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A Theory of Just Immigration Policy

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A THEORY OF JUST IMMIGRATION POLICY

by

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B.A., California State University, Sacramento, 2005

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This thesis entitled:
A Theory of Just Immigration Policy
written by Martín Chamorro
has been approved for the Department of Philosophy

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The final copy of this thesis has been examined by the signatories, and we
Find that both the content and the form meet acceptable presentation standards
Of scholarly work in the above mentioned discipline.

Chamorro, Martín A (Ph.D., Philosophy)

A Theory of Just Immigration Policy

Thesis directed by Associate Professor Claudia Mills

The philosophical discussion on immigration has been dominated by the debate over the state's right of exclusion. Scholars who focus on the question of exclusion have missed an important first step, which needs to be taken before exclusion can be considered at all. This step is to ask what justifies a state to take any kind of harmful measure against immigrants in the first place. Only after that question is answered by showing that states have significant morally legitimate interests that ought to be secured, may we then ask what kinds of harmful measures a state may use against immigrants in order to secure these interests. Exclusion is one such measure, but I argue that it is not the only one and, in fact, is likely to be a disproportionately harmful measure since less harmful measures can be used to achieve the same goal. The argument in this dissertation is unique in that while it may turn out to entail *de facto* open borders, it is compatible with securing the central thing that traditional opponents of open borders argue for, namely, the legitimate interests of the state. In short, I argue that we can grant full moral weight to any legitimate interest the closed borders advocate believes requires closing the borders to secure—including, perhaps, things like national solidarity, the preservation of culture, the protection of language—and my theory will still show that the justification to secure this interest will actually fail to entail closing the borders in most circumstances.

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CHAPTER 1

INTRODUCTION

1.1 Overview of Dissertation

Shelley Wilcox writes that most philosophers who have addressed immigration have typically defended what she calls the conventional view, which is the view that states have a right to control their immigration policy as they see fit.¹ Until very recently, philosophers who subscribed to the conventional view defended it by appealing to morally significant interests that they believed states can only secure if they have extensive discretionary power to exclude immigrants. Michael Walzer, for example, famously argued that “without [exclusion], there could not be *communities of character*.”² The discussion broadened, though, when other philosophers began to challenge the conventional view. One notable philosopher who was one of the first to challenge this view is Joseph Carens.³ He argues that states have a *prima facie* duty to maintain open borders. More recently, he has argued that the two central tenets of liberalism, freedom and moral equality, entail that there is a basic human right of international migration. However, for Joseph Carens, this is only a *presumptive* right since it can be outweighed by other considerations such as when it is necessary to limit immigration to maintain public order or

1 Shelley Wilcox, “The Open Borders Debate on immigration,” *Philosophy Compass* 4, no. 5 (2009), 813-821.

2 Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), 63 (emphasis his).

3 Joseph Carens, “Aliens and Citizens: The Case for Open Borders,” *The Review of Politics* 49, no. 2 (1987), 251-273.

ensure national security.⁴

More recently still, a new kind of argument in defense of closed borders has been developed by Christopher Wellman. Unlike the conventional view, Wellman's account rests on the right of political self-determination that legitimate states enjoy. This right of self-determination grants states a *presumptive* right of exclusion, which allows them to have extensive discretionary power to exclude immigrants as they see fit. Like Carens' right of international migration, Wellman's right of exclusion is only presumptive, so it can be outweighed by other considerations. Wellman, however believes that none of the arguments that Carens and other traditional open borders advocates offer supply the necessary considerations to outweigh a state's right of exclusion.

What I presented above is an exceedingly brief overview of the current state of the philosophical discussion on immigration policy. Both the conventional view defended by philosophers like Michael Walzer and David Miller and the traditional open borders positions defended by philosophers like Joseph Carens and Phillip Cole have faced significant challenges for many years. Wellman's new and unique account has also begun to face deep challenges very recently. We will not be examining the standard objections to these positions in this dissertation. Instead, the aim of this dissertation is to provide a kind of bridge between the two positions, while at the same time demonstrating why both sides have failed to provide an ultimately satisfactory account of just immigration policy.

The problem is that both sides are focused on the justification of exclusion. Even the open

4 Joseph Carens, "Migration and Morality: A Liberal Egalitarian Perspective." in *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, eds. Brian Barry and Robert E. Goodin (University Park, PA: The Pennsylvania State Press, 1992), 25-47.

borders side makes this mistake when philosophers who defend that position argue that there may be situations that override an individual's right of migration when exclusion is necessary to secure a really significant interest like public order or national security. They are right about this, but they miss the bigger picture. It is not *always* the case that exclusion is necessary for either of these things and more often than not, exclusion is one of the most harmful means available to secure not only these interests but many others that closed border advocates fear are threatened by immigration.

To my mind, the open borders position is closer to a just immigration policy than the closed borders position, but both positions are focused on the wrong question. The contribution this dissertation offers to the ongoing discussion of just immigration policy is to re-frame the debate into two questions. First, we must ask what gives states the right to inflict harm on immigrants. Second, we must ask whether there are any limits to the kinds and degrees of harm a state may inflict on immigrants even if the state is justified in harming them. By framing the discussion in this way, we can immediately notice that exclusion may no longer be the only game in town. This is because even if a state is justified in harming immigrants in order to secure some significant interest (including an interest in exercising the right of self-determination) there is still the second question: to what extent may a state harm immigrants in the process of securing this interest? The argument I make in this dissertation is that exclusion is one possible answer to this question, but why should we think it is the *only* answer especially when *less harmful* answers may be readily available that sufficiently secure the interest in question? Keep in mind, however, that the argument I will advance in this dissertation does not suggest we may ignore the interests of the state or that they should be given less weight. Rather, my argument permits us to

give full moral weight to the legitimate interests of states and it implies that those interests should be secured whenever it is possible to do so. Nonetheless, even if this is true, the argument I will advance here suggests that exclusion is going to be impermissible in most cases as long as there are more proportional (less harmful) means available to secure these legitimate interests.

1.2 Chapter Summaries

In the remainder of this brief chapter, I summarize the main issues and arguments of the subsequent chapters. Each of the chapters tell a part of the story of the proportional infringement theory of open borders. In the end, it is my hope to present to you a theory of just immigration policy whose story, as told in the chapters to follow, accomplishes four important things. First, it should be seen as becoming part of the broader story of proportionality in international law where a great deal of work has already been done in a variety of other important areas like war policy and trade policy. Second, it should provide a response to interest-based arguments for closed borders. Third, it should provide an account of the kinds of interests that states are justified in protecting against immigrants. Finally, fourth it should provide a response to deontological-based arguments for closed borders.

1.2.1 Chapter 2 - Proportionality in International Law

This chapter provides an introduction to the concept of proportionality and how it has been applied in a variety of international contexts. The chapter is not exhaustive in that it does not attempt to present every or even most instances in which proportionality has been invoked to settle international disputes. Instead, it surveys some of the paradigmatic uses of proportionality

in international contexts and, in particular, those that contain features that are most relevant to the theory of just immigration policy I develop in later chapters. There are two aims to this chapter. The first is to examine how and why proportionality has been used to settle international disputes. The second is to be able to situate the theory of immigration policy I advance in the dissertation in the broader context of the just use of proportional harm.

The first case of the use of proportionality examined in this chapter is also its most paradigmatic example, just war theory. From this example, we are able to draw out two criteria that must be satisfied in order to fight a just war in a just way. These two criteria are *jus ad bellum* and *jus in bello*. The former criterion, *jus ad bellum*, is used to determine whether a war is justified at all, that is, whether the reasons for going to war are sufficiently weighty. The latter criterion, *jus in bello*, is used to determine whether a war is being fought justly. It is in analyzing this second criterion where we first see the critical role that proportionality plays in justifying harmful actions. In short, even when a war is just, the means of fighting the war must also be just and one of the main components that determines this is whether the harm inflicted during the war is proportional with respect to the ultimate (justified) military goals of the war. Any harm inflicted in excess of the harm sufficient to achieve these goals is gratuitous harm and is impermissible. This insight gives us the principle of minimally sufficient harm: If *X* is justified in inflicting harm on *Y* to address *Z*, then *X* is morally obligated to inflict the least harm necessary to sufficiently address *Z*.

As the chapter progresses, we see the principle of minimally sufficient harm applied also in trade disputes between Members of the WTO. When one Member violates a trade agreement, the WTO grants the victims (other Members) of the violation the authority to retaliate by

inflicting harm on the offending Member up to the degree sufficient to secure or restore the interests that were harmed by the violation of the trade agreement and no more. That is, the victims may exert proportional harm on the offending Member, but no more. Finally, this chapter also introduces us to H. L. A. Hart's helpful idea of distinguishing between the justifying criterion (for example, *jus ad bellum* in just war theory) and the distribution criterion (for example, *jus in bello* in just war theory) by referring to each as a question. The former criterion can be said to represent the *why* question because it addresses why a state is entitled to seek harmful measures against another state. The latter criterion can be said to represent the *how* question because it addresses how a state may use such measures.

1.2.2 Chapter 3 - Proportionality and Borders

This is the most significant chapter of the dissertation because it presents the open borders theory of proportional infringement (just immigration policy) for the first time. Before arriving at a just immigration policy, however, this chapter opens with a general account of the just use of retaliation. The survey in the previous chapter gives us the material we need to develop a general theory of just retaliation. The theory suggests that a just retaliation is one that meets both the *jus ulscici* and *jus in talionis* criteria. In the context of just retaliation, these criteria serve as more general terms than *jus ad bellum* and *jus in bello*, which are specific only to just war theory. The criteria of *jus ulscici* and *jus in talionis* I present in this dissertation are used to demarcate the distinction between the justification to take harmful measures against an offending party in any context (not merely in war) and the limits dictating the kinds of harmful measures that are permissible. The *jus in talionis* criterion relies on the principle of minimally sufficient harm to

determine the limit of harm that may be inflicted in a just retaliation and it is this limit that makes the harm proportional. A second version of the principle is introduced here, which I call the principle of least infringement, that shifts the focus away from harm in general to the specific harm arising from a violation of interests. I introduce this second version and use it, rather than the first version, throughout the remainder of the dissertation because the kind of harm we will be looking at in the context of immigration policy is specifically the harm arising from the violation of interests.

The chapter proceeds by then applying the general theory of just retaliation to immigration policy. The argument presented in the chapter suggests that even when a state is justified in taking harmful measures against immigrants in order to secure interests that it believes immigrants threaten, the state must inflict the least harm that is sufficient to secure these interests. Any harm in excess of this amount is, by definition, unnecessary and gratuitous, which means it is impermissible. What this entails is that if there are any means less harmful than exclusion that may sufficiently secure the interests of the state against the purported threat posed by immigrants, then the state is prohibited from using exclusion. The upshot is that it seems most interests (and especially most of the interests I describe as legitimate interests) can be secured with means less harmful than exclusion, so my theory entails that a just immigration policy is a *de facto* open borders policy. Nonetheless, one of the unique features of my theory that distinguishes it from other theories of immigration policy on either side of the debate is that it allows me to give full moral weight to both the individual autonomy of the immigrant and the legitimate interests of the state. I am not arguing for a right of migration or a right of exclusion, but rather a proportional solution that sufficiently satisfies the interests of both parties without

inflicting excessive or gratuitous harm.

1.2.3 Chapter 4 - Legitimate Interests

While the theory of just immigration policy presented in the previous chapter suggests that a state must always inflict the least harm sufficient to secure its interests (proportional harm), it does not specify what may count as a legitimate interest that a state is entitled to secure through the infliction of harm. This chapter aims to present such an account. The strategy employed in this chapter is to bind the legitimacy of interests to the legitimacy of political states. The argument presented in this chapter suggests that legitimate interests are interests that are related to the very grounds that are supposed to grant a state political legitimacy, which is commonly understood to mean that which justifies a state's use of coercion on its own citizens. A legitimate interest, therefore, is restricted only to a narrow class of interests that are purported to give a state a political *raison d'être* such that without the state, the interests could not be secured. Additionally, these interests must be indispensable; they must be so vital that they justify restricting an individual's (primarily a citizen of the state) autonomy to secure. Thus, in a fundamental sense, what I refer to as a 'legitimate interest' is really a *legitimate-making* interest: an indispensable interest that makes a state legitimate by necessitating a state's existence in order to secure the interest. It is this minimalist set of interests that, when genuinely and imminently threatened or violated, provides legitimate states with the moral grounds to inflict proportional harm on migrants in order to secure the interests; it is the violation of this set of interests that satisfies the *jus ulscici* criterion.

The argument in the chapter proceeds by first noting why an account of political

legitimacy is required to avoid the charges of philosophical anarchism. After addressing the concerns from philosophical anarchism, we examine some of the leading and most plausible accounts of political legitimacy. In particular we look at the fairness account defended by George Klosko and also the samaritan account defended by Christopher Wellman. It turns out that on these accounts, the interests that make a state legitimate (which necessitate its existence to secure) are presumptive interests—that is, those interests that we can presume every person wants and needs to live an acceptable life. In short, most authors refer to these interests as human rights. Human rights, therefore, constitute the state's legitimate interests. If immigrants threaten these legitimate interests, then a state is justified in exacting proportional harm on them to secure these interests from being violated. However, if an immigrant does not threaten these legitimate interests, then it becomes much more difficult to justify the state's infliction of harm on the immigrant.

This chapter also examines the extent to which a state may inflict harm on people to secure other kinds of interests including discretionary and illegitimate interests. Discretionary interests are interests like the preservation of culture or language that do not necessarily rise to the level of a presumptive interest, that is, one that is required to live an acceptable life. Discretionary interests can vary in degree of moral weight, of course, but none of them are such that we can presume every person wants or needs them in order to lead an acceptable life. The argument I advance in this chapter implies that a state demonstrates how weighty it considers its discretionary interests by how willing the state is to inflict proportional harm across the board to secure the interest. This means that if it thinks culture is an important enough interest to secure, then it ought to be willing to (proportionally) harm not only immigrants that threaten the culture

but citizens as well. If it does not do this, then it demonstrates that the interest is not weighty enough to justify the infliction of harm on anyone. Finally, I also argue that illegitimate interests fail to justify the infliction harm on anyone.

1.2.4 Chapter 5 - The Deontological Case for Closed Borders

The philosophical discussion on immigration policy began in earnest in the early 1970s after Michael Walzer published his book *Spheres of Justice*, which features a chapter that presents an interest-based argument for a state's right to exclude immigrants. Since then, the vast majority of theorists who defend some form of exclusionary immigration policy do so mainly on the basis of important interests that they believe require exclusion to secure. The interests may be culture, language, nationalism, national security, the economy, or some other interest that states believe immigrants threaten. What is common about these arguments is that theorists who defend them believe control over membership, through the power to exclude, is the only means available to secure these interests. The arguments advanced in the previous chapters demonstrate that this is mistaken and that if these interests can be secured through less harmful means, states are not permitted to use exclusion. In this chapter, we examine a unique and innovative attempt to ground the right of exclusion that is purported not to rely on any of the controversial claims made by previous theorists who appeal to things like culture and national solidarity to ground exclusion.

In this chapter, we look at Christopher Wellman's deontological argument for the right of exclusion. The three premises of Wellman's argument are that legitimate states are entitled to political self-determination, that freedom of association is an integral component of self-

determination, and that freedom of association entitles one to *not* associate with others. The motivation behind the first premise is that the best way to explain our intuition that unilateral interference by a foreign state in our domestic affairs is wrong is that there exists a moral (irreducibly collective) right of self-determination that sufficiently legitimate states have.

Legitimacy here is used in a similar sense as it was used in the previous chapter, meaning that a state is legitimate for Wellman if it can secure the human rights of its citizens (and respect the human rights of all others). The right of self-determination that legitimate states are entitled to entails that legitimate states have a further right to decide whom it associates with (the second premise), which means not only that it has the right to accept any association it so chooses but also the right to reject any association (the third premise) as well.

In the argument summarized above, Wellman appeals to the moral value of freedom of association to defend a state's right to control its membership. Wellman refers to an analogy from marriage to motivate his argument. The right to freedom of association in marriage grants an individual the right not only to determine whom he or she would like to marry but also the right to remain single or reject any potential suitors. Wellman believes the right to freedom of association plays an analogous role for legitimate states. Just as an individual has a right to determine whom to marry or to remain single and to reject any potential suitors, a state has a right to determine who may be admitted as a member, to keep its membership as it is, or to reject any potential immigrant. Just as an individual cannot be said to really have the right to freedom of association in marriage if he or she lacks the power to marry, remain single, or reject suitors, so too a state cannot be said to really have the right to freedom of association if it lacks the power to control its immigration policy as it sees fit. Thus, since the right to freedom of

association is an integral component of self-determination (Wellman's second premise) and states are entitled to the right of self-determination if they are legitimate states (Wellman's first premise) and since the right to freedom of association implies that the state may reject new members (Wellman's third premise), then the state has the right to exclude.

On Wellman's account a state has a right to exclude not because exclusion is necessary to secure an interest like culture or language but rather because it is a byproduct of the fact that it is a legitimate state. The state earns the right to exclude not because of the weightiness of any interests, but because it is entitled to freedom of association, which entails a right to not associate with others as it sees fit. It is important to note, however, that Wellman stipulates he is merely presenting a *pro tanto* argument so it may be outweighed by other significant considerations. In other words, there is no absolute right of exclusion, but Wellman believes that in most cases his *pro tanto* argument is still able to generate a very robust presumptive right of exclusion. In the chapter I have just summarized, I present Wellman's argument in detail and raise some initial concerns about the argument, but the aim of this chapter is actually to accept Wellman's deontological argument. The goal of the subsequent chapter is to nonetheless show that even if we accept Wellman's argument, it still fails to entail the robust right of exclusion he believes it entails.

1.2.5 Chapter 6 - Proportionality and Self-Determination

In order for my theory to provide a full account of just immigration policy, it must address not only the traditional interest-based arguments for exclusion but also the newer deontological arguments for exclusion, such as the one defended by Christopher Wellman. The argument I

present in this chapter suggests that Wellman is far too quick in his presentation of the right of exclusion. He assumes it is more robust than it plausibly can be. There may be a right of exclusion but the right exists only on those rare occasions when it does not inflict gratuitous harm. These occasions will turn out to be very limited and far less common than Wellman believes.

The argument in this chapter proceeds in the following way. The principle of least infringement entails that it is not solely the amount of gratuitous harm that matters (otherwise the principle might seem to be primarily a consequentialist principle) but also the necessity of the harm and this latter fact is true on deontological grounds as well: people have a *right* not to be inflicted *any* gratuitous harm. Recall, on interest-based accounts of closed borders, harm that is inflicted in the process of sufficiently securing legitimate interests is permissible and necessary. Harm beyond this is gratuitous. For Wellman's deontological account we must use different language, but the principle of least infringement still applies. In short, harm that is inflicted in the process of sufficiently exercising the moral right of political self-determination is permissible and necessary but any harm beyond that point is gratuitous. Thus, as long as the right of self-determination can be exercised sufficiently (in accordance with other moral considerations) without the need of exclusion, then exclusion is impermissible. The right of exclusion only exists when a particular exercise of the right of self-determination requires it. Thus, what I find to be the basic flaw with Wellman's deontological case for the right of exclusion is that it takes no account of proportionality.

Wellman's deontological case for the right of exclusion unfortunately lacks precision. This imprecision is evident in three different central places but they are all related. First, and

most important, the account is imprecise in the fact that there is no clear guide to determine at what exact point may a *pro tanto* (or presumptive) right be outweighed. This directly creates the second imprecision, which is the fact that the precise domain (scope and range) of permissible exercises of self-determination is never specified. Finally, this then creates the third imprecision, which is the fact that the precise domain of freedom of association is never specified either. Without this precision, it is easy to see why and how Wellman reaches his conclusion. If the right of self-determination is entirely unrestricted (or, at most, only very vaguely restricted by *pro tanto* considerations), then it seems that it can generate a very unrestricted right to freedom of association, which does indeed entail that the agent with the right of unrestricted (or only vaguely restricted) self-determination may choose to not associate with anyone it so pleases (even on the basis of things like race and gender). The problem is that the only way to get to the final step, where the agent can choose to not associate with anyone it pleases, is to agree to the previous steps, which are highly implausible in their imprecise and unrestricted formats. Not even Wellman believes that the right of self-determination is unrestricted. This is evident not only in the fact that he explicitly invokes an (imprecise) *pro tanto* clause but also in the fact that he argues that states cannot use racist selection criteria in their immigration policies. Thus, the only way to make Wellman's argument plausible is to supplement it with the theory of proportional infringement, specifying that the *pro tanto* clause requires the state not to inflict gratuitous harm. A legitimate state avoids inflicting such harm if it uses only the least harmful sufficient means available to sufficiently (and morally) exercise the right of self-determination. In this chapter I also present an account of what the limits of the right of self-determination are. Once we make these modifications for precision to Wellman's argument, though, the right of

exclusion generated by it no longer has the teeth he believes it has. The kind of exclusion that it permits is limited by the principle of least infringement to a very narrow class of cases of immigration (in most standard cases, exclusion is impermissible), which leads us back to my earlier claim that a just immigration policy implies *de facto* open borders.

CHAPTER 2

PROPORTIONALITY IN INTERNATIONAL LAW

2.1 Introduction

The perception of the Old Testament *lex talionis*—the principle of an eye for an eye—as a draconian and barbaric form of retribution is mistaken. Morris J. Fish, a justice of the Supreme Court of Canada, notes that while that perception is understandable because as a “divinely ordained punishment, ‘an eye for an eye’ sounds both primitive and cruel,” it is nevertheless a misunderstanding that results from overlooking the historical significance of the Old Testament *lex talionis* as a “turning point in the evolution of lawful punishment.”⁵ Fish goes on to explain that the form of the *lex talionis* appearing in the Mosaic Law introduced a policy of restraint by sanctifying the principle of proportionality as a moral tenet of punishment. Prior versions of the *lex talionis*, such as that found in the Code of Hammurabi, were meant to apply literally and required the imposition of equivalent punishment, or sometimes harsher punishment, in retaliation as a countermeasure for some wrong committed. Under Hammurabi’s Code, the punishment could be imposed on an innocent member of the wrongdoer’s family; in fact, this was often obligatory. Fish provides the following example from the Code of Hammurabi: “if a man has struck a gentleman’s daughter, he shall pay 10 shekels of silver for what was in her

5 Morris J. Fish, “An Eye for an Eye: Proportionality as a Moral Principle of Punishment,” *Oxford Journal of Legal Studies* 28, no. 1 (2008), 57.

womb; if that woman has died, one shall put to death his daughter.”⁶ In contrast, the Mosaic *lex talionis* does not command the punishment of an innocent person for a wrong committed by another but instead establishes a limit or ‘general maxim’ to the countermeasure that can be exacted on the wrongdoer himself. That is to say, the *most* one may punish another for taking an eye is by taking his eye and no more; anything more than an eye for an eye would be disproportional—indeed, it would be unfair.

The principle of proportionality exhibited in the Old Testament *lex talionis* endures today not only in modern penal theory but also in many contexts governing international law. It endures in the sense that most people now believe countermeasures taken by a wronged party for an offense it has suffered ought to be proportional to the injury suffered as a result of the offense. If countermeasures exceed this limit, then the countermeasures themselves become an offense. If one steals a bike from another person, the victim is justified in asking for and receiving his bike back in the same condition it was in prior to the theft (or compensation of a similar value). The victim is not justified in asking for all future lifetime earnings of the thief in addition to the return of his bike in its original condition. Such a request is disproportional to the wrong committed against him. If the victim proceeds to take back his bike along with the thief’s lifetime earnings as a countermeasure to the bike theft, then the victim becomes an offender as well. The victim is justified in exacting a countermeasure against the bike thief, but he is not justified in exacting *any* countermeasure he desires. Unlike the Code of Hammurabi, the principle of proportionality found in both the Old Testament *lex talionis* and in contemporary international law sets the limit of appropriate countermeasures to an eye for an eye and a bike for

6 Ibid., 59.

a bike, sometimes even requiring that the countermeasure actually do less harm than the original injury suffered but never permitting more because more would be disproportional—it would be gratuitous.

