianism must always prevail unless an inequality can be shown to improve the whole society, most especially the least well off.

As we can see from this second principle, Rawls's political view, while not the same as that of Rousseau or Marx, shares their concern that too much inequality can undermine autonomy and social stability. This is an interesting move within the history of liberalism because prior to this move[34] and even after[35] most liberals have tended to give greater weight to the notion of negative liberty. Rawls is instead presenting a new brand of liberalism, which I will refer to as "egalitarian liberalism." This brand of liberalism can better take into account issues of self-determination and universal equality, than could classical liberalism. In doing so, Rawls's brand of liberalism thereby avoids the other pitfalls leading to a *liberty dilemma*. Furthermore, the end product of Rawls's theory, a stable and well ordered society, reaffirms the conclusion originally put forth in Chapter II: that a satisfactory answer to the *liberty concern* could also address the *security concern*, while avoiding the *security dilemma*.

Conclusion

Rawls's accomplishment here is very impressive. He manages to address the utilitarian and Marxist critiques of Kant, and therefore strengthens Kant's resolution to the *liberty*

dilemma. The problem with Rawls resolution of the *liberty dilemma*, however, is that, like Kant's account, it does not extend to non-ideal concerns—specifically immigration. In developing the original position, one of Rawls's initial assumptions was that he was dealing with a closed society. In other words, a society "…we enter only by birth and exit only by death."[36] When considering the issue of immigration, this assumption obviously cannot hold, and the realities of globalization mean that this kind of society is a practical impossibility.

In the next chapter, I will provide an outline of the philosophical debate over immigration debate. I will make the case that the *liberty dilemma* returns in a slightly new form: either too much freedom of movement (an instance of individual freedom) can prove disruptive in obtaining distributive justice (the necessary requirements for positive freedom/equality) or we find that democratic autonomy (a people's right to self-determination) might be unobtainable without assuming a deep inequality between members and non-members (an important tenet of universal equality). Furthermore, I claim that this debate has largely revolved on how to resolve this dilemma once the initial assumption of a closed society is no longer possible.

Notes

[1] Immanuel Kant, "On the Proverb: That May be True in Theory, But Is of No Practical Use," in *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis/ Cambridge: Hackett Publishing Company, 1983) 78.

[2] Kant, "On the Proverb: That May be True in Theory, But Is of No Practical Use," 84.

[3] Immanuel Kant, "Grounding For The Metaphysics Of Morals," *Ethical Philosophy*, trans. James Ellington (Indianapolis: Hackett Publishing Company, 1983) 2.

[4] David Hume, *An Enquiry Concerning The Principles of Morals*, ed. J.B. Schneewind (Indianapolis: Hackett Publishing Company, 1983) 83.

[5] Kant, "Grounding For The Metaphysics Of Morals," 30.

[6] Ibid., 36.

[7] Kant, "On the Proverb: That May be True in Theory, But Is of No Practical Use," 73.

[8] Ibid., 72.

[9] Kant, "Grounding For The Metaphysics Of Morals," 43.

[10] Ibid., 43.

[11] Kant, "On the Proverb: That May be True in Theory, But Is of No Practical Use," 73.

[12] Immanuel Kant, "An Answer to the Question: What is Enlightenment?," in *Perpetual Peace and Other Essays*, trans. Ted Humphrey (Indianapolis/ Cambridge: Hackett Publishing Company, 1983), 41.

[13] Kant, "On the Proverb: That May be True in Theory, But Is of No Practical Use," 77.

[14] See Chapter 2 pg 59.

[15] Jeremy Bentham, "Anarchical Fallacies; Being an Examination of the Declarations of Rights Issued During the French Revolution—an Examination of the Rights of Man and the Citizen Decreed by the Constituent Assembly in France," in *The Works of Jeremy Bentham Vol 2*, ed. John Bowring (London: Elibron Classics, 2005), 501.

[16] John Stuart Mill, *Utilitarianism*, ed. George Sher (Indianapolis: Hackett Publishing Company, 2001), 6.

[17] John Stuart Mill, *On Liberty*, ed. Elizabeth Rapaport (Indianapolis: Hackett Publishing Company, 1978), 10.

[18] Mill, *Utilitarianism*, 54.

[19] Mill *On Liberty*, 10.

[20] Mill, *Utilitarianism*, 7.

[21] Ibid., 8.

[22] Mill *On Liberty*, 9.

[23] Ibid., 16.

[24] Ibid., 3-4.

[25] Karl Marx, *Capital Vol 3: A Critique of Political Economy*, trans. David Fernbach (London: Penguin Classics, 1991), 958-59.

[26] Karl Marx, and Frederick Engels, *The Communist Manifesto*, trans. Samuel Moore, ed. David McLellan (Oxford/New York: Oxford University Press, 1998), 3.

[27] John Rawls, *A Theory of Justice*, (Cambridge, Massachusetts: Harvard University Press, 1971), 4-5.

[28] Ibid., 10.

[29] Ibid., 14-15.

[30] Ibid., 53.

[31] Ibid., 3-4.

[32] Henry Sidgwick, *The Methods of Ethics*, (Chicago: University of Chicago Press, 1962).

[33] Rawls, *A Theory of Justice*, 53.

[34] See Friedrich von Hayek, *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960).

[35] See Robert Nozick, *Anarchy, State and Utopia*, (New York: Basic Books, 1974).

[36] John Rawls, *Justice As Fairness: A Restatement*, ed., Erin Kelly (Cambridge, Massachusetts: Harvard University Press, 2001), 40.

CHAPTER V

THE IMMIGRATION DEBATE WITHIN PHILOSOPHY

Introduction

In Chapter II, I introduced what I called the *security dilemma*. I proposed that the way to avoid that dilemma was to give priority to the liberty concern. That proposal seemed promising, especially if we were to adopt a Philadelphia model of sovereignty (i.e. constitutional democracy). In Chapter III, however, we found that in giving priority to the liberty concern we run the risk of falling into a *liberty dilemma*. This dilemma arises from the fact that the Philadelphia model of sovereignty requires commitments to self-determination, individual freedom and universal equality. The problem is that reconciling these commitments with each other is difficult because they are based on conflicting notions of liberty—a positive versus a negative notion of liberty.

In Chapter IV, I outlined two attempts to reconcile the *liberty dilemma*. I argued that Kant's account of autonomy ultimately provides the resolution to the *liberty dilemma*, but that his account is susceptible to utilitarian and Marxist objections. I then showed how Rawls's theory of justice could take up the Kantian project, while also accounting for the utilitarian and Marxist objections to Kant. Rawls's account, with its two principles of justice, therefore presents us with the best possible resolution to the *liberty dilemma*.

In the conclusion of Chapter IV, however, I alluded to the fact that Rawls's resolution of the *liberty dilemma* has at least one important shortcoming. Rawls's resolution does not hold with respect to immigration because Rawls assumes a society in which all members enter only by birth and leave only by death. Because of this

shortcoming, I suggested that the debate over immigration, at least within philosophy, has largely been a recasting of the *liberty dilemma*: either too much freedom of movement (individual freedom) can prove disruptive in obtaining distributive justice (positive freedom/equality) or we find that democratic autonomy (self-determination) might be unobtainable without assuming a deep inequality between members and non-members (universal equality). In order to defend this claim, in this chapter I will provide an outline of the seminal philosophical works on immigration. This chapter will therefore be broken up into the following three sections: (1) an introduction to the question of exclusion, (2) a recasting of the *liberty dilemma*, and (3) the communitarian/nationalist and cosmopolitan responses to the *liberty dilemma* as it has to do with the issue of immigration. The conclusion of this chapter will be similar to the conclusion at the end of Chapter III: if, with regard to the issue of immigration, philosophers wish to avoid the *security dilemma* by prioritizing the liberty concern over the security concern, philosophers might find themselves in one of the two horns of the *liberty dilemma*.

Section 1: The Question of Exclusion

The current philosophical debate over immigration finds its starting point in Michael Walzer's *Spheres of Justice*. In *Spheres of Justice*, Walzer attempts to provide a communitarian response to John Rawls's *Theory of Justice*. Walzer's critique of Rawls begins with a defense of a state's right to control political membership. Specifically, Walzer is critiquing Rawls on the issue of distributive justice because his starting point is prior to Rawls's assumption of an already bounded political community. Walzer, instead, begins his account prior to the bounding of the political community because he considers

the establishment and criteria of membership to be an important consideration for distributive justice. As Walzer writes:

> The primary good that we distribute to one another is membership in some human community. And what we do with regard to membership structures all our other distributive choices: it determines with whom we make those choices, from whom we require obedience and collect taxes, to whom we allocate goods and services[1] [furthermore]…it is only as members somewhere that men and women can hope to share in all the other social goods—security, wealth, honor, office, and power—that communal life makes possible.[2]

According to Walzer's view, there is an important distinction between members and non-members. Rawls's account fails to appreciate this distinction because his account starts with an already bounded community. For Walzer, the distinction between members and non-members "… is both a matter of political choice and moral constraint."[3] By political choice, Walzer means that political communities, much like clubs, have the right to shape their collective character and this means that states have the right to admit or exclude people as they see fit. The only caveat that Walzer allows for is that a state's right to control its borders is circumvented by three constraints: (1) refugees must be admitted, (2) prior inhabitants must not be forcefully removed, and (3) there should be no form of second-class citizenship.

In contrast to admission and exclusion, Walzer notes that: "Naturalization…is entirely constrained: every new immigrant, every refugee taken in, every resident and worker must be offered the opportunities of citizenship."[4] In short, a political community,

as a matter of political choice, has a nearly unchecked right to determine which non-members may be admitted or excluded from the community. Once non-members have been allowed into the community, however, it is imperative that they be given the opportunity to become full and active members, as the criteria for citizenship is morally constrained. In this sense, Walzer's position embodies an important civic-republican commitment: membership in a political community (i.e. universal equality) is a necessary, although not sufficient, condition for an individual to realize his or her potential; and maintaining control over membership is vital to a community's sense of self-determination, and it allows for the necessary distribution of positive liberties by bounding the community of people who have a right to such liberties.

Joseph Carens, in his essay "Aliens and Citizens: The Case for Open Borders," provides a counter-argument to Walzer's position. In that essay, Carens argues that barriers to mobility, like those justified in Walzer's account, protect unjust privilege and, similar to the feudal privileges of the past, these privileges go against fundamental liberal values. Carens begins his critique by looking at, what he believes is, the typical response given to the following question: what politically and morally justifies the use of force to prevent the entry of potential immigrants, assuming the immigrants in question are not criminals, subversives, or armed invaders? Walzer would answer that the typical response to this question is: "The power to admit or exclude aliens is inherent in sovereignty and essential for any political community."[5]

Carens challenges this response by following three traditional liberal positions to their logical conclusion. These three positions are Robert Nozick's libertarian view centering on property rights, John Rawls's two principles of justice, and utilitarianism as

it is generally understood. Carens concludes that none of these three liberal positions, as different as they are from each other, can consistently provide a justification for closed borders.[6] This conclusion brings to a close the first part of Carens's argument: a state's right to control its borders (i.e. a state's right to impede an individual's freedom of movement) cannot be justified on any of these three mainstream liberal grounds.

Yet, Walzer's position is not a liberal position. As I mentioned above, it is a communitarian position that seems to be more in line with the values of civic-republicanism. So while it might be the case that a state's right to control its borders cannot be justified on liberal grounds, this objection leaves Walzer's position relatively unscathed. Carens recognizes this and so in the second part of his essay he moves on to consider Walzer's position in particular. According to Carens, Walzer's conclusion is: "Across a considerable range of the decisions that are made, states are simply free to take strangers in (or not)."[7] Carens challenges this conclusion in three ways.

First, Carens challenges Walzer's claim that a sense of "distinctiveness" is important in order to maintain a political community. A sense of distinctiveness is necessary for Walzer because it not only separates one political community from another, but it is also what gives political communities their cohesion. For Walzer, in order to obtain a sense of distinctiveness a political community must, at some level, be closed off.[8] Carens objects by stating that: "What makes for distinctiveness and what erodes it is much more complex than political control of admissions."[9] As examples, Carens points to cities, provinces, and states that can and do remain distinct, even without having much control over admissions. Specifically, Carens gives the example of the state of California

and how it is able to remain distinct from the state of Oklahoma, even though people are allowed to, and frequently do, migrate between the two states.[10]

Second, Carens critiques Walzer's analogy of political communities being like clubs. Carens argues that this analogy glosses over the distinction between the public and the private. Carens writes:

> Drawing a line between public and private is often problematic, but it is clear that clubs are normally at one end of the scale and states at the other. So, the fact that private clubs may admit or exclude whomever they choose says nothing about the appropriate admission standards for states.[11]

In glossing over this distinction, Carens argues, Walzer fails to address the conflict between freedom of association, which typically wins out in the private sphere, and equal protection, which typically wins out in the public sphere. We would not, for example, be comfortable if a governmental organization, say a city's parks and recreation department, only hired people who belonged to a certain local club, because the government is public and thus forced to put equal protection over freedom of association.

Lastly, Carens puts emphasis on one of Walzer's key claims. Walzer claims that, unlike Rawls, his analysis is not grounded in universal principles, nor does it work from behind a "veil of ignorance." Instead, Walzer claims that his analysis is based on "the particularism of history, culture, and membership."[12] Carens' responds by pointing out that liberalism has been a central part of US culture and, as he showed in the first half of his article, liberalism is not compatible with immigration restrictions.[13] On this point, Carens concludes that: "No moral argument will seem acceptable to us, if it directly challenges the assumption of the equal moral worth of all individuals. If restrictions on

immigration are to be justified, they have to be based on arguments that respect that principle."[14] This is essentially an open challenge, which Carens thinks cannot be met. Carens' overall conclusion is that neither liberal (i.e. Nozick, Rawls, and utilitarianism) nor communitarian views can morally or politically justify closed borders.

At this point we now have a general outline of the two positions within the philosophical debate over immigration. On the one side, there are those who are committed to the view that a political community (e.g. a state) has the right to control its borders and membership. According to this position, if a political community lacks the ability to exclude non-members from gaining entrance, that community will not be self-determined and is at risk of disintegration. If the political community disintegrates, the consequences will be disastrous, not the least of which will be an inability to promote distributive justice (i.e. promote universal equality). The other side of the debate argues that anything short of fairly open borders is a violation of an individual's right to freedom of movement (i.e. violation of individual freedom). Furthermore, drawing a political and moral distinction between members and non-members is in fact to not respect the equality of all persons (i.e. violation of universal equality). In short, the work of Walzer and Carens demonstrate that, with regard to the immigration issue, the *liberty dilemma* remains alive and well.

One attempt to reconcile this dilemma comes from David Miller. Miller, in his article "Immigration: The Case for Limits," attempts to take up Carens' open challenge, by putting forth an argument for liberal-nationalism. According to Miller:

> [I]t is possible *both* to argue that every member of the political community, native or immigrant, must be treated as a full citizen, enjoying

> equal status and the equal respect of his or her fellows, *and* to argue that there are good grounds for setting upper bounds both to the rate and the overall number of immigrants who are admitted.[15]

Miller defends this claim by first going through what he views as the three most common arguments in favor of open-borders and shows how each of these attempts fail.

The first argument Miller examines is the "freedom of movement" argument. Miller argues that while free movement is a basic right, it is not unlimited. Individuals have a right, for example, not to be chained down, but this does not mean that individuals have a right to trespass on private property. Miller argues that with respect to migration a person has a right to migrate if they do not have adequate access to a range of options that are central to one's life plans.[16] Bracketing for the moment cases regarding religious/political persecution and economic/social displacement (which he addresses in the third argument), Miller concludes that: "So although people certainly have an *interest* in being able to migrate internationally [so long as the states they live in provide an adequate range of options], they do not have a basic interest of the kind that would be required to ground a human right."[17]

Miller next considers the argument that the right to exit or leave a country forms the basis for having the right to enter any country. The argument in favor of connecting the right to exit with the right to enter is as follows: if one does not have a right to enter somewhere then the pre-established right to exit is not much of a right at all. Miller disagrees and argues that by analogy the right to exit is similar to the right to get married: "…where by no means everyone is able to wed the partner they would ideally like to have, but most have the opportunity to marry *someone*."[18] Miller concedes that if no state

offered to take someone in, then the right to exit would have no value, but he argues that this is not the case. According to Miller, states generally are willing to let people in and so long as there is at least one state that will take one in, no state has an obligation to take in everyone.