The subjects in which the principle is applied today include penal theory, war, international trade, and arbitration of human rights abuses among others. The proportionality principle's main use is in determining the permissible conduct of a party that is justified in taking harmful measures against another party in retaliation for some offense. There are two parts to the justification of these harmful measures: first, whether provocation *X* warrants such measures; and second, whether the measures are proportional to *X*. I will refer to the first part as the *jus ulscici* (Latin for “right to retaliate”) criterion and the second part as the *jus in talionis* (Latin for “right in retaliation”) criterion. Those familiar with just war theory may notice a similarity between my terms and the terms *jus ad bellum* and *jus in bello*. These two terms are used by just war theorists to refer to the two-pronged justification for war. In his seminal book on just war theory, *Just and Unjust Wars*, Michael Walzer writes:

War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second adverbial: we say that the war is being fought justly or unjustly. Medieval writers made the difference a matter of prepositions, distinguishing *jus ad bellum*, the justice of war, from *jus in bello*, justice in war. ... The two sorts of judgment are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules. ... The dualism of *jus ad bellum* and *jus in bello* is at the heart of all that is most problematic in the moral reality of war.⁷

The similarity between the terms *jus ad bellum* and *jus in bello* and the terms *jus ulscici* and *jus in talionis* is intentional and is used to illustrate the claim that former are merely instances

⁷ Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 2000), 21.

specific to just war theory of the latter abstracted and more general terms. These general terms demarcate the distinction between the justification to take harmful measures against an offending party, such as by initiating a war, and the limits dictating the kinds of harmful measures that are permissible, such as refraining from killing civilians unnecessarily. In the next chapter I will develop a general theory just retaliation, which will elaborate on the concepts of *jus ulscici* and *jus in talionis* in detail. In this chapter, it will suffice to merely understand the basic distinction between these two concepts to see how they have been used in various contexts where proportionality has been invoked in international law.

With the exception of the material on criminal punishment, the survey on the use of proportionality in international law that I present in this chapter borrows heavily from Thomas Franck's plenary article he wrote for the American Society of International Law titled *On Proportionality of Countermeasures in International Law*.⁸ The following survey is important for at least three reasons. First, since the survey is predominantly an examination of recent legal decisions—more specifically, advisory opinions—invoking the principle of proportionality, these decisions offer a guide to help us determine how the principle ought to be applied generally. Second, critical analysis of these decisions provides an opportunity to specify the moral reasons for thinking that proportionality is a necessary component of justice. Third, the survey demonstrates that the principle of proportionality works not only in theory but in practice as well. One of the objections that may be used against the principle is that while in works in theory, it is

8 Thomas M. Franck, "On Proportionality of Countermeasures in International Law," *The American Journal of International Law* 102, no. 4 (2008), 715-767. Franck's article is remarkable in the breadth of contexts examined that make practical use of the principle of proportionality. The principle of proportionality connects all these contexts together. Indeed, this requirement of the principle of proportionality in each of these contexts becomes more evident as one reads Franck's article noting how independent tribunals and courts, adjudicating widely disparate contexts, seem to come to a consensus on the necessity of the principle for matters of justice.

too subjective and indeterminate to provide insight into—much less produce—real world policy. The fact that the principle has been and continues to be invoked with incredible frequency by a variety of international courts in different contexts, renders that objection quite weak.

We will primarily examine the use of the principle of proportionality by interstate tribunals such as the International Court of Justice (ICJ), which is the judicial arm of the United Nations, as well as intergovernmental arbitration commissions—in particular, the World Trade Organization (WTO)—in the contexts of war and trade. In this chapter, we will also briefly examine the use of the principle of proportionality by the penal theorist and legal philosopher H. L. A. Hart in the context of criminal punishment. This chapter proceeds in the following way. Section 2.2 presents an account of how the principle of proportionality has been used to adjudicate conflicts between two agents in the context of war. Section 2.3 applies the principle to international trade disputes. Section 2.4 presents a brief account of how the principle is used in penal theory. Finally, section 2.5 provides some concluding remarks.

2.2 Proportionality in War

The context in which the principle has been most widely studied and applied is in war. Indeed, it is fair to say that just war theory gave birth to the principle of proportionality, at least as far as the modern discourse on the moral requirement for the principle in international law is concerned. This section is divided into two parts. The first part concerns the justification of military retaliation (*jus ad bellum*) and the second part concerns the justification of the kinds and degrees of military retaliation that are permissible (*jus in bello*).

2.2.1 *Just Ad Bellum*

The *jus ad bellum* criterion—in concept, if not in name—is codified as international law. While Article 2(4) of the United Nations Charter prohibits the threat or use of force against other states, Article 51 provides an exception to this rule when force is used in self-defense against an armed attack: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs.”⁹ It is Article 51, then, that specifies the grounds that satisfy the *jus ad bellum* criterion, which is the criterion that determines if a state is justified in retaliating. Notice, as far as the UN Charter is concerned, the use of coercive force in response to a provocation—in this case, the threat or use of an armed attack—is not controversial since it is permitted by Article 51. What may be a matter of dispute is whether a particular provocation counts as an armed attack or as an armed attack of a sufficient magnitude to justify coercive force in retaliation. More generally, we are here concerned with whether provocation *X* warrants the use of coercive force in retaliation. In the context of war, if a state responds to provocation *X* with military force when *X* has been determined not to warrant such a response, then its use of military force is unjust—a war started because of *X* in this case is an unjust war. We need not even ask about the second criterion, *jus in bello* or *jus in talionis*, which concerns what range of responses are proportional, because *any* action performed by the agent as a retaliatory measure to *X* has already been deemed unjust by the failure to meet the first criterion.

The first dispute over the invocation of Article 51 to justify the use of military force by one state against another state came before the ICJ in the 1984 Nicaragua v. United States case. In 1972, a devastating earthquake ravaged Managua, the capital of Nicaragua. The Nicaraguan

⁹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, <http://www.un.org/en/documents/charter/index.shtml>.

government, led by President Anastasio Somoza appealed for and received millions of dollars in foreign aid. Much of the aid never reached the victims of the earthquake because it was plundered by Somoza and his cronies. In the aftermath of the earthquake, the socialist Sandinista (FSLN) movement gained significant popular appeal by organizing relief and publicly opposing the corrupt Somoza regime. The FSLN led the popular uprising known as the Nicaraguan Revolution against the corrupt government and overthrew Somoza in 1979. Soon after, FSLN military officials began aiding ideologically similar Marxist insurgents in neighboring El Salvador by providing logistical support. The United States, an ally of the Salvadorean regime, had long been opposed to the FSLN because of its socialist ideology. When Ronald Reagan became President of the United States, he ordered direct support to Somoza loyalists to oppose the FSLN. The support came in the form of financing, recruiting, training, arming and directing military and paramilitary actions in and against Nicaragua including armed attacks against its ports and villages.

The ICJ considered these actions to be equivalent to the use of coercive force by the U.S. against Nicaragua and questioned whether the U.S. was entitled to use such force for the purpose of self-defense. The U.S. argued that its actions were in accordance with Article 51 of the UN Charter. It claimed that it was acting in response to the arming of insurgents in El Salvador, a state allied to the U.S., by the FSLN regime in Nicaragua. However, the ICJ ruled against the U.S. by a vote of 12-3. Even though there was evidence of an arms flow between Nicaragua and insurgents in El Salvador, the ICJ found that it did not rise to the level of an armed attack against the U.S. or its allies as required by Article 51 in order to justify the use of coercive force in retaliation. In its summary judgment regarding the application of the law to the facts, the

majority opinion wrote the following:

Having found that intervention in the internal affairs of another State does not produce an entitlement to take collective counter-measures involving the use of force, the Court finds that the acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.¹⁰

In short, the majority found the U.S. to have failed to meet the *jus ad bellum* criterion—Nicaragua’s actions did not justify any response by the United States. This alone makes the actions taken by the U.S. disproportional to the initial provocation by Nicaragua on the basis of the fact that no U.S. military response was justified at all. There was no need to adjudicate the *jus in bello* criterion, it would have been irrelevant since the U.S.’s actions had already failed to meet the *jus ad bellum* criterion.

Contrast the preceding case with a recent conflict between Israel and Lebanon. On July 12, 2006, Hezbollah forces attacked Israel from Lebanese territory. The attack left two Israeli soldiers dead and two captured by Hezbollah forces. Israel held the Lebanese government, which included members of Hezbollah, responsible for failing to prevent the attack. Moreover, this was not an isolated incident; it followed years of hostilities launched against Israel from Lebanese territory including raids and rocket attacks on Israeli settlements. Most observers, including the UN secretary-general and all members of the UN Security Council except Qatar and China, recognized Israel’s right to respond to these attacks in self-defense with the use of military force against Lebanon in accordance with Article 51 of the UN Charter. In essence, they were declaring that Israel’s military response was just, it met the *jus ad bellum* criterion, because Hezbollah’s provocation was considered an armed attack on Israel. The two main differences

¹⁰ Military and Paramilitary Activities in and Against Nicaragua (Nica. v. U.S.), Merits, 1986 ICJ Rep. 14 (June 27), at 127, para. 249.

between this case involving Israel and the preceding one involving the U.S. are first, that there was no doubt that Hezbollah's attacks rose to the level of an armed attack against Israel and, second, that most observers were in agreement that the only measures seemingly sufficient to prevent further attacks from Hezbollah required the use of military force against Lebanon. Additionally, whereas there was no need to discuss the *jus in bello* criterion in the U.S. case, there is a need to discuss it in the Israel case so that we may determine if the degree of Israel's response was itself justified or not and the key to this determination rests on proportionality.

2.2.2 *Jus In Bello*

To be proportional, the military response Israel used must have met two conditions. First, the response must have been *sufficient* to thwart Hezbollah's provocations. This first condition by itself, though, will not be enough to determine if Israel's use of force was just. This is because as it stands, it could justify any use of force no matter how harmful, including a nuclear attack, as long as it would be sufficient to thwart the provocations. Thus, a second condition is needed that requires that the military force Israel used must have been *necessary* to thwart the provocations. In the Nicaragua vs. United States case, the ICJ noted that in "appraising the United States activity in relation to the criteria of necessity and proportionality, the Court cannot find that the activities in question were undertaken in the light of necessity, and finds that some of them cannot be regarded as satisfying the criterion of proportionality."¹¹ Here, when the ICJ appeals to the *criteria of necessity and proportionality*, it is making clear that it did not find the actions taken by the U.S. to be necessary to thwart Nicaragua's provocation. Thus, even if the U.S. had met the *jus ad bellum* criterion, the ICJ claims it would have failed the *jus in bello* criterion

¹¹ Ibid., at 122, para. 237.

anyway because its actions were not necessary. What is unclear, however, is what is meant by the term ‘necessity’ as it is being used here; the answer to this will be critical in determining if Israel’s actions satisfied the *jus in bello* criterion. A necessary use of military force could refer to something like the least *destructive* force available to sufficiently thwart a provocation. In my view, though, this interpretation fails to be the most salient because not all forms of destruction necessarily have a significant moral component. I do not believe, for example, that the UN would condemn Israel for destroying 50 empty tanks as opposed to 25 empty tanks—though the former is a more destructive scenario than the latter—even if we assume that the destruction of 25 empty tanks was sufficient to end the conflict. Instead, I suggest that we tie ‘necessity’ to something that does necessarily have a significant moral component, namely harm. So defined, a necessary use of military force is understood to refer to the least *harmful* force available to sufficiently thwart a provocation. Thus, the condition of necessity here should be thought of as a harm-limiting clause on the first condition. In other words, of all the *sufficient* military responses that could thwart Hezbollah’s armed attacks, the only permissible response Israel may take would be the one that inflicts the *least harm* among those options.

The foregoing discussion about necessity leads us to what I call the principle of minimally sufficient harm, which is present in every moral context where an appeal is made to proportionality. Indeed, it is precisely this principle that makes something proportional. The principle of minimally sufficient harm may be formalized in the following way:

If *X* is justified in inflicting harm on *Y* to address *Z*, then *X* is morally obligated to inflict the least harm necessary to sufficiently address *Z*.

To generalize, the principle stipulates that when there are a range of countermeasures that can be

taken, it is incumbent on the party taking the countermeasures against an offender to use the least harmful sufficient means in that range whenever the party is justified in retaliating in response to a provocation. In the Nicaragua vs. United States case, even if the United States had somehow met the *jus ad bellum* criterion, then as long as Nicaragua's actions of arming Salvadorean insurgents could be thwarted by, for example, using sanctions against Nicaragua, then this option would be preferable than the use of military force if it produced less harm. I make no claim to be an expert on whether sanctions would be a viable alternative to armed intervention or if they are, in fact, less harmful but the upshot is that as long there are less harmful sufficient means available, then the use of military force would be a disproportional and unjust response to Nicaragua's provocation.

Proportionality became codified as a legal requirement of the *jus in bello* criterion in international law after World War II. The fighting in Manila in 1945 during World War II claimed the lives of 17,000 soldiers (both Japanese and U.S. Combined) and 100,000 Filipino civilians.¹² During the final stages of the war in 1945, the nuclear bombing of Hiroshima and Nagasaki killed between 226,000 and 566,000 Japanese civilians.¹³ These events and others like them led to the diplomatic negotiation of the Geneva Conventions of 1949 and the subsequent drafting of Protocol I of the 1977 Geneva Conventions. These negotiations made clear that the principle of minimally sufficient harm is inherent to the concept of proportionality in the *jus in bello* criterion by prohibiting means of war that cause unnecessary suffering. Article 35 of Protocol I mandates the following:

12 William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 91 (1982), quoted in Franck, "On Proportionality of Countermeasures in International Law," 724.

13 Ibid.

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.¹⁴

Articles 51 and 54 further outlaw indiscriminate attacks on civilian populations. One kind—though certainly not the only kind—of indiscriminate attack specifically prohibited in Article 51 is “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military *advantage anticipated*.”¹⁵ Here we see clearly the principle of minimally sufficient harm being invoked in Article 51 when it prohibits unnecessary or excessive means to achieve an anticipated advantage in warfare, namely to respond to an armed attack. The ICJ found the principle of minimally sufficient harm—in the form of prohibitions on the unnecessary suffering of combatants and indiscriminate attacks on civilians—so fundamental that it ruled it is “to be observed by all States whether or not they have ratified the conventions that contain [it].”¹⁶

Similarly, in its commentary on Protocol I, the International Committee of the Red Cross (ICRC) notes that the concept of military necessity:

can never justify a *degree of violence* which *exceeds* the level which is strictly *necessary*

14 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>.

15 Ibid., Article 51(5)(b) (emphasis mine).

16 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, para. 30 (July 8), quoted in Franck, “On Proportionality of Countermeasures in International Law,” 729.

to ensure the *success* of a particular operation in a particular case. This rule is sometimes expressed by the maxim which states that necessity is the limit of legality. Any violence which exceeds the minimum that is necessary is unlawful and it is on this principle that all law relating to the conduct of hostilities is ultimately founded. This principle is expressed in specific rules in the Protocol, but it does not govern only these specific rules. Its scope also extends to situations which are not covered by these rules. This is a direct consequence of the principle which states that the Parties to the conflict do not have an unlimited right.¹⁷

In its commentary, the ICRC is referring to Article 35 of Protocol I when it states that the Parties to the conflict do not have an unlimited right to choose any method of war they desire. Notice also that the ICRC refers to Article 51 when it states in its commentary that “any violence which exceeds the minimum that is necessary is unlawful.” In making this appeal, the ICRC, like the UN, recognizes that in order to satisfy the *jus in bello* criterion, the retaliating party must use the “minimum [harm] that is necessary” and no more—it must abide by the principle of minimally sufficient harm.¹⁸

To summarize the discussion thus far, satisfaction of the *jus in bello* criterion requires that military force be proportional and what determines this is the principle of minimally sufficient harm. The use of proportional military force, combined with the satisfaction of the *jus ad bellum* criterion, is ultimately what makes a military response fully just. This, of course, harkens back to Walzer’s pronouncement that war is always judged twice. A just war can be fought unjustly when the war itself, which is an armed response, meets the *jus ad bellum* criterion but the means used to fight the war fail to meet the *jus in bello* criterion. An unjust war can be fought justly when the

17 Claude Pillod et al., *Commentary on the Additional Protocols: Of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987), 396 (emphasis mine).

18 To be sure, it may turn out that the least harmful military response might actually require quite a lot of harm. In supreme emergencies, for example, such as a case in which a Nazi victory is imminent (which would likely produce a world with massive violations of human rights) it might be permissible and necessary to use very harmful measures in order to prevent any chance of that outcome materializing especially if it was generally agreed that the alternative would lead to a moral nightmare.

means used to fight the war meet the *jus in bello* criterion but the war itself fails to meet the *jus ad bellum* criterion. What we hope for, of course, is that any war that is waged is a just war that is fought justly and that only happens if both criteria are met. Unfortunately, as is too often the case, it is the contrary that occurs where both criteria fail.

Returning now to the case of the conflict between Israel and Lebanon in 2006, as the months ensued after Israel began its retaliation in response to Hezbollah's armed attack, support for Israel's offensive began to wane when the violence intensified. By the end of the conflict, Hezbollah had fired hundreds of rockets into Israel causing 50 civilian deaths and 113 military casualties.¹⁹ Israel's military retaliation resulted in approximately 1,000 Lebanese civilians killed by strikes, 3,500 wounded, and almost a million displaced.²⁰ The question before the Security Council was whether Israel had met the *jus in bello* criterion in its conduct when it retaliated against the original Hezbollah provocation. Israel maintained that it had met the criterion because its response should be weighed not against the single provocation on July 12, 2006 but against the ongoing aggression and threat that Hezbollah posed long before that attacks of that day. If we look only at the single Hezbollah attack on July 12, Israel's retaliation seems markedly disproportional and clearly stands in violation of the principle of minimally sufficient harm. Israel and its few remaining supporters argued, however, that this becomes much less clear if we take into consideration the prior and ongoing aggression by Hezbollah. Additionally, it could be argued that since Israel never ratified Protocol I, which carries with it the requirement of

19 "Security Council Calls for End to Hostilities Between Hizbollah, Israel," Press Release SC/8808, Aug. 11, 2006), quoted in Franck, "On Proportionality of Countermeasures in International Law," 732.

20 "Humanitarian Factsheets on Lebanon," UN Office for the Coordination of Humanitarian Affairs Press Releases IHA/1215, Aug. 11, 2006, IHA/1216, Aug. 14, 2006, quoted in Franck, "On Proportionality of Countermeasures in International Law," 732.

proportionality, then it should not be bound by it anyway. Nonetheless, most members of the Security Council remained unconvinced by Israel's arguments. In the aftermath of the conflict, the UN Human Rights Council established the Commission of Inquiry on Lebanon to investigate whether Israel's actions had been in accordance with the UN Charter or if they had violated international humanitarian law. The Commission found that Israel's actions demonstrated a "significant pattern of excessive, indiscriminate and *disproportionate* use of force against Lebanese civilians."²¹ Moreover, the Commission invoked the principle of minimally sufficient harm when it also found that Israel's actions went "beyond reasonable arguments of military necessity and proportionality, and clearly failed to distinguish between civilian and military targets, thus constituting a flagrant violation of international humanitarian law."²² It is difficult to disagree with the Commission's findings when one considers that it is very likely Israel might have sufficiently achieved its goals without displacing a million people, killing 1,000 civilians, and wounding 3,500 others. If we take the principle of minimally sufficient harm seriously, then surely it seems possible there must have been alternative options sufficient to properly respond to Hezbollah's provocation that would have resulted in far less bloodshed.

A final important note to make here is that even though Israel never ratified Protocol I, which as we saw above outlaws indiscriminate and disproportional attacks, most authorities consider ratification unnecessary; states are legally bound by it whether they ratify it or not. The proportionality requirement codified in Protocol I has become international customary law and

21 Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1* <http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf> (accessed July 16, 2012), 3 (emphasis mine).

22 Ibid., 5.

so is binding even on states that do not ratify the Protocol.²³ According to Article 38(1)(b) of the UN Charter, international customary law is considered just as binding as codified international law.

While there continues to be some disagreement regarding Israel's *jus in bello* justification for its conduct in Lebanon, this case neatly illustrates the following two important things:

- 1) the dual justification of war and the distinction between *jus ad bellum* and *jus in bello*, and
- 2) the requirement of proportionality, which is determined by the principle of minimally sufficient harm, for satisfaction of the *jus in bello* criterion.

It is important to keep in mind the preceding two points because they will come up again in each of the contexts we will examine and will ultimately be crucial for my theory of a just immigration policy.

2.3 Proportionality in Trade Disputes

I have been referring to *jus ad bellum* and *jus in bello* in the context of war, but I will now switch to the more general terms *jus ulscici* and *jus in talionis* respectively. As noted earlier, the former terms are traditionally used in military contexts whereas the latter terms can be used in all contexts involving the just use of harmful retaliatory measures. With that in mind, we now turn to examine the use of proportionality to adjudicate trade disputes between states. The examples I use in this section all involve disputes brought before the World Trade Organization (WTO).

The WTO accounts for 96.4 percent of world trade,²⁴ so it serves as the primary authority

23 Andreas Zimmermann, *The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality* (2007) MAX PLANCK Y.B. UN L. 99, available at <http://www.mpil.de/ww/en/pub/news.cfm>, quoted in Franck, "On Proportionality of Countermeasures in International Law," 734.

24 World Trade Organization, *Handbook on Accession to the WTO: Chapter 1, Accession in Perspective*,

on trade dispute arbitration in the world. When a state joins the WTO, it becomes a Member and agrees to refer trade grievances with fellow Members to the WTO's multilateral system of settling disputes rather than seek a unilateral solution. It must also agree to abide by the Dispute Settlement Understanding (DSU)—a set of procedures used to resolve most trade disputes—and respect judgments rendered by the Dispute Settlement Body (DSB). The DSB is the arm of the WTO made up of all the representatives from Member states—hence, the multilateral dispute settlement system—that determine the outcome of trade disputes. The DSB ultimately makes its decision based on a recommendation by a dispute panel that it assigns to a case, but it may also receive recommendations by the Appellate Body, the WTO Secretariat, arbitrators, independent experts and several specialized institutions.²⁵ For most kinds of trade disputes, the DSB appeals to the DSU rules to adjudicate a case. However, when a trade dispute involves an alleged violation of certain subsidy rules, a special set of rules called the Agreement on Subsidies and Countervailing Measures (SCM Agreement) apply and take precedence over the DSU rules. It is important to understand these distinctions because the DSU and SCM Agreement rules differ in their application of proportionality.

To summarize then, the DSB primarily adjudicates trade disputes between Members that involve international trade law set by the WTO in two ways.²⁶ For most kinds of trade disputes,

http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm (accessed July 8, 2012).

25 World Trade Organization, *Dispute Settlement System Training Module: Chapter 3, WTO Bodies involved in the dispute settlement process*,

http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm (accessed July 8, 2012).

26 There are, additionally, other kinds of trade disputes in which the DSB makes use of different sets of specialized rules than those set forth in the DSU or SCM Agreement. One occasion involves unfair conduct pursuant to the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) and the other involves unfair conduct pursuant to the Agreement on Safeguards. In this dissertation, I will not cover how proportionality is used in these special cases except to say the following. Broadly speaking, proportionality in cases violating the anti-dumping disputes is used in similar ways as those which I will cover when I discuss violations of DSU rules and the SCM Agreement. Incidents involving disputes over the use of

the DSB renders its decision based on the rules set forth in the DSU. However, when a dispute involves an allegation of unlawful subsidy use, the DSB renders its decision based on the rules set forth in the SCM Agreement instead.

2.3.1 Dispute Settlement Understanding

Article 22.2 of the DSU provides the grounds for satisfying the *jus ulscici* criterion in most trade disputes when it stipulates that if a WTO Member found to be in violation of trade agreements:

fails to bring the measure found to be inconsistent with a covered agreement into compliance ... such Member shall ... enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed, ... [then] any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.²⁷

Article 22.2 gives an injured party the right to seek countermeasures against the Member whose failure to be in compliance with WTO trade agreements has caused an injury²⁸ on the party invoking the dispute settlement procedures. As Article 22.2 makes clear, this is supposed to be a last resort used only if negotiations between the disputants for fair compensation fail. If that happens, then the injured party may seek authorization from the DSB to take countermeasures in the form of a release from performing some of its WTO obligations otherwise owed to the

safeguards are handled very differently since they do not involve the use of countermeasures except, perhaps, in cases when a safeguard is unfairly used. The use of proportionality in issues pertaining to safeguard disputes in international trade is controversial and so it is best to avoid it here since it would be beyond the scope of this dissertation and will not be necessary for the discussion on immigration. It is, perhaps, a perfect topic for a future article, though. For a more in depth look at how proportionality relates to both anti-dumping and safeguard disputes, see Andrew Mitchell, "Proportionality and Remedies in WTO Disputes," *The European Journal of International Law* 17, no. 5 (2007), 996-997 and 1004-1008.

27 World Trade Organization, *Dispute Settlement: Legal Text, Understanding on Rules and Procedures Governing the Settlement of Disputes Annex 2 of the WTO Agreement*, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed March 7, 2013).

28 I will be using the terms 'injury,' 'adverse effects,' and 'harm' interchangeably.

offending Member. In the same sense that satisfying the *jus ulscici* (or *jus ad bellum*) criterion provides the justification to seek military retaliation in military conflicts, satisfying the *jus ulscici* criterion, as invoked here by Article 22.2, provides the justification to seek countermeasures against an offending WTO Member in trade disputes.

The second criterion, *jus in talionis*, is invoked by Article 22.4 when it stipulates that “the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.” In other words, after being authorized to seek countermeasures against the offending Member, the injured party may be released from some of its WTO obligations owed to the offending Member equivalent to the *level of injury* it has suffered. Notice, a subtle but critically important nuance in Article 22.4 is that it does not state that the injured party may retaliate by using measures equivalent in kind and degree to those used by the offending Member to cause the original injury. Instead, it makes clear that the degree of the party’s countermeasures are limited by (must be equivalent to) the *level of injury* it has suffered. To demonstrate this, consider the following example. Suppose Atlantis had violated a trade agreement with Shangri-La to export 100 tons of resource *R*. If Shangri-La lost one-million dollars from Atlantis’s failure to export *R*, then it would be entitled to refrain from fulfilling obligations (or suspend concessions) it has to Atlantis amounting to a savings of up to one-million dollars. Shangri-La would not, though, necessarily be authorized to use measures like failing to export resource *S* to Atlantis, for the explicit purpose of costing Atlantis one-million dollars in losses. If Shangri-La can somehow recuperate its one-million dollars in losses by refraining from fulfilling certain obligations owed to Atlantis that would cost Atlantis only half a million dollars, then that would be all that Shangri-La is entitled to. Simply put, countermeasures

are justified to correct an injury, not to exact revenge. What this example shows is that according to Article 22.4, the injured party's countermeasures must abide by the principle of minimally sufficient harm. Article 22.4 permits only countermeasures, or the suspension of concessions, necessary to address the impairment suffered by the injured party. It does not permit additional concessions beyond those minimally sufficient to address the injury suffered. Andrew Mitchell puts the point succinctly when he writes that "the level of nullification or impairment is, broadly speaking, the amount of injury that the Member has suffered due to the inconsistent measure" and "in that sense, the aim is to ensure that the penalty (suspension of concessions) is not disproportionate to the injury suffered (nullification or impairment)."²⁹ Mitchell also notes that several arbitrators have suggested—and the Appellate Body has endorsed the view—that while the purpose of suspending concessions might sometimes include an intention to induce compliance with the offending Member "this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment."³⁰

One case in which the DSB panel referred to the DSU rules in order to render a decision involved a dispute between the United States and the European Community when on January 26, 1996 the U.S. filed a complaint with the WTO alleging that the EC was violating several WTO agreements by prohibiting U.S. beef exports that had been treated with certain growth hormones.³¹ A DSB panel found that the EC ban on imports of hormone-treated beef was in

29 Mitchell, "Proportionality and Remedies in WTO Disputes," 995.

30 Decision by the Arbitrators, EC – Bananas III (US) (Art. 22.6 – EC), at para. 6.3. quoted in Mitchell, "Proportionality and Remedies in WTO Disputes," 998 (emphasis his).

31 World Trade Organization, *Dispute Settlement: Dispute DS26, European Communities — Measures Concerning Meat and Meat Products (Hormones)*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm (accessed July 10, 2012).

violation of WTO agreements because the ban was not based on any scientific evidence demonstrating that there was risk associated with the meat. The U.S., therefore, met the *jus ulscici* criterion according to DSU rules and sought compensation in the amount of \$202 million per year but the arbitrators felt that amount would have been disproportional. That is to say, the \$202 million per year sought by the U.S. failed to satisfy the *jus in talionis* criterion; the arbitrators felt that if the U.S. were awarded that amount, it would inflict unnecessary harm on the EC because the injury the U.S. suffered could be sufficiently repaired with less. Given that the U.S. had met the *jus ulscici* criterion, it was entitled only to countermeasures in the form of compensation limited by the principle of minimally sufficient harm according to Article 22.4.

The text of the award the U.S. ultimately received summarizes these results nicely:

the arbitrators determine that the level of nullification or impairment suffered by the United States in the matter ... is US\$116.8 million per year. Accordingly, the arbitrators decide that the suspension by the United States of the application to the European Communities and its member States of tariff concessions and related obligations under [a WTO agreement] covering trade in a maximum amount of US\$116.8 million per year would be consistent with Article 22.4 of the DSU.³²

In this particular case, therefore, the countermeasures that were taken against the EC by the U.S. were fully just because the U.S. was justified in responding to the EC's trade violations (satisfying *jus ulscici*) and the compensation it received was proportional to (sufficiently addressed) the injury it suffered as a result of the violations (satisfying *jus in talionis*).

2.3.2 Subsidies and Countervailing Measures

The preceding case was a straightforward application of the just use of countermeasures in the

³² Award of the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse by the United States to Article 22.7 of the DSU*, WT/DS26/21, 15 July 1999, DSR 1999:V, 83.

context of trade disputes resolved by appeal to the DSU (Dispute Settlement Understanding) rules. The case that follows is slightly more complex and involves an instance when the WTO arbitrators ruled instead according different rules known as the SCM (Subsidies and Countervailing Measures) Agreement. This case is more complex because trade disputes arising from the use of subsidies may involve not only injuries that have already occurred—these are the only kinds of injuries that DSU rules adjudicate—but also injuries that have not yet occurred though their occurrence is probable in the near future—that is, where there is only a threat of injury instead of an injury itself. The previous cases we have looked at thus far in war and trade disputes will aid us in the next chapter when we examine how proportionality principles can be applied to immigration policy when it deals with migrants that have already violated a state’s interests (perhaps, for example, by deporting migrants that violate these interests). The case we now turn to will aid us in examining how proportionality principles might be applied to cases where migrants have not yet violated a state’s interests but where there is a threat of a violation in the near future. These latter kinds of cases are very important in the philosophy of immigration because they are what traditionally ground theories of exclusion; in other words, it is argued that closing the borders (exclusion) is justified because it is needed to protect the state’s interests against the threat posed by migrants.

Before presenting the case, I will briefly compare how the *jus ulscici* and *jus in talionis* criteria are used in both the DSU and SCM Agreement rules. With regard to *jus ulscici*, the SCM Agreement rules are very similar to those we have already seen in the DSU rules. Recall that DSU rules authorize an injured party the right to seek countermeasures against a Member that has been found to have taken measures inconsistent with WTO trade agreements. Similarly,

Article 4.7 of the SCM Agreement states that if a Member is found to have granted or maintained a prohibited subsidy, then the offending Member must withdraw the subsidy. Note, however, that there is no mention of injuries in Article 4.7. Article 4.10 of the SCM Agreement then adds the following:

In the event the recommendation of the DSB is not followed ... the DSB shall grant authorization to the complaining Member to take appropriate countermeasures ...³³

It is Article 4.10 of the SCM Agreement, like Article 22.2 of the DSU rules, that invokes the *jus ulscici* criterion by authorizing the injured party the right to use countermeasures against the offending Member. Here, the only difference between the DSU rules and the SCM Agreement is that the former allows a WTO Member to satisfy the criterion when it has been injured as a result of the violation of certain kinds of WTO trade agreements whereas the latter allows a WTO Member to satisfy the *jus ulscici* criterion simply on the basis of another Member's use of a prohibited subsidy even before any injury is present.

Notice that both Article 4.10 of the SCM Agreement and Article 22.2 of the DSU rules merely authorize the use of countermeasures, they do not specify what the limit of those countermeasures may be. Thus, these articles only address the *jus ulscici* criterion. The *jus in talionis* criterion, on the other hand, was addressed by a separate Article in the DSU rules, Article 22.4. This is the Article that invokes the principle of minimally sufficient harm, essentially limiting the kinds of countermeasures that can be used according to the DSU rules. Recall that according to Article 22.4 of the DSU rules, the satisfaction of the *jus in talionis* criterion

33 World Trade Organization, *WTO Analytical Index: Subsidies and Countervailing Measures, Agreement on Subsidies and Countervailing Measures*, http://www.wto.org/english/res_e/booksp_e/analytic_index_e/subsidies_02_e.htm#article4 (accessed July 10, 2012)

demands that the limit of the level of concessions an injured party may receive as countermeasures for an injury “shall be equivalent to the level of the nullification or impairment.” Under DSU rules, the DSB may authorize proportional countermeasures that compensate the injured party up to the level of injury already suffered but it does not have discretion to authorize any further compensation.

Article 4.10 of the SCM Agreement instead uses a footnote, specifically footnote 9, rather than a separate Article to address the *jus in talionis* criterion for certain kinds of subsidies, namely prohibited subsidies. The footnote exists to clarify what is meant by the statement that a complaining Member may take *appropriate countermeasures*. In doing so, the footnote aims to set a somewhat flexible limit upon the kinds of countermeasures than can be used. The footnote states that the expression *appropriate countermeasures* “is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.”³⁴ Thus, satisfaction of the *jus in talionis* criterion for prohibited subsidies, according to the SCM Agreement, is more nuanced and may be interpreted as suggesting the following: countermeasures are permissible up to the level necessary to respond to the unlawful use of prohibited subsidies. We should read necessity here as the requirement to employ the least harmful means available that sufficiently address the use of a prohibited subsidy. The only difference between the use of necessity here and its use in the previous cases we have examined is that what is being addressed (what the countermeasures are responding to) in disputes according to the SCM Agreement is the use of a prohibited subsidy, rather than any injury already suffered. The implication is that the use of a prohibited subsidy need not have caused

34 Ibid., n.9.

injury for a complaining Member to be authorized to respond its use.

To understand the justification for this nuanced limit on countermeasures in the SCM Agreement, we first need to understand the two kinds of subsidies recognized by the WTO: prohibited subsidies and actionable subsidies.³⁵ In short, a prohibited subsidy is prohibited regardless of any harmful effects it may or may not already have caused. According to the SCM Agreement, it is prohibited because it is “specifically designed to distort international trade, and is therefore likely to hurt other countries’ trade.” Thus, the use of a prohibited subsidy involves a malicious intent³⁶ to inflict injury and because of this, it has what amounts to a built-in propensity to cause injury (at some point in the future). We will look at an example of the use of a prohibited subsidy below. By comparison, the use of an actionable subsidy does not always carry with it a malicious intent and is permitted as long as it does not produce harmful effects but must be withdrawn if it does. In other words, an actionable subsidy only becomes illegal if it has harmful effects, otherwise not because it does not necessarily have a built-in propensity to cause injury (though it might still end up causing injury) and its use is often devoid of malice. An actual infliction of injury is a necessary component for the authorization of countermeasures in the case of an actionable subsidy. An example of an actionable subsidy may be a government

35 According to the document in World Trade Organization, *Understanding the WTO: The Agreements, Anti-dumping, subsidies, safeguards: contingencies, etc.*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed July 13, 2012) these two kinds of subsidies are defined as follows. A prohibited subsidy is one that requires recipients to meet certain export targets, or to use domestic goods instead of imported goods. They are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries’ trade. An actionable subsidy is one in which the complaining country has to show that the subsidy has an adverse effect on its interests. Otherwise the subsidy is permitted. The agreement defines three types of damage they can cause. One country’s subsidies can hurt a domestic industry in an importing country. They can hurt rival exporters from another country when the two compete in third markets. And domestic subsidies in one country can hurt exporters trying to compete in the subsidizing country’s domestic market.

36 We will return to the idea of malicious intent in chapter two when we look more closely at the use of exclusionary border policies on potential immigrants.

loan to a domestic industry where the intent is to keep the industry from failing rather than to take unfair advantage of a trade agreement with other countries. Such a subsidy may not necessarily produce harmful effects on other countries' trade, though in some circumstances it may. The SCM Agreement actually has different *jus in talionis* rules for actionable subsidies (addressed by Article 7.9) than for prohibited subsidies (addressed by footnote 9 of Article 4.10). For actionable subsidies, the *jus in talionis* criterion is actually satisfied in a very similar way as we saw it satisfied according to the DSU rules. As just mentioned, the relevant text regarding actionable subsidies with harmful effects is found in Article 7.9 of the SCM Agreement, which states:

In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy ... the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist. ...

The key phrase here is that countermeasures are to be 'commensurate with the degree and nature of the adverse effects determined to exist.' Article 7.9 of the SCM Agreement, therefore, like the DSU rules, sets the limit of countermeasures to the level necessary (minimally sufficient) to correct an injury (adverse effects) suffered.³⁷ The only difference is that Article 7.9 of the SCM Agreement addresses injuries suffered from the use of actionable subsidies whereas the DSU rules address injuries suffered from other kinds of trade violations not involving subsidies. If an actionable subsidy does not cause an injury, then no countermeasure at all is authorized; the *jus ulscici* criterion remains unsatisfied and so any countermeasure would *ipso facto* be disproportional.

³⁷ Article 7 of the SCM rules applies only to subsidies defined in Article 1, namely, actionable subsidies. Article 7 does not apply to subsidies defined in Article 3, which are prohibited subsidies.

The SCM Agreement rules for prohibited subsidies, on the other hand, are not directly tied to an existing injury or adverse effects. Footnote 9 of Article 4.10 leaves a great deal of discretion—some might say, ambiguity—with respect to the limit of countermeasures that are not disproportionate ‘in light of the fact’ that the subsidies are prohibited. At least one scholar, Andrew Mitchell, objects to the drafters decision to tie the proportionality of countermeasures for prohibited subsidies to the fact that the subsidies are simply prohibited rather than to the level of existing injury or adverse affects caused by the use of prohibited subsidies as is done by the DSU rules and Article 7.9 pertaining to actionable subsidies.³⁸ For this reason, Mitchell finds countermeasures authorized by this rule as necessarily disproportional and unfair. To my mind, the objection that Mitchell and others who may agree with him feel, is misplaced for two reasons. First, he misunderstands the difference between the kinds of countermeasures that must be used for actionable and prohibited subsidies due to the different ways each address injuries. Second, he fails to take full account of the work that malicious intent is doing in the use of prohibited studies, which makes future injury not only possible but also very probable.

With regard to the first problem with Mitchell’s objection, it is important to understand that an actionable subsidy requires only retaliatory countermeasures because they address fairly measurable injuries. A prohibited subsidy, on the other hand, may require not only retaliatory countermeasures but also anticipatory countermeasures, which respond to future injuries that are much harder to measure because they have not yet occurred. In both cases, though, the principle of minimally sufficient harm continues to apply. The difference is that the application of the principle in the case of a prohibited subsidy is going to be a little more difficult and will require

38 Mitchell, “Proportionality and Remedies in WTO Disputes,” 1002.

perhaps greater discretion (hence the need for flexibility) due to the ambiguity that may be present in determining the extent of future injury from the use of a prohibited subsidy. This is precisely why the drafters were correct to tie proportionality to the ‘fact’ these subsidies are prohibited so that they may allow for more discretion in adjudicating often difficult to measure future injury. We will look more closely at the distinction between retaliatory and anticipatory measures in the next chapter. For now, it will be helpful simply to understand why the drafters of the SCM Agreement decided to permit anticipatory countermeasures, which, to my mind, is explained by the fact that these measures are necessary to preempt a likely future violation of a trade agreement.

With regard to the second problem with Mitchell’s objection, it is critical that we do not underestimate the impact malicious intent has in the use of prohibited subsidies. In fact, without malicious intent, the clarification I offered for the first concern I have with Mitchell’s objection would actually fail to justify anticipatory measures. To see this, consider that if all that was necessary to justify such measures was the mere possibility of a future violation of a trade agreement, then Members could launch even frivolous complaints about possible violations far into the future whose likelihood of occurrence would be close to nil. However, if there is malicious intent in the use of a subsidy, then the likelihood that it will inflict injury is much higher, indeed it is very probable. This is why malicious intent is included in the definition of prohibited subsidies in the SCM Agreement; these subsidies are prohibited precisely because they do have a high chance of causing *maliciously intentional* injury. This is also why actionable subsidies are permitted until they cause harm, because the chance that they will *not* cause injury is usually going to be greater than the chance that they will, due to the fact that there may be no

malicious intent whatsoever in the use of an actionable subsidy. In summary, the response to Mitchell's objection is that proportional (or minimally sufficient) anticipatory measures must be tied to 'fact' that a subsidy is prohibited—by which the SCM Agreement means the fact that a subsidy is used with *malicious intent*—because Members should be allowed to defend themselves against injury *before* it occurs, when there is a *high likelihood* that it will occur given the presence of malicious intent.

The authorization of anticipatory countermeasures to address prohibited subsidies is not merely a theoretical possibility, the WTO has put it in practice. In 1996, Canada submitted a dispute to the WTO against Brazil accusing Brazil of intentionally disrupting the airline market by using prohibited subsidies to unfairly aid its domestic aerospace manufacturer Embraer, which primarily manufactured commercial airplanes.³⁹ Brazil counter-claimed that Canada was doing the same with its own domestic aerospace company Bombardier. In 1999, the WTO ruled that both Members were at fault and demanded that both withdraw their prohibited subsidies. While Canada followed through, Brazil did not. The arbitrators subsequently authorized Canada to use countermeasures in the form of a suspension of concessions and obligations that would otherwise be owed to Brazil. The authorized countermeasures were equivalent to the full value of the prohibited subsidies for global sales (a maximum of C\$344.2 million in sanctions a year for six years against Brazil) of Embraer airplanes, rather than limit the level of countermeasures to the level of adverse effects presently experienced by Canada. The arbitrators stated that these countermeasures were not disproportionate because the limit of proportionality is not determined

³⁹ Decision by the Arbitrators, *Canada-Export Credits and Loan Guarantees for Regional Aircraft, Recourse to Arbitration by Canada Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, paras. 3.9, 3.11, 3.38, WT/DS222/ARB Feb. 17, 2003 [henceforth *Canada-Aircraft*].

solely by the existing adverse effects of the prohibited subsidy but also the amount necessary to induce the offending Member to withdraw it. Unfortunately, as we have already noted, given the ambiguity that exists with foretelling how much is necessary to induce a state to withdraw its unlawful, maliciously intentional, and imminently harmful subsidies, some indeterminacy is to be expected, which inevitably conflicts with a strict reading of the principle of minimally sufficient harm. Nonetheless, the figure the WTO arbitrators ultimately came up with in the Canada-Aircraft case was not obviously excessive and it seemed a fair approximation of what may be considered one of the lesser harmful, minimally sufficient countermeasures available to address the imminent injury posed by Brazil's prohibited subsidies. I do not deny that others with perhaps more expertise on these matters might disagree and may find ways that inflict less harm on Brazil while sufficiently addressing the injury that Canada has suffered and would suffer as a result of Brazil's continued use of prohibited subsidies. If such measures were available then we might say the countermeasures authorized by the WTO arbitrators were, in fact, disproportional. In any case, the countermeasures that were actually authorized worked because by 2001, fearing the detrimental effects that they might have, Brazil brought its subsidy program (PROEX III) into compliance with the trade agreements and the WTO was satisfied with the modifications. The important thing to keep in mind here is that whatever measures the WTO authorizes, whether they are addressing existing or imminent injury (that is, they meet the *jus ulscici* criterion), must still be limited by the principle of minimally sufficient harm. This is required despite the fact that in practice we may be able to only reasonably approximate the application of the principle of minimally sufficient harm to satisfy the *jus in talionis* criterion.

In concluding this section, I want to take note of three important things in the context of

trade disputes, which are:

- 1) the dual justification of trade dispute countermeasures and the distinction between *jus ulscici* (the right to take countermeasures) and *jus in talionis* (the right in using countermeasures),
- 2) the requirement of the principle of minimally sufficient harm for the *jus in talionis* justification, in both retaliatory and anticipatory countermeasures,
- 3) and the important role that malicious intent plays in justifying the use of anticipatory countermeasures.

2.4 Proportionality in Penal Theory

Of the contexts we will look at in this chapter, penal theory may have the largest breadth of literature behind it. Luckily for us, there is no need to review it all here. In fact, this section will be the briefest of the three in which we analyze proportionality in a popular context. This is because we need only limit our attention to H. L. A. Hart's significant contribution to penal theory, and even then, only in a limited way to introduce the famous distinction between what he called the "general justifying aim" of punishment and the "distribution" of punishment.⁴⁰ Andrew Von Hirsch calls this contribution by Hart the "most significant clarification" in the philosophy of criminal punishment up to that point.⁴¹ Hart believed that the reason scholars had been unable to develop a satisfactory theory of punishment until then was because of their failure to distinguish these two parts in the justification of punishment. Much of the disagreement in the philosophy of punishment is an extension of the conflict in ethical theory between deontology and consequentialism. We need not delve deeply into that here, it suffices to point out that these ethical theories contribute to the disagreement penal theorists have about whether criminal

40 H. L. A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968).

41 Andrew Von Hirsch, "Proportionality in the Philosophy of Punishment," *Crime and Justice* 16 (1992), 61.

punishment must be justified on the grounds of retribution (the offender *deserves* the punishment) or deterrence (we must punish to *deter* other offenders). However, Hart argued that once we clarify the different kinds of questions we must ask about the justification of punishment, then there can be room for both ethical theories to play a role. Many have argued that Hart was ultimately unsuccessful in combining both ethical theories into his account of punishment; nonetheless, the distinction he draws in the justification of punishment, or what he calls the different kinds of questions we must ask, still applies and is still crucially important even if the other parts of his account fail.