The third argument Miller considers is the demand for open-borders based on a state's commitment to universal distributive justice and equal opportunity. Miller concedes that when states are confronted with people whose lives are less than decent, states "…must either ensure that the basic rights of such people are protected in the places where they live—by aid, by intervention, or by some other means—or they must help them move to other communities where their lives will be better."[19] That said, Miller points out that this obligation does not necessitate open-borders, but only an obligation to work towards improving local conditions. In other words, it is possible to export distributive justice and equal opportunity. The demands of distributive justice may obligate us to send resources to help aid struggling nations, but it does not obligate us to take in non-members (e.g. citizens from those struggling nations) into our community.

These three responses might entail that individuals do not have an unlimited right to move anywhere they choose, but these three responses do not entail that states have the unilateral right to close off their borders. To this end, Miller provides two reasons why states might have such a unilateral right. First, a state has the right to preserve its culture (i.e. cultural continuity which he differentiates from cultural rigidity) such that a state is entitled to have immigration polices in place that work to "…enrich rather than dislocate public culture."[20] Second, an overriding concern, such as the need for population control, could justify giving a state such a unilateral right. Miller then provides an argument for

how population control will not take place globally, or even nationally, until restrictions are not placed on the movement of people.[21] This overriding concern therefore gives a state the unilateral right to close off their borders

In this way, Miller believes he has answered Carens' challenge. He has shown that restrictions on immigration are not necessarily illiberal, but that immigration restrictions might in fact be necessary to establish and maintain a liberal state. In other words, commitments to individual freedom and universal equality rest on the ability of a state to be self-determined. If Miller's argument holds up, then supporting immigration restriction will not place us in a *liberty dilemma*. In the next section, however, I will look at some reasons to be skeptical of Millers argument. In particular we will look at whether Miller's argument does not reach the conclusion it does only by distorting the meaning of liberalism.

Section 2: Recasting the Liberty Dilemma

As a response to Miller's liberal-nationalist position, Phillip Cole puts forth the following claim in his book *Philosophies of Exclusion*: "…there is a tension, if not an outright contradiction, between the liberal principle of moral equality and the perceived need for closure of liberal polities."[22] Cole believes this problem arises because an important component of moral equality is determining who actually counts as morally equal. Cole claims that there is no way for a liberal community to establish and maintain "boundaries," to exclude certain persons from moral consideration, without doing so in an illiberal manner.

Cole's argument in support of this claim begins with the premise, which I have already mentioned before, that liberal theory (at least since Rawls) has at least two principle commitments: autonomy (self-determination and individual freedom) and universal equality. Cole argues that the second of these commitments translates into respect for the moral equality of all persons and justifies this interpretation by citing the work of various liberal theorists, such as Amy Gutmann and Will Kymlicka.[23] In other words, there is no liberal justification for the unequal treatment of non-members.

The first commitment, self-determination and individual freedom, is expressed in what Cole refers to as the "rationality principle." The basis for this principle is a notion of autonomy similar to Kant's (i.e. rational beings are those who give the moral law to themselves). Cole explains the "rationality principle" by stating the following:

> …the assumption that all human beings are in principle equally capable of rational thought, and that all political problems are therefore, in principle, capable of a rational solution: appeal to non-rational or arbitrary criteria for solving problems is therefore ruled out.[24]

This principle, as we saw in Rawls's *Theory of Justice*, has played a prominent role in recent liberal thought: practices and institutions that negatively affect people in matters of life importance, and that lack any rational justification, are deplored as unjust. Cole, like Walzer, believes that obtaining membership within a political community is a matter of serious life importance. Unlike Walzer, Cole does not see any rational or non-arbitrary way to justify membership exclusions—we do not choose or deserve the privileges or burdens associated with our national membership. Cole therefore concludes

that: "…the only consistently liberal [approach to immigration is]…complete freedom of international movement."[25]

Cole defends this conclusion by presenting, what he purports to be an exhaustive list of the four possible approaches to membership restrictions and the reasons as to why the first is the most consistent with liberalism. The four distinct possibilities are the following: (1) there is no non-arbitrary membership criteria, so membership restrictions are always in violation of the *rationality principle* and will therefore always be illiberal; (2) there is no non-arbitrary membership criteria, but the need to establish a political community overrides liberalism's *rationality principle*; (3) there are non-arbitrary membership criteria, but this criterion appeals to notions of "common identity"; and finally (4) there are non-arbitrary membership criterion and this criteria does not appeal to notions of "common identity."[26]

Out of all these possibilities, the last (4) would obviously present the best-case scenario for liberals who wish to consistently advocate for membership restrictions. Cole, however, does not believe that such a case can be made. The third (3) is the position of liberal-nationalists, such as Miller, which Cole believes is mostly in practice today. Cole rejects (3) because it maintains a pernicious distinction between members and non-members, and in doing so it sacrifices liberalism's commitment to the moral equality of all persons. According to Cole, the second (2) is the best that political theorists, like Walzer, have so far been able to muster an argument for, but it is an illiberal view because it rejects the *rationality principle*. The first (1), therefore, is what Cole believes is the most coherent answer to the question of membership restrictions from within a liberal framework. As Cole writes: "as it is presently constituted, liberal

theory cannot provide a justification for membership control and remain a coherent political philosophy."[27]

Cole's conclusion entails that when states exercise restrictive forms of membership they are forced to give up one or both of their liberal commitments: they must sacrifice either a commitment to autonomy (in the form of the *rationality principle*) or universal equality (in the form of respect for the moral equality of all persons). Sacrificing either of these will make a state non-liberal, at best, and illiberal, at worst. For this reason, Cole concludes that the issue of immigration makes clear that the only way to remain consistent with the ideals of liberalism is to disallow restrictive forms of membership and allow for freedom of movement (i.e. open-borders).

Cole's argument is very powerful, but his notion of equality seems to miss an important nuance that is captured by Michael Blake in "Immigration," a chapter he contributes to *A Companion To Applied Ethics*. Blake concedes to Cole's argument that liberal discourses have indeed traditionally conflated moral and political equality. Normally, when the political community is assumed to be a "bounded," this does not raise much of a problem. However, when dealing with the issue of immigration these two notions are decoupled and this presents liberals with a unique situation: you can have a person (i.e. the would-be immigrant) that must be regarded as morally equal, but who, at the same time is politically unequal. Blake's concludes:

> The conventional methodology of liberalism is quite inappropriate for use when the question is not one affecting the rights of members, but the composition of membership itself. To use the political egalitarian framework to develop principles of immigration is either to assume the

> border as a moral watershed or to assume away potentially relevant political differences.[28]

In short, Blake agrees that some of the intuitions behind open-border arguments, in particular Carens and Cole's, are correct. Specifically, that "…liberalism's guarantee of moral equality cannot stop at the border…" and that "…a consistent liberal theory cannot assume away the moral status of outsiders."[29] Blake, however, disputes the range to which the *rationality principle* can be applied, specifically the range allotted to it by Cole. Blake's own position is that some things that might be considered morally arbitrary can at times justify legitimate differences in political rights. As an example, Blake presents the case of a Torontonian and a Buffalonian. For Blake, it is morally arbitrary that one person is from Toronto and the other from Buffalo, yet it seems legitimate that there be a difference in political rights—for example, one can vote in US elections and the other cannot.[30] The upshot of Blake's example is simply this: under a liberal paradigm, some political inequalities are not necessarily violations of moral equality. That said, Blake makes sure to note that: "Insisting that states do not have the same political duties to foreigners as they do to citizens is not the same as insisting that states owe nothing to foreign nationals."[31]

After this consideration of open-border arguments (e.g. Carens and Cole's), Blake goes on to consider the communitarian/nationalist perspective, in particular that of Walzer and Miller.[32] Blake understands the communitarian/nationalist position to be that: "If immigration would undermine cultural integrity and continuity, then such immigration may legitimately be precluded."[33] According to Blake, this means that the state becomes primarily responsible for protecting the interests and projects of its

members over and against the interests of non-members. This is essentially a version of self-determination: "If a given state does not see large scale immigration as in its self-interest, it has the moral right to refuse such immigration."[34] This position, Blake points out, can easily become pernicious. For example: "In all cases in which there are national or ethnic minorities…to restrict immigration for national or ethnic reasons is to make some citizens politically inferior to others."[35] In such cases, restrictions on immigration would be in violation of the political equality of all citizens and therefore illiberal.

But even if culture or race are not used in determining immigration exclusions, Blake argues that there still needs to be some account as to why there is a partiality to members over and against non-members.[36] Blake's conclusion, which is similar to Cole's, is that there is no way to justify the difference without violating either a commitment to individual freedom or universal equality. For Blake, this demonstrates that philosophy needs a fresh start when it comes to the issue of immigration. Blake says little about what this would mean, except that philosophers would find that much of the exclusion currently employed by Western liberal democracies is illegitimate, as it helps perpetuate global poverty and inequality, but also that we will not find all forms of exclusion as being unjust.[37]

So while Cole and Blake do not provide us with much of a prescriptive account for dealing with immigration, their respective accounts demonstrate how the *liberty dilemma* returns in full force when the *liberty concern* is given priority in dealing with the issue of immigration. In the next section, I will look at two attempts to reconcile this dilemma. The first is a re-articulation of the liberal-nationalist position, which attempts a

return to contract theory; the other is the cosmopolitan account, which concludes that notions of sovereignty and citizenship should be thought of as multi-layered.

Section 3: The Liberal-Nationalist and Cosmopolitan Responses

In his article "Immigrants, Nations, and Citizenship," Miller directly takes up the challenge of developing a fresh start for a liberal approach to immigration. Miller begins by first articulating what he takes to be the central question of the immigration debate: "How far is it reasonable to expect immigrants to adapt to existing conditions in the host society, and how far must citizens in the host society bend to accommodate 'the strangers in our midst?'"[38] In other words, what are the limits to an individual's freedom while in an alien community and what duties does a community owe to a non-member?

This is an interesting question for political philosophers to consider because, while its form is similar to the classic tension between the individual and the collective, it is different in an important way. Traditionally, the tension between the individual and the collective has revolved around trying to determine the priority of one over the other: do the liberties of the individual take precedence over the good of the collective or vice versa? Yet, regardless of the different answers provided to this question, the presumption was always that the individual was, or would be, a member of the community. The case of immigration is different, however, because the individual in this case is not already a member of the community and might never qualify for membership. Absent the guarantee of membership, it cannot be assumed that either party—the individual or the collective—has any rights or duties that bind the other.[39]

In large part, the framing of this question is Miller's way of acknowledging the worries expressed by Carens, Cole, and Blake, over liberalism's ability to address the immigration issue. In true liberal fashion, Miller's suggestion is that the issue of immigration should be approached by thinking of the relationship between the immigrant group and the citizens of the receiving state as quasi-contractual."[40] In other words, instead of abandoning liberalism, Miller proposes that the issue of immigration return to liberalism's social contract roots. This time, however, the contract is between non-members and members. In this way "each side claims certain rights against the other, and acknowledges certain obligations in turn."[41] This move by Miller converts the issue of immigration, which at first appeared to make a poor fit, into something that is more palatable to the liberal tradition. Following Rawls, Miller believes that this will convert the issue of immigration into an issue of fairness, such that "it searches for norms of fairness to set the terms on which immigrant groups and host societies interact without regard to the particular circumstances of any individual immigrant or category of immigrants."[42]

While a commitment to fairness is an excellent starting point, Miller's solution assumes, as all contract theories do, that the parties involved are largely equal before entering the contract and are therefore in a position to make demands on each other.[43] While we might be able to assume this sort of equality in an ideal context—where an immigrant, free of coercion, decides to move to another country—it is not something that can be assumed in a non-ideal context. Some factors that make the case of immigrants non-ideal is that, even if immigrants are not necessarily or exclusively refugees, a significant number of immigrants are nonetheless heavily pressured to move because of

neo-liberal policies[44], active recruitment by foreign employers[45], or in other ways are coerced or persuaded to move to another country.[46] In such cases, where immigrants begin from such a disadvantaged position with respect to the potential "host" society, the parties to the new contract would not in any meaningful sense be equal. To be fair, this concern falls outside of Miller's scope because, as his quote above makes clear, his attempt at fairness abstracts from the particular circumstances of immigrants. In so doing, Miller's solution comes up far short in non-ideal situations.[47]

There is, however, a different liberal approach, which actually prides itself on taking particular circumstances into account: cosmopolitanism. The cosmopolitan approach to immigration finds its best expression in the work of Thomas Pogge. In his article, "Cosmopolitanism and Sovereignty," Pogge argues that first-world countries bear certain responsibilities for the condition of third-world countries and therefore owe certain duties to them. These duties are, contrary to the Rawlsian understanding of duties, best thought of in negative, as opposed to positive, terms.[48] As Kim Diaz makes clear in her article "U.S. Border Wall: A Poggean Analysis of Illegal Immigration," Pogge's position does not advocate for charity from first-world countries, but instead demands that these countries not cause third-world countries any harm and that they redress the harm that they have already caused them.[49]

As a way to address the immigration issue in a non-ideal manner, Pogge proposes the idea of vertically dispersing sovereign authority. So instead of understanding sovereignty as being concentrated and indivisibly situated at one highest level, as Thomas Hobbes had proposed, Pogge proposes a notion of sovereignty that is dispersed throughout various levels, both above and below the state. This dispersal of power, he

argues, should be de-centralized such that: "…persons should be citizens [i.e., members] of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state."[50]

Those who disagree with Pogge's notion of dispersed sovereignty object that such a dispersal would lead to the disintegration of political communities and thereby its ability to engage in acts of distributive justice. Pogge's response to this worry is that the cohesiveness of a community "…is actually better served by a division of the authority to admit and exclude than by the conventional concentration of this authority at the level of the state."[51] In other words, if we concede that communities exist at levels both above (e.g. Latin America) and below (e.g. Barrio Logan) the state, then concentrating sovereign authority at the level of the state, and with it the power to include and exclude (i.e. control borders and access to membership), could potentially undermine the cohesiveness of communities that exist both above and below the state.

Following this line of reasoning, Veit Bader expands on Pogge's critique by taking direct aim at Walzer and Miller's claim that states have an ethico-political right to close their borders and deny non-members access to membership on the grounds that doing so maintains cultural homogeneity and/or democracy (i.e. self-determination). Bader's rejects this claim because he does not think that states are in fact culturally homogeneous or democratic political communities, and therefore "…the moral and ethical legitimacy of their exclusionary 'right to communal self-determination' gets severely undermined."[52]

Bader puts forth three arguments to support this objection. First, he argues that the phrasing itself, "culturally homogenous and democratic," is "…much too vague to be useful in either empirical or normative arguments."[53] This is because it is not clear which

cultural distinctions should be defended, when obviously some should not be (e.g. those that are classist, racist, sexist…etc), and it is also not clear what type or types of democratic closure we are dealing with, closure in which all parties have consented, or where there is rough equality among all parties involved, or closure where there is neither. Second, Bader claims that states have historically done more to eradicate cultural diversity, both internally and externally, than they have to actually promote and protect it.[54] Lastly, Bader argues that the communitarian/nationalist defense fails to hold up empirically, as "…one finds even in the present world context of severe economic, cultural, and political inequalities a rich variety of newly created cultures,"[55] and also normatively, as the claim fails to take into account power asymmetries.[56]

Bader concludes that Walzer "…wants states to be what they historically and actually never have been—linguistically and culturally homogeneous worlds of common meaning, free associations based on democratic consent."[57] Instead, Bader advocates for a notion of citizenship that is similar to the notion of sovereignty advocated by Pogge. Bader argues that the notion of citizenship should be disassociated from ethnicity and instead should be thought of as a "multilayered concept."[58]

In short, Pogge and Bader together supply both good reasons for rejecting the primacy given to the nation-state with regard to immigration and also provide an alternative way for dealing with the problems associated with high levels of immigration. For Pogge and Bader, we need to re-conceptualize our notions of sovereignty and citizenship so that they better reflect the world we currently live in—we should come to think of them as multilayered concepts. The result would be that global and local

communities would be given equal footing with the nation-state and the notion of membership would better reflect the communities we actually belong to.