According to Hart, the justification of punishment must answer at least two questions: *why* a state is allowed to punish (the general justifying aim) and *how* a state may punish (the distribution of punishment). Hart suggests there are other questions too, such as *who* may be punished, but what should interest us most here are the *why* and *how* questions. Notice how these two questions map on nicely to the distinction we have examined in various contexts between the *jus ulscici* criterion and the *jus in talionis* criterion. The former grounds the reasons *why* a party such as a state or WTO Member may seek countermeasures and the latter determines *how* the party may use countermeasures. Thus, in the context of punishment, we may agree with Hart that before the punishment of a citizen may be authorized by the state, it must first offer grounds for the punishment (*jus ulscici*) and then whatever punishment the state inflicts must be inflicted proportionally (*jus in talionis*) relative to the just goals the state is authorized to achieve after satisfying the *jus ulscici* criterion. Clearly, there is still plenty of room for debate even after we frame the theory of just punishment in this way, as Hart has done. For example, penal theorists may still debate about whether it is, in fact, deterrence or retribution that satisfies the

jus ulscici criterion. The upshot is that at least the framing Hart provides seems to be the correct way to begin to get at what just punishment is. Moreover, this way of framing the justification of punishment and separating the questions, allows for the *jus in talionis* criterion to be satisfied by different principles. Thus, whether the *jus ulscici* grounds are satisfied on consequentialist or deontological grounds, we can say that the punishment inflicted on the offender is still required to abide by the principle of minimally sufficient harm—it must still be proportional—before the *jus in talionis* criterion can be satisfied. In the context of criminal punishment, as in the other contexts we looked at, gratuitous harm is impermissible. Thus, a state is never permitted to inflict more harm in punishing a criminal than is sufficient to achieve its *jus ulscici* goals.

2.5 Concluding Remarks

This chapter provided a brief survey of the use of proportionality in international law and in penal theory. In the following chapter, I will develop a general theory of just retaliation that relies on many of the insights we have gained from the survey. The theory will then be applied to immigration policy. My aim is to show that the main problem that has prevented us from developing a plausible theory of just immigration policy is the same one Hart observed in penal theory. The contention will be that the reason we have been unable to come up with a theory of just immigration policy is because philosophers working on this topic have failed to properly distinguish between the two central parts of the justification of immigration policy and have instead conflated them.

CHAPTER 3

PROPORTIONALITY AND BORDERS

3.1 Introduction

As we saw in the previous chapter, modern scholars have come to something of a consensus that the principle of proportionality is a basic requirement of fairness across a broad range of subjects where harmful measures—alternatively, countermeasures—are sought by one party against another party in response to some provocation performed by the latter against the former.⁴² My aim in this chapter is to apply the principle to immigration policy. I will first present a general theory of just retaliation, which can be applied in any context concerning the just use of harmful measures in response to the violation (or potential violation) of a legitimate interest. I will then demonstrate that when the theory is applied in the context of immigration policy, it makes traditional closed borders policies—which include the use of harmful measures such as exclusion (inadmission) and expulsion (deportation) on immigrants—impermissible. My argument will have two main upshots. First, it will turn out, perhaps surprisingly, that in most cases, exclusion

42 See especially Hirsch, “Proportionality in the Philosophy of Punishment,” 55-98; and Franck, “On Proportionality of Countermeasures in International Law,” 716 and 762; and Jeremy McBride, “Proportionality and the European Convention on Human Rights,” in *The Principle of Proportionality in the Laws of Europe*, ed. Evelyn Ellis (Oxford: Hart Publishing, 1999), 23 where McBride writes: “The concept of proportionality is not specifically mentioned in the text of the European Convention in any of its additional Protocols. Nevertheless it has come to be recognized as one of the central principles governing the application of the rights and freedoms contained within these instruments.”

and expulsion are permissible only when they are a product of the immigrant's, rather than the state's, choosing. In this way, the theory is able to preserve the central liberal tenet of individual autonomy even when the migrant is excluded or expelled. Second, while my theory may seem initially to be compatible only with the aims of open borders advocates I will show that my conclusion is, in fact, also compatible with the aims of the opponents of open borders. This is because it permits me to give full moral weight to the very things they believe open borders threaten and exclusion and expulsion protect, such as the preservation of culture, without resorting to these measures to attain them—that is, without resorting to closing the borders.⁴³ In fact, in most circumstances and even given that we ought to secure a state's legitimate interests, closing the borders will turn out to be unjustified.

3.2 Proportionality

To review from the previous chapter, recall that the main use of proportionality is to determine the permissible conduct of a party that is justified in taking harmful measures against another party in retaliation for a violation (or potential violation) of a legitimate interest. This is how proportionality was applied in each of the contexts we examined from war to trade and penal theory. We saw that there are two parts to the full justification of these harmful measures: first, whether provocation *X* warrants such measures; and second, whether the measures are proportional to *X*. I have been referring to the first part as the *jus ulscici* criterion and the second part as the *jus in talionis* criterion. Proportionality plays a critical role primarily in the second

⁴³ For consistency and brevity, it should be understood that when I use the term 'closed borders' I mean to refer to both the exclusion (inadmission) and expulsion (deportation) of immigrants from a state. Where necessary for purposes of distinction, I will refer to exclusion and expulsion separately but in all other cases 'closed borders' will refer to both simultaneously.

part, *jus in talionis*, by determining whether a harmful measure taken in response to some provocation is justified. For any such measure, if the *jus ulscici* criterion is not met, then the measure is *ipso facto* disproportional—it can never satisfy the *jus in talionis* criterion even in principle—since the provocation does not warrant it. If the *jus ulscici* criterion is met—the provocation warranted a harmful measure—but the measure used is disproportional to the provocation, then the *jus in talionis* criterion will remain unsatisfied. Only if the measure meets both criteria—an agent is justified in taking it (*jus ulscici*) and it is a proportional response to the original provocation (*jus in talionis*)—would it be fully justified.

3.2.1 Proportionality as a Moral Principle

The use of proportionality is a moral requirement when it is invoked in contexts that involve harm. When invoked in these moral contexts, proportionality rests on what I called the *principle of minimally sufficient harm* in the previous chapter:

If *X* is justified in inflicting harm on *Y* to address *Z*, then *X* is morally obligated to inflict the least harm necessary to sufficiently address *Z*.

I will now elaborate on the reasons motivating this principle. Morality demands that we minimize unnecessary harm. Indeed, we (*X*) ought to refrain from harming others (*Y*) whenever it is possible to avoid harm consistently with our other moral goals. Sometimes, harm is justified, such as when it is necessary to achieve some greater good (*Z*). When harm is necessary, it is incumbent on those causing the harm to cause the least amount possible to sufficiently achieve the greater good. This is true not only in consequentialist theories but also in deontological theories, because what is important is not merely the amount of harm but the *necessity* of it; people have a *right* not to be harmed more than is necessary, or agents have a *duty* not to harm

others unnecessarily, or people only *deserve* proportional harm, even when some some degree of harm is justified. For example, suppose Smith's neighbor Jones has been dumping trash on Smith's lawn. Smith is not justified in using more violence than is necessary to sufficiently achieve the greater good, namely, to prevent Jones from dumping trash on his lawn. Smith may not shoot Jones in order to address the dumping. However, Smith may still harm Jones via less violent means, such as by reporting him to the police so that he receives a citation.

When we begin to put the principle of minimally sufficient harm into practice, we often use the language of interests. For example, a state may seek countermeasures against another state for unlawfully violating its trade interests. It is fair to say that the literature on immigration policy has historically made heavy use of the language of interests too, especially in grounding arguments in favor of exclusion. For instance, it is often argued that states are entitled to close their borders in order to protect their interests. Thus, for precision and consistency, it will be beneficial for us to reformulate the principle of minimally sufficient harm in terms of interests. To do this, we should first specify that the harm inflicted by *X* on *Y* is the harm arising from an infringement of interests. Second, we should define *Z* in terms of a violation of *X*'s own legitimate interests. Let us call the new principle the *principle of least infringement*:

If *X* is justified in inflicting harm by infringing on the interests of *Y* to secure its legitimate interests against their violation, then *X* is morally obligated to inflict the least harm necessary to sufficiently secure its interests.

This principle requires that the harm one causes by the infringement of another party's interests be minimized even when some infringement of interests is justified. This follows from the requirement introduced above that one ought to inflict the least harm necessary (specifically, in this case the harm is the infringement of interests). This is not, of course, to say that we ought

always to refrain from infringing another party's interests. The moral principle of proportionality, with its dependence on the principle of least infringement, rules out only unnecessary or gratuitous harm from the infringement of interests. This is ultimately why it is morally wrong to take measures that inflict more harm than is necessary to sufficiently secure one's legitimate interests. Anything beyond this *minimally sufficient harm* inflicted by an infringement of interests is, by definition, gratuitous and therefore impermissible. For example, suppose that Atlantis is provoked into an armed conflict with Shangri-La after Shangri-La launches a missile into Atlantis territory. Atlantis may be justified in inflicting some harm by infringing on Shangri-La's interests in an effort to secure its legitimate interests (defend itself against further attacks) from Shangri-La's provocation. Assume that Atlantis has only two options, to use very minor sanctions against Shangri-La or to send a nuclear missile into Shangri-La. Assume, further, that both options would be sufficient for securing its legitimate interests. If so, then Atlantis is obligated to use very minor sanctions rather than a nuclear missile, since, presumably, the sanctions would inflict less harm and thus the excess harm inflicted by a nuclear missile would be entirely unnecessary or gratuitous. This example is presented here merely to demonstrate how proportionality works when it is invoked in terms of interests. The principle of least infringement as used here provides one of the central moral components that will be essential in the general theory of just retaliation, which now follows.

3.3 The General Theory of Just Retaliation

The general theory of just retaliation can be thought of as a test, which comprises the two criteria introduced in the previous chapter: *jus ulscici* and *jus in talionis*. Harmful measures that pass this

test are just, those that do not are not. Passing the test is a necessary condition for a harmful measure to be just, which by extension means that if the measure fails the test then it is unjust and unfair. Some of what follows may, admittedly, seem slightly repetitive but it is presented here to aid us in making the general components of the theory clear. In the previous chapter, we looked only at how these components were applied in practice but here we will now elaborate on and pick out the specific components that provide us with a general theory.

3.3.1 *Jus Ulscici*

The first part of the just retaliation test is the *jus ulscici* criterion. In each context that invokes *jus ulscici*, the very act of seeking recourse to some measures that would intentionally harm another party needs to be independently justified, and that is the purpose of the *jus ulscici* criterion, the right to retaliate. A helpful way of referring to the *jus ulscici* criterion is by borrowing from H. L. A. Hart's important clarification in penal theory and calling it the *why* question of the test. This part of the test addresses why an agent has the right to take harmful measures in the first place—why it has a right to retaliate at all. The general answer to the *why* question is that the agent has a right to retaliate because it has been (or will be) harmed.

There are two important concepts that need to be carefully defined. The first is how I make use of the concept of harm. As mentioned above, I define harm very narrowly as a violation of legitimate interests. Additionally, we need to make a distinction between two kinds of harm. The first kind is necessary harm and this kind of harm is synonymous with harm that might be described as unavoidable; so it may be said that this kind of harm is either permissible (perhaps even obligatory in some cases) to inflict or refrain from preventing. The second kind is

gratuitous harm and this kind is synonymous with harm that might be described as unnecessary or avoidable; so it may be said that this kind is at least impermissible to inflict if not possibly also (and more controversially) obligatory to prevent. For our purposes here, I aim to leave open the contexts in which these two kinds of harms may be interpreted so that we are not forced to rely on controversial claims about consequentialism or deontology. As I briefly discussed above, it is sufficient to say that gratuitous harm is wrong on any normative account—for example, we can say gratuitous harm always decreases utility or that one has a right not to be gratuitously harmed. Additionally, gratuitous harm is always wrong and this is true whether a state inflicts it on another party, such as an individual, or an individual inflicts it on another party, such as a state. Thinking of harm in terms of gratuitousness will be very helpful when we apply the principle of proportionality to immigration policy. Finally, note that while harm in the sense of a violation of legitimate interests is required to justify the use of retaliation, guilt is not. That is, the guilt of the agent that is violating (or about to violate) the legitimate interests of another party does not make a just retaliation any more or less permissible. One is permitted to defend oneself against a violation of one's legitimate interests whether the agent committing the violation intends to do so or not.

The second item that needs to be defined, though only in a very general sense for now, is *legitimate interest*. What counts as a legitimate interest will vary from one context to another. In the just war context, Walzer argues that the only legitimate interests that justify war are rights.⁴⁴ For Walzer, wars fought in defense of rights meet the *jus ulscici* criterion. Commercial wars, wars of expansion and conquest, and religious crusades are prohibited because the interests

44 Walzer, *Just and Unjust Wars*, 72.

secured by these wars are not legitimate. In other contexts, different legitimate interests may meet the *jus ulscici* criterion. In the context of international trade agreements, for example, legitimate interests are defined by WTO agreements and it is the violation of these agreements (serving as a proxy for legitimate interests) that satisfies the *jus ulscici* criterion. There is much disagreement in penal theory but even there we might at least say that some theorists define just laws as proxies for the protection of legitimate interests so that a state is entitled to punish (it satisfies *jus ulscici*) whenever an offender violates a law. The next chapter of this dissertation is devoted to determining what legitimate interests are in the context of immigration policy but this will not be necessary in this chapter. What is important to understand for now is that while legitimate interests may be defined narrowly by each context, in general, we can say that legitimate interests are interests an agent is justified in protecting. The upshot to this is that the answer to the *why* question will depend on legitimate interests. Thus, *why* does an agent have the right to retaliate? In short, it is because the agent's legitimate interests have been violated.

It is important to remember that meeting the *jus ulscici* criterion alone does not justify the use of any and all measures; it justifies only the permissibility of an injured party to retaliate. It does not determine what a just retaliation is. Retaliation must have certain limitations, which are determined by the second criterion of the proportionality test. The *specific* measures the injured party uses must themselves be justified and this is determined by the second criterion of the proportionality test, *jus in talionis*.

3.3.2 *Jus In Talionis*

Recall that to be a proportional response to some offense, a measure must do two things. First,

the measure must be sufficient to secure⁴⁵ the legitimate interests that have been or will be violated. Second, the range of measures must be limited by the principle of least infringement. The least harmful sufficient measure possible is the only option necessary for securing the legitimate interests—any measures that are more harmful are gratuitous. Violating the principle of least infringement makes the measure disproportional by definition, so it fails to meet the *jus in talionis* criterion.

Just as with the *jus ulscici* criterion, meeting the *jus in talionis* criterion also depends on what count as legitimate interests in a given context. However, these two criteria address different questions about legitimate interests. The *jus ulscici* criterion primarily addresses questions about what counts as a violation of legitimate interests, whereas the *jus in talionis* criterion primarily addresses questions about the permissible kinds of measures that may be taken to secure these interests. Once again, it is helpful here to apply Hart's important clarification in penal theory. In other words, *jus ulscici* answers *why* an agent may use harmful measures against another party while the *jus in talionis* criterion answers *how* an agent may use these measures. The answer to the former, as we have just seen, is that the agent's legitimate interests were (or will be) violated. The answer to the latter is determined by the application of the principle of least infringement to the entire range of possible measures available for responding to the violation of the legitimate interests in question.

There may be multiple ways to secure these interests, but the agent does not have unlimited choice among these options. The agent must consider the harmful effect its choice will have on the other party even though the other party is responsible for the original injury. Harm is

45 I use the term 'secure' when I refer to legitimate interests throughout the paper but it can also be substituted by 'compensate for,' 'restore,' or 'protect' depending on the context.

an essential component of the calculation here, and a certain amount is justified. Indeed, most retaliatory measures will presumably require a certain amount of harm to appropriately and sufficiently secure the legitimate interests that have been or will be violated. The necessity of the harm, combined with sufficiency of the response, sets the limit. On one end of the range of options may be the option to do nothing. While this option has the virtue of perhaps inflicting the least amount of harm, it will not sufficiently respond to the violation. On the other end of the range of options is the option to take the most extreme measure and potentially inflict a massive amount of gratuitous harm. While this option may have the virtue of being maximally efficacious at securing the agent's legitimate interests, it very likely goes far beyond the minimum harm required to sufficiently secure the interests, making the harm gratuitous. Thus, what is needed is to strike a balance between the force of the response and the degree of harm.

3.3.3 *The Degrees of Harm*

I want to briefly return now to the concept of necessity that I introduced in the context of just war theory in the previous chapter. To generalize the claim I made in the previous chapter, a necessary use of retaliatory measures should be understood to refer to the least *harmful* measures available to sufficiently secure one's legitimate interests against their violation. Thus, the condition of necessity here should be thought of as a harm-limiting clause on the use of retaliation a party is justified in using if it satisfies the *jus ulscici* criterion. We must be careful to avoid assuming that the degree of the force of the response corresponds perfectly with the degree of harm inflicted by the wronged agent on the offending party. If this were always true, then the reason an agent may not pick harmful measures beyond the limit set by the sufficiency of the

response is because as the degree of the force of the response rises, so too does the degree of harm. The assumption stipulates that going beyond the sufficient force would necessarily inflict more harm. However, this is not always the case. There may be cases when a measure exceeds the force required to sufficiently secure a state's legitimate interests but inflicts no more harm. For example, suppose during a war an agent is justified in dropping a bomb in self-defense to end a war of aggression. Now, suppose the least harmful sufficient measure the agent may take to end the war and defend itself is to drop a bomb at location *A* resulting in the deaths of 1,000 people. Dropping a second bomb at location *B*, while perhaps not strictly necessary for ending the war, will have the added benefit of destroying a couple of additional enemy munitions depots—which may prove dangerous in the future—and no additional people will be harmed or killed. Dropping the second bomb at location *C*, instead, would similarly destroy a couple of additional munitions depots but would also harm another 1,000 people by either wounding or killing them. In these examples, dropping a second bomb, in addition to the first, is not strictly necessary and so this action counts as a measure of a higher degree of force than is sufficient to bring the war to an end. However, dropping the bomb at *B* will cause no additional harm whereas dropping the bomb at *C* will actually cause more harm (in terms of human collateral).

In other words, the degree of harm rises with the degree of force in the latter but not in the former. The example of dropping the bomb at *B* demonstrates that the degree of harm (in the *harm range*) is, strictly speaking, independent from the degree of force (in the *force range*)—there is not always a strict one-to-one correspondence between the two as the degrees rise for each—though some element of harm is nevertheless nearly always inherent in retaliatory measures, even if it does not always rise concurrently with the degree of force. Notice also,

dropping the bomb at *B* does not violate the principle of least infringement whereas dropping it at *C* does because gratuitous harm will be inflicted at *C*. Thus, dropping the bomb at *B* is not as morally problematic (if it is at all) as dropping it at *C*.

While the assumption I have been making that the degree of harm rises with the degree of force seems to me appropriate in most cases, we can easily account for the kinds of exceptions noted in the previous paragraphs by adding that the actual limit is set by the degree of harm present at the point where a measure is forceful enough to sufficiently secure the legitimate interests. Any measures that are more forceful (which may also be more efficacious), but which do not increase harm, are permissible. It is the necessity of the harm that intersects with the sufficiency of the force of the retaliatory measure that determines the limit of permissible measures. The agent may always elect to go in the other direction and choose less harmful (in the harm range) measures, though they may not be sufficient (in the force range) for securing legitimate interests, but the agent may not choose measures that inflict more harm (in the harm range) than is sufficient (in the force range) to secure these interests. Thus, *how* may an agent use harmful measures to secure its legitimate interests? In sum, by using whatever means inflict the least amount of harm necessary, yet are sufficient to secure the agent's legitimate interests and no more.

3.3.4 Efficacy

One final point to make in this section is that the degree of efficacy plays little or no role in the *jus in talionis* criterion beyond what is sufficient to secure an agent's legitimate interests. Any magnitude of efficacy beyond the minimally sufficient will not factor into the calculation of

permissible measures except, perhaps, in cases where the response to a violation of legitimate interests can be made more efficacious without additional harm being inflicted. Some measures may turn out to be more efficacious but they require the infliction of more harm. As was made clear in the preceding section, any harm inflicted beyond what is necessary to sufficiently secure an agent's legitimate interests is gratuitous even if a measure that inflicts such harm may be more efficacious. Returning to the war examples used above, dropping a bomb at *A* is sufficient with respect to the goal of ending the war and securing self-defense. Dropping a second bomb at *C* is, perhaps, more efficacious at this goal—conceivably by preventing the small chance of future acts of aggression or by more decisively defeating the enemy and sending a clear ‘message’—but it is certainly not necessary and because of this, using this measure will inflict gratuitous harm. So, while dropping the bomb at *A* and a second bomb at *C* will be more efficacious than dropping a bomb only at *A*, this is not permissible because it violates the principle of least infringement and thus fails to meet the *jus in talionis* criterion. Dropping several nuclear bombs on the enemy and wiping out their entire country would be still more efficacious, preventing any chance at all of future aggression, but such a method would inflict massive amounts of gratuitous harm. These cases illustrate why efficacy, when it entails inflicting gratuitous harm, may not be part of the calculation to determine permissible retaliatory measures. It may, however, play a role if being more efficacious does not entail more harm as in the case above involving a bomb dropped at *B*.

3.4 The Proportional Infringement Theory of Open Borders

We now have all we need to present the *proportional infringement theory of open borders*. The theory suggests that in most standard cases of immigration, proportionality prohibits closed

borders. There are, in principle, some exceptions that I will specify later, in which excluding or expelling migrants from a state is permissible as a last (or proportional) resort, but I believe these exceptions will rarely obtain. Thus, my theory requires *de facto* open borders as the only permissible immigration policy available to states today. This is not to say that a state's legitimate interests—which ultimately lead many states to close their borders in order to secure them—do not matter. On the contrary, a state's legitimate interests matter a great deal and they ought, morally speaking, to be secured at all times in all instances whenever possible, even in the face of open borders. This is what I believe may make my theory compelling to closed borders advocates who offer an interest-based justification for closing, or greatly limiting, the borders, since I am ready and willing to grant them the very thing they are trying to secure with closed borders, namely, a state's legitimate interests. In fact, while I find the traditional open borders arguments for a right of migration appealing, my theory does not require them. In short, I can grant full moral weight to nearly any interest the closed borders advocate believes requires exclusion or expulsion to secure—including things like national solidarity, the preservation of culture, the protection of language—and my theory will still show that the justification to secure this interest will actually fail to entail closing the borders in most circumstances.⁴⁶

Exclusion and expulsion, on my theory, are just two of many possible (and, in my view, most harmful) answers to the *jus in talionis* question of *how* a state may secure its legitimate interests. The error closed borders theorists make is to conflate the *why* and *how* questions, leading them to assume that exclusion and expulsion are the only answers to the *how* question.

⁴⁶ Most closed borders advocates offer interest-based accounts to justify exclusion and expulsion. However, some advocates of exclusion, like Christopher Wellman, have provided innovative attempts to provide deontological grounds for the right. The argument I present in this chapter will specifically target the interest-based accounts and chapters 5 and 6 of this dissertation will address the deontological case for the right of exclusion.

They treat these measures as the very same thing as the securing of legitimate interests; they define ‘exclusion’ and ‘expulsion’ in terms of the ‘securing of legitimate interests.’ Regarding the question of exclusion, rather than first ask ‘why may a state use harmful measures on immigrants?’ these theorists instead ask, ‘why may a state exclude?’ The *how* question is never asked; they simply presume that exclusion is necessary to secure a state’s legitimate interests. Michael Walzer, for example, famously claimed that “without [exclusion], there could not be *communities of character*.”⁴⁷ That is, his argument for the importance of communities of character just *is* his argument for exclusion. What justifies the former necessarily justifies the latter. This leads to the error in which the justification is sufficient to ground the legitimacy of the interest but not sufficient to ground the method used to protect the interest, such as exclusion. Italy, for example, has too small a working age population to care for its aging, retiring citizens. These are grounds for a legitimate interest in increasing the working age population. *Why* should Italy increase its working age population? To be able to provide adequate care for its older citizens. *How* should Italy increase its working age population? Certainly not by exclusion, that might only *decrease* the working age population. Thus, the fact that there is too small a working age population to care for Italy’s older citizens justifies increasing the working population, but it is not grounds for excluding immigrants.