Even if this is right, however, it still seems very far from where, morally and politically speaking, we find ourselves today. This is essentially Walzer's response to these criticisms, in "Response to Veit Bader." Walzer's twofold response to Bader could just as equally apply to Pogge. First, Walzer takes issue with Bader's questioning of the state as the prime political unit. Walzer gives two reasons in defense of the state as the prime political unit: security and welfare. Walzer argues that states, at least some of the time, have been able to accomplish these two tasks, while the formations to which Bader and Pogge allude to as possible replacements to the state have not shown that they are up to the task.[59]

Second, Walzer defends the legitimacy of the citizenship/ethnicity connection by rhetorically asking Bader what it would mean to disentangle citizenship from ethnicity. Walzer concedes this might be possible and maybe even desirable in places like the United States, "But does Bader really mean to advocate a French state, say, entirely neutral with regard to the preservation and enhancement of French culture?"[60] Walzer concludes by stressing that these two responses to Bader do not necessarily ignore drastic international inequalities. Walzer recognizes these inequalities and also believes that we have a duty to rectify them, but he thinks that Bader and Pogge's cosmopolitan position is far too radical a response to these inequalities.

Conclusion

These last three sections have provided an outline of the philosophical debate over immigration. In presenting this outline, I have tried to make the case that the issue of immigration returns philosophers to the *liberty dilemma*: philosophers who favor a state's right to self-determination argue that if a state is charged with maintaining a stable and well-ordered society, that state must have the unilateral right to exclude non-members; philosophers who favor individual freedom and universal equality believe that granting a state such a unilateral right would constitute an arbitrary infringement on the basic liberties of individuals and would only serve to perpetuate unjust inequalities.

In Chapter VII, I will present Christopher Heath Wellman's valiant attempt to bridge this divide. I will also outline three of the objections raised against his account. Wellman's account and the objections raised against it are instructive not only as they relate to the *liberty dilemma*, but also because they make evident some of the areas where philosophers have not been sufficiently thorough in dealing with the immigration issue. Specifically, I think philosophers have not paid enough attention to immigration enforcement and expulsion strategies. The issue of enforcement and expulsion strategies will therefore be the subject of Chapter VII.

Notes

[1] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, (New York: Basic Books, 1983), 31.

[2] Ibid., 63.

[3] Ibid., 62.

[4] Ibid.

[5] Joseph H Carens, "Aliens and Citizens: The case for Open Borders," *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1997), 331.

[6] Ibid., 331-341.

[7] Michael Walzer quoted in Carens, "Aliens and Citizens," 342.

[8] Walzer, *Spheres of Justice*, 39.

[9] Carens, "Aliens and Citizens," 342.

[10] Ibid., 343.

[11] Ibid., 344.

[12] Michael Walzer quoted in Carens, "Aliens and Citizens," 342.

[13] Carens, "Aliens and Citizens," 345.

[14] Ibid., 346.

[15] David Miller, "Immigration: The Case for Limits." *Contemporary Debates in Applied Ethics*, ed. Andrew I. Cohen, and Christopher Heath Wellman (Malden MA: Blackwell Publishing, 2005), 193.

[16] Ibid., 196.

[17] Ibid.

[18] Ibid., 197.

[19] Ibid., 198.

[20] Ibid., 201.

[21] Ibid., Pg 201-202.

[22] Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration*, (Edinburgh, Great Britain: Edinburgh University Press, 2000), 3.

[23] Ibid., 3-5.

[24] Ibid., 5.

[25] Ibid., 203.

[26] Ibid., 6.

[27] Ibid., 202.

[28] Michael Blake, "Immigration," *A Companion To Applied Ethics*, ed. R.G. Frey and Christopher Heath Wellman (Oxford: Blackwell Publishing, 2003), 236.

[29] Ibid., Pg 227.

[30] Ibid., 227-229.

[31] Ibid., Pg 230.

[32] Ibid., Pg 231.

[33] Ibid.

[34] Ibid., 232.

[35] Ibid., 233.

[36] Ibid., 234.

[37] Ibid., 236.

[38] David Miller, "Immigrants, Nations, and Citizenship," *The Journal of Political Philosophy* 16. 4 (2008): 371.

[39] It is worth mentioning here that Hannah Arendt is making a similar point with her brilliant insight about "a right to have rights." See Hannah Arendt, *The Origins of Totalitarianism* (New York: Shocken Books, 2004), 376.

[40] Miller, "Immigrants, Nations, and Citizenship,"371.

[41] Ibid.

[42] Ibid., 373.

[43] Thomas Hobbes, for example, argues that in the state of nature everyone is equal in that everyone is entitled to everything and anyone can potentially kill (i.e. force) or out wit (i.e. fraud) anybody else. See Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis: Hackett Publishing, 1994). Rousseau also argues that we are all equal in the state of nature, although not in the same sense that Hobbes believed, but in a more benevolent egalitarian sense and that it is civilization that gives rise to "unnatural"

inequalities. See Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, trans. Franklin Philip, ed. Patrick Coleman (Oxford: Oxford University Press, 1999).

[44] See David Bacon, *The Children of NAFTA: Labor Wars on the U.S./Mexico Border*, (Berkeley and Los Angles, California: University of California Press, 1997).

[45] See Reginald Williams, "Illegal Immigration: A Case for Residency," *Public Affairs Quarterly* 23.4 (2009): 309-324.

[46] See David Bacon, *Illegal People: How Globalization Creates Migration and Criminalizes Immigrants*, (Boston, Massachusetts: Beacon Press, 2008).

[47] This could potentially be a very serious problem for Miller because, even according to Rawls, the issue of immigration is almost exclusively a non-ideal issue. This would mean that Miller's account would be largely unhelpful in most immigration cases. See John Rawls, *The Law Of Peoples*, (Cambridge, Massachusetts: Harvard University Press, 1999): 8-9.

[48] Thomas W Pogge, "Cosmopolitanism and Sovereignty," *Ethics* 103.1 (1992): 48-75.

[49] Kim Diaz, "U.S. Border Wall: A Poggean Analysis of Illegal Immigration," *Philosophy in the Contemporary World* 17.1 (2010): 1-12.

[50] Pogge, "Cosmopolitanism and Sovereignty." 58.

[51] Pogge, "Cosmopolitanism and Sovereignty," 61.

[52] Veit Bader, "Citizenship and Exclusion. Radical Democracy, Community, and Justice. Or, What Is Wrong with Communitarianism?," *Political Theory* 23. 2 (1995): 218.

[53] Ibid., 219.

[54] Ibid.

[55] Ibid., 220.

[56] Ibid.

[57] Ibid., 221.

[58] Ibid., 213.

[59] Michael Walzer, "Response to Veit Bader," *Political Theory* 23.2 (1995): 247-248.

[60] Ibid., 248-249.

CHAPTER VI

A LEGITIMATE STATE'S FREEDOM OF ASSOCIATION AND ITS CRITICS

Introduction

In Chapter V, I put forth the claim that the philosophical literature on immigration can be broken down into two general camps: those who favor a state's unilateral right to exclude non-members (e.g. communitarian/nationalists), and those who oppose it in favor of an individual's right to freedom of movement (e.g. cosmopolitans). I argued that those who favor the former have tended to play up the virtue of self-determination, while those who favor the later have tended to play up the virtues of individual freedom and universal equality. The task of reconciling these two positions has been a difficult, but also familiar task for philosophers—it is essentially a recasting of the *liberty dilemma*.

With this in mind, Christopher Heath Wellman has recently put forth a very persuasive argument that appears to resolve this dilemma. Wellman defends a notion of self-determination that manages to not run afoul of individual freedom or universal equality. In this chapter, I will reconstruct his argument, after which I will present three objections that have been raised against it. These three objections can be found in Sarah Fine's essay, "Freedom of Association Is Not the Answer," and in the work of Shelley Wilcox and Ryan Pevnick. Together these three objections raise serious concerns about the ability of Wellman's account to resolve the *liberty dilemma*. Ultimately, I conclude that Wellman's account might be able to withstand these objections, but I do not think his account can remain consistent with liberalism (i.e. not run afoul of individual freedom

and universal equality) when strategies of enforcement and expulsion are taken into consideration.

Section 1: Freedom of Association as the Freedom to Exclude Non-Members

As we saw at the end of Chapter V, philosophers who support a state's unilateral right to control immigration justify their position by arguing that this right is entailed in the definition of autonomy (i.e. people's self-determination). Philosophers who do not believe that a state should have a unilateral right to control immigration argue that this is an infringement on the basic liberties of individuals, in particular on individual freedom and universal equality. At the end of the last chapter, these two positions appeared to be irreconcilable and so we seemed to be back in a *liberty dilemma*: those who take a communitarian/nationalist position risk falling into the civic-republican horn; those who take a cosmopolitan position risk falling into the classical liberal horn.

With this in mind, Christopher Heath Wellman, in "Immigration and Freedom of Association," presents a unique argument in favor of a state's unilateral right to control immigration. Wellman's argument in favor of a state's unilateral right to control immigration claims to incorporate liberal commitments to individual freedom and universal equality. In the rest of this section I will reconstruct Wellman's argument and then, in the sections that follow, I will look at some of the objections that have been raised against it.

Wellman's argument, by his own admission, is wonderfully simple. His argument is composed of three, rather innocuous, premises: (1) legitimate states are entitled to political self-determination, (2) "freedom of association" is an integral component of self-

determination, and (3) *freedom of association* entitles one *not* to associate.[1] From these premises Wellman reaches the conclusion that:

> Legitimate political states are entitled to a sphere of political self-determination, one important component of which is the right to freedom of association. And since freedom of association entitles one to associate with others, legitimate political states may permissibly refuse to associate with any and all potential immigrants who would like to enter their political communities.[2]

As we can see from premise (1), Wellman's argument is restricted to "legitimate" states. This means that, like a good liberal, Wellman does not believe that any and all states are entitled to self-determination. According to Wellman only *legitimate* states, by which he means states that respect human rights (i.e. individual freedom and universal equality), are entitled to self-determination. Wellman's justification/explanation for this is as follows:

> There is a moral presumption against political states because they are by nature coercive institutions. This presumption can be defeated, however, because this coercion is necessary to perform the requisite political functions of protecting basic moral rights. In my view, then, a regime is legitimate only if it adequately protects the human rights of its constituents and respects the rights of all others.[3]

With regard to premises (2) and (3), Wellman resorts to the analogy of marriage in an effort to generate intuitive support for these premises. According to this analogy, a self-determined and legitimate state is a lot like an autonomous person. An autonomous

person has the right to propose marriage to whomever they choose (i.e. the right to associate with whoever they like). This, however, is not the full extent of this right; *freedom of association* also entails the right to rebuff a marriage proposal (e.g. the right not to associate), along with the right to divorce (e.g. the right to disassociate). This analogy has a lot of intuitive appeal in that: what else could autonomy mean if not that we can marry whom we want, and by the same token we cannot force, or be forced by, others into marriage or in staying in a marriage. For Wellman, if self-determined and legitimate states are at least sufficiently similar to autonomous persons in this regard, then self-determined and legitimate states are equally entitled to *freedom of association* in this strong sense.[4] With regard to immigration, this strong sense of *freedom of association* entails that a legitimate state not only has the right to associate with whomever it chooses (e.g. admit whichever non-members it wishes), but also has the right not to associate (e.g. the ability to exclude non-members unilaterally), along with the right to disassociate (e.g. the ability to expel non-members unilaterally).[5]

The obvious problem at this point in the argument is that, while Wellman does give lip service to individual freedom and universal equality in premise (1), the argument itself appears to be falling into a *liberty dilemma*; in the end it seems that individual freedom and universal equality are being sacrificed for a state's right to be self-determined. In order to complete the argument (i.e. show that his argument does indeed avoid the *liberty dilemma*), Wellman must demonstrate that his position, even if it does not necessarily promote individual freedom and universal equality, at least does not violate them. In other words, Wellman must show that his position can hold up against both egalitarian and libertarian objections. To this end, Wellman considers four possible

objections (two egalitarian and two libertarian) to a legitimate state's unilateral right to control immigration.

The first set of objections that Wellman considers is of the egalitarian variety. In considering these objections Wellman is careful to maintain the distinction, originally pointed out by Michael Blake, between moral and political equality.[6] With this distinction in mind, Wellman first considers the moral egalitarian objection to a legitimate state's unilateral right to control immigration. This objection points out that people born in different countries have radically different life chances and this is the result of nothing but arbitrary luck—a clear violation of the *rationality principle*. Because borders only perpetuate these inequalities, a commitment to moral equality would seem to require that borders be open, at least until these arbitrary inequalities are ameliorated.

Wellman concedes two points to this objection: a commitment to the moral equality of all persons should not be abandoned and that grave and unjustifiable global inequalities do exist. Wellman, however, rejects the assertion that these two points are sufficient to demand open borders. For Wellman, there is an important difference between "luck egalitarianism" and "relational egalitarianism." For *luck egalitarianism* any unequal distribution of goods must have a rational explanation. So in this case, closed borders would be at odds with a commitment to *luck egalitarianism*. This, Wellman points out, would be too simplistic a view of moral equality because it misses the essential point made earlier by Blake's: "[that] the same inequalities which would clearly be pernicious among compatriots might well be benign when present between foreigners."[7]

Wellman, instead, argues that equality might better be thought of in relational terms and not in terms of moral luck. In other words, equality is not just a matter of always having an equal distribution of goods, but also has an important relational dimension to it—the inequality is both bad enough to deserve attention and there is an obvious relation between the unequal parties such that one party is the cause of and/or unfairly benefits from the inequality. This is the *relational egalitarian* position, and Wellman claims that under this view, a commitment to the moral equality of all persons would "not require us to guarantee that no one's life prospects are affected by matters of luck…"[8]

The example Wellman gives to flesh out his point is a comparison of two different cases of unequal opportunities to go to college. In the first case, a family pays for its son's college tuition, but refuses to pay for their daughter's; in the second case one family pays for their children's college tuition while another family does not pay for theirs. According to Wellman, both cases are examples of unequal distribution and therefore would be unjust under *luck egalitarianism*, but only the former would be objectionable under *relational egalitarianism*. Wellman believes that while we might find both cases objectionable, only the first case constitutes a violation of moral equality, while objections to the second case are based on what he calls "Samaritan" concerns. For Wellman this means that only inequalities of the *relational egalitarian* variety count as infringements on the moral equality of all persons. Therefore, Wellman's concludes:

> …even if achieving relational equality [rectifying injustices analogous to the first case] is important enough to trump other values like freedom of association, realizing luck equality [rectifying injustices analogous to the

> second case] is not important enough to deny people their rights to self-determination.[9]

So while *luck egalitarianism* might prove insufficient to trump *freedom of association,* and therefore a legitimate state's unilateral right to control immigration, it is possible that, as the quote states, *relational egalitarianism* might be. In considering this possibility, Wellman concedes that the world is indeed becoming more interrelated and unequal, and furthermore that the wealth and prosperity of many countries can be directly linked to the poverty and misery of other countries.[10] In this case, a commitment to the moral equality of all persons would require that something be done to rectify this inequality.

Yet, even in these cases of extreme interrelated global inequality, Wellman denies that non-members have any claims to be admitted or remain within a legitimate state that could trump the legitimate state's *freedom of association*. Wellman, following David Miller's third argument against open-borders,[11] argues that there are other ways for wealthy countries to discharge their obligations to *relational equality*—for example countries could send some of their wealth to those less fortunate,[12] or intervene to make certain parts of the world safer and more hospitable[13]—that do not require a legitimate state to admit or retain non-members that the state does not wish to associate with. According to Wellman, these two counter-arguments show that his position can account for moral egalitarian concerns.

Moving on to the political egalitarian objection—the view that a commitment to the political equality of all citizens might require that a state open its borders—Wellman here considers the issue of discrimination. Wellman understands that one of the dangers of

taking the position on immigration that he has is that it can and has led to pernicious forms of discrimination. This type of discrimination is not only detrimental to those who are excluded, but has the potential of detrimentally affecting citizens who share certain similarities with those whom immigration restrictions are discriminating against (e.g. recall the *Chinese Exclusion Acts* from Chapter II). In such cases, immigration restrictions could be considered a violation of the political equality of all citizens.

Wellman concedes the point and also believes that this sort of discrimination must be checked, as he writes:

> [J]ust as few would suggest that individuals have a right to marry only people of their own ethnicity, culture, nationality, or character, I do not believe that a group's right to limit immigration depends upon its members sharing any distinctive ethnic/cultural/national characteristics.[14]

Wellman here is suggesting that a state should not have the right to limit immigration based on ethnicity, nationality, or other cultural characteristics. The problem Wellman's position faces, however, is how to consistently justify a rejection of discriminatory immigration policies. This is especially problematic for Wellman because, as I argue below, he ultimately rejects a position like that of David Miller, and is at the same time tempted by a position like that of Michael Walzer.[15]

As we saw in the last chapter, David Miller believes that in setting an immigration policy, states can use various forms of discriminatory criteria. For example, a state could more readily admit immigrants that provide economic benefits or have values similar to those of citizens. Yet, Miller rejects the possibility that a state can use race or gender as a criteria for exclusion because: "To be told that they belong to the wrong race, or sex…is

insulting, given that these features do not connect to anything of real significance to the society they want to join."[16]

Wellman, however (and I believe consistent with his position), is not persuaded by Miller's argument. Returning to the marriage analogy Wellman writes that: "I would expect a black person to be insulted by a racist white who would never consider marrying someone who is black, but I would not say that this black person has a right not to be insulted in this way."[17] So while insults are not something that should be approved of, under Wellman's account, insults are not themselves sufficient to limit the autonomy of legitimate states. Legitimate states do not have a duty to anyone to not be insulting.

Wellman considers an alternative in the work of Walzer, who in his defense of a state's unilateral right to control immigration, presents a diametrically opposite view to Miller's. According to Walzer, so long as certain stipulations are met, race can be used to exclude certain groups of people. The example Walzer uses is the "White Australia" policy, where he argues that if Australians wish to engage in a policy of admitting only whites, they must leave enough land for non-whites to live on.[18] Wellman is disturbed by Walzer's position, but in returning to his marriage analogy he notes that: "[A]s much as I abhor racism, I believe that racist individuals cannot permissibly be forced to marry someone outside of their race…[therefore] why does [*freedom of association*] not similarly entitle racist citizens to exclude immigrants based upon race?"[19] Wellman then agrees with Walzer's position that, if we are only considering a state's right to self-determination, then we must allow even exclusions based on race.

Still, Wellman ultimately rejects both Walzer and Miller's positions on discriminatory immigration policies, opting instead for a view put forth by Michael

Blake. If we recall from the last chapter, Blake's rejection of discriminatory immigration policies is the following: "In all cases in which there are national or ethnic minorities…to restrict immigration for national or ethnic reasons is to make some citizens politically inferior to others."[20] This rejection of discriminatory immigration policy is, unlike Miller's position, consistent with Wellman's notion of *freedom of association*. This is because the rejection of discrimination is not aimed at doing justice to non-members, but at maintaining the equal status of members who happen to share in that race, ethnicity, national origin, religion, or gender of those who would be excluded. The force of Blake's argument, therefore, comes from its appeal to the political equality of all citizens, which a legitimate state must accept. Even Walzer seems to concede as much when he insists that: "No community can be half-metic, half-citizen and claim that its admissions policies are acts of self-determination or that its politics is democratic."[21] Therefore, while on self-determination grounds, a state could have racist exclusion policies; the racial equality of all existing citizens overrides self-determination on this account.

Wellman therefore gladly adopts Blake's position over Walzer or Miller's and concludes: "Whether or not we are sympathetic to the idea of a state designed especially to serve a specific racial, ethnic, or religious constituency, such a state is not exempt from the requirement to treat all its subjects as equal citizens."[22] In this way, Wellman believes he has been able to successfully defend a legitimate state's unilateral right to control immigration against the political egalitarian objection because states can legitimately control immigration as long as exclusions do not violate the political equality of all citizens, as race based exclusions would indeed do to citizens of the excluded race.

Wellman, having refuted luck and relational egalitarian arguments, takes up two as yet unconsidered libertarian objections from Joseph Carens's "farmer argument": in denying non-members admission, a state will be denying both a member (e.g. a farmer) the right to hire a non-member (e.g. a foreign worker) and, inversely, will deny a non-member (e.g. a foreign worker) the right to come and work for a member (e.g. a farmer).[23] Assuming that both the farmer and the foreign worker would like to partake in this relationship, the state's action in this case violates the individual freedom of both the farmer and the foreign worker. Carens originally presents this as a single objection, but as Wellman correctly points out, there are really two objections in this example: one based on property rights and another based on freedom of movement. Wellman writes,

> The former emphasizes the rights of those within the state and contends that limiting immigration violates individual property owner's rights to invite foreigners to visit their private property. The latter stresses the rights of foreigners, claiming that closing territorial borders wrongly restricts an individual's right to freedom of movement.[24]

Thus, the member-farmer's property rights (rights to have whomever he or she wishes on his or her property) are violated, and the non-member- foreign worker's freedom of movement rights are violated.

After parsing out this objection into its two parts, Wellman first considers the "property rights" argument. This argument, in true libertarian fashion, holds that when there is a conflict of rights, priority must be given to the individual over the state. In the case of a state's immigration policy denying a farmer the ability to employ a foreign worker, the case can be made that two rights are in conflict—the state's *freedom of*

association versus the individual's *freedom of association*. In this case, a commitment to individual freedom would seem to entail that, "if either party should have priority in claiming the right to freedom of association, it is the individual, not the state."[25]

Wellman concedes that this is in fact a conflict of rights, but he is not convinced that the individual's *freedom of association* should in this case take precedence over the state's *freedom of association*. Giving priority to the individual in this case would, for Wellman, be equivalent to committing ourselves to anarchy. According to Wellman, "effective political society would not be possible unless some crucial decisions were made by the group as a whole, and…all areas of group sovereignty imply a corresponding lack of individual dominion."[26] Furthermore, Wellman notes that individual freedom (i.e. an individual's control over their property) does not trump state sovereignty in all areas. For example, people who own their land cannot, whenever they like, just declare their land independent from the state. Therefore, "if an individual's claim to freedom of association does not trump her state's right in the case of secession, there seems good reason to believe that an individual's right would be equally impotent in the realm of immigration."[27]

Wellman goes on to give two further reasons for why individual's *freedom of association* should not in the case of immigration take precedence over the state's *freedom of association*: "(1) an inability to invite foreigners onto one's land is typically not an onerous imposition and (2) bringing outsiders into the political community has real consequences for one's compatriots."[28] Wellman is here agreeing with Walzer's contention that any non-member who is admitted into the state must be given the opportunity to become a full member and because of that:

> This invitation does not merely entitle the invitee to stay on one's land; it morally requires all of one's fellow citizens to share the benefits of equal political standing with this new member of the political community. And because the costs of extending the benefits of political membership can be substantial, it makes sense that each individual should not have the right unilaterally to invite in as many foreigners as she would like.[29]

Wellman therefore concludes: "[A] property owner's dominion over her land might well entitle her to invite foreigners to visit her land but that would not justify a more sweeping curtailment of a state's right to control immigration into its territory."[30]

Wellman next considers the "freedom of movement" argument, in particular Philip Cole's version. As briefly mentioned in the last chapter, Cole argued that *freedom of movement* has two parts to it, emigration and immigration, and that liberal theory has neglected the symmetrical relationship between the two. In neglecting the symmetrical relationship, liberalism has taken an "asymmetrical" stance with respect to *freedom of movement*: emigration (i.e. the right to exit) must be unconstrained, but immigration (i.e. the right to enter) can be constrained. Cole argues that there is no good argument to uphold this asymmetry and there is at least one good reason for not allowing the state to control immigration. "[I]f it can be shown that the state *does* have the right to control immigration, it must follow that it also has the right to control emigration: the two stand and fall together."[31] In other words, consistency demands that if the state can control one aspect of free movement, it should also control the other. Allowing the state to control emigration would go against the ideals of liberalism and so therefore a legitimate state

must not be allowed to restrict emigration. This being the case, it follows that a state must also not be allowed to control immigration.

Wellman's response to this objection follows closely the line of argument already laid down by Miller.[32] Wellman concedes that a commitment to individual freedom includes with it the right to free movement, but similar to property rights, he does not believe that this freedom is absolute. As Wellman rhetorically asks: "My right to freedom of movement does not entitle me to enter your house without your permission…so why think that this right gives me a valid claim to enter a foreign country without that country's permission?"[33] And again, returning to the marriage analogy, "No one says that I am denied my right to marriage merely because I cannot unilaterally choose to marry you against your will."[34] Wellman's point is that there is an important difference between emigration and immigration, and this difference comes into focus when we look at the analogies of trespassing and marriage. For Wellman, there is such a meaningful distinction: "one may unilaterally emigrate because one is never forced to associate with others, but one may not unilaterally immigrate because neither are others required to associate with you."[35]

This brings to a conclusion Wellman's consideration of the two possible libertarian objections to a legitimate state's unilateral right to control immigration. Wellman believes that he has, at this point, demonstrated that his interpretation of a state's right to self-determination can be consistent with both individual freedom and universal equality. Therefore:

> Even if egalitarians are right that those of us in wealthy societies have demanding duties of global distributive justice and even if libertarians are

> correct that individuals have rights both to freedom of movement and to control their private property, legitimate states are entitled to reject all potential immigrants even those desperately seeking asylum from corrupt governments.[36]

Wellman's argument appears to have bridged the gulf between cosmopolitans and communitarian/nationalists, and thereby resolved the *liberty dilemma* with respect to immigration. Wellman's account has not, however, been without its critics. In the sections that follow, I would like to look at three criticisms raised against Wellman's argument. The core of these criticisms is found in Sarah Fine's "Freedom of Association Is Not the Answer," where she challenges Wellman on three fronts. First, she questions whether an argument justifying freedom of association is sufficient to justify potential harm to others. I refer to this objection as the "harm objection." Second, she questions Wellman's use of analogies and in particular his fast and loose conflation of "intimate/expressive" associations with "innocuous" associations. I refer to this objection as the "bad analogy objection." Lastly, she argues that even if Wellman can address these two objections, he overreaches in his conclusion. According to Fine, Wellman's argument only entails that a state has the right to exclude non-citizens from membership, but it does not entail that a state has the unilateral right to exclude non-citizens from its territory. I refer to this last objection as the "equivocation objection."

Section 2: The Harm Objection

According to Fine, in being denied admission into a state, would-be-immigrants are subject to a potential harm that is serious enough to check, or at least demand further

justification for, a state's unilateral right to control immigration. Fine concedes that much of this harm might be addressed by "exporting justice." This said, Fine contends that Wellman "does not pause to consider the possibility that the act of exclusion is potentially harmful to [non-members] insofar as it thwarts the interests that they have in long-term settlement or in acquiring membership."[37] In other words, there are potential harms that arise from immigration exclusions, which cannot be remedied by "exporting justice" and while there might be reasons for overriding the concerns of non-members in favor of a state's right to self-determination, Wellman does not supply these reasons.

As a way of expanding on this objection, and in particular as a way to take the non-ideal insights of Thomas Pogge and Veit Bader into consideration, I will look at Shelley Wilcox's Global Harm Principle (GHP). In "Immigrant Admissions and Global Relations of Harm," Wilcox points out that current international realities are such that the demand for entry into affluent societies is greatly exceeded by the number of actual admissions. When framed in this way, the issue of immigration posses a different problem from the one that most philosophers, regardless of whether they favor a state's unilateral right to control immigration or not, have attempted to address. According to Wilcox, most philosophers have given an answer to the question: "Do [potentially receiving] societies have unacknowledged moral duties to admit immigrants?" [38] They have not, however, given an answer the following question: "If restrictions on immigration can sometimes be justified, which prospective immigrants ought to receive priority when not all are [or can be] admitted?"[39]

Wilcox raises this second question because very few borders are in reality completely closed off and so the real world question that immigration posses is who

should get priority in admissions criteria and why? As an attempt to answer this question and "provide adequate normative guidance concerning immigration in the world as it is today"[40] Wilcox puts forth the GHP. This principle, states that: "societies should not harm foreigners; and societies that violate this duty must: (1) stop harming these foreigners immediately; and (2) compensate their victims for the harm they have already caused them."[41] The strength of this principle, according to Wilcox, is that it is not parasitic on the *freedom of movement* argument (or the *property rights* argument), but it nonetheless allows that certain non-members, who have not been granted legal permanent residency, have certain moral claims on states to be admitted. This position itself raises a whole host of questions: What constitutes harm? How should we understand the collective duty not to harm foreigners? What specific duties to admit immigrants does the GHP entail? But forgoing those questions for the moment, the force of Wilcox's argument based on a principle of restitution is undeniable: Some states might have a negative duty to give preference, in its immigration policy, to those non-members it has directly harmed.

Wellman, however, has a response to the *harm objection*. To understand his response, let us keep in mind that there are two parts to this objection. The first was Fine's: if there are potential harms created by immigration exclusions that cannot be remedied by "exporting justice," then this potential harm serves as a check on a legitimate state's *freedom of association* and therefore its right to control immigration. To this part of the objection, Wellman responds by stating that: "rights to freedom of association and duties of distributive justice are distinct and can be kept separate in both the domestic and international realms."[42] In other words (and allowing for the possible

exception of refugees, which we will be dealt with in the second part of this objection), Wellman doubts there can be any such harms that either cannot be remedied through distributive justice or, if they cannot be remedied through distributive justice, that they are strong enough to override a legitimate state's *freedom of association*.

In short, Wellman is shifting the burden of proof and essentially denying that there can be such a harm that is both strong enough to override a legitimate state's *freedom of association* and that cannot be addressed through exporting justice. This brings us to the second part of the *harm objection*, where Wilcox aimed to provide a more concrete (i.e. non-ideal) example of such harms. Again, Wilcox's argument is not a *freedom of movement* or a *property rights* argument, but it does come to the conclusion that certain non-members have a moral claim on certain states to be admitted based on restitutional grounds.

While Wellman does not tackle this part of the objection directly, we can gather a response from what he has said about a legitimate state's obligation to refugees:

> Just as wealthy states may permissibly respond to global poverty either by opening their borders or by helping to eliminate this poverty at its source, countries that receive refugees on their political doorstep are well within their rights either to invite these refugees into their political communities or to intervene in the refugees' home state to ensure that they are effectively protected from persecution there.[43]

In other words and similar to the first part of the *harm objection*, Wellman concedes that legitimate states might have duties to non-members, even duties of restitution. But, while helping non-members emigrate from their present location can

only discharge some of these duties, this general obligation is not sufficient to override a legitimate state's *freedom of association.* A legitimate state can, for example, pay a different state to take in the immigrants to whom it owes a duty of restitution, and thereby fulfill its duty while not necessarily having to associate with them. Wellman, in fact, likens this to trading carbon emissions.[44] Wellman, therefore, remains steadfast that: "A state can entirely fulfill its responsibility to persecuted refugees [or in this case foreigners that have been directly harmed by the state's action or policy] without allowing them to immigrate into its political community."[45]

Section 3: The Bad Analogy Objection

Fine's second objection, which I refer to as the *bad analogy objection,* targets Wellman's use of analogies. Wellman, in his argument of a legitimate state's right to *freedom of association,* fluctuates between two types of analogies—usually they are "golf clubs" and "marriage." According to Fine, the first type of analogy (e.g. golf club) is an "innocuous" association, while the second (e.g. marriage) is an "intimate/expressive" association. Fine points out that Wellman is not always careful to keep distinct the two very different types of analogies. For example, Fine claims that Wellman's argument gets most of its intuitive force from the first type of analogy: a legitimate state's freedom of association is like an individual's right to marriage. This analogy is based on an "intimate/expressive" association. According to Fine, this is problematic because to say that state membership is analogous to an "intimate/expressive" associations (e.g., becoming a member of the state is like getting married) is essentially to endorse a comprehensive doctrine.

Now, whether one supports Rawls's view regarding comprehensive doctrines—that liberal societies should not endorse comprehensive doctrines—is not important here.[46] The important thing is that Wellman does and this is the reason, according to Fine, that he at times alternates between the marriage analogy and "innocuous" association analogies like golf clubs. This switching back and forth between the two allows him to avoid the entailment of a comprehensive doctrine, while helping himself to the strong conception of association entailed by "intimate/expressive" associations. The problem for Wellman is that "innocuous" associations, like a golf clubs, are not justified in having the same degree of control over its membership as "intimate/expressive" associations.[47] Fine concludes that if Wellman wishes to remain consistent with liberalism, the best his argument can do is to show that legitimate states have the same type of a *freedom of association* as "innocuous" associations do. The problem would then be that these types of associations do not enjoy the same unilateral right to not associate or to disassociate, as "intimate/expressive" associations do.