Exclusion and the securing of legitimate interests are not the same thing and the latter in no way entails or necessitates the former as exemplified in the Italy case; indeed, exclusion is counterproductive in that case. Note that while the Italy case shows why the grounds for exclusion and the securing of legitimate interests should be separated (the former is insufficient

47 Walzer, *Spheres of Justice*, 63 (emphasis his).

to attain the latter), with respect to immigration policy the main reason the two should be separated will not be due to exclusion's insufficiency but rather to exclusion's disproportionality as a means to secure the state's legitimate interests. Moreover, what is true about exclusion in the Italy example also applies to expulsion. All of this demonstrates why we must properly separate the *why* and *how* questions. The answers to each of these questions must be grounded independently.

3.4.1 Proportionality and Immigration Policy

The application of the theory of just retaliation to immigration policy should now be straightforward. Beginning with a state's legitimate interests, we can identify those that are being, or at risk of being, violated by an open borders policy. To protect these interests, a state is justified in seeking harmful measures against actual or potential immigrant violators. Simply by having a legitimate interest, the state has met the *jus ulscici* criterion and is justified in seeking measures to secure it. However, the means used to secure these interests from immigrants already violating them, or poised to violate them, may not be unlimited. They are limited by the principle of least infringement. Within the range of options a state may use to secure its interests, there is a point that is sufficient for doing so and whatever harm is inflicted on an immigrant at that point is the maximum amount of harm that is permissible. Presumably, an immigrant has an interest in residing within the receiving country. That does not mean he or she has an absolute right to that interest, but it does mean that the interest must carry some, possibly even significant, weight in whatever calculation we use to determine the least harmful sufficient measures the state may use to secure its own legitimate interests. Any interest of the immigrant that is infringed is a harm

inflicted on that person. What we must do is to balance the amount of harm inflicted on the immigrant against the risk the immigrant poses to the state's legitimate interests and attempt to ensure that we minimize the infliction of gratuitous harm on both parties.

It will be helpful to pick an interest that we can refer to for the purpose of illustrating the theory of proportional infringement. I will use the interest of maintaining a primary language. This may turn out not to be a legitimate interest after all, but for simplicity, let us assume it is for now. Supposing that a state is justified in securing this interest, any actual or imminent violation of the interest of maintaining a primary language permits the state to take measures to secure the interest. If a potential immigrant desires to migrate into a country but is unable to speak its primary language, then the receiving country's interest of maintaining a primary language may be, even if only to a diminutive degree, imminently at risk. In these cases, the state may elect to do nothing and simply admit the potential immigrant at great risk to its language interests. This would not violate the principle of least infringement but it would also not be sufficient to secure its legitimate interests. The state may elect to shoot and kill the potential immigrant at the border, but this is impermissible because it would inflict far more harm than is necessary to sufficiently secure its interests even if doing so would secure these interests more efficaciously—for example, by having greater deterrence effects on other potential immigrants. Recall, efficacy has no moral weight beyond the point of sufficiency if increasing efficacy means increasing harm beyond what is necessary to sufficiently secure the state's legitimate interests.

One possible option that seems sufficient for securing the interest of language and inflicting the least amount of harm on the potential immigrant is to require language classes prior to (or immediately after) admittance. If this option works, then it meets the *jus in talionis*

criterion and any measure that inflicts more harm than the harm inflicted by this option would be disproportional and impermissible. It is clear that shooting potential immigrants is disproportional in this regard but notice, so too is the option to exclude if exclusion inflicts more harm than the requirement to attend language classes, even if exclusion is more efficacious. The principle of least infringement makes exclusion in this case impermissible as long as the requirement of language classes is possible, less infringing, and sufficient to secure the interest.

Ultimately, I contend that, in principle, this will be true of nearly all (if not actually all) legitimate interests in most cases. These interests can be secured without closing the borders by securing them in more proportional ways. An immigrant's or potential immigrant's interests must be infringed proportionally with respect to the legitimate interest a state has a right to secure. The harm must be proportional; it must be necessary to secure a state's legitimate interests and no more. Notice that this fine-grained proportional approach to immigration policy creates a *de facto* open borders policy because while closing the borders is not ruled out in principle, it violates the *jus in talionis* criterion in most cases. To summarize my theory, in the context of immigration, just as in the other contexts we have surveyed, a policy is permissible only if it meets both the *jus ulscici* criterion—a state has legitimate interests that it is justified in securing—and the *jus in talionis* criterion by sufficiently securing its interests through the proportional infringement of an immigrant's or potential immigrant's interests—that is, by inflicting the least harm necessary to sufficiently secure its interests.

3.5 Anticipations

Though at times in the preceding discussion I have hinted at the possibility of justifying

measures that may be used when a violation of legitimate interests is imminent, the focus may have seemed primarily to be on *retaliatory measures* in cases when a violation has already occurred. We must also consider the justification of *anticipatory measures* in cases when a violation is imminent, but not yet actual. In the previous chapter, we examined how anticipatory measures are used to settle disputes involving the use of prohibited subsidies. Recall that a case was made to ground the justification of anticipatory measures on the basis of the probability and imminence of harm given the malicious intent inherent in the use of prohibited subsidies. I will now elaborate on that discussion here in two different contexts, just war theory and immigration policy, in order to make clear how a theory of just immigration policy can accommodate not only retaliatory, but also anticipatory measures.

In just war theory, retaliatory measures are used in *defensive* wars whereas anticipatory measures are used in *pre-emptive* wars.⁴⁸ There is a difference in how a party meets the *jus ulscici* criterion for defensive and pre-emptive wars. In defensive wars, a party is justified in exercising proportional retaliatory measures to secure its interests because they have actually been violated via overt aggression by another party. In contrast, during pre-emptive wars, as in the case of the use of prohibited subsidies, a party is justified in exercising proportional anticipatory measures only if there is a genuine *threat* to its legitimate interests. There is a parallel to this important distinction in immigration policy, which I have been alluding to throughout this dissertation, between immigrants and potential immigrants. This distinction is reflected in the different measures that states normally use to address these two groups. States

48 Many just war theorists, including Walzer, suggest that pre-emptive wars are really just a kind of defensive war. It is important to separate them conceptually, though, in order to properly analyze the distinct justification for each.

use the retaliatory (defensive) measure of expulsion, or deportation, on *immigrants* that are unwelcome and they use the anticipatory (pre-emptive) measure of exclusion, or inadmission, on *potential immigrants* that are unwanted. Thus, we must now consider the additional dimension this distinction plays in arriving at a just immigration policy by determining the effect it has on the *jus ulscici* and *jus in talionis* criteria.

3.5.1 Anticipatory Measures in Jus Ulscici

It is important to set the terms of a genuine threat to avoid generating absurd implications. If simply any perceived threat counts, then harmful responses (including war) may be justified for distant dangers or even lesser acts such as insults or base fear. In short, we want to avoid justifying what Walzer calls *preventive wars*—wars against some potential future threat.⁴⁹ This is where the component of malicious intent we first saw in the use of prohibited subsidies becomes critically helpful. Just as in the context of trade, in war we may stipulate that a genuine threat arises primarily from acts with non-subjective “evidence of malignity,” which for Walzer means acts that follow directly from the declaration of one’s intention to inflict injury.⁵⁰ Without this component of intent to injure, it becomes much more difficult to classify an act as a genuine threat. The mere acts of acquiring weapons or augmenting military power are not just cause for a war, even if they make others (perhaps understandably) afraid. Lacking an intent to injure, those acts do not produce, in Walzer’s words, *enemies*.⁵¹ We may not use harmful measures on possible enemies, but only actual enemies who are “*engaged in harming us* (and who have already

49 Walzer, *Just and Unjust Wars*, 74-85.

50 Ibid., 78.

51 The same can be said of the use of an actionable subsidy in the context of trade agreements. Lacking a specific intent to undermine trade, these subsidies do not make injury probable. The case is, of course, different with the use of prohibited subsidies, which do carry an intent to undermine trade.

harmed us, by their threats, even if they have not yet inflicted physical injury).”⁵² Walzer correctly notes that it will always be a charge against us if we harm those “engaged in entirely legitimate (non-threatening) activities. Hence the moral necessity of rejecting any attack that is merely preventive in character, that does not wait upon and respond to the *willful* acts of an adversary.”⁵³

The reason that the intent to injure is crucial for meeting the *jus ulscici* criterion is because it is a fairly good indication that a violation of one’s legitimate interests is imminent. For example, the augmentation of power, without the intent to injure, rarely leads to an actual violation of another party’s legitimate interests. With an intent to injure, though, the augmentation of power is much more likely to lead to such a violation. Thus, the intent to injure is a necessary condition for satisfying the *jus ulscici* criterion in the case of pre-emptive measures. To be clear, I reiterate here that the theory I am advancing is not retributive. The work that malicious intent is doing here is not meant to justify anticipatory harm on the grounds that parties who are genuine threats *deserve* to be harmed. Rather, it is instead meant only to justify anticipatory harm because it is a very strong indicator of imminent harm. The theory, therefore, does not rely on claims about the culpability or guilt of the violators or potential violators of legitimate interests as a retributivist account might, but rather strictly on the imminence of harm—it is about self-defense, not desert or revenge. The ultimate end, therefore, is to keep a party’s legitimate interests from being violated and anything that offers a strong indication that this is imminent justifies an anticipatory response—it satisfies the *jus ulscici* criterion.⁵⁴

52 Walzer *Just and Unjust Wars*, 81 (emphasis his).

53 Ibid., 80 (emphasis mine).

54 In addition to the condition of intent, Walzer also lists two more conditions: first, there must exist a general situation in which waiting or doing anything other than fighting greatly magnifies the risk and second, the

The preceding discussion can be abstracted to the more general theory of just retaliation we have been examining, allowing us to apply it to immigration policy. The parallel case in the immigration context, however, requires us to make clear two important distinctions: first, between *recalcitrant* migrants, those who carry an intent to violate a state's legitimate interests and *amenable* migrants, those that do not carry such an intent; and second, between *abled* migrants, those who are able to migrate without violating a state's legitimate interests and *less-abled* migrants, those who are unable (or less able) to migrate without violating these interests. Both immigrants and potential immigrants can be either recalcitrant or amenable and abled or less-abled as I have defined these terms and these distinctions will determine not only whether the state is justified in taking any kind of measures against them at all (*jus ulscici*) but also what kinds of measures it can take (*jus in talionis*).

To make sense of what follows, I want it to be clear that in the context of immigration, it is not only states that are held to the principle of least infringement but immigrants as well. Immigrants and potential immigrants must not violate the legitimate interests of a state gratuitously or unnecessarily. If they are able to learn the primary language of the receiving state and maintaining the language is a legitimate interest of the state, then they should do so. Recalcitrant migrants, therefore, are those that *intentionally choose* not to do something they are able to do, thereby disregarding the principle of least infringement and violating the interests of the state when that violation—even if it were small and relatively inconsequential on its own—is entirely avoidable. In my view, these actions constitute what I have been referring to as an intent

belligerent party must be engaging in a degree of active preparation that makes the intent a positive danger. However, these conditions are not as critical in the immigration context, except perhaps when dealing with terrorists, so I am putting them aside here.

to injure in other contexts, or at least a relevant and reasonable approximation of it. Perhaps the intent of recalcitrant migrants is not always entirely malignant (though it can be in some cases, such as with terrorists) in the same way it tends to be in the paradigms of war and trade. Nonetheless, a failure to refrain from violating morally legitimate interests, when one has the power to do so—that is, they are ‘abled’ as I defined earlier—causes an avoidable and gratuitous injury (or makes one imminent) and constitutes a *willful* act. Contrast this with amenable migrants, who understand the moral importance of a state’s legitimate interests and are determined to avoid violating those interests. Immigrants and potential immigrants who do not have an intent to inflict gratuitous injury, that is, who choose to avoid violating the state’s legitimate interests, and are able to do so, are abled amenable migrants.

As defined, recalcitrant *immigrants*—those currently residing in the state—are willfully violating a state’s legitimate interests and therefore, a state meets the *jus ulscici* criterion and is justified in taking proportional retaliatory, or defensive, measures (possibly including deportation) against them. To satisfy the *jus ulscici* criterion in the case of recalcitrant *potential immigrants*—those in the process of migrating to the state—they must pose a genuine threat as defined earlier. If this condition attains, then the state would satisfy the *jus ulscici* criterion and would be justified in using harmful anticipatory, or pre-emptive, measures (possibly including inadmission) against these potential immigrants.

On the other hand, a state is not justified (it does not meet the *jus ulscici* criterion) in taking any measures against abled amenable migrants—the majority of immigrants and potential immigrants in the world today—because they do not pose any actual or imminent risk to its legitimate interests (or, if given a proper chance, are entirely willing and able to do what they

need to so that they no longer pose a risk such as by taking language classes, paying back taxes, getting drivers licenses when it becomes lawful for them to do so, so on and so forth). As we have established by now, if the state infringes more interests than necessary to sufficiently secure its legitimate interests, it would be violating the principle of least infringement. Presumably, since the abled amenable immigrants are not a threat to these interests, any measures a state takes against them would be gratuitous—they would not be necessary to secure these interests. Given the principle of least infringement, the state is, therefore, required to admit all abled amenable potential immigrants and must allow all residing abled amenable immigrants to remain even if they originally came in illegally (as might be the case if they were formerly recalcitrant immigrants). This is important because it demonstrates that states are not justified in taking harmful measures against formerly recalcitrant immigrants who become amenable, except perhaps to rectify any injury they have caused from their prior recalcitrance.

The reason I have also introduced a distinction between abled and less-abled migrants is because it is also relevant for determining whether a state may use retaliatory and anticipatory measures. If, as I mentioned earlier, self-defense rather than desert is the reason culpability (recalcitrance) grounds the use of these measures, then so should self-defense also ground the use of these measures when they are taken against those who are unable to migrate without violating the state's legitimate interests even if they are not intentionally choosing to violate these interests. Consider the case of an amenable potential immigrant who wishes to migrate into a country but, unfortunately, carries a highly contagious and deadly airborne disease. Whatever other legitimate interests a state may have, protecting the health of its citizens must certainly be one of them. Thus, though the amenable potential immigrant is not attempting to migrate with

the intention of inflicting harm on the citizens of the state, he is unable to avoid doing so. Self-defense, therefore, is again the reason why the distinction between abled and less-abled migrants is important. A state satisfies the *jus ulscici* criterion and is justified in taking countermeasures against less-abled migrants. Note also that although this is true whether the migrants are amenable or recalcitrant, the distinction is primarily important only for migrants that are amenable. The justification for using countermeasures against less-abled recalcitrant migrants is overdetermined since being either less-abled or recalcitrant is sufficient for grounding these measures—both of these categories violate or threaten to violate a state’s legitimate interests. On the other hand, while abled amenable migrants neither violate nor threaten to violate these interests and so no countermeasures may be taken against them, less-abled amenable migrants do. However, as we will see momentarily when we address anticipatory measures in the *jus in talionis* criterion, the conclusion we have drawn here regarding less-abled migrants does not mean the state may necessarily be authorized to exclude or expel these migrants. As always, those measures are only permissible if they are the least harmful measures available for the purpose of securing the state’s legitimate interests.

There is one additional brief point to make about the term ‘threat’ itself and that is that we must always be careful to distinguish between threats to legitimate interests and threats to illegitimate interests. Walzer’s emphasis on fear in the just war context will be relevant here. Xenophobic people believe that just about any of their interests (sometimes even racial homogeneity) count as justifications for measures taken against migrants. Xenophobia is driven by fear. As we saw in the just war context, base fear is not enough to satisfy the *jus ulscici* criterion. Potential immigrants, like neighboring countries, can be engaged in entirely legitimate

activities, that, while seeming different or even eliciting fear, pose no imminent risk to the state's legitimate interests. Thus, when fear is directed at abled amenable potential immigrants who do not pose any risk to legitimate interests or when it is directed at threats to illegitimate interests (such as maintaining racial homogeneity) it is not enough to satisfy the *jus ulscici* criterion.

This observation is also in play for those who believe that exclusivity or isolation itself is a legitimate state interest. If it were, then potential immigrants would be (genuine) threats simply because they are potential immigrants since that fact on its own is a threat to isolation; there could be no such thing as abled potential immigrants—all potential immigrants, whether amenable or not, would be less-abled migrants because they could not migrate without necessarily violating the state's interest in isolation. Further, this would *ipso facto* justify closing the borders since that would be the only proportional measure that would work to secure the interest of isolation. However, the interest in isolation is not legitimate in my view because it is arbitrary on its own: no state wants isolation just for the sake of isolation. There is always a more fundamental interest, such as the preservation of culture, that is then supposed to entail the interest in isolation.⁵⁵ As we have seen, though, these other interests can be met proportionally without isolation or exclusion.

3.5.2 Anticipatory Measures in *Jus In Talionis*

The *jus in talionis* criterion is not applicable to abled amenable migrants since states cannot justify the use of any harmful measures on them for the purpose of securing its legitimate interests. The *jus in talionis* criterion is, therefore, only relevant for justifying the use of harmful

⁵⁵ I believe the same can be said of the interest in self-determination simply for the sake of self-determination. Self-determination is a legitimate interest only indirectly because it allows for meeting other legitimate interests. By itself, however, it is not a legitimate interest.

measures on recalcitrant and less-abled migrants. On my view, most immigrants and potential immigrants in the world today (even those currently living unlawfully in many first world countries) are more likely to be abled and amenable rather than less-abled or recalcitrant migrants. My theory, thus, implies that states are committing wrongful acts on most immigrants and potential immigrants today when they deport them or refuse admission to them, respectively. In fact, my theory implies that *any* harmful actions a state takes against these people today on the grounds of securing some legitimate (or otherwise) interest, is wrong.

The question remains, though, what kinds of harmful anticipatory measures are states permitted to use on recalcitrant and less-abled migrants. It is important to keep in mind that even when dealing with these kinds of migrants, the state's immigration policy must still defer to the principle of least infringement. What this will entail is that exclusion and expulsion are still going to be impermissible in most cases, even when dealing with recalcitrant or less-abled migrants, as long as there are less infringing—more proportional—measures available. Michael Walzer makes the same observation in the context of war when he notices that even when a state is justified in retaliating against an aggressor to secure its interests that “it is obvious ... that measures short of war are preferable to war itself whenever they hold out the hope of similar or nearly similar effectiveness.”⁵⁶

Let us first consider *jus in talionis* and recalcitrant potential immigrants. If we take the case of language again, a recalcitrant potential immigrant might decide never to learn the primary language, though he is capable of doing so. He is, therefore, a genuine threat to the state's interest in preserving the language and because he is capable of learning the language but

56 Walzer, *Just and Unjust Wars*, 85.

has intentionally chosen not to, he would inflict gratuitous harm on the state should he migrate. Does this justify his exclusion from membership in the state? Perhaps, but probably not immediately, despite the fact that a greater infringing anticipatory measure than that of requiring the potential immigrant to take language classes is now required. As a result, whatever greater infringing anticipatory measure the state chooses next becomes the new least harmful sufficient option. The reason exclusion is still impermissible in this case is that it is likely this new least harmful sufficient option is still well short of exclusion. We might find something in between learning the primary language and exclusion that the recalcitrant migrant might choose to comply with, in which case he would become amenable at that point, or an option that does not depend on the potential immigrant's compliance at all, which would be especially appropriate if the degree of recalcitrance is particularly high. Examples that may serve as minimally sufficient anticipatory (or retaliatory if enacted after the potential immigrant actually migrates to the state) measures might include requiring all non-primary language speakers to purchase and use real-time translation technology at all times, citations for speaking in another language in public, a federal ban on producing any government documents in another language, or even temporarily disenfranchising the recalcitrant migrant. Most of these options are likely to be less harmful for the recalcitrant migrant than exclusion or expulsion and some might actually be more efficacious for the state. For example, the money from the citations issued for speaking in another language could be used to fund projects and classes that help further the use of the primary language in the state and enough citations might encourage the recalcitrant migrant to simply learn the language. On the more extreme end, the state might elect to disenfranchise new recalcitrant immigrants, at least temporarily, so that they do not affect legislation that might alter the prominence of the

primary language. Unlike learning a language but like exclusion, disenfranchisement—while admittedly very morally questionable—is something the immigrant has no control over but may at least be less infringing of the migrant’s interests than exclusion. The important thing to remember is that we must be careful to avoid making the mistake of assuming that ‘maintenance of the primary language’ just *is*, or necessarily entails, exclusion (or expulsion).

One of the nice features of my theory is that, in most cases, it is designed to let the potential immigrant choose, through his actions, what he considers to be the least infringing option to him. In this way, it preserves and maximizes the central tenet of individual autonomy (liberty) so important in liberalism. Other open borders theories often suggest that exclusion, by its very nature, is incompatible with liberty but if we allow exclusion to be a choice, then there is no reason to think that it must be incompatible with liberty. To see how this is possible, suppose, for the sake of argument, that there were only two anticipatory measures available to the state for securing the maintenance of its primary language: the requirement of language classes or exclusion. Notice, even with such limited options available in this difficult scenario, the state is not telling the potential immigrant that he must be excluded, the state is giving him a choice. It is up to him to determine for himself which of the two options will harm him more. Assume that he is able to learn the language without great sacrifice. By refusing to learn the language when he is able to do so, he is choosing for himself to take the option of exclusion by demonstrating that he *prefers* exclusion to learning the language. It is fair to assume that for him, the fact that he prefers exclusion over learning the language means that learning the language would infringe more of his interests than exclusion. This assumption seems fair because if one has two competing interests, one tends to choose the interest that is more valuable (and necessarily

sacrifices the less valuable interest). To my mind, this is all that can be required of the liberal tenet in individual autonomy. When some restriction on liberty is justified (such as when it is necessary to secure a legitimate interest), the range of choices one may exercise is restricted but as long as one has maximum autonomy while respecting that justified restriction, then we can still say that the tenet of liberty is satisfied. That is to say, as long as the restriction on liberty is well-grounded and minimized (it respects the principle of least infringement) to a point strictly sufficient to secure the legitimate interest, then liberty is still preserved and can be maximized up to the point where it does not violate the legitimate interest. If we are able to do this, then both sides will inflict only necessary harm and can avoid inflicting any gratuitous harm at all. The state inflicts no more harm than is necessary on the migrant while continuing to be free to secure its legitimate interests and the migrant inflicts no more harm than is necessary on the state while being free to pick from a range of choices available to him that are compatible with the state securing its legitimate interests. Additionally, note that as a necessary byproduct of this, regardless of what the potential immigrant chooses, my theory allows the state to secure its legitimate interests without inflicting gratuitous harm—the state uses the least harmful sufficient anticipatory measure to secure its interest as determined by the potential immigrant's choice.

The degrees of the anticipatory and retaliatory measures in the force range (and quite likely the harm range as well unless all more forceful retaliatory measures do not inflict any more harm) correlates with the degree of recalcitrance all the way up to exclusion and expulsion.⁵⁷ If the recalcitrant migrant becomes entirely unreasonable and chooses not to take

⁵⁷ Indeed, the proportional infringement theory may begin to blend with just war theory here when we are addressing exceedingly malignant and violent people such as terrorists who have declared their intent to injure as their sole reason for desiring to migrate into a state. Not only would exclusion and expulsion be warranted in such cases, but likely so would even more harmful measures including permanent imprisonment. These

any of the lesser infringing options available to him, which he is capable of performing, then exclusion may be justified. Moreover, as I just explained, he is, by his recalcitrance and his choices, demonstrating that for him all of those other options would actually have been more infringing to him than exclusion—he prefers exclusion to any of those other options.

Finally, let us consider also how *jus in talionis* addresses less-abled amenable migrants. Much of what I have already said about recalcitrant migrants applies here as well. That is, exclusion is not automatically justified even in the case of less-abled migrants as long as there are more proportional options. The main difference is that less-abled migrants lack the kind of autonomy abled recalcitrant migrants may enjoy, so they may not have a wide range of choices to pick from to avoid violating a state's legitimate interests. The difficulty in assessing what to do with this is that unlike recalcitrant migrants, less-abled amenable migrants are not necessarily inflicting gratuitous harm on the state when they attempt to migrate. Less-abled amenable migrants would be willing to avoid violating the state's legitimate interests if they could, so they have no malicious intent. Nonetheless, if their reasons for migrating are not very morally weighty, then it may be permissible for the state to use a measure like exclusion to secure its legitimate interests. However, if the less-abled migrant's reasons are very morally weighty—weighty enough, in fact, that their migration constitutes a necessary harm on the state—then we might think that since they are not inflicting gratuitous harm, as long as the state is able to accommodate the migrant, even if it comes at some expense, then it ought to do so. For instance, consider again the case of the deathly contagious migrant. Suppose the migrant will die if he remains in his current country but has a good chance of surviving if he migrates to another

measures might turn out to be the only proportional ways to secure the state's legitimate interests from such malignant individuals.

country with far better medical facilities. As long as the receiving state is able to secure its legitimate interests, though it may require an additional cost to the state, then it ought to let the migrant in with whatever restrictions are necessary to sufficiently secure its legitimate interests. The state may, for example, allow the migrant to enter but he must remain under quarantine at a healthcare facility until he is no longer a genuine threat to the other constituents of the state. Let me be clear that when I say the state is able to accommodate the migrant, I mean mainly that it has enough resources to do so while continuing to be able to sufficiently secure all of its legitimate interests and without putting in jeopardy its ability to perform the other relevant functions of a state. If a state is unable to do this, if it genuinely lacks the resources, then surely it cannot be required to permit a less-abled migrant entry into the state and in such a case, exclusion is permissible. This may be precisely what happens in extreme cases of less-abled migration. For instance, in a scenario of genuine overpopulation, it may be that all potential immigrants might be considered less-abled (there could be no abled amenable potential immigrants) because all would necessarily be incapable of migrating without putting the state's legitimate interests in serious jeopardy. I will address the concern of overpopulation at length in the following chapter. The main idea I wish to advance for now, though, is only the same one I have advanced throughout the dissertation so far and that is, even when the state satisfies the *jus ulscici* criterion in the case of less-abled migrants, just as in the case of recalcitrant migrants, it must still aim to minimize gratuitous harm by addressing even these difficult cases in the most proportional way possible. We must be cautious and recognize that it is not impossible, though it may be difficult, to find anticipatory measures that sufficiently secure the state's legitimate interests and inflict less harm than exclusion.

Most of the examples I have given in this section have been primarily concerned with anticipatory measures against potential immigrants; but, what has been said could also easily apply to retaliatory measures against immigrants. The only important stipulation I make here is that it seems expulsion is more often going to inflict greater harm on an immigrant than exclusion will on a potential immigrant. Expulsion may involve a separation of families, a severance of long established community ties, the loss of assets, and many other things that can cause extreme amounts of harm. Thus, expulsion ought to require much greater justification than exclusion. The state's legitimate interest that is being harmed by the presence of the recalcitrant immigrant must be extremely weighty, at great risk because of the immigrant, and incapable of being secured in any other more proportional way.

3.6 Concluding Remarks

Scholars have made the principle of proportionality a necessary component of the discussion in a variety of international contexts including penal theory, international trade, and just war theory among others, but they have overlooked its central role in a just immigration policy. Instead, the philosophical discussion on immigration has been dominated by the debate over whether a state may justifiably close its borders (primarily through exclusion). Philosophers who reject open borders have put forth various interest-based grounds for closing the borders such as the moral importance of national solidarity and the preservation of culture. I have argued that the current debate is focused on the wrong question, punctuated by an error closed borders advocates make when they fail to separate the two criteria required to justify harmful measures against immigrants and potential immigrants. What the debate should focus on is not the question, 'why

may a state exclude?’ but rather the two questions, ‘why may a state use harmful measures on immigrants?’ (the *jus ulscici* question) and, ‘how may a state use these measures?’ (the *jus in talionis* question) to which closing the borders, through exclusion and expulsion, would be just one of many possible responses to the latter.

A just immigration policy must satisfy both the *jus ulscici* and *jus in talionis* criteria. A just war can be fought in an unjust way and so too can immigration policies that satisfy *jus ulscici* but not *jus in talionis* have just cause to harm some migrants, yet nevertheless harm them in an unjust way. This may happen when a state has legitimate interests it is justified in securing, but then uses exclusion and expulsion to secure them, thereby inflicting disproportional harm. In my view, all modern immigration policies are guilty of at least this problem. On the other hand, an unjust war can be fought in a just way and so too immigration policies that satisfy *jus in talionis* but not *jus ulscici* cause unjust harm, yet do so in a proportional way. This can happen when a state harms some immigrants because they violate or threaten an illegitimate interest but the state harms proportionally based on that interest. A policy that favors whiteness as an interest—perhaps like the White Australia policy—is an example of this. The policy might harm non-white immigrants by excluding them but then make no restrictions on white immigration since whites would not be violating the interest of whiteness.

I have argued that exclusion and expulsion are disproportional because they violate the principle of least infringement. The preservation of language, for example, can be achieved through less infringing means. Cultural preservation (if such an interest gets past the *jus ulscici* criterion at all) might be maintained through compulsory integration courses for all new immigrants and a requirement that all primary and secondary schools teach culture courses to all

students so that the children of immigrants and subsequent generations integrate fully into the culture. The vast majority (if not all) of legitimate interests, can be sufficiently secured without closing the borders. Additionally, even if exclusion and expulsion can secure these interests more efficaciously, it is still impermissible. Efficacy has no moral weight beyond the level necessary to sufficiently secure these interests and any measures beyond this level violate the principle of least infringement if they inflict more harm regardless of how efficacious these measures may be. This is why we do not think it is permissible to shoot immigrants at the border in order to secure higher wages for citizens. Even if this strategy were the most efficacious, it would still be impermissible because it inflicts gratuitous harm.

The important difference between my position and the position of traditional open borders advocates is that my position grants full moral weight to the legitimate interests of liberal states while still preserving the individual autonomy of migrants. So, while my position may turn out to be a *de facto* open borders position—abled amenable migrants are immune from exclusion and expulsion and, in the case of recalcitrant migrants, they, rather than the state, choose whether to be excluded or expelled by their actions—it is compatible with securing the central thing that traditional opponents of open borders argue for (and incorrectly believe only exclusion and expulsion can secure), namely, the legitimate interests of the state.

CHAPTER 4

LEGITIMATE INTERESTS

4.1 Introduction

It is important to make clear that the proportional infringement theory I proposed in the previous chapter for immigration policy is a political theory, despite the fact that it hinges in critical ways on the principle of least infringement, which is a moral principle. What follows in this chapter will be an account of the limits resulting primarily from political principles rather than moral ones in justifying closed borders, though there will be a moderate amount of discussion on the effect that moral principles might have on a just immigration policy. The *jus ulscici* criterion stipulates that a state is entitled to take harmful measures against immigrants who have already violated (or potential immigrants who are at risk of violating) the legitimate interests of the state. In this chapter, I will provide an account of what those legitimate interests may be. In doing so, I will essentially be placing a limit on the reasons a state may offer for harming migrants through proportional retaliatory or anticipatory measures.

The strategy I will employ here will require binding the legitimacy of interests to the legitimacy of political states. My use of term ‘legitimate’ in this context is technical and minimalist in that it will refer to interests that are strictly political and normative. Legitimate interests, on my view, are interests that are related to the very grounds that are supposed to grant

a state political legitimacy, which is commonly understood to mean that which justifies a state's use of coercion on its own citizens. Thus, in this dissertation, 'legitimate interest' will not be used as it may be commonly used in a descriptive sense to refer to the entire class of interests that are not obviously immoral or illiberal. In this latter sense, a state may be said to have an interest in rooting for its athletes in the Olympics or in promoting exercise and healthy eating habits but these interests are not constitutive of the normative political reasons for the state's existence or legitimacy. Instead, a legitimate interest, as I have defined it, is restricted only to a narrow class of interests that are purported to give a state a political *raison d'être* such that without the state, the interests could not be secured. Additionally, these interests must be indispensable; they must be so vital that they justify restricting an individual's (primarily a citizen of the state) autonomy to secure. Thus, in a fundamental sense, what I refer to as a 'legitimate interest' is really a *legitimate-making* interest: an indispensable interest that makes a state legitimate by necessitating a state's existence in order for it to be secured. It is this minimalist set of interests that, when genuinely and imminently threatened or violated, gives legitimate states permission to inflict proportional harm on migrants in order to secure the set of interests; it is the violation of this set of interests that primarily satisfies the *jus ulscici* criterion.

4.2 Political Legitimacy

The literature on political legitimacy is quite extensive, spanning at least as far back as the age of the philosophical fathers of social contract theory in the seventeenth and eighteenth centuries including Hobbes, Locke, Rousseau, and Kant. It cannot be my aim here to cover the entire breadth of the views on the matter. It is also not my intention in this chapter to take a stand on

any of the controversial unsettled issues currently being debated on the topic of political legitimacy. My approach is a pragmatic one, so I limit my scope to what is most directly applicable to a just immigration policy. Where I privilege one position over another, it should be clear that it is not necessarily because I believe that position to be authoritative but rather because it best illustrates a point I want to make about immigration. I will paint with broad strokes as often as possible so that the application of my theory to the ongoing conversation of political legitimacy will work well regardless of which view one holds. Thus, strictly out of pragmatism, I will focus on what many leading theorists consider to be one of the most plausible accounts of political legitimacy, namely, the account based on fairness. This account has the additional virtue of directly appealing to interests to ground legitimacy, which makes it an ideal candidate to test against the proportional infringement theory. Before considering the fairness account, though, I will explain what political legitimacy is and why some scholars consider it distinct from political obligation. I will also briefly address some concerns about philosophical anarchism.

4.2.1 Distinguishing Political Legitimacy and Political Obligation

As many political theorists readily acknowledge, there is sometimes confusion about the use of some technical terms when discussing political legitimacy. To be as clear as possible, it is imperative that we define these terms from the beginning. The first clarification we must make is that the ‘legitimacy’ in political legitimacy is used in a normative, as opposed to descriptive, sense by political theorists. What we are concerned with is not the conditions under which other states, individuals, or political institutions recognize a state as legitimate. While having a seat at

the United Nations may give a state the aura of legitimacy in the eyes of other agents around the world, that does not make the state legitimate in the normative sense. Echoing the standard definition in political theory, Allen Buchanan writes that a state has political legitimacy in the normative sense “if and only if it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws.”⁵⁸ In short, if a state has political legitimacy, it is morally entitled to coerce its constituents. The question political theorists wrestle with is what, precisely, provides the moral grounds for this.

A second source of ambiguity is the concept of political obligation, but on this there is much disagreement among political philosophers. The disagreement should not significantly affect our current project with immigration policy, but it is important to make the contention known nonetheless. The issue here is whether we can decouple the concepts of a state’s moral authority to coerce (political legitimacy) and a citizen’s obligation to obey (political obligation)—that is, whether it is coherent to say that we can have the former without the latter. Can a state be morally *entitled to coerce* without its constituents having any *obligation to obey* the state’s commands? The prevailing view is that these two concepts are logical correlates of each other.⁵⁹ However, several philosophers like Christopher Wellman, Allan Buchanan, Leslie Green, William Edmundson and others disagree.⁶⁰ Wellman, for example, argues that it is a mistake to

58 Allen Buchanan, “Political Legitimacy and Democracy,” *Ethics* 112, no. 4 (2002), 689-690

59 See, for example, A.J. Simmons, *Moral Principles and Political Obligations*, (Princeton: Princeton University press, 1979) and Tom Christiano, “Justice and Disagreement at the Foundations of Political Authority,” *Ethics* 110, no. 1 (1999), 165-187.

60 See Christopher Wellman, “Toward a Liberal Theory of Political Obligation,” *Ethics* 111, no. 4 (2001), 735-759; Buchanan, “Political Legitimacy and Democracy,” 689-690; Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1989); and William Edmundson, *Three Anarchical Fallacies* (Cambridge: Cambridge University Press, 1998).

think that the two concepts cannot be separated:

The correlative of a state's right to coerce is not a citizen's moral duty to obey: it is a citizen's lack of right to not be coerced. Political legitimacy entails only the moral liberty to create *legally* binding rules, not the power to create *morally* binding rules. ... If there are no political obligations, citizens are morally free to disobey the law and to emigrate if they would like. If there is no political legitimacy, on the other hand, then citizens have the right to stay put and be free from political coercion; in other words, each individual may secede.⁶¹

In the simplest terms, what political philosophers on either side of this conceptual disagreement are hoping to accomplish is to generate grounds that make it the case that citizens have an obligation to obey a state's laws merely because they are the state's laws. This is known in the literature as having a content-independent duty to obey the state, or a duty to comply with the dictates of the state on grounds independent of the content of those dictates. If political obligation in this sense is plausible, then one does not need additional moral reasons to obey a particular law, all one needs is the fact that the state commands it, or, at the very least, the fact that the state commands it adds an additional moral reason to comply with it.

Returning to the conceptual disagreement over political legitimacy and political obligation we may say that if the latter is a logical correlate of the former, then the grounds for legitimacy also ground the citizen's content-independent duty to obey the state. More importantly for the purpose of a just immigration policy (as we shall soon see when we turn our attention briefly to philosophical anarchism), if there is no content-independent duty to obey the state, then states cannot be legitimate.⁶² On the other hand, if political obligation is not a logical

61 Wellman, "Toward a Liberal Theory of Political Obligation," 741 (emphasis his).

62 Keep in mind that the lack of a content-independent duty to obey the state does not necessarily entitle one to break any law. Wellman in "Toward a Liberal Theory of Political Obligation," 741 n.9 points out that the fact that there is no content-independent duty to obey the law does not mean a citizen can disobey a law against murdering people, for instance. The lack of political obligation, more precisely the lack of content-independent political duties, only implies that the mere fact that the state commands people not to murder is morally irrelevant with regard to the impermissibility of murdering people. Since there is no political obligation, the fact

correlate of political legitimacy, then we need separate grounds to show that citizens have a content-independent duty to obey the state. If this is correct, then we can essentially put aside concerns about political obligation since what a just immigration policy will be concerned with is not whether citizens have a duty to obey the law, but whether states can justify inflicting harm on migrants in order to secure the very interests that make it legitimate.

What we are primarily concerned with in this chapter is a state's morally founded *raison d'être*—that which makes it legitimate. Political philosophers agree that without this foundation, the coercion of citizens (and, I would add, for related but different reasons, the use of coercion, or harmful anticipatory and retaliatory measures, on non-citizens as well) would be impermissible. But, why is that? It is important to note, if it was not clear before, that this entire project is contained within the framework of liberalism. At the very core of liberalism is the profound belief in the inalienability of an individual's autonomy. The central supposition is that, *prima facie*, the individual's autonomy ought not to be infringed.⁶³ However, state coercion of citizen and non-citizen alike requires an infringement of the autonomy of many individuals and so it stands in need of justification. Political philosophers believe that the justification can be found in the absolute necessity of state coercion for securing significant and indispensable legitimate interests that would otherwise be unattainable. With this in mind, we can now understand why it is important to clarify the ambiguous concepts in political legitimacy before

that the state commanded this provides no *additional* moral reason for compliance. On this account, murdering people is wrong solely because it is immoral and the wrongness is not compounded further by the fact that one is breaking the law when one commits murder. On the other hand, if we can justify political obligation, then we could say that murdering someone is doubly wrong, first because murder is morally wrong and second because it is against the law to murder and breaking the law is also immoral.

63 This is one of the virtues of the theory of just immigration policy I advance in this dissertation. The fact that the individual, rather than the state, maintains control over which measure is the least infringing to the individual allows the individual to maintain as much autonomy as possible, even when the infringement of his or her liberty is necessary.

we examine its impact on a just immigration policy. First, it is only political legitimacy in the normative, not descriptive, sense that can justify the use of harmful measures on migrants. Second, if the duty to obey is a logical correlate of the state's moral authority to coerce and it turns out the philosophical anarchists are correct that there is not (and, quite possibly, may never be) a duty to obey, then the *jus ulscici* criterion can never be satisfied, making the use of any harmful measures on migrants by the state for the purpose of securing legitimate interests impermissible. On the other hand, if the two concepts can be separated as Wellman and others believe, or if they are logical correlates of each other and there is a duty to obey, then we actually need not concern ourselves very much with political obligation since it will suffice to find the grounds that give a state its *raison d'être*—it will be enough to establish the possibility of political legitimacy. In short, what we are looking for are those things that will satisfy the *jus ulscici* criterion, the satisfaction of which is possible only if political legitimacy is possible.

4.2.2 Philosophical Anarchism

A priori anarchism, the view famously defended by Robert Paul Wolff,⁶⁴ implies that any state that imposes content-independent duties—that is, a duty to do as the law requires merely because it is the law—on its citizens is illegitimate in principle. This is because such a duty is logically incompatible with the overriding duty individuals have to act as their own personal moral assessment requires them to act, which may often conflict with the state's commands. Moreover, on this view, political legitimacy and political obligation are logical correlates of each other. Thus, the incompatibility between one's individual autonomy and the content-independent duty to obey the state's commands render the state, any state, illegitimate. There is much that can be

64 See Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row, 1970).

said in response to this view, but for our purpose, we need not concern ourselves with this because the kind of just immigration policy I advocate does not play any role in a world governed by *a priori* philosophical anarchism. I will add, however, as a matter of moral principle, that even if an illegitimate state were to govern and set up a politically impermissible (though perhaps not morally impermissible) immigration policy, the principle of least infringement would still apply. That is, even if the state is unable to satisfy the *jus ulscici* criterion it would still be obligated to satisfy the *jus in talionis* criterion by refraining from inflicting gratuitous harm in any immigration policy it implements.

A posteriori philosophical anarchism, the view defended by theorists like A.J. Simmons, Leslie Green, and Joel Feinberg,⁶⁵ may seem more promising since it does not suggest that legitimate states are impossible in principle, only in practice, but this view is going to fare only slightly better because it still implies that no modern state is legitimate. *A posteriori* anarchism, like the *a priori* version of anarchism, supposes that political legitimacy and political obligation are logical correlates. This view asserts that one is under no obligation to obey the commands of a state unless one actually consents to the authority of the state. While it is not actually impossible to have a state in which everyone *clearly* consents to its authority, in practice it may be utterly unfeasible. Thus, in the real world, no state can be legitimate since no state can guarantee that all of its citizens consent to its rule. Nevertheless, on this account, states (of which all are illegitimate) can still issue commands which people have a duty to obey—again, not because the state issues the command, but because the content of the command itself is moral.

65 See A.J. Simmons, "Philosophical Anarchism" in his *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001); Leslie Green, *The Authority of the State*; and Joel Feinberg, "Civil Disobedience in the Modern World," *Humanities in Society* 2, no. 1 (1979), 37-60.

Though, once we make that concession, it becomes impermissible for a state to command an immigrant to leave its territory or refrain from entering it unless there are independent moral reasons that ground this directive and even then, it is not clear that the state is the proper authority to enforce the directive. Any policy governing the treatment of outsiders in such a world would be a derivative of the principles of morality writ large, not from a state's interests since, of course, there could be no legitimate state to have interests. The wrongness of an outsider's migratory action would come not from his or her violation of a state's interests but from the violation of some independent moral principle. Additionally, it is not clear what would demarcate an outsider nor how exclusion and expulsion would play the same role they play in a world where legitimate states are possible. What would 'outsiders' be excluded and expelled from and why? Why would an outsider who violates a moral principle not simply be susceptible to the same kind of treatment any other immoral or unjust person receives?⁶⁶

Answering all the questions about immigration policy raised by either version of philosophical anarchism would require me to write a different kind of dissertation from this one. These are good questions and the arguments raised in defense of anarchism are not implausible, but anarchism is not the prevailing view of the liberal political world today. My aim in this dissertation is to show that closed borders are rarely permissible even in a world governed by territorially defined states that are at least minimally just and legitimate, which is the view the majority of people and political philosophers currently hold. If philosophical anarchism is sound, immigration policy would likely look very different from what is currently proposed by most

⁶⁶ However, as we will see later in this chapter, it will turn out that even if political legitimacy is possible, my theory of a just immigration policy may suggest that, in principle, there may be no good grounds for making a great distinction between the treatment of migrants who violate a state's legitimate interests or other interests derived from independent moral principles and citizens who do so.

closed borders theorists anyway. Nonetheless, we can say that the moral principle of proportionality persists whether legitimate states are possible or not. Thus, no matter what might justify the use of harmful measures against outsiders in a world without legitimate states, morality would still require those measures to be minimized when and where they inflict harm, which will make measures like exclusion and expulsion very difficult to justify even in an anarchical world.

4.3 Fairness

One of the most plausible theories of political legitimacy is the fairness theory.⁶⁷ According to A.J. Simmons, this theory is a kind of transactional account of political legitimacy whereby political obligation arises from our responsibility to engage in a transaction of reciprocity with others under the state's authority in order to secure certain benefits.⁶⁸ The fairness theory stipulates that the transaction between the participating parties is morally significant and incurs an obligation to do one's part to maintain the ongoing distribution of benefits. In this section we will look at the evolution of the theory up to and including Wellman's recent attempt to ground it in samaritanism.

4.3.1 Benefits Theory

We begin with original fairness theory, sometimes called the benefits theory. H. L. A. Hart and

67 I reiterate here that my presentation of the fairness theory is not an endorsement of the view. I have no firm position on which theory of political legitimacy I subscribe to but the fairness account, or some version of it, seems to be one of the most popular (though, far from universally accepted) views in the literature. Moreover, it seems particularly suitable for an efficient application of my theory of just immigration policy.

68 Christopher Wellman and A.J. Simmons, *Is There a Duty to Obey the Law?* (New York: Cambridge University, 2005) 116.

John Rawls are widely credited as being the first philosophers to motivate the theory.⁶⁹ Hart writes:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to those restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties...⁷⁰

As is evident from this passage, Hart does not see political obligation as inseparable from political legitimacy so the reception of benefits is enough to ground political obligation, which entails that it is enough to ground political legitimacy. On this account, states are seen as cooperative political institutions whose function it is to produce and distribute benefits for their members. These benefits may include not only the satisfaction of the basic interests people need to lead a minimally decent life but also a wide range of any number of other benefits, both trivial and significant, the state is equipped to supply. If citizens of the state receive these benefits but fail to do their part in generating them, such as when they evade taxes or refrain from restricting a liberty that everyone else restricts, then they are unfairly free-riding on the sacrifice of others. Thus, in the name of fairness, all citizens are obligated to do their part to generate benefits if they receive them.

Notice, on this view, any set of benefits can essentially make a state legitimate. If, as I have suggested, a legitimate interest is any interest that makes a state legitimate, then this view may entail that any benefit—whether trivial or significant—distributed by the state can be a legitimate interest. The benefits may include the promotion of culture, the prevention of wage

69 H. L. A. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64 (1955), 175-191 and John Rawls, “Legal Obligation and the Duty of Fair Play,” *Law and Philosophy*, ed. Sidney (New York: New York University Press, 1964), 3-18.