As I did with the *harm objection*, I would like to supplement the *bad analogy objection* by including some non-ideal concerns. This is because, while ideally and liberally speaking, legitimate states might best be thought of as "innocuous" associations; non-ideally speaking it seems to be the case that legitimate states are thought of in terms of "intimate/expressive" associations. In this case, there might be some non-ideal, empirical reasons for justifying the exclusion of non-members that are not illiberal. Turning again to the work of Shelley Wilcox, we see that there are usually two reasons that are offered in defense of a legitimate state's unilateral right to control immigration. First, immigrants are said not to integrate sufficiently into receiving societies and

therefore "embracing large numbers of unacculturated immigrants will disrupt the cultural conditions that enable citizens to act autonomously [i.e. act like liberals]."[48] Second, "the presence of ethically diverse immigrants will diminish the strong sense of national solidarity that is necessary to sustain vital liberal democratic ideals."[49]

According to Wilcox, there have been two ways of trying to resolve these problems: make immigrants assimilate to the national culture of the receiving society and/or force them to adopt the shared civic national identity of the receiving society. Wilcox refers to proponents of the first as cultural preservationists and proponents of the second as civic nationalists. Wilcox acknowledges that most people who support the view that legitimate states are more like, using Fine's terms, "intimate/expressive" associations also recognize the problems with the cultural preservationist perspective (e.g., it leads to racism, ethnic discrimination, pernicious forms of nativism…etc.) and therefore have tended to opt instead for the civic national model. This later model "is based on a shared commitment, across cultures, to a set of historically embedded liberal democratic principles…[such that] adopting a civic national identity involves committing oneself to the political ideals and principles upon which a particular polity is founded."[50] Those who defend this position appeal to liberalism's commitment to solidarity in making their case that "a shared national identity is necessary to sustain liberal democratic ideals and practices in the face of the multiple identities and conflicting allegiances that characterize pluralist societies."[51] So, while liberals are likely to reject the solution of forcing cultural assimilation, when trying to reconcile immigration and solidarity, they may find the civic solution of promoting shared liberal political ideals attractive.

There are two different arguments in support of the civic nationalist model. One, a shared civic national identity is necessary in order to sustain the liberal ideals of tolerance and respect for cultural pluralism. Two, a shared civic national identity is necessary for the realization of social justice in liberal states. Wilcox raises objections to both of these arguments.

First, Wilcox thinks that it is overly optimistic to believe that something like a naturalization process will be sufficient to instill a strong sense of national identity. As Wilcox states: "Civics and history classes would teach immigrants about the basic public institutions and history of their new society…but it is difficult to see how these experiences would translate into strong national identification."[52] If this is true, that it is a mistake to believe that something like a naturalization process will be sufficient to generate a strong sense of national identity, then the civic nationalist position is either inadequate or is really seeking to make the would-be immigrant share more than just a civic identity. In the later case, the civic nationalist would be no different than the cultural preservationist. Second, Wilcox raises an objection with regard to the desirability of aspiring to such a strong sense of shared civic national identity. According to Wilcox, we should question whether it is even possible to theorize a civic national identity that is genuinely culturally neutral. Even if possible, Wilcox raises the possibility that this notion of a shared civic national identity could be used in the same way as a cultural national identity is used—to justify polices that are inconsistent with liberal ideals.

Take for example France's recent ban on wearing the Hijab in public.[53] The justification given for banning this religious headdress in public, or at least the one offered to the public at large, was something like the following: France is a liberal

democracy and the wearing of this religious headdress in public places, like public schools, violates liberalism's fundamental tenet of the separation of church and state. The justification of this ban is essentially an appeal to a shared sense of civic national identity and not necessarily an appeal to culture. Yet, what some one like Wilcox would point out is that this appeal to civic national identity still has an effect similar to that of racial profiling or ethnic discrimination, which an appeal to cultural national identity would have.

Together, Fine and Wilcox's objections are sufficient to at least make us pause at the ease with which Wellman shifts from one analogy to the other. It is also obvious from these objections that Wellman's account needs to be able to do two things. First, it needs to do more to justify a legitimate state's *freedom of association* in the strong sense—where the state, as opposed to the individual, has the presumptive right of association. Second, he needs to do this without violating liberal principles and in particular without smuggling in a comprehensive doctrine. Fine and Wilcox's objections have shown that it is difficult, if not impossible, to meet these two conditions.

Wellman responds to this objection by acknowledging that there is indeed a difference between the two types of associations that Fine has pointed out, but he does not believe "that rights of freedom of association are more valuable in intimate contexts […and so…] At most, then, this objection highlights only that it may require more to defeat the presumptive right in intimate contexts."[54] In other words, Fine's objection only shows that "intimate/expressive" associations, like marriage, have a very strong right to *freedom of association*, but that does not show that "innocuous" associations

(e.g., golf clubs) lack a strong enough *freedom of association* such that they would make poor analogies for a legitimate state's unilateral right to control immigration.

In defense of this claim, Wellman argues that there are many examples of "innocuous" associations, like political groups, where *freedom of association* is not only highly regarded, but has even been protected by legal institutions like the Supreme Court.[55] More to Fine's theoretical point, Wellman argues that intimacy is not necessary in order to justify a strong right to *freedom of association*. Returning to the golf club analogy, Wellman notes that simply "being a club member gives one reason [enough] to care about the rules for admitting new members, because, once admitted, new members will typically have a say in determining the future course of the club."[56]

Similarly with legitimate states, and here Wellman would be responding to the empirical concerns of someone like Wilcox as well, we can put to the side most of the things we associate with a comprehensive doctrine (e.g. culture, race, religion, gender, etc…) but "there are [still] a number of obvious reasons why citizens would care deeply about how many and which types of immigrants can enter their country."[57] Maybe the most important of these reasons, which does not necessarily commit Wellman to embrace a comprehensive doctrine, is the right to determine the future of the group. As Wellman writes: "No collective can be fully self-determining without enjoying freedom of association [when the members of a group can change] because…an essential part of the group self-determination is exercising control over what the 'self" is."[58]

In short, Wellman would concede that France's right to self-determination does not justify a ban on the use of the Hijab in public because in that case it is infringing on the rights of its members. But by the same token, France's right to self-determination

would justify France in determining its own admission and exclusion policy with regard to non-members, so long as it does not violate the political equality of its citizens. In other words, states like France are free to exclude anyone they choose and can still consider themselves liberal, so long as the exclusions are not based on cultural, racial, religious, or gender affiliations.

Section 4: The Equivocation Objection

The final objection that Fine raises against Wellman's argument is the *equivocation objection*. According to Fine, "…Wellman's position begs the question whether…[legitimate states] are within their rights not just to control the rules of membership but also to control settlement within that territory."[59] The question begging arises from Wellman's equivocating of at least two, if not three, different types of exclusion: (1) A state's right to exclude outsiders from its territory; in other words, preventing non-members from crossing its borders. (2) Excluding outsiders from settling within that territory—in other words, preventing non-members from acquiring residency. (3) Excluding outsiders from membership within the political community—in other words, preventing non-members from acquiring citizenship. The last of these (3) is unquestionably the type to which Wellman's *freedom of association* argument applies, but it is not clear that Wellman's argument also applies with regard to the first two. The first two types of exclusion seem to have little or nothing to do with the issue of membership. Instead the first two types of exclusion have to do with the issue of territorial rights and it is not clear that territorial rights and association are the same thing.

To better make her point, Fine uses the example of a private club that owns the territory and resources it uses versus a yoga club that does not. With regard to that example, Fine writes:

> The [private] club members might enjoy the right to exclude outsiders from membership and from using the club's property and resources, provided that they have rights of ownership over the premises. However, while a yoga group that meets in Central Park might be free to reject prospective members, it is not entitled to bar them from making use of Central Park itself because the park is not the members' property.[60]

According to Fine, this entails that "…a successful defense of the state's right to exclude others from its territory could not rest on the appeal to freedom of association alone: it would require a justification of the state's territorial rights…"[61] Fine concludes her argument by stating that:

> If states are the legitimate owners of their territory, then there would be additional grounds for concluding that they enjoy a right to exclude outsiders from that territory. Yet, ultimately Wellman does not appear to conceive of the state's relationship to its territory as one of ownership…[62]

Interestingly enough, another thinker, Ryan Pevnick, does present an ownership model, which he calls the "Associative Ownership View." Pevnick's view, however, leads to the conclusion that even if the members of a state could be thought of as the legitimate owners of the state, a legitimate state still would not have the unilateral right to exclude non-members from the territory, or least would not have the right in the strong

sense advocated by Wellman. I will now briefly consider the relevant aspects of Pevnick's model as a supplement to Fine's objection.

In *Immigration and the Constraints of Justice*, Pevnick presents the following argument: if one does not contribute to the production of society's vital institutions, then they do not deserve to enjoy them (i.e. do not deserve membership). Pevnick states:

> The intuition underlying [the *Associative Ownership View*] is…that [a group] may claim ownership over its collective accomplishments because without the contributions of members (in time, effort, and money) the [collective accomplishments] could not exist…In other words, member's creation of institutions gives them an ownership claim that grounds their right to make future decisions about the shape and direction of such institutions (in other words, their right to self-determination).[63]

Pevnick goes on to provide three clarifications/implications of this view. First, that this is only a limited claim to ownership. Second, that by "labor" he means the creative and directive qualities that bring forth and direct political institutions (e.g. paying taxes and contributing to collective political decisions). Third, denying people membership does not deny them their personhood, but only reflects that they did not play a fundamental role in the creation of the institutions.[64]

The strength of this view, Pevnick believes, is that it can justify a state's right to be self-determined while avoiding the difficulties encountered by communitarian/ nationalists.[65] Pevnick's view, for example, justifies the idea that states, and in particular the members that make up that state, have a right to determine/control membership and this "explains the connection between citizens and the institutions of their state in a way

that does not depend on similarities in national identity."[66] Yet, this ownership model also does not foreclose the possibility that non-members might have some right to enter or pass through the state's territory. For example, a legitimate state might be entitled to deny non-members, even those already in its territory, the same rights that members enjoy (in particular the benefits of a welfare state), but under Pevnick's account, its ability to deny non-members access to its territory is limited. In other words, the issue of admittance into a territory is a very different issue from that of membership. Again, Wellman's account might be able to justify a legitimate state's right to control membership, but Pevnick's stronger conclusion (stronger in that it thinks of the state's relationship to its members in terms of ownership) is that this is not sufficient to show that a legitimate state has the unilateral right to control immigration.

Wellman responds to this objection by first addressing Fine's three-part distinction. According to Wellman states are necessarily territorial, "they are delineated in terms of land because no other means of sorting political constituents would work."[67] If this is the case, then Fine's distinction might actually be better thought of in the following way, as asking these three questions: (1) who has a property claim on the territory, (2) who has jurisdiction over the territory, and (3) who has a right to visit the territory. Wellman's unapologetic view is that:

> Without taking a stand on property or visitation rights, my position on jurisdiction is that, other things being equal, those who occupy a territory enjoy jurisdictional rights over this land as long as they are able and willing to perform the requisite political functions."[68]

So unlike Fine's example of a yoga group that uses a park, but does not have an ownership right over the park, a state enjoys jurisdiction over the territory it occupies. This jurisdiction is not, as Pevnick argued, derived from the state owning the territory, but is part of the definition of sovereignty. So using Fine's example, having sovereign authority over a park is different from owning it or merely using it, but it nonetheless grants the state the authority to determine who may or may not enter it.

This, however, still leaves open the question of why jurisdiction should trump property or visitation rights with regard to immigration. Especially since Wellman has claimed that: "States have no compelling justification for denying individual's [specifically property owners] rights to invite foreigners to visit either for personal or economic reasons."[69] Wellman's response to this is to concede that legitimate states do not own their territory, but, as he made clear in his rejection of the *property rights* argument, this does not mean that individual property owners therefore have a right to grant residency to non-members. The reason is that in granting residency to non-members individual property owners impose a substantial burden on the whole group and not just on themselves.

Pevinick's objection, as we saw, questions the idea that all residents must be enfranchised. If this is the case, that residents do not need to be given the same social benefits as members, then the visitation by non-members would not be as burdensome as Wellman has pointed out. Wellman, however, rejects this possibility for two reasons. The first is symbolic. According to Wellman being able to vote or have a voice in the community where one is a resident can be psychologically important, such that its denial can make one seem and/or feel less worthy.[70] Second, it is unlikely that the concerns of

those who are not enfranchised will be represented or taken seriously when issues that directly affect them are voted on. As Wellman writes: "if the system is designed so that no one need be politically accountable to these groups, it should come as no surprise when the legal system issues policies that routinely disregard even the most legitimate interests of [any] guest workers."[71] This does not eliminate the possibility that people can visit and even be guest workers, but under Wellman's account they must be given membership rights after living in a country for certain amount of time.

In short, Wellman responds to this objection by arguing that a commitment to universal equality actually demands that the differences between residency and membership be as minimal as possible, and when these differences are minimized so too are the differences between a state's control over its territory and its control over membership. If this is the case, then Wellman is not so much guilty of committing a logical fallacy (the fallacy of equivocation) as he is of trying to put forth a more just account of a legitimate state's unilateral right to control immigration. This account can be rejected, but in doing so the burden of proof falls on his detractors who must then explain why or how their separation of a state's control over its territory and its control over membership does not violate a commitment to universal equality.

Conclusion

While I am not totally convinced by some of Wellman's responses to these three objections, I am also not totally persuaded that these three objections do enough to seriously undermine Wellman's overall argument. I think that the real problem is that too much attention has been given to fairness (or unfairness) of admission and exclusion

policies and not enough attention has been given to immigration enforcement and expulsion strategies. My contention is that the real shortcomings of Wellman's account are exposed when we look at this neglected aspect of the immigration debate. In the next chapter I will therefore look at the implications that these strategies have for Wellman's notion of *freedom of association* and I will present what I call a minimalist defense of immigrant rights.

Notes

[1] Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude* (New York: Oxford University Press, 2011), 13.

[2] Ibid., 36-37.

[3] Ibid., 16.

[4] Christopher Heath Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 109-141, 114.

[5] Ibid., 110-111.

[6] See Chapter 4 pg 105-06.

[7] Wellman, "Immigration and Freedom of Association,"126

[8] Ibid., 120

[9] Ibid., 122

[10] Ibid., 123

[11] See Chapter 4 pg 100.

[12] Ibid., 127

[13] Ibid., 129.

[14] Ibid., 118.

[15] Ibid., 138.

[16] David Miller, "Immigration: The Case for Limits." *Contemporary Debates in Applied Ethics*, ed. Andrew I. Cohen, and Christopher Heath Wellman (Malden MA: Blackwell Publishing, 2005): 193-206, 204.

[17] Wellman, "Immigration and Freedom of Association," 138.

[18] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, (New York: Basic Books, 1983), 47.

[19] Wellman, "Immigration and Freedom of Association," 138.

[20] Michael Blake, "Immigration," *A Companion To Applied Ethics*, ed. R.G. Frey and Christopher Heath Wellman (Oxford: Blackwell Publishing, 2003): 224-37, 233.

[21] Walzer, *Spheres of Justice: A Defense of Pluralism and Equality*, 62

[22] Wellman, "Immigration and Freedom of Association," 141.

[23] Joseph H Carens, "Aliens and Citizens: The case for Open Borders," *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1997), 251-273, 253.

[24] Wellman, "Immigration and Freedom of Association," 130.

[25] Ibid.

[26] Ibid., 131.

[27] Ibid., 133.

[28] Ibid., 133.

[29] Ibid., 133-1334.

[30] Ibid., 134.

[31] Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration*, (Edinburgh, Great Britain: Edinburgh University Press, 2000) 46.

[32] See Chapter 3 pg xx.

[33] Wellman, "Immigration and Freedom of Association," 135.

[34] Ibid.

[35] Ibid., 136.

[36] Ibid., 141.

[37] Sarah Fine, "Freedom of Association Is Not the Answer," *Ethics* 120 (2010): 338-356, 348.