70 H. L. A. Hart, “Are There Any Natural Rights?” 185.

deflation, the preservation of a primary language, having a national football team, and nearly any other benefit the citizens may enjoy. If this version of the fairness theory is sound, then the proportional infringement theory I have advanced would suggest that the violation of nearly any benefit would satisfy the *jus ulscici* criterion and could provide grounds for the state to inflict proportional harm on migrants. This permits the state to use harm to secure far too many things, including things that might be relatively trivial benefits.

This version of fairness theory, though, is open to a widely recognized fatal objection introduced by Robert Nozick. Nozick argues that the mere reception of a benefit does not obligate one to contribute to the cooperative scheme. He provides an example of a neighborhood where you and 364 other people live that has a public broadcasting system which broadcasts entertainment for the entire neighborhood. Each day, one of the neighbors takes a turn at sacrificing an entire day to operate the system. On occasion, you tune into the system and enjoy one of its many programs, produced by the sacrifice of your neighbor's time. On the day your turn arrives, are you obligated to give up your entire day to operate the system? It seems clear that you are not obligated to do this. Nozick writes:

Though you benefit from the arrangement ... you would rather not have any of it and not give up a day than have it all and spend one of your days at it. Given these preferences, how can it be that you are required to participate when your scheduled time comes?⁷¹

Several attempts have been offered to rescue the fairness account from Nozick's objection. The most popular one concerns clarifying an important distinction between the kinds of benefits one may receive from a cooperative scheme.

71 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 93.

4.3.2 Presumptive Benefits

George Klosko responds to Nozick's objection by first noting that part of the force of Nozick's criticism is that it concerns the provision of a good that has relatively little value.⁷² Klosko notes that the principle of fairness applies differently to different kinds of goods, or benefits. Thus, he believes that if we substitute a far more significant benefit in place of a public broadcasting system in Nozick's example, our reaction to it would change. Suppose, for example, that instead of entertainment, each individual in the neighborhood sacrificed a day to occupy a watch tower which defended the neighborhood from fierce roaming marauders. If any individual skipped his or her turn, the marauders would raid the neighborhood, steal vital resources and kill anyone who got in their way. In this case, it seems each individual does have an obligation to do his or her part to secure the benefit of security.

Klosko, thus, makes a distinction between *discretionary* goods and *presumptive* goods. Quoting Rawls, Klosko defines a presumptive good as one that we can presume every person wants. These are goods that each individual needs to live an acceptable life and include, at least, "physical security, protection from a hostile environment, and the satisfaction of basic bodily needs."⁷³ While admitting that the list may not be exhaustive, he refrains from including more controversial goods. Thus, his minimalist set of goods ends up approximating only the sorts of goods normally associated with the concept of human rights. He adds that the provision of presumptive goods is widely recognized as a central *purpose of government*.⁷⁴ To my mind, this means that for Klosko, it is this minimalist set of presumptive goods that provides a state with

72 George Klosko, "Presumptive Benefit, Fairness, and Political Obligation," *Philosophy & Public Affairs* 16 (1987), 241-259.

73 Ibid., 247.

74 Ibid.

political legitimacy. Discretionary goods, on the other hand, are goods that do not rise to the level of being necessary for living an acceptable life. Klosko notes that it is Nozick's use of a discretionary good that makes his example appear to work because "there is something inherently questionable about restricting an individual's liberty in order to give him something that he could easily do without, even if the benefits of receiving such goods outweigh the burdens of helping to provide them."⁷⁵

Notice, one of the virtues of Klosko's approach here is that it accords nicely with the core feature of liberalism, namely an individual's autonomy. The distinction between presumptive and discretionary goods is supposed to distinguish those goods most rational individuals would autonomously choose to secure, even if it meant they had to sacrifice some of their liberty, from those goods that at least some or many individuals would autonomously decide not to secure if it meant having to sacrifice some of their liberty. This is why the set of presumptive goods is necessarily minimalist, since there are few goods that we can presume nearly all rational individuals would autonomously agree are significant enough to be worth the sacrifice of their liberty. Indeed, these presumptive goods are so significant and foundational that they must be secured first, before the variety of discretionary goods (on which there is far less agreement about their value) can begin to be secured. For example, it would be very difficult, if not impossible, to pursue a college education if one were not first protected from a hostile environment. The reverse, however, is not true: one can be protected from a hostile environment without first pursuing a college education.

What this means for the just immigration policy I am advancing is that if Klosko's

75 Ibid., 248.

account is sound, then the *jus ulscici* criterion can be satisfied only when a presumptive good is violated. Discretionary goods are not legitimate interests; they do not provide the grounds for political legitimacy. Like Klosko, though, I readily admit that the exact list of presumptive goods is difficult to nail down. Nonetheless, even many of those who feel that Klosko's defense of the fairness theory is unsuccessful do not necessarily disagree with him that if anything could justify political legitimacy, it must include (and perhaps be limited to) the provision of goods that at least approximate what Klosko refers to as presumptive goods. While the precise list may be a bit elusive, the general principle seems correct, that these are goods, or interests, necessary to live an acceptable life.

This is what seems to me to be captured by the idea of human rights, and other authors have drawn the same conclusion. Brian Orend, for example, suggests that "human rights are core entitlements we all have to those things we *both* vitally need as human beings *and* which we can reasonably demand from other people and social institutions."⁷⁶ Orend provides his own minimal set of rights that include physical security, material subsistence, personal freedom, elemental quality, and social recognition as a person and rightsholder. Like Klosko, Orend also believes purpose of the state, its *raison d'être*, "is to do its part in realizing the human rights of its people" and if it fails in this regard, then "its people have no reason to obey it."⁷⁷ While here Orend is referring to political obligation—the duty to obey—it is clear that for him, like many other political philosophers, it is inextricably linked to political legitimacy. For Orend, therefore, the provision of this minimal set of human rights are what grant the state legitimacy. Andrew Altman and Christopher Wellman agree that human rights ground state legitimacy when they write:

76 Brian Orend, *The Morality of War* (Broadview Press, 2006), 33 (emphasis his).

77 *Ibid.*, 33.

If a state adequately protects and respects human rights, then we will say that it successfully carries out the “requisite political functions.” That is, the state is doing the job it needs to do in order to justify its coercive power and thereby be legitimate.⁷⁸

Wellman expands on Klosko’s point to note that the reason human rights make a state legitimate is because the state is the only political institution that can adequately secure them. He appeals not only to Klosko but also to Hobbes, Lock, and Kant to emphasize the belief that a stateless environment—such as the one we find in the state of nature, or the time prior to the rise of states and governments—is a perilous environment devoid of security:

The plain truth is that (1) one cannot lead a meaningful and rewarding life unless one is minimally secure from attack by others and (2) the coercive laws of a state secure us by providing others with practical reasons to respect our moral rights. As such, political society provides the most precious benefits imaginable because it *rescues us from continual peril* and, in doing so, destroys one of the most formidable obstacles to meaningful life.⁷⁹

Wellman is correct when he argues that there are no market solutions that could provide these presumptive benefits (the provision of human rights) as well as states. A market solution may produce a great number of different companies, each competing with every other company and potentially clashing often, operating under different rules, and failing to respect the decisions of other agencies as authoritative. In short, I think a market approach to securing human rights would lead only to the rise of—to borrow Michael Walzer’s words—a thousand petty fortresses.⁸⁰

While Wellman agrees with Klosko on the centrality of presumptive benefits, specifically human rights, in providing the grounds for legitimacy, he feels Klosko’s theory is insufficient

78 Andrew Altman and Christopher Wellman, *A Liberal Theory of International Justice* (New York: Oxford, 2009), 3.

79 Wellman, “Toward a Liberal Theory of Political Obligation,” 742 (emphasis mine).

80 Michael Walzer, *Spheres of Justice*, 39.

because there is always a possibility that some citizens (perhaps “rugged individualists” or “members of a larger separatist group”) may, while relying on their own autonomy, prefer that the state not continue to exist.⁸¹ Wellman, therefore, supplants the fairness theory with what he calls samaritanism. Samaritanism, as proposed by Wellman, maintains that “the perils that *others* would experience in a state of nature can limit *our own* moral rights.”⁸² In extraordinary conditions when a stranger’s peril is sufficiently dire, as would be the case in the state of nature, and one can rescue the stranger at no unreasonable cost, then one must rescue the stranger. In essence, Wellman’s samaritan account insists that the state may nonconsensually coerce even reluctant citizens (such as the rugged individualists that give Klosko’s theory trouble) because it is the only way to secure their compatriot’s human rights, which would otherwise be vacant or at dire risk in the state of nature. Notice, thus far we have discussed only Wellman’s assessment of the permissibility of the state to coerce its citizens—we have seen only his samaritan account of *political legitimacy*. Fairness does not play a role here; it plays a role only in the samaritan account of *political obligation*, the duty to obey the state.⁸³ Since we are concerned with the reasons that provide a state with legitimacy, I will put aside Wellman’s account of political obligation. I will also not debate the merits of this theory in comparison to Klosko’s own theory of political legitimacy. For the purpose of a just immigration policy, what I have presented suffices to demonstrate how central presumptive goods—human rights—continue to be even in the most recent and plausible attempts to ground political legitimacy, such as Wellman’s samaritan account.

81 Wellman, “Toward a Liberal Theory of Political Obligation,” 738-739 n.6.

82 Ibid., 744 (emphasis his).

83 Ibid., 747-759 is where Wellman discusses the samaritan account of political obligation.

To review why this discussion is relevant to a theory of just immigration policy, recall that I argue that the only way to satisfy the *jus ulscici* criterion, which is a political condition, is to demonstrate that there has been (or will imminently be) a violation of a state's legitimate interests. I have argued that the only things that may count in a political paradigm as legitimate interests are 'legitimate-making' goods; that is, those things that make a state legitimate—or, alternatively, things that ground political legitimacy. Political legitimacy, meanwhile, is what gives a state the permission to coerce its constituents. Since liberalism is central to the entire project, we must take very seriously any abrogation of the individual autonomy (liberty) of an individual. Infringing on the autonomy of individuals for discretionary goods is impermissible because these are not the sorts of goods we can presume that most rational people would be willing to sacrifice their autonomy to secure. Thus, coercion can be permissible only if it is necessary for the securing of presumptive goods, which most authors define as a minimalist set of human rights. Since states are the only political institution capable of securing these rights and they can do so only if they coerce their citizens, they are permitted to coerce as long as they fulfill the requisite function of securing human rights. If anyone or anything puts at risk the state's ability to secure human rights for its citizens, then the state has a just reason to respond to the risk in a proportional way sufficient enough to remove the risk or correct any violation of the human rights of its citizens. Thus, the only *reason* why a state may inflict proportional harm on immigrants and potential immigrants is to secure the things that give reason for its very existence—for its legitimacy—against their violation by migrants. The *things* for which a state is permitted to inflict this harm in order to secure are human rights.⁸⁴

84 I reiterate one more that I am not necessarily privileging the benefits account of political legitimacy; I am merely presenting it here because of its popularity with political philosophers and because of the ease of

4.4 Other Interests

The preceding discussion focused on the political grounds (assuming political legitimacy is plausible) that a state may use to justify the infliction of proportional harm on migrants including, perhaps, the possible use of exclusion and expulsion if no less infringing option is available to secure presumptive goods for its citizens. We now turn to the question of whether there could be other grounds and other interests that could justify inflicting proportional harm on migrants.

4.4.1 *Harming Migrants to Secure Other Interests*

To begin with, let me make clear why a state is not *politically* justified in inflicting any harm on migrants for interests other than those I have referred to as ‘legitimate-making’ interests.

Wellman correctly observes that:

states may be routinely inserting themselves into matters where their presence is not justified. If this is accurate, then it may be a virtue rather than a liability of the samaritan theory that it requires a distinct explanation for the state’s performance of any chore that is not necessary to rescue us from peril.⁸⁵

This is because it is not the purpose of states to engage in the business of harming individuals by infringing on their autonomy to secure discretionary goods; these goods are not essential to living a minimally decent life and many individuals (in some cases most, or at least most of those

applying my just immigration theory to it. The general point will remain that whatever reason is offered to ground the legitimacy of the state will also provide the grounds for inflicting proportional harm on migrants. Moreover, this is assuming that some account of political legitimacy is sound; otherwise the state is not justified in either coercing its own citizens or inflicting harm on migrants for the purpose of securing legitimate interests.

85 Wellman and Simmons, *Is There a Duty to Obey the Law?*, 56; though, as we will see in chapters 5 and 6 of this dissertation, Wellman does believe that states have the right to exclude immigrants but he recognizes that he must provide independent grounds for this conclusion.

negatively affected by these goods) would prefer *not* to sacrifice their autonomy to attain them. Make no mistake, modern states do this every day, but the question I am addressing is not a descriptive one, it is a normative one: should states be engaging in this? To me, the answer seems to be clearly no. We may always be tempted to try to adjust our political and moral theories so that they fit as neatly as possible with our pre-theoretical intuitions, but we must be vigilant not to fall for this temptation when there is a deep discord between the fundamental principles of the theories that have persuaded us and our pre-theoretical notions. This should be so even when the theories take us to conclusions that may not be currently popular. We should never justify something immoral simply because it is popular. In some states, it may be popular to believe that the state should secure the interests of a single religious group, even at the expense of harming (often disproportionately) others. In other states, popular opinion may hold that the state should protect its citizens from competition for jobs or from the influence of other cultures, even at the expense of harming others and even when the failure to secure these goods would not result in so radically altering the life of the citizens that they would be forced to live in conditions similar to those they might experience in the state of nature. Wellman's remarks on laws enforcing a duty to vote, which he finds unjust, are particularly helpful:

just because I assert that states may sometimes coerce us, it does not follow that I would permit them to do so whenever they want or even whenever it is necessary to secure a public good. If a public good is insufficiently important, for instance, then its maintenance is not a weighty enough concern to justify coercing people. And because people do not seem horribly imperiled by their residence within relatively unhealthy democracies, I am not prepared to license governments to do all that they can to secure the health of their democracies.⁸⁶

It is crucial that we do not diminish or fail to remember the fact that states are, by their very

86 Ibid., 64.

nature, institutions designed to take away an individual's autonomy—her liberty. Whether one does or does not hold the view that liberty is the greatest good, everyone agrees it is a very significant good. Any abrogation of a liberty stands in need of profound justification and lacking such justification, it ought not be infringed. The harm from this abrogation must always be necessary and never gratuitous.

None of what I have said so far implies that states may never permissibly facilitate the securing or promotion of an interest or public good other than a 'legitimate-making' interest. I mean only to suggest, like Wellman, that the state's involvement in any matter that is not necessary to rescue us from peril will need a distinct explanation. The explanation will likely have to come from independent moral principles. As in the case of philosophical anarchism, the violation of interests derived from these independent principles would be wrong because they violate these principles, not because they violate the state's authority. Of course, in such cases, one would have to demonstrate three things before the infliction of harm on another individual would be justified: 1) the independent moral theory is plausible, if not sound; 2) the theory entails that certain public goods ought to be secured; and 3) the theory entails that the goods are of sufficient moral weight that some individuals can be harmed in order to secure them.⁸⁷ Meeting all these conditions will not be easy and it should not be easy. Again, we are dealing here with the justification of harm, whether it be an infringement of liberty or some other interest an individual may have, so this should be rare and difficult (though perhaps not always impossible) to justify.

One possible example may come from ethical utilitarianism. Suppose that a particular

⁸⁷ We may need to add a fourth condition stipulating the appropriate agent that has the moral authority to secure the goods, which may turn out to be the state but not necessarily so.

culture increases utility. Securing this culture would, therefore, be a morally good thing to do. Since we are dealing here with utilitarianism we would have to say that whenever in the securing of culture we increase overall utility we ought to do so, even if this sometimes involves harming migrants. Since, as the utilitarian story goes, the most important thing is the maximization of utility, then it is permissible to inflict some amount of harm on migrants as long as doing so helps to achieve this important goal. Furthermore, if the most efficient way to achieve this goal is to allow the state to facilitate the securing of culture, then the state may use its power to do so and may inflict some harm on migrants in the process.

There are at least three important points to take from this example. First, a plausible story is provided by an ethical theory here to explain the importance of the interest in question. Thus, it is not the case that simply any interest or good will have moral weight nor that it can be used to harm others. The interest or good must be reasonably grounded in a plausible ethical theory. Second, *jus in talionis* still applies here. As I mentioned in chapter three, what matters in moral contexts is not merely the amount of harm, but its necessity. No ethical theory escapes this clause whether it be a consequentialist, deontological, or otherwise. No ethical theory can justify unnecessary or gratuitous harm. Thus, however one justifies the use of harm, whether through political or moral grounds, its use must always be restricted by the principle of least infringement. In the example I provided here concerning utilitarianism, this applies to both agents: the state and the migrant. If the state can secure its culture without exclusion or by simply teaching a migrant a handful of dances (supposing, perhaps, that this particular culture is not very complex), then that is all it is permitted to do. If the migrant can satisfy her interests without affecting the culture of the state by taking culture classes (or perhaps even without permanently

migrating but only temporarily migrating as a guest worker), then that may be all she is permitted to do if she is a genuine threat to the culture.

The third and final point—which I have avoided making clear so far in this dissertation but is crucially important and applies to violations of both discretionary and presumptive, or legitimate, interests—is that what I have said about retaliatory measures applies to everyone, not just the state and immigrants, but also citizens as well, as we shall see in the following section.

4.4.2 Citizens and Special Obligations

In my view, gratuitous harm inflicted on a citizen carries no more and no less moral weight than gratuitous harm inflicted on a non-citizen. We may, of course, have a different reaction to the gratuitous harm in one case when compared to the other since we may be more closely related to one than the other, but as a matter of normativity, the gratuitous harm is the same. Gratuitous harm is gratuitous harm regardless of who experiences it. Of course, there are different degrees of gratuitous harm and some actions will produce gratuitous harm for some people in some contexts that won't produce gratuitous harm for others. Nevertheless, we can at least say that gratuitous harm should never occur to anyone regardless of its degree. Whether we are speaking of family members, friends, compatriots, or complete strangers, there is nothing special about our relation to these people that makes gratuitous harm (or higher degrees of gratuitous harm) permissible the more distant our relation is to its recipient. This may seem like a trivial truth, but it is often missed. When this happens in the context of immigration policy, it seems that gratuitous harm inflicted on migrants is frequently minimized. Normally, the minimization of gratuitous harm from measures like exclusion and expulsion is attributed to the moral weight

attached to the relationship one has with others; it is commonly argued, for example, that compatriots have special obligations to each other that they do not have to non-compatriots.⁸⁸ I will not challenge here the idea that compatriots can have such special obligations, in part because it seems true to me. Even so, fulfilling those obligations has nothing to do with *gratuitous* harm⁸⁹ and yet, when one fails to appreciate the implications of the principle of least infringement, one may carelessly assume that these special obligations help ground not only necessary harm but also disproportional, and therefore gratuitous, harm—such as the harm from exclusion—on migrants but never on fellow citizens. As will become clear, my contention is that these so-called special obligations have been misunderstood. Once we properly define what they actually are and once we distinguish necessary from gratuitous harm, we will see that special obligations entail only that the state may inflict necessary (and proportional) harm to secure its legitimate interests or perhaps other relevant important moral interests. Moreover, the harm may be inflicted on either a migrant or a citizen but gratuitous harm will never be permissible on anyone.

To demonstrate this line of thinking, consider a state's policy on universal healthcare for its citizens. Let us suppose that healthcare is a presumptive good, a human right, and a state is necessary to secure this good. In order to be a legitimate state, it must therefore secure universal healthcare for all its citizens. If either version of the fairness account we reviewed earlier is correct, we might interpret special obligations as simply the reciprocal obligation—owed to other

88 See, for example, Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); David Miller, "The Ethical Significance of Nationality," *Ethics* 98, no. 4 (1988), 647-662; and David Miller, "Reasonable Partiality Towards Compatriots," *Ethical Theory and Moral Practice* 8, no. 1/2 (2005), 63-81.

89 This seems true by definition. After all, if they really are obligations, does that not entail that if some amount of harm is required to fulfill the obligation, then the harm is morally necessary? Thus, it would be incoherent to say one must fulfill one's obligation by inflicting gratuitous harm—that is a contradiction in terms. It would be equivalent to saying one may be morally obligated to do something morally impermissible.

compatriots—to do one’s fair share in the state so that it may secure presumptive benefits, like universal healthcare, for its citizens.⁹⁰ There is no such parallel obligation on these accounts to do the same for non-compatriots—thus, these are special obligations owed only to fellow compatriots. Nonetheless, the question remains: must the state also provide universal health care for everyone in the world? The answer is no, and the reason should be clear: the state would be unable to fulfill its requisite functions of securing human rights (the very reason for its legitimacy) for its citizens if it tried to provide presumptive goods like universal healthcare to everyone in the world.

It is interesting to note the supposed analogy here between special obligations purportedly generated by the relationship between family members and those generated by the relationship between compatriots. Some authors, such as Ronald Dworkin, have relied on the intuition, which most of us seem to share, that parents have a special obligation to their children, which they do not have with others’ children, to draw an analogy with the idea that citizens may show partiality to fellow citizens. Even if we accept this analogy—though there are an abundance of reasons not to⁹¹—it would not show that patriotic special obligations permit the state to inflict gratuitous harm on non-citizens by excluding or deporting them. There is nothing about familial relationships that permit parents, for example, to inflict gratuitous harm on the children of strangers; the relationship merely puts in context what counts as necessary harm. Like a state, a

90 I should also acknowledge that there are a handful of other accounts of special obligations that compete with the one I put forward here. It will not be necessary to address all such accounts. The important general point I need to make is that any account of special obligations is implausible if it entails that these obligations justify the use of gratuitous harm of any degree on strangers and not on members. Special obligations can justify only the infliction of different kinds and degrees of necessary harm depending on the ultimate moral or legitimately political goal the cooperative that shares in the special obligations is aiming to achieve.

91 See, for example, Christopher Wellman, “Associative Allegiances and Political Obligations,” *Social Theory and Practice* 23, no. 2 (1997), 181-204.

parent's role, as a parent, is to perform certain requisite functions, namely raising his or her children in a decent way.⁹² It may acquire this role in a manner different from the way that the state acquires its role as the protector of the human rights of its citizens, but once the role is acquired, the legitimacy of the agent playing the role (whether parent or state) comes attached with certain functions it must fulfill to do the job adequately—to secure the interests it is entrusted with in virtue of its role. In order to do this, it may at times be necessary to harm others who violate those interests and refrain from aiding others whose aid might jeopardize the agent's ability to fulfill its requisite functions. Thus, some harm or a refrain from aiding those not under the agent's direct care may be necessary for the agent to fulfill the *legitimate* functions of its role—again, such as securing human rights (state) or adequately raising a child (parent). The agent does not inflict gratuitous harm on those it does not benefit if it cannot benefit them without simultaneously undermining its ability to fulfill its requisite functions in virtue of the role it holds. A parent who has limited resources and provides health insurance only for his child inflicts no gratuitous harm on anyone.⁹³ So defined here, necessary harm is harm inflicted in the process of fulfilling the requisite functions of the role such as securing 'legitimate-making' interests and

92 To avoid confusion, I want to clarify that I am not using the term 'role' in the same way that other political philosophers use it in the context of special obligations. Authors like Dworkin in *Law's Empire*, 196-201, Michael Hardimon, "Role Obligations," *The Journal of Philosophy* 91, no. 7 (1994), 333-363, and Samuel Scheffler, "Relationships and Responsibilities," *Philosophy and Public Affairs* 26, no. 3 (1997), 189-209 use 'role' to refer to the part played by any agent (usually a person) with obligations. My use is more narrow. I use 'role' to refer to specific agents (who may not all be persons) who play a normatively legitimate role (such as the role of a parent or a state) whose legitimacy rests on the agent's ability to fulfill the requisite normative functions of the role. Thus, while other authors talk about, for example, the 'roles' a citizen or parent or child play and what obligations are incurred by that role, my use of the term refers instead, for example, to the functional 'role' a state or a parent is supposed to play to be considered a legitimate state with the authority to coerce citizens or a decent parent fit to raise a child.