[38] Shelley Wilcox, "Immigrant Admissions and Global Relations of Harm," *Journal of Social Philosophy* 38. (2007): 274-91, 275.

[39] Ibid.

[40] Ibid., 274.

[41] Ibid., 277.

[42] Wellman and Cole, *Debating the Ethics of Immigration*, 66.

[43] Ibid., 123.

[44] Ibid., 131.

[45] Ibid., 123.

[46] Rawls writes that a doctrine is comprehensive "when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to informs our conduct, and the limit to our life as a whole." See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 13. Comprehensive doctrines are not necessarily bad in Rawls's account, but they are not for him political doctrines. As he goes on to say: "we always assume that citizens have two views, a comprehensive and a political view; and that their overall view can be divided into two parts, suitably related. We hope that by doing this we can in working political practice ground the constitutional essentials and basic institutions of justice solely in those political values…" Ibid., 140.

[47] Fine, "Freedom of Association Is Not the Answer," 350.

[48] Shelley Wilcox, "Culture, National Identity, and Admission to Citizenship," *Social Theory and Practice*, 30.4 (2004): 559-83, 559.

[49] Ibid., 559.

[50] Ibid., 569.

[51] Ibid., 571.

[52] Ibid., 573.

[53] "French Senate votes to ban Islamic full veil in public," *BBC News*, September 14 2010, accessed January 20, 2012, http://www.bbc.co.uk/news/world-europe-11305033

[54] Wellman and Cole, *Debating the Ethics of Immigration*, 38.

[55] Ibid., 38.

[56] Ibid., 39.

[57] Ibid., 39.

[58] Ibid., 40-41.

[59] Fine, "Freedom of Association Is Not the Answer," 354.

[60] Ibid.

[61] Ibid., 340.

[62] Ibid., 355.

[63] Ryan Pevnick, *Immigration and the Constraints of Justice: Between Open Borders and Absolute Sovereignty* (Cambridge: Cambridge University Press, 2011), 33.

[64] Ibid., 33-36.

[65] Ibid., 19.

[66] Ibid., Pg 38

[67] Wellman and Cole, *Debating the Ethics of Immigration*, 100.

[68] Ibid., 102n10.

[69] Ibid., 137.

[70] Ibid., 136.

[71] Ibid., 136-37.

CHAPTER VII

STRATEGIES OF DEATH AND DISCRIMINATION

Introduction

In Chapter VI, I outlined Christopher Heath Wellman's argument in support of a legitimate state's right to unilaterally control immigration. I also outlined three general critiques that have been raised against his account and pointed to ways that he has or could respond to those critiques. My critique of Wellman, however, is different from these other critiques in two significant ways. First, unlike the other critiques, my critique can actually concede to Wellman (although it does not necessarily need to agree with) all of his original premises. Second, my critique of Wellman is actually part of a larger attempt to include a concern for immigration enforcement and expulsion strategies within the philosophical debate over immigration. My view is that philosophers who work on the issue of immigration have underappreciated the moral and political implications of these strategies and yet these strategies are at the heart of much of the current debate over immigration.[1]

In this chapter I argue that even if Wellman's conclusion is correct, that a state's right to self-determination can be made compatible with human rights, the presumptive right that this conclusion generates is, at best, limited to admission and exclusion policies (i.e. to questions regarding the criteria for who can be let in and who can be kept out). This same presumptive right does not hold, however, for immigration enforcement and expulsion strategies (i.e. to questions regarding how these policies may be enforced or what sort of deportation procedures a state may be justified in using). Under Wellman's account, a legitimate state is not prevented, in both the moral and political sense, from

deploying immigration enforcement and expulsion strategies that violate a commitment to universal equality. This raises a problem for Wellman's overall account, which, as we saw in the previous chapter, purports to reconcile the *liberty dilemma* by providing an account of state self-determination that is consistent with individual freedom and universal equality.

This argument against Wellman's defense of a legitimate state's freedom of association is composed of two separate, complementary arguments. In the first section of this chapter, I argue that a state's immigration enforcement strategies, if left unchecked by a concern for the rights of non-members, can violate the moral equality of all persons (which includes citizens and non-citizens). In the second section, I argue that a state's expulsion strategies, if left unchecked by protections for non-members, can violate the political equality of all citizens. Together, these two arguments lead to the following conclusion: if a legitimate state wishes to control immigration, it is the state who bears the burden of proof to show that not only its immigration policies, but also its enforcement and expulsion strategies, do not violate prior commitments to individual freedom and universal equality. In other words, even under Wellman's own account, a truly legitimate state does not have as strong a freedom of association in matters concerning enforcement and expulsion as it might with matters of admission and exclusion.

This conclusion challenges Wellman's claim that, from a liberal point of view, a legitimate state has the presumptive right to control immigration. In fact, my conclusion shows that, at least with respect to immigration enforcement and expulsion strategies, it is non-members who hold presumptive rights that may check a legitimate state's right to

control immigration. I call this position a minimalist defense of immigrant rights. I call it minimalist because it does not aim to provide an exhaustive account of immigrant rights, but it does present an argument for there being a baseline set of protections which no one, not even undocumented immigrants, should fall below with respect to a legitimate state's authority to control immigration. By the end of this chapter, my hope is that all philosophers working on the issue of immigration come to adopt some version of this position.

Section 1: Egalitarian Limits on Enforcement Strategies

Beginning in 1994, the US has deployed a military-style border enforcement strategy along various key immigrant-crossing points; for example: Operation Safeguard in central Arizona; Operation Hold-the-Line in El Paso, Texas; Operation Rio Grand in south Texas; and Operation Gatekeeper in San Diego, California[2]. The US Border Patrol has dubbed this strategy "prevention through deterrence."[3] According to some of the key findings in 2009 ACLU report, this strategy:

> concentrated border agents and resources along populated areas, intentionally forcing undocumented immigrants to extreme environments and natural barriers that the government anticipated would increase the likelihood of injury and death. The stated goal was to deter migrants from crossing. But this strategy did not work. Migrants have died crossing the border every day, year after year. Estimates of the death toll range from 3,861 to 5,607 in the last fifteen years.[4]

My point in referring to *prevention through deterrence* is not to show that it is impossible to enforce immigration admission and exclusion policies without incurring a high number of civilian deaths along the border, but simply to show that an increase in civilian deaths has occurred as a result of one particular form of immigration enforcement strategy. The mere existence of this strategy suggests that philosophers inquiring into the ethical and political implications of immigration have more to consider then simply analyzing the policies of admission and exclusion, they must also concern themselves with *how* these policies come to be enforced. This concern raises the following question: *What, if any, are the limits to the strategies that a state may deploy to enforce its immigration policies, regardless of whether the admission or exclusion policies are themselves just?* In other words, what limits are there on the coercive powers of a legitimate state in repelling unarmed civilians who attempt to unlawfully enter the state?

One philosopher who has attempted to address the issue of enforcement is Arash Abizadeh. In "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," Abizadeh puts forth a critique of a state's unilateral right to enforce its own border. Abizadeh claims that:

> Anyone who accepts a genuinely democratic theory of political legitimation domestically is thereby committed to rejecting the unilateral domestic right to control and close the state's boundaries, whether boundaries in the civic sense (which regulate membership) or in the territorial sense (which regulate movement).[5]

Abizadeh concedes to the communitarian/nationalist position that democracy requires bounded political communities. That said, he responds that:

> The mere existence of a border delineating distinct political jurisdictions does not necessarily entail anything about its regime of border control, which comprises the reigning *entry policy* (how open, porous, or closed the border is) and *who controls* the entry policy.[6]

Abizadeh is here arguing that even if the existence of borders can be justified, that in itself does not justify the right of one political community to unilaterally control the border it shares with another political community. Unilateral control of the border would require a further argument. Abizadeh's point here is simple yet brilliant: the principle of self-determination does not necessarily entail the right to unilaterally control one's own border.[7] This, Abizadeh argues, is because "…according to democratic theory, *the democratic justification for a regime of border control is ultimately owed to both members and non-members*."[8] And again:

> To be democratically legitimate, any regime of border control must either be jointly controlled by citizens and foreigners, or, if it is to be under unilateral citizen control, its control must be delegated, through cosmopolitan democratic institutions giving articulation to a "global demos," to differentiated polities on the basis of arguments addressed to all.[9]

Failure to do this, according to Abizadeh, would compromise the autonomy of non-members (i.e. it would violate the self-determination of others).

David Miller responds directly to Abizadeh's argument by claiming that immigration controls are not coercive (i.e. they do not violate the self-determination of others) and therefore do not need democratic justification. This is because, while they do

in fact deter an individual from performing certain actions, they do not necessarily circumscribe the range of all adequate alternatives.[10] According to Miller, it is the later part—the circumscription of adequate alternatives—that makes coercion a violation of self-determination and is thereby in need of democratic justification. Miller continues: "By conflating being subject to coercion, in the proper sense, with hypothetical coercion, Abizadeh severs the link he is trying to forge between coercion and autonomy."[11] Abizadeh, in reply, addresses this criticism by claiming that in drawing such a distinction, Miller would allow for a vast array of laws to be exempt from democratic justification, thereby undermining self-determination on a grander scale.[12]

While this is a fascinating debate in its own right, my argument here veers in a slightly different direction. My claim is that even if Miller is correct with respect to the issue of coercion and self-determination, which I am not sure that he is, the larger insight of Abizadeh's argument still remains untouched. The issue of democratic justification is not limited to concerns over self-determination, but, as we saw with the civic-republican tradition, also includes a concern for universal equality. My argument, which is really just an expansion of Abizadeh's original argument, is that: *unilateral border enforcement, border enforcement that is unchecked by concerns for non-members, violates the moral equality of all persons*. This expanded version of Abizadeh's argument, I believe, offers a powerful objection to immigration enforcement strategies such as the aforementioned *prevention through deterrence* strategy. It also offers a powerful objection to Wellman's argument, as I do not believe that his appeal to *freedom of association* cannot consistently reject strategies such as *prevention through deterrence*.

My position is that there are certain limits to the amount of coercion that a state may deploy in preventing unlawful entry and these limits are grounded in a respect for the rights of non-members. My argument in defense of this claim is composed of three premises. (1) A state is not justified in using deadly force in its attempts to deter minor (e.g. misdemeanor) offences. (2) Subjecting persons to harsher penalties or enforcement simply because they arbitrarily belong to a subordinate group, is a violation of the moral equality of all persons. (3) Unlawful entry into a foreign state by civilians is equivalent to a minor offence. From these three premises I conclude that strategies that deploy deadly force to deter unlawful entry by civilians, justified only on the grounds that these civilians are non-members, is a violation of the moral equality of all persons.

Briefly, my support for these premises is as follows. Premise (1) relies on a distinction between minor and serious legal offences. How detailed this distinction must be is not here important. The point is simply that we could understand there to be such a distinction. Typically, the term "misdemeanor" is reserved for minor offenses where the penalty for a conviction is not necessarily trivial, but is also not too onerous. The term "felony " is usually reserved for crimes of a more serious nature, resulting from actions such as homicide, battery, robbery, burglary, larceny, and rape. The penalty for felonies is usually very severe and has been known to include the death penalty. Now whether the death penalty is just or unjust is beyond the scope of this project, and point here is only that there is a recognized and substantial difference between *misdemeanors* and *felonies,* and that if deadly force by a legitimate state is ever warranted, it should be reserved only for those most serious of offenses (i.e. *felonies*). It stands to reason, therefore, that while the deterrence of *felonies* might warrant the use of deadly force, it would be absurd to say

that the deterrence of *misdemeanors* requires or even justifies a legitimate state's use of deadly force.

With regard to premise (2), a commitment to the moral equality of all persons demands that everyone (citizens or non-citizen) receive reasonably equal treatment both under the law and that its application (i.e. the punishments doled out and its enforcement). This means that individuals are not singled out for belonging to certain communities or groups—especially a traditionally subordinate group—and that the use of state force is meted out equally and in accordance with the nature of the crime. For example, the use of deadly force by state officials might be justified when the lives of innocent people could be in danger, but the use of deadly force would be unjustified when threats are minimal (i.e., shooting a shoplifter I the back as they flee). Also, if we find that the use of deadly force is unconscionable when used against one set of persons (e.g. rich white males who have stolen money through a ponzi scheme) then it should be held to be unconscionable with respect to a different set of persons committing similar crimes (e.g. poor non-white women who steal food from a supermarket). The argument here is not to justify violence against rich white males or condone the theft of property, but to appeal to our intuitions that subjecting some set of persons to harsher penalties or enforcement of the law than would normally be the case for similar offences, justified only on the fact that those violating the law belong to a subordinate group, is a clear violation of the moral equality of all persons.

Premise (3) holds that unlawful entry into a foreign state by civilians is equivalent to a *misdemeanor* offence. In support of this claim I offer two pieces of evidence. First, unlawful entry into a foreign state more closely resembles trespassing onto private

property or a violation of traffic laws than it does homicide, battery, robbery, burglary, larceny, and rape. In other words, our intuitions would lead us to believe that a legitimate state's response to unlawful entry should more closely resemble a response to trespassing than a response to murder. Second, in the US—the same country whose current enforcement strategies I have held up as an unconscionable example—unlawful entry is considered a misdemeanor offence.[13] In short, if the same country whose enforcement strategy was referred to by one of the most renowned immigration scholars in the world, Wayne Cornelius, as "more than 10 times deadlier to migrants from Mexico during the past nine years (1994-2003) than the Berlin Wall was to Germans throughout its 28-year existence"[14] acknowledges that unlawful entry is only a *misdemeanor* offence, then it seems rather difficult to make the case that it should be treated as a serious felony.

My conclusion from these three premises is that resorting to the use of deadly force to deter unlawful entry by civilians, justified only on grounds that these civilians are non-members, is a clear violation of the moral equality of all persons. This conclusion shows legitimate states, who by definition and in order to be entitled to self-determination are supposed to respect the moral equality of all persons, must concede that the range of strategies that they may deploy in enforcing its admission and exclusion policies are checked by a respect for the moral equality of non-members. If this is the case, then this suggests that legitimate states, contra Wellman, do not have the presumptive right to control immigration with the use of deadly force or with strategies that predictably and regularly cause death—even if they do have the presumptive right to unilaterally determine their admission and exclusion policies. In fact, a legitimate state has a presumptive duty to not violate the moral equality of non-members, even when

respecting the moral standing of non-members compromises the state's ability to control immigration.

Section 2: Egalitarian Limits on Expulsion Strategies

In the US, it has been estimated that as high as 50% of the current undocumented immigrant population originally entered the country through *legal* means. [15] That is, nearly half of all undocumented immigrants currently living in the US did not enter the state unlawfully, but only went out-of-status (i.e. became undocumented) after overstaying or not renewing their visas.[16] Even if the true figure turns out to be much less than 50%, the point here remains the same: regardless of border enforcement strategies, there are, and will continue to be, some resident immigrants who are out-of-status, but who originally entered the country through legal means. These cases suggest to philosophers who inquire into the moral and political implications of immigration that they have more to consider than policies of admission and exclusion, or border enforcement strategies. Because of the apparent perennial existence of undocumented immigrants, philosophers must also consider: *what limits, if any, a state has in deploying strategies for locating, identifying, treating, and deporting undocumented immigrants*?

While philosophers have said little about this aspect of the immigration issue, the fact that harsher border enforcement strategies have not (and might never be able to) put an end to the presence of undocumented immigrants has not been lost on anti-immigrant groups. Within the US, anti-immigrant groups have not only favored increased border enforcement, but they have also begun supporting a new strategy that the Center for Immigration Studies, an organization dedicated to reducing unauthorized immigration to

the US, has dubbed "attrition through enforcement."[17] This strategy seeks to reduce the number of undocumented immigrants living in the US by employing harsh domestic policies that attempt to make life so hard for immigrants that they begin to "self-deport."[18] In recent years, this strategy, not admission and exclusion policies, has been the most hotly contested aspect of the immigration debate. In the US, for example, this strategy is at the heart of the controversy surrounding the state of Arizona's notorious immigration bill, SB 1070, which was largely found to be unconstitutional by the US Supreme Court.[19] If upheld, this bill would have increased the penalties for being an undocumented immigrant, and would require police officers to check the status of anyone they suspect might be undocumented.[20]

Wellman, I believe, might well deplore the use of such expulsion strategies.[21] Nonetheless, in arguing that legitimate states have the presumptive right to control immigration, it seems difficult to see on what grounds Wellman's account would prevent a legitimate state from deploying expulsion strategies which, even if not as harsh as *attrition through enforcement*, might still be morally and politically unjust. Recall that for Wellman, as with most defenders of a state's right to control immigration, there is an important and meaningful distinction between members and non-members. This was expressed in Wellman's own view about the difference between *relational egalitarianism* and *luck egalitarianism*. This distinction holds that while you cannot violate the human rights of any person, not all persons are necessarily afforded the same political rights (i.e. the same privileges and protections from the state). Expulsion strategies treat non-members politically unequally with respect to members. That said, expulsion strategies

are justified under Wellman's account, so long as they treat non-members morally equal and are not applied to members (i.e. do not treat citizens politically unequal).