93 Keep in mind, this is not to suggest that the parent must use all the excess of his or her resources on others if it has any left over after providing the presumptive goods for his or her family. Nothing about my theory implies that this is required. If the parent has morally significant reasons to spend those resources on other goods (including many, though certainly not all, discretionary goods), then the parent may do so as long as the parent does not inflict gratuitous (disproportional) harm in the process of securing those other goods.

gratuitous harm is all other harm in excess beyond what is sufficient to secure these interests.

Ultimately, it is this distinction between necessary and gratuitous harm, in the context of the *role* that makes an agent *legitimate*, that explains our intuitions about special obligations.

Notice the implication from this: a state may privilege its own constituents in the distribution of presumptive benefits—like healthcare—over non-constituents. Moreover, the citizens of the state have obligations to each other—which they do not share with non-citizens—to maintain the state so that it can provide healthcare to all its citizens. None of this suggests that the state may inflict gratuitous harm on non-citizens in order to secure its interests. The question for a just immigration policy is: do patriotic special obligations entail that the exclusion or expulsion of migrants rises to the level of a necessary harm? The answer is, not necessarily and not immediately. One might think it does because it is relatively easy to succumb to exaggerated xenophobic fears of a massive invasion of immigrants who will bankrupt the state just as some authors, like Garrett Hardin, succumbed to exaggerated fears of overpopulation to suggest that developed countries should not send aid to developing countries.⁹⁴ The account of special obligations I presented above is especially vulnerable to these fears, and some may think that the account does, in fact, yield the conclusion that states ought to be able to exclude and expel immigrants as they please (or, in the parallel case of Hardin's lifeboat ethics, that we are obligated to refrain from sending any aid at all to poor countries). This is because, in instances of supreme emergencies, the account may permit this. In cases of genuine overpopulation, for example, the special obligations shared by compatriots and the state might require closing the

94 This is what I take to be the greatest error made in Garrett Hardin's famous "Lifeboat Ethics," in *The Environmental Ethics & Social Policy Book*, 3rd ed, edited by Donald VanDeVeer and Christine Pierce (Belmont, CA: Thomson/Wadsworth, 2003), 402-408.

borders if no less infringing options are available to continue to sufficiently secure their legitimate interests and chances are there would not be in this case. That is, in cases of supreme emergencies, the infliction of harm from closing the borders may be a necessary, not gratuitous, harm. The problem is—if I may borrow from the lifeboat metaphor—that even if the worry is that the lifeboat (or the provision of presumptive benefits like healthcare) will sink if too many people are on it, that does not mean we may exclude everyone else from the lifeboat when only six of ten seats are occupied. To deny anyone the remaining seats, which can accommodate four more people safely, is to inflict gratuitous, not necessary, harm. Additionally, the lifeboat metaphor is problematic because it assumes all new people on the boat would be net-takers. It assumes, in other words, that the four seats would be taken up by people who would produce no increase of resources but rather people who would produce only an increase of consumption and an overall decrease of available resources. It may be, though, that the reason there are only four vacant seats is on the assumption of a maximally fixed number of resources, but if the new people who get on the lifeboat are productive, they can help extend the size of the boat by producing more resources sufficient to expand the capacity of the boat—perhaps not infinitely, but at least beyond the current limit. In other words, we should not assume that the new people on the lifeboat (or new immigrants in a country) would only be a drain on the resources available when it is far more likely that they would actually help increase the production of resources needed to secure presumptive benefits. The additional tax revenue new immigrants provide, for example, could pay to expand healthcare coverage to new members of the state (or, in lifeboat terms, for new seats on the boat).⁹⁵

95 Several studies have demonstrated that on average, immigrants contribute more than they receive in benefits. For a discussion on this see Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration*,

To reiterate, people who argue from a lifeboat ethics perspective may have satisfied the *jus ulscici* criterion so they have a just reason for inflicting necessary harm on those who violate or imminently threaten their legitimate interests (which may be things like human rights, a state's healthcare system, or in lifeboat terms, a lifeboat's safety), but—as we have already seen in a previous chapter—they tend to conflate the satisfaction of the *jus ulscici* criterion with the permissibility to use whatever means they want to secure their interests, even if those means inflict gratuitous harm. One might respond that if we open the borders and find more proportional measures to secure the state's interests as I recommend, this will lead to overpopulation—in lifeboat terms, if we allow more people onto the lifeboat, it will sink because not only will four people hop on, but so will many others until it is over capacity. The theory I have advanced does not imply that this disastrous consequence is permissible but I am also not convinced it is inevitable. According to the International Organization for Migration, as of 2010 only 3.1% of the global population is migrating and this number has remained relatively stable over the last decade.⁹⁶ That means that the vast majority of people, nearly 97%, do not migrate. Even in the European Union, which has an open borders system between member states, only 3.2% of the residents of member states are immigrants from another member state, even though all citizens of EU states are free to migrate to any other EU state if they choose.⁹⁷ Phillip Cole quotes Philip L. Martin in noting that “[i]t should be emphasized that most people do not migrate despite ever more incentives to do so. The industrial democracies are not being overrun by a tidal

(Edinburgh: Edinburgh University Press, 2000), 27-28.

96 “Facts & Figures,” International Organization for Migration, accessed February 24, 2013, <http://www.iom.int/cms/en/sites/iom/home/about-migration/facts--figures-1.html>.

97 Katya Vasileva, “6.5% of the EU population are foreigners and 9.4% are born abroad,” *Eurostat*, 34/2011, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF.

wave of migrants.”⁹⁸

Thus, the overly fearful response, again, simply demonstrates first, an uninformed and careless rush to action and, second, in the real world, inflicts disproportional harm on an inappropriate target (in the context of immigration, the primary target is the migrant, who is often from the third world rather than the citizen of the receiving country, who is often from the first world). With regard to the rush to action, this seems to be a result of what I mentioned above, namely the belief that the satisfaction of the *jus ulscici* criterion permits the use of any heedlessly harmful measure, which it does not. Moreover, unlike in war when death may be imminent and measures must sometimes be taken in a fashion that requires rushed thinking that may not always permit the most careful consideration in choosing the least harmful sufficient measure, immigration policy can slog along for a while (as it currently does), which gives us ample time carefully to devise the most proportional (least infringing but sufficient) measure possible.

Second, with regard to an inappropriate target, if a state’s legitimate interest is at risk of violation because of a finite amount of resources, it is far from clear to me that the burden of harm should fall only or primarily on migrants and not at all on citizens. For illustration, let us return to the lifeboat ethics metaphor. It would be more accurate if rather than strictly considering the total number of seats available, we also considered the weight of the individuals on the boat. For example, if the lifeboat represents the United States, then the six people currently on that boat would likely be considerably overweight since people from the United States are among the highest per capita consumers of the world’s resources. Now, even with that in mind, let us suppose, as before, that the lifeboat can still accommodate four more people.

98 Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration*, 24.

Why, then, should the target of the harm be those people attempting to get on the boat who are already worse off since, presumably, they are likely to be underweight, at least relative to the people from the U.S. already on the boat? Why should the four people from the United States not be obligated to lose some of their weight to make more room for others, especially when we might be able to fit not only four more (underweight) people on the boat, but perhaps ten averaged-sized or underweight people on the boat for each overweight person from the United States? If the overweight people currently on the boat lost weight, then even more people might be rescued.⁹⁹ In any case, it would be clearly wrong simply to refuse to let anyone else on the lifeboat, allowing only the overweight people to remain on there and not requiring them to do anything on their part to make more room by losing weight. This conclusion from the traditional account of lifeboat ethics seems the absolute worst possible one precisely because it generates the most gratuitous harm on two counts: (1) entry onto the lifeboat is prohibited though more people can fit; and (2) the overweight people refuse to lose any weight when it would probably be relatively easy (and far less harmful relative to the harm experienced by those refused a seat) to lose at least some of the excess weight.¹⁰⁰

As a metaphor for the real world, lifeboat ethics does not prove that we are permitted to

99 Indeed, as a metaphor for reality, the very need for a lifeboat may not primarily be the result of overpopulation but of overconsumption by the people in the first world.

100 A consequence of my theory, which I accept, is that it would also make it impermissible for overweight people (or too many normal or underweight people) to get on the boat if doing so would inflict gratuitous harm or sink the boat. In terms of immigration policy, this means all things considered, if a well-off migrant, for example, wants to migrate to another country, the migrant may do so as long as the migrant is a abled amenable migrant. In other words, the well-off migrant may migrate (and the state ought not interfere with the migration) if the migrant is willing (amenable) and able (abled) to do so without putting in jeopardy the legitimate interests of the state. However, if the well-off migrant cannot migrate without putting at risk these interests, for example by consuming more resources than the receiving state can afford, then the migrant would be less-abled (unable to refrain from violating the state's interests) and the state could exclude the migrant without inflicting gratuitous harm (it would inflict only necessary harm).

close the borders under the guise of special obligations, just as it does not prove that we may close the lifeboat door. On the contrary, lifeboat ethics actually teaches us that we must open the borders, at least until the dangers of overpopulation are genuinely imminent. Even then, the more appropriate solution would be to reduce the consumption of the first world, which may inflict some necessary and proportional harm on the citizens of the first world, rather than compound the harm that people in the third world already experience with the further harm of inadmission and all that it entails. Even a solution somewhere in between where the burden would be more evenly distributed would be better than the one offered by the conclusion from the traditional account of lifeboat ethics.

All of this applies just as well for interests that may not be presumptive, such as the culture example I introduced above. Moreover, I am not persuaded that citizens, in virtue of nothing else but the mere fact of their citizenship or special obligations, ought to be exempt from any infliction of *necessary* harm. It is odd to say that a state may so privilege an interest (not only a legitimate interest but also a discretionary interest) that it believes it is justified in harming migrants but not citizens. If a group of citizens poses an imminent and serious danger to the state's interest in culture, should the state not also inflict proportional harm on those citizens just as it would to migrants who pose the same danger? To fail to do so demonstrates that the state does not take that interest as seriously as it claims to. Would that not also demonstrate that *any* harmful measure, no matter how small, used on migrants to secure the interest in culture *ipso facto* inflicts gratuitous harm since the state does not really think that culture is so important after all and so the interest in culture would not satisfy the *jus ulscici* criterion to begin with? The appeal of the argument I am advancing here becomes even greater when we move on to

presumptive goods. In fact, once we do that, most people's intuition immediately changes. Suppose the interest that is in danger of being violated is national security or some other human right. In that case, most people agree that the state is indeed justified in seeking harmful measures against even its own citizens if it is necessary to secure these vital human rights just as the United States did with domestic terrorists like Timothy McVeigh and Ted Kaczynski. Indeed, if the state fails to take proportional measures against its own citizens in order to secure a legitimate interest, it would lose its legitimacy since its *raison d'être* is to secure its legitimate interests (at least if a fairness account of political legitimacy is sound).

In my view, the reason that many people fail to appreciate why it is gratuitous harm that we ought to be concerned with, rather than any purported special relationships we may hold with fellow compatriots (which yield special obligations), is because they conflate the fact of how one is situated—one's context—with what that entails about how actions affect one in terms of harm, and this conflation is compounded further by the failure to distinguish between necessary and gratuitous harm. A person who has grown up her entire life in one community and formed deep bonds with her community will experience far more harm from her forcible separation from that community than would a complete stranger who spent a single day in that same community and was then forcibly removed. The very same action will affect these two people differently because of how each is situated and how the action affects them given each person's particular *context*. Notice, also, what counts as gratuitous harm will also vary with context: requiring citizens who are already culturally assimilated to take culture classes may inflict gratuitous harm but requiring new culturally unassimilated immigrants to do so would not. This is why it may appear to a citizen that she has a special obligation not to support actions that would inflict harm on her

compatriot but lacks such an obligation with an immigrant. She is conflating the *action* and how it affects the two people with her (special) obligation or lack thereof.¹⁰¹ In other words, her mistaken beliefs do not track her obligations appropriately because they are tracking actions rather than gratuitous harm. The correct way to think about her case is that she has a *general* obligation not to support gratuitous harm, period, regardless of who it is inflicted on and even though what counts as gratuitous harm will vary with context. Her obligation, therefore, must track the rejection of gratuitous harm and allow the infliction of necessary harm, but there is nothing special about that obligation that is particular to her relationship with her compatriots.

Finally, note that everything I have argued in this section is strictly consistent with the principle of least infringement. First, in the healthcare example, I suggested that the state is not required to give healthcare to non-citizens if it has only enough resources sufficient to secure the presumptive good for its citizens and this does not violate the principle. This is because what makes the state legitimate is its necessity for securing legitimate interests for its citizens and if healthcare is such an interest, then the state must use its resources to secure it for its citizens.

101 Content-independent special obligations of these sorts, which many people believe exist, strike me as impossible to justify. The common understanding, as I hinted at, demonstrates a profound misunderstanding of the distinction between necessary and gratuitous harm. We must learn to separate ‘actions’ from ‘kinds and degrees of harm.’ As I just mentioned, the one and same action may produce different kinds and degrees of harm in different people. However, the harm itself counts for the same to both people. Let us suppose a certain action *x* produces 20 points of harm on agent *A* (10 points of which are gratuitous) and 40 points of harm on agent *B* (only 10 points of which are gratuitous); then action *x* is equally wrong regardless of the overall amount of points of harm and regardless of who agents *A* and *B* are (e.g., whether citizen or immigrant). This is because what makes it wrong in both cases are the 10 points of *gratuitous* harm, which is the only bit of harm that is impermissible in both cases. The remaining points in both cases are *necessary*, and therefore permissible, harm even though there is more necessary harm in one case than the other. To draw out the intuition even further, consider another case in which action *x* produces 20 points of harm on *A* (all 20 of which are gratuitous) and 40 points of harm on *B* (but none of which are gratuitous). There is greater overall harm inflicted on *B* than on *A* but in the case of *A* all of it is gratuitous and in the case of *B* none of it is gratuitous. It seems clear to me that even though more overall harm is produced on *B* that the action done to *A* is far worse. It is the only normative conclusion we can draw from this. Thus, what ultimately matters is *only* gratuitous harm and not overall harm or special relationships. Relationships are only a factor in that they generate the context in which we interpret the kind of harm inflicted by actions, whether it be necessary or gratuitous.

Otherwise, it would be illegitimate because it would not be fulfilling its function as a legitimate state. Second, for either presumptive or discretionary goods, if the goods are morally significant enough to inflict proportional harm on migrants in order to secure them, they ought to be morally significant enough to inflict proportional harm on citizens as well for the same reason.¹⁰² In either case, as long as the harm is not gratuitous, then the principle of least infringement is satisfied. If a state does not inflict proportional harm on its own citizens to secure its interests, then it is either not fulfilling its requisite function in the case of presumptive goods or it demonstrates the goods in question are not actually important enough to inflict harm on anyone in order to secure them.

4.5 Concluding Remarks

By way of conclusion, I will summarize the three conditions that any legitimate interest must meet. First, in securing the interest, the agent (for our purpose, the state) cannot inflict gratuitous harm. This should have been clear since I first introduced the *jus in talionis* criterion in the previous chapter, but it also applied in new ways in this chapter, such as when we examined the issue of special obligations. Second, in order for the state to be justified in securing the interest, it must be a ‘legitimate-making’ interest. In other words, it must be a presumptive interest which provides the state with a reason for its existence such that without its existence, the interest could not be secured. This is the political principle that the state may use to secure legitimate interests, which may turn out to be only a minimalist set of goods comprised of human rights. The state may be called on to secure other interests, such as culture, but these would have to be justified by

¹⁰² This may even entail measures like expulsion or other measures similarly harmful in cases of supreme emergencies, such as when there is a genuine and imminent threat of overpopulation.

independent moral principles since they cannot be defended on the grounds that they are necessary for the state's legitimacy. Any other interest not grounded on either political or moral principles are illegitimate and cannot be used to ground the infliction of harm on migrants. Third, and finally, the securing of interests must apply to all individuals alike, whether they are immigrants or citizens. As just noted above, if the interests are morally important enough to harm in order to secure, there is no good reason why it should be secured only at the expense of migrants. If the state is willing to let the interest be violated by its own citizens, it demonstrates that the interest is not important enough to secure in the first place and so the interest would fail to satisfy the *jus ulscici* criterion, making any harmful measures inflicted on migrants *ipso facto* disproportional, gratuitous, and impermissible.

CHAPTER 5

THE DEONTOLOGICAL CASE FOR CLOSED BORDERS

5.1 Introduction

In the preceding chapters we examined interest-based justifications for closed borders. In the next two chapters we will turn our attention to Christopher Wellman's recent influential deontological case for closed borders. The proportional infringement theory I presented in chapter three entails that exclusion and expulsion are impermissible whenever they inflict gratuitous harm. What this means for interest-based accounts of closed borders is that even when a state is justified in securing its legitimate interests, it must do so in a proportional way—it must use the least harmful sufficient measure to secure these interests. Closing the borders often inflicts a disproportional amount of harm because legitimate interests can be sufficiently secured with other less harmful measures. However, the deontological case for closed borders is purported not to rely on any claims about particular interests; for example, it does not rely on the importance of the interest of culture and its inability to be secured if there is open migration. Instead, on the deontological account, a state is entitled to close its borders because it has a right of political self-determination and an integral component of self-determination is the freedom of association, which permits the state to freely choose who it wishes to associate with. In this chapter, we will look at some of the reasons that motivate the deontological case for closed

borders and consider some preliminary concerns about the argument. In the next chapter, we will examine how proportionality may be applied to the deontological case for closed borders.

5.2 Political Legitimacy and Self-Determination

Christopher Wellman has recently argued that legitimate political states are morally entitled to unilaterally design and enforce their own immigration policies, even if such policies include closed borders.¹⁰³ The groundwork for this argument was first hinted at by Michael Walzer when he proposed that a state's right of political self-determination requires that states have the ability to set their admissions policy.¹⁰⁴ Wellman fleshes out the argument in full and supplements it, first with his account of political legitimacy and second with his account of freedom of association. In this section, we will focus only on the former.

Wellman's deontological case for closed borders (the right of exclusion) flows from his broader liberal theory of international justice.¹⁰⁵ The first premise of Wellman's deontological case for closed borders is that legitimate states have a right to political self-determination. Since we have already covered Wellman's Samaritan account of political legitimacy in the previous chapter, there is no need to repeat it here. We need only recall that his account stipulates that a legitimate state is one that adequately secures the human rights of its constituents. Also, in his most recent work, Wellman has clarified a second component that is required for legitimacy, which is that a legitimate state must also respect the rights of those who are not its constituents. Here we will explore why he thinks legitimacy grants a state the right of political self-

103 Christopher Wellman and Phillip Cole, *Debating the Ethics of Immigration* (New York: Oxford, 2011), 13.

104 Michael Walzer, *Spheres of Justice*.

105 See Altman and Wellman, *A Liberal Theory of International Justice*.

determination. If Wellman's account of political legitimacy is correct, he believes it removes any duty the state has to give up its sovereign powers to international arrangements. Finally and crucially, the moral right of self-determination is a group rather than individual right and so it is *irreducibly* collective. This means that the right is held *jointly* by the group of constituents of the state and it cannot be reduced to the individual rights of the persons who constitute the group. As we will soon see, the irreducibility of the right of self-determination combined with a state's political legitimacy yields the claim that it is morally permissible for a legitimate state to exclude all potential immigrants.

5.2.1 Political Self-Determination

The first premise of Wellman's deontological case for closed borders, that legitimate states have a right of political self-determination, is controversial and anti-cosmopolitan because it suggests that legitimate states have no obligation to give up any sovereignty to international institutions like the UN. Wellman himself admits that this first premise is the most controversial.¹⁰⁶ So what might motivate us to become convinced of this contentious first premise?

To draw out the motivation, consider the following analogy from parenting. How would you feel if you had a child and your neighbor felt she could raise it better than you. That might offend you but you would not feel as if any of your rights had been violated merely on the basis of your neighbor's opinion regarding your parenting abilities. Now, suppose that in addition to insulting your parenting skills, your neighbor were somehow granted the legal authority to go inside your home and raise your child as she sees fit without your permission and you were no longer permitted to make any more decisions about your child from that moment on. This time, it

¹⁰⁶ Wellman and Cole, *Debating the Ethics of Immigration*, 13.

does seem as if your rights are being violated and something terribly impermissible is occurring. It is this intuition about the ordering of one's own affairs that is behind Wellman's first premise.

The fact that our intuition tells us that what the neighbor is doing is wrong motivates the general claim that it is wrong for someone else to order one's affairs without one's consent even if that other person could, in fact, perform the act (such as raising one's child) better. Suppose, however, that not only could your neighbor raise your child better than you but you happen to be highly addicted to drugs, criminally neglectful of your child, and physically abusive. In that case, our intuition sides with your neighbor instead. Notice why, though. The reason is that in the latter example, you were not simply a sub par parent but a criminally liable and abusive parent. In the former example, there was no reason to believe you would criminally harm your child and the assumption was that you would be an average conscientious parent. The implication is that as long as you meet the criteria for being a minimally decent parent then you are entitled to raise your own child as you see fit even if your neighbor might do a better job than you. If you are a decent parent and your neighbor decides to raise your child anyway without your consent, then she has violated your right to order your own affairs. On the other hand, if you fail to meet the criteria for being a decent parent and you are extremely harmful to your child, then you have no right to order your own affairs at least as far as your child is concerned. If your neighbor is a decent parent, then your neighbor has the right to take your child from you, perhaps via adoption, to prevent the child from suffering any further harm by you. Of course, this may all be true of a decent individual's right to order her own affairs with her child without interference from outsiders, but why should we believe that this is also true of a group's irreducible right to order its own affairs without interference, and especially the unique kind of group that a state is?

The following case may help motivate the leap from the individual right of self-determination in the parenting case to the analogous case of the irreducible collective right of political self-determination. On April 23, 2010, Arizona Governor Jan Brewer signed into law Arizona Senate Bill 1070. This piece of legislation was designed to crack down on undocumented immigrants residing in Arizona. A month later Mexican President Felipe Calderón was invited to the U.S. to speak to a Joint Meeting of Congress. In his speech, he criticized the Arizona law in much the same way it had already been criticized by not only many regular American citizens and people from all around the world but also progressive American legislators and the President of the United States. The backlash from conservative American circles was immediate. Fox News ran an article headlined “Mexico’s President Has Some Nerve Lecturing His U.S. ‘Amigos.’”¹⁰⁷ The sentiment among not only conservatives but others as well was that the Mexican President had no business meddling in the affairs of Americans. Tom McClintock, a Republican Congressman from California, stated:

The Mexican government has made it very clear for many years that it holds American sovereignty in contempt and President Calderón’s behavior as a guest of the Congress confirms and underscores this attitude. It is highly inappropriate for the President of Mexico to lecture Americans on American immigration policy, just as it would be for Americans to lecture Mexico on its laws.¹⁰⁸

One need not agree with these conservatives on the merit of the Arizona law to be motivated by their contention that foreign powers