Some expulsion strategies might clearly violate the moral equality of all persons and so cannot be morally justified. That said the case could be made that some expulsion strategies, including those like *attrition through enforcement*, might be made consistent with a commitment to the moral equality of all persons. In these cases, preferential treatment of members over non-members would not be morally unjust. This would be similar to the previous example of a Torontonian who does not have the right to vote in US elections, but nonetheless this does not mean that his or her moral equality has been violated.[22] Even if expulsion strategies could be made consistent with a commitment to the moral equality of all persons (as is the preferential treatment of US citizens over the Torontonian with respect to voting in US elections), there still the question of whether these strategies are consistent with a commitment to the political equality of all citizens.

When all citizens are potential subjects of expulsion strategies, the commitment to the political equality of all citizens remains unaffected. The problem arises when domestically internal communities that contain a disproportionate amount of undocumented immigrant population also begin to bear a disproportionate brunt of expulsion strategies. This is a problem because domestically internal communities are not exclusively composed of undocumented immigrants, but also contain a large number of full citizens (i.e. members). In these cases, certain citizens (those who are affiliated with these domestically internal communities) come to bear a disproportionate brunt of expulsion strategies as compared to those citizens who are not affiliated with these domestically internal communities. In this case, the deployment of expulsion strategies

violates the political equality of all citizens because the outcome of these strategies is the creation of second-class citizenship.

In the US, for example, roughly 80 percent of undocumented immigrants are of Latin American descent.[23] This means that under certain expulsion strategies citizens who are or appear to be of Latin American descent will disproportionately bear the brunt of the surveying, identifying, interrogating, and apprehending that goes along with these strategies—even though the vast majority of those who compose the Latino/a community within the US are themselves citizens. In bearing such a disproportionate amount of this burden, the citizens affiliated with the Latino/a community will, for all intents and purposes, be reduced to a second-class status (i.e. treated as not fully "American"). This reduction in citizenship status is a clear violation of the political equality of all citizens.

For a more concrete example, note the following results from a Pew Hispanic Center survey:

> Just over half of all Hispanic adults in the U.S. worry that they, a family member or a close friend could be deported…Nearly two-thirds say the failure of Congress to enact an immigration reform bill has made life more difficult for all Latinos. Smaller numbers (ranging from about one-in-eight to one-in-four) say the heightened attention to immigration issues has had a specific negative effect on them personally. These effects include more difficulty finding work or housing; less likelihood of using government services or traveling abroad; and more likelihood of being asked to produce documents to prove their immigration status.[24]

In this case, due to the deployment of a state's expulsion strategy, citizens of Latin American decent do not enjoy the same status as other citizens. Again, this is a clear violation of the political equality of all citizens.

In order for a state to avoid perpetuating this type of political inequality while at the same time being allowed to deploy some type of expulsion strategy, a state must choose from one of the following two options. First, a state may design expulsion strategies in such a way that all citizens come to bear the brunt of them equally. Second, a state may put in place certain protections, such that these protections will shield all citizens equally from the pernicious effects of expulsion strategies. In the rest of this section I will explore both these options, and argue that the second option is preferable for a legitimate state (i.e. a state that respects human rights). The difficulty with this option, at least for thinkers like Wellman, is that it has the unintended consequence of providing non-members, including undocumented immigrants, with some protections that would take precedence over a state's right to control immigration.

On the first option, expulsion strategies could be designed in such a way that all citizens come to bear the brunt of them equally. Any citizen would be as likely as any other to be stopped and interrogated about his or her legal status. This option seems the fairest, but also in many ways the least appealing—at least from a liberal point of view. If all citizens were subject to expulsion strategies, the state would be permitted to unilaterally deploy any expulsion strategy it sees fit, so long as the burdens are shared equally and fairly distributed. The idea here is similar to the screening process currently being used (or at least how it should work in theory) in US airports: everyone's carry-on bag gets screened, everyone is subjected to some sort of detection device, and everyone is

as likely as anyone else to be subjected to further inspection and random searches. In these cases no one is singled out because anyone can be singled out and therefore no one person or group is reduced to second-class status by the screening process.

While some approve of the airport-screening type procedure at points of entry, this procedure might be difficult to accept internally. Putting aside for the moment the issue of what this procedure would actually look like, it is difficult to see how such an intrusive procedure by the state against its own citizens would avoid horns from either the *security* or *liberty dilemmas*. First, this type of procedure would be a clear infringement on individual freedom and would therefore put us in the civic-republican horn of the *liberty dilemma*: individual freedom would come to be sacrificed for the sake of self-determination and universal equality.

Second, even if people are happy to give up their individual freedom for the sake of self-determination and universal equality, this option only returns us to the *state of exception* horn of the *security dilemma*. In effect, designing expulsion strategies such that all citizens come to bear the brunt of them equally does not protect against some citizens from falling into second-class status; it actually reduces *all* citizens to second-class status. This option therefore seems to fail on two very important fronts; it infringes on some important liberties, while also expanding the status of second-class citizenship.. While this might be a satisfactory outcome for non-liberal or illiberal states, Wellman's legitimate state is supposed to be a liberal state. Therefore, consistency demands that Wellman avoid this option..

This leaves us with only the second option. Under this option, legitimate states would need to put in place certain protections that would shield all citizens equally from

the pernicious effects of expulsion strategies. To do this, certain basic principles that everyone would ideally consent to must first be found. These basic principles could be derived from something like a Rawlsian original position, by people asking themselves what protections would we want, knowing that we ourselves could become unduly subject to the most pernicious effects of expulsion strategies.

One principle that could be derived from such a thought experiment is that constitutional protections, such as due process, equal protection, and a right to an attorney, should be extended to everyone in all cases—including cases of deportation (which is currently not the case in the US[25]). Another principle could be that all persons present in a state should be assumed to be lawfully present until their presence is proved to be unauthorized. This principle is based on the same idea that people should be considered innocent until proven guilty; this is the famous Blackstone formulation that it is better for many guilty people to go free than for one innocent person to be found guilty. This is an important point to keep in mind because US expulsion strategies have recently led to the wrongful deportation of some its own citizens and people who were otherwise eligible to remain in the country. In one case, the citizen wrongly deported was a developmentally disabled man, whose return trip home was traumatic and very easily could have ended in tragedy.[26] In another case it did end in tragedy and the person wrongly deported died in a fire inside the Honduran jail where Honduras' immigration agency was holding him.[27]

These two principles are not the only ones that might be derived, but they are sufficient to show that a collateral, and maybe unintended, effect of protecting citizens from expulsion strategies is that non-members, including undocumented immigrants,

come to be entitled to some basic rights in cases involving deportation. Take for example the following case. Assume that it is determined, based on the second principle, that no expulsion strategy may allow police offers to inquire into a person's immigration status. The reasoning for this prohibition could be either the potential for police abuse (e.g. Latino/a and Asian citizens might get unfairly profiled) or because it might make certain people less likely to come forward to report crimes or to serve as witnesses (e.g. the safety of citizens is dependent on the lawful cooperation of all persons present, regardless of their immigration status). In either case, police inquiring into a person's immigration status would place an undue burden on citizens. As far as domestic law enforcement goes, all persons present should be assumed to be lawfully present.

In cases like these we find that the protections against the more pernicious aspects of expulsion strategies do not just cover citizens, but extend to everyone present, including undocumented immigrants. All persons, including undocumented immigrants, have a right to come into contact with police, without the fear of being deported. These protections are unquestionably checks on a legitimate state's "freedom of association" because it limits a state's freedom to carry out its desired disassociation from non-members. This limit on *freedom of association* at least weakens, if not completely undermines, the claim that a legitimate state has a unilateral right to control immigration.

As we saw above, Wellman has already accepted an argument whose structure is similar to the one I am putting forth. Recall Blake's earlier argument against discriminatory immigration exclusion policies, where he stated that: "In all cases in which there are national or ethnic minorities…to restrict immigration for national or ethnic reasons is to make some citizens politically inferior to others."[28] The difference

here is that Wellman's argument overlooks the expulsion aspect of immigration and so fails to explain how *freedom of association* and the political equality of all citizens can be reconciled with respect to expulsion strategies. For example, in the case of exclusion policies, the rejection of discriminatory policies did not entitle non-members to any protections. In rejecting discriminatory immigration policies, a legitimate state did not then have to admit any non-members it did not want. Legitimate states were in this case simply prevented from excluding non-members on discriminatory grounds. In the case of discriminatory expulsion strategies, avoiding the discriminatory aspect of these strategies does entail non-members to certain protections. There are certain things a legitimate state cannot do to non-members, even if this would compromise the state's ability to control immigration.

Section 3: A Minimalist Defense of Immigrant Rights

When taken together, these last two sections leave Wellman, and all other philosophers who work on the issue of immigration, with the following choice: either abandon the claim to liberalism (i.e. a commitment to human rights) or concede that, at least with respect to enforcement and expulsion strategies, the presumptive right is actually on the side of the immigrant and not the state. I, favor the second option, as a *minimalist defense of immigrant rights*. It is a defense of immigrant rights because it gives the presumptive right to immigrants as opposed to the state with regard to immigration control, but it is minimal because it does not exhaust the full potential for immigrant rights. With respect to immigration, political philosophers and policy makers should

adopt this view because it is the only way to consistently avoid either the *security* or *liberty dilemma*.

The key claim of the minimalist defense of immigrant rights is that we should give up the idea that a legitimate state has the unilateral right to control immigration. That said, there are two key objections to this position. Some might object that it concedes too much to immigrants and therefore does not fully account for a political community's security or autonomy. I call this objection the "conservative" objection. Others would object that this position does not go far enough in its defense of immigrant rights—a minimalist defense could easily be adopted while leaving the exploitation and oppression of undocumented immigrants relatively unabated. I call this objection the "radical" objection.

My response to the first objection—the "conservative" objection—really began back in Chapter II, where I showed how overemphasizing the security concern only places us in a *security dilemma*. As I argued at the end of that chapter, only a constitutional democracy, a form of sovereignty that gives priority to liberty, can prevent us from falling into a *security dilemma*. Constitutional democracies, however, do not enjoy the type of political authority that Westphalian nation-states do. One of the important differences between these two types of sovereignty is that constitutional democracies do not place people completely outside the protection of the law. Constitutional democracies are designed to avoid *states of exception* through the Philadelphia model of individual rights and checks and balances. In this sense, all persons within the jurisdiction of the state, whether they are authorized to be there or not,

are entitled to certain inalienable rights and cannot be subjected to the whims of the sovereign.

As I pointed out in Chapter III, however, liberty itself is a complicated issue. Liberty is not just a people's right to self-determination, but also includes commitments to individual freedom and universal equality. Constitutional democracy is an attempt to bring these different notions of liberty together and so one cannot be attained exclusively at the expense of the other. A political community can be as self-determined as it likes, but it only has the right to do so if it in turn respects some basic rights owed to all persons, including undocumented immigrants.

In short, the problem with the "conservative" objection is that it undermines itself. It asks us to sacrifice some of our liberal commitments for the sake of security and/or self-determination, but security and/or self-determination are undermined when a commitment to individual freedom and universal equality are sacrificed. Again the only way to consistently avoid either the *liberty dilemma* or *security dilemma* is through a constitutional democracy. If constitutional democracies are to be consistent, they must respect the human rights of all persons, including undocumented immigrants. This is part of the price of taking the liberty concern seriously.

However, assuming that a constitutional democracy is possible, there is the other objection to the minimalist position. This objection is that a minimalist defense of immigrant rights does not go far enough. In fact, a minimalist defense just gives the illusion that immigrants are protected, and therefore would actually do more to harm than benefit immigrants and the communities to which they belong. My response is to

reiterate that my argument seeks to create a new starting point for the immigration debate within philosophy, it is not meant to be a final resolution.

This is not to say, however, that this position is not itself a compelling challenge to those who support a state's unilateral right to control immigration. The minimalist position is similar to that presented by Joseph Carens's in "The Rights of Irregular Migrants." In that article Carens argues that even under the "conventional view" of immigration (i.e. the view that the "state has a moral right to control entry and to apprehend and deport irregular migrants."[29]) all persons, including undocumented immigrants, are still entitled to certain moral and legal rights. Specifically Carens argues that children's rights (e.g. the right for a child to receive education), work-related rights (e.g. a worker's right to his/her earnings, safe working conditions, and social programs they pay into) and social and administrative rights (e.g. driver's licenses) should be granted to all persons, regardless of legal status. A protection of these very minimal rights stops a lot of the harm that *attrition through enforcement* style laws are perpetuating, and it provides a foundation for progressive immigrant rights because it shows that no state ought to have a unilateral right to do whatever it wants to non-citizens.

Carens is skeptical about a state having the kind of moral right that is presupposed by the "conventional view," but by conceding this view up front and showing that regardless of this, undocumented immigrants are nonetheless entitled to certain rights, Carens makes it much more difficult to argue that states, especially legitimate states, have a presumptive right which can trump immigrant rights. In this sense, Carens's position is consistent with the minimalist defense of immigrant rights. The goal is not to put a cap

on immigrant rights or to provide an exhaustive list, but to work to create a solid foundation for immigrant rights to which most, if not all, reasonable people can assent to. My hope is that this foundation will eventually serve as a base for a larger structure of immigrant rights. Yet, at a time when even this baseline protection does not exist for most undocumented immigrants, maybe the most radical thing a philosopher can do is to work towards establishing it.

Conclusion

The arguments I have presented in sections 1 and 2 have focused on Christopher Heath Wellman's *freedom of association* argument because, unlike other arguments in favor of a state's unilateral right to control immigration, Wellman takes liberal concerns very seriously and presents us with one of the strongest attempts at reconciling the *liberty dilemma* as it relates to the issue of immigration. My claim is that Wellman's position is undermined when immigration enforcement and expulsion strategies are taken into account. When philosophers consider immigration enforcement and expulsion strategies they find that they must either sacrifice some of their liberal commitments, in particular their commitment to universal equality, or give up the idea that a legitimate state has the unilateral right to control immigration.

My position, which I call a minimalist defense of immigrant rights, is that we should not sacrifice any of our liberal commitments, especially our commitment to universal equality. I recognize that my minimalist position might not give everyone everything they want—conservatives will object that a political community's security and self-determination is compromised, while radicals will say that it does not extend far

enough—but my position will at least give everyone what we need—a way to consistently avoid the *security* and *liberty dilemmas*. While I feel that my position holds the most promise, there is still the question of what this would mean for future immigration reform. In an attempt to present more concrete implications of my position, I will outline in the conclusion of this dissertation a minimalist framework for future immigration reform.

Notes

[1] Here I have in mind the immigration issues that in the year 2012 loom large in the United States: Arizona's passing of Senate Bill 1070 (i.e. the "show me your papers bill"), President Obama's deportation of over one million undocumented immigrants, and the continued push to further militarize the US-Mexico border.

[2] Wayne A. Cornelius, "Controling 'Unwanted' Immigration: Lessons From the United States, 1993-2004," *Journal of Ethnic and Migration Studies* 31.4 (2005): 783-84.

[3] "Immigration Enforcement Within the United States," Congressional Research Service, *The Library of Congress*, April 6, 2006, accessed September 12, 2011, http://www.fas.org/sgp/crs/misc/RL33351.pdf.

[4] Maria Jimenez, "Humanitarian Crisis: Migrant Deaths at the U.S.-Mexico Border" *ACLU*, October 1, 2009, 7-8, accessed September 15, 2011, http://www.aclu.org/files/pdfs/immigrants/humanitariancrisisreport.pdf.

[5] Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36.1 (2008): 38.

[6] Ibid., 43.

[7] Ibid., 44.

[8] Ibid.

[9] Ibid., 54.

[10] David Miller, "Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh," *Political Theory* 38.1 (2010).

[11] Ibid., 116.

[12] Arash Abizadeh, "Democratic Legitimacy and State Coercion: A Reply to David Miller," *Political Theory* 38.1 (2010).

[13] See "Immigration Enforcement Within the United States."

[14] Cornelius, "Controlling 'Unwanted' Immigration," 783-84.

[15] See Ted Robbins, "Nearly Half of Illegal Immigrants Overstay Visas," *NPR*, June 14, 2006, accessed September 15, 2011, http://www.npr.org/templates/story/story.php?storyId=5485917.

[16] My mother, for example, was an undocumented immigrant for nearly 10 years and never once did she cross a state border unlawfully.

[17] Jessica Vaughan, "Attrition Through Enforcement: A Cost-Effective Strategy to Shrink the Illegal Population," *Center for Immigration Studies*, April 2006, accessed September 15, 2011, http://www.cis.org/Enforcement-IllegalPopulation.

[18] Ibid.

[19] *Arizona v. United States*, 567 U.S.___ (2012).

[20] Ibid.

[21] I base this on a brief conversation I had with Wellman in San Diego, California on April 22, 2011 a Pacific Division meeting of the American Philosophical Association.

[22] See Chapter 4 pg 105.

[23] Michael Hoefer, Nancy Rytina and Bryan C. Baker, "Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010." Office of Homeland Security, February 2010, 4, accessed September 15, 2011, http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2010.pdf.

[24] "2007 National Survey of Latinos: As Illegal Immigration Issue Heats Up, Hispanics Feel a Chill," Pew Hispanic Center, December 19, 2007, accessed September 15, 2011, http://pewhispanic.org/reports/report.php?ReportID=84.

[25] Kevin R. Johnson, *The "Huddled Masses" Myth: Immigration and Civil Rights*, (Philadelphia: Temple University Press, 2004).

[26] Kemp Powers, "Group says U.S. citizen wrongly deported to Mexico" *Reuters* June 11, 2007, accessed May 10, 2012, http://www.reuters.com/article/2007/06/11/us-usa-immigration-deportation-idUSN1118919320070611.

[27] Ruxandra Guidi, "Honduran LA resident accidentally deported, then dies in prison fire" *Southern California Public Radio* March 2, 2012, accessed May 10, 2012, http://www.scpr.org/news/2012/03/02/31481/honduran-resident-los-angeles-wrongfully-deported.

[28] Michael Blake, "Immigration," *A Companion To Applied Ethics*, ed. R.G. Frey and Christopher Heath Wellman (Oxford: Blackwell Publishing, 2003): 224-37, 233.

[29] Joseph Carens, "The Rights of Irregular Migrants," *Ethics & International Affairs* 22.2 (2008): 165.

CHAPTER VIII

CONCLUSION: A MINIMALIST FRAMEWORK

Introduction

In this dissertation I have developed a minimalist defense of immigrant rights. This defense began by first explaining the *security* and *liberty dilemmas*. In Chapter II, I argued that current immigration policy in the US is mired in a *security dilemma*. I then presented the possibility that prioritizing the liberty concern over the security concern could provide us with an escape from this dilemma. Specifically, I argued that we should favor a Philadelphia model of sovereignty (i.e. a constitutional democracy) over a Westphalian model because this would ameliorate most, if not all, the pernicious aspects of the *security dilemma*—the checks and balances of separated powers and the limitation of sovereignty by individual rights allows for a strong enough sovereign to avoid a Hobbesian *state of nature*, but enough checks on this sovereign to avoid an Agambinian *state of exception*.

This seemed to be a very promising approach, but as we saw in Chapter III, a constitutional democracy depends on the cohesion of two different notions of liberty (i.e. negative and positive notions of liberty) that do not necessarily cohere well together. This incoherence leads to a *liberty dilemma*. In Chapter IV, I argued that John Rawls's two principles of justice, based on a Kantian model, ultimately overcome this dilemma. The problem with Rawls's approach, however, was the initial assumption that the society he is dealing with is a bounded community—a community we enter by birth and exit only by death. This assumption cannot hold up when discussing the issue of immigration and so the *liberty dilemma* returned in a new form.

In Chapter V, I outlined the various philosophical positions that have been taken with regard to the issue of immigration. In doing so, I showed that in the immigration debate, the *liberty dilemma* reappears as the tension between democratic autonomy (i.e. a people's right to self-determination) and human rights (i.e. respect for individual freedom and universal equality). In Chapter VI, I presented Wellman's attempt to overcome this tension. Wellman presented a case where a legitimate state (i.e. a state that respects individual freedom and universal equality) can be entitled to "freedom of association" (i.e. self-determination). With regard to immigration this entailed that legitimate states have the unilateral right to control immigration.

I then went on to present three critiques of Wellman's account, but in Chapter VII, I pointed out that even if Wellman's account holds up against these critiques, it does not hold up with respect to enforcement and expulsion strategies. There are certain expulsion and border enforcement strategies that violate the moral equality of non-members, and so must be prohibited by legitimate states; and there are expulsion strategies that violate the political equality of all citizens and so protections must be in place in legitimate states such that they extend even to undocumented immigrants. These two arguments showed that, with respect to a state's unilateral right to control immigration, one must either abandon their commitment to human rights (i.e. individual freedom and universal equality) or concede that, at least with respect to enforcement and expulsion strategies, all persons, including undocumented immigrants, have some presumptive rights that can trump a legitimate state's right to control immigration.

The argument I have made throughout this dissertation leads us to conclude that the best alternative would be to adopt the later option that gives the presumptive right to

the immigrant and not the state in matters of enforcement and expulsion. This position I have called a minimalist defense of immigrant rights. I have not, however, said what a position like this would entail for public policy. In this concluding chapter, I would like to present an outline of what this entailment would be.

Section 1: A Minimalist Framework for Future Immigration Reform

This minimalist position assumes that the "immigration problem" is the problem of both considerable numbers of unauthorized entries into a political community and a significant number of unlawfully present residents already established within a political community. To deal with this problem I believe that a framework for immigration reform must address three areas of needed concern. The first general area of concern is what I call the "ghost of immigration past." By this I mean that a political community must acknowledge its actions and policies that have helped to create the unlawfully present segment of its population. Whether intentionally or not, many of the current "receiving" countries have had a hand in the economic and/or political troubles that plague many of the "sender" countries throughout the world. These political/economic troubles are commonly referred to as "push factors." If "receiving" countries are therefore serious about addressing the issue of undocumented immigration, they need to first investigate to what degree they are responsible for rectifying these conditions. In this respect the work of Miller, Pogge, Wellman and Wilcox are not so much in conflict, but can be seen as complementary—justice demands that something be done about "push" factors, especially when the "receiving" countries are responsible for these factors.

Aside from "push" factors, receiving countries also create "pull" factors. Here I have in mind the demand for cheap and easily exploitable labor. It is in this form that documented and undocumented immigrants alike have always been a welcomed addition to "receiving" countries, even when laws and official actions make it difficult for them to be present. Aviva Chomsky in her insightful book, *"They Take Our Jobs!" and 20 other myths about immigration*, draws a connection between the "push" and "pull" factors by arguing that mere disparities in resources between countries do not by themselves lead to immigration, but that trends in migrant flows are structured along colonial relationships; that is by economic ties created by both classical colonialism and neocolonialism. As Chomsky points out:

> Colonialism sets up a system in which colonized peoples work for those who colonized them. This system is not erased after direct colonialism ends. Rather, it evolves and develops. The colonizer continues to use former colonial subjects as cheap workers, and the unequal economic relationships is also reinforced in this way. Immigration is just one piece of this larger puzzle, interlocking with all the other pieces.[1]

To put this even more simply, the question of undocumented immigration is not one that can be adequately understood or addressed without taking into account the history and legacy of colonialism. Furthermore, this history and legacy expose the fact that the colonial structure—the relationship between colonized and colonizer—does not end when former colonies attain political independence. The relationship merely changes from a relationship of political domination into one of economic domination. The point here is that, while legitimate political communities do have a right to be self-determined,

this political self-determination is not legitimate if it comes at the expense of the rights of others. In cases that involve colonial relations, states might be required to perform acts of restitution before they can be legitimate; and so long as they are not legitimate they are not entitled to "freedom of association"—even under Wellman's account.

The second area of needed attention is what I'm calling the "ghost of immigration present." This area of attention would focus on the fate of undocumented immigrants currently living in inside of a foreign state. With respect to this area of needed attention, I argue that any serious solution would require both a method to normalize the status of most undocumented immigrants and a clearing of backlogs for family reunification, especially immediate family such as children and spouses.

A clear process to normalization is necessary because it is unfeasible, and maybe even immoral, to believe that millions of people can be simply rounded up and deported. This process does not need to be an unconditional "amnesty" for all undocumented immigrants; it can have various conditions attached to it (e.g. years of residence, good standing during those years, fines…etc), but a clear, reasonable process to normalize the status of undocumented immigrants will be essential. The same reasoning holds with regard to family reunification. To believe that people will not try to reunite with their immediate family at any cost is simply unrealistic. Furthermore, even if it were feasible, it would be easy to make a case that it is deeply immoral to keep these family members apart. This is not to say that there should not be some reasonable limit, but the current wait time in the US is completely unreasonable and practically begs for an "immigration problem" to develop. In the US, the current minimum wait time for sponsoring a spouse or a minor child is five years, and it is much longer if the child is an adult. For example,

if the adult child is from Mexico the average wait time to get into the US is seventeen years.[2] This situation needs to be addressed in a fair manner or the "immigration problem" will continue unabated because parents cannot be expected to wait five years to be reunited with their children.

Another element of the "ghosts of immigration present" that must be addressed is the reality of the needed labor that immigrants provide. Guest worker programs have historically been used to take advantage of immigrants, who, because of political and/or economic hardships, represent an incredibly vulnerable population. They have created a second-class workforce: a pool of workers who have little or no leverage in their work places. These groups of workers are, in practice if not by contract, denied certain basic rights under the threat of deportation. There is also no mechanism in place to motivate or compel employers to pay these workers any more than minimum wage for some of the hardest, dirtiest, and nastiest jobs.[3] In short, guest-worker programs, as they stand, are designed to take advantage of the world's most vulnerable people, without at the same time having to take responsibility for them.

The minimalist solution would be something like the following. First, there should be an increase in the allotment of work visas that accounts for the reality of the number of workers who will come from some countries and the types of work they will actually be asked to do. For example, if more immigrants are coming into the US to work from Mexico than Romania (regardless of whether its because of proximity, past relationships, or active recruitment by employers), then guest-worker visas should reflect that. If more immigrants are coming in to do "un-skilled" labor, then guest-worker visas should also reflect that as well. Second, changes to these visas should be such that it is

easier for immigrant workers to unionize and enjoy all the same rights that native workers enjoy. Here I have in mind not just working conditions, but also the right to leave an employer without the fear of immediate deportation. Lastly there should be some mechanisms in place so that employers pay non-citizen workers a fair rate for their work. In this way, employers are not allowed to take unfair advantage of a person's vulnerable status.

These changes would provide more immigrant workers with a normalized status, a livable wage, recognition of basic rights, and recourse for unjust practices. Depending on how long these immigrants stay, a path to citizenship will also be necessary as political participation and representation are vital for any democracy. First, it is absurd to deny members of a community in good standing the right to have a say in what their government should be like, which policies they favor, and which ones they oppose. Second, if long-term residents are not allowed to vote, it is unlikely that elected lawmakers will seriously take their concerns into account.

The third area of needed attention is what I'm calling the "ghost of immigration yet to come." If the goal is to put an end to undocumented immigration, then the root of displacement, and not just its symptoms, needs to be addressed or the "immigration problem" will continue unabated. To address this last area, I argue that there is going to have to be concerted effort by entities like the IMF and the World Bank to both forgive the debt of poor countries and end the structural adjustment programs (and other variants of these programs), which in many cases have been part of the original loan agreements and have resulted in the loss of social safety nets in "sending" countries. In place of these failed economic programs, sustainable economic plans need to be encouraged that will

help many of these countries build up their own economies. This move is in fact more consistent with the original mandate of the IMF and World Bank then the neo-liberal agenda it has followed in the last few decades.

The way to end economic displacement, which accurately describes the condition of most undocumented immigrants, is to create an environment in which people do not need to flee their homes in order to have a decent life. Ending displacement in "sending" countries by addressing the "push" factors, regardless of who is responsible for these factors, is the most effective and humane means of curbing future undocumented immigration.

Lastly, "receiving" countries need to develop realistic admission and exclusion policies. There are many admission and exclusion policies that might appear "fair" on the surface, but whose detachment from the realities of current and future immigration flows creates the conditions for unjust strategies of immigration enforcement and expulsion. For example the *1965 Immigration and Nationality Act* in the US was aimed at ameliorating the rest of the pernicious aspects of US immigration policy. The 1965 Act abolished the national origins quota system and replaced it instead with a preference for family reunification, immigrants with technical skills, and numerical restriction set at 170,000 per fiscal year.[4] The presumption, expressed here by President Lyndon B. Johnson, was that: "This bill that we will sign today is not a revolutionary bill. It does not affect the lives of millions…It will not reshape the structure of our daily lives or add importantly to either our wealth or our power"[5]

The effect, however, was very different. There was also a "sudden rise" in the number of undocumented immigrants from Mexico. The main reason for this "sudden

rise" was the numerical restrictions that the 1965 Act placed on all countries. The numerical restrictions were to apply equally to all countries, but this formal equality failed to acknowledge the different relationships that countries, both historically and geographically, have had with the US. For example, the migration from Mexico, U.S.'s southern neighbor, was not capped before 1965 and accounted for about 200,000 immigrants annually in the early 1960's, most of whom were migrants that would work for a season and then returned home. According to the 1965 Act, however, Mexican immigration was to be capped at 20,000 annually.[6] This cap did not magically reduce Mexican immigration into the US by 90%. Instead it only worked to increase the number of undocumented immigrants and in turn help establish and solidify the current status of the Latino/a community as the internal community of undocumented immigrants *par excellence*.

This example shows that if admission and exclusion policies do not reflect the realities of current and future immigration flows, they will contribute to the "immigration problem" rather than help resolve it; and this in turn will generate the need for unjust enforcement and expulsion strategies, rather than reduce the number of undocumented immigrants. My claim, therefore, is that unjust strategies of enforcement and expulsion would not be necessary if admission and exclusion policies took into account the realities of current and future immigration flows.

Conclusion

The framework I have presented here is a minimalist account because it does nothing more or less than respect the autonomy of all political communities, the freedom

of all individuals, and the moral and political equality of all persons. This framework also provides a better model for future immigration reform than enforcement and expulsion centered models (i.e. models that begin with a state's unilateral right to control immigration). My three-part comprehensive framework takes into account the entire issue of immigration: from policies of admission and exclusion to strategies of enforcement and expulsion. Furthermore, my account also addresses and seeks to remedy the root cause of the "immigration problem" and not just its symptoms. Lastly, while I focused primarily on contemporary US immigration, this three-part framework can be extended into other contexts. In conclusion, I feel I have provided not only a philosophical justification for a minimalist defense of immigrant rights, but have also shown that this position is a feasible position to hold with regard to public policy.

Notes

[1] Aviva Chomsky, *"They Take Our Jobs!" and 20 other myths about immigration* (Massachusetts: Beacon Press books, 2007), 146.

[2] Daniel Huang, "A Devastating Wait: Family Unity and the Immigration Backlogs," (United States: Asian Pacific American Legal Center, 2008), 10.

[3] Justin Akers Chacon, and Mike Davis, *No One Is Illegal: Fighting Racism and State Violence on the U.S.- Mexico Border*, (Chicago: Haymarket Books, 2006): 78, 133-35.

[4] 1965 Immigration and Nationality Act, H.R. 2580; Pub.L. 89-236; 79 Stat. 911. 89th Cong., 2nd sess., (October 3, 1965).

[5] Cited in Jennifer Ludden, "1965 Immigration Law Changed Face Of America," *NPR* June 14, 2010, accessed July 15 2011, http://www.npr.org/templates/story/story.php?storyId=5391395.

[6] Mae Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton, NJ: Princeton University Press, 2004), 261.

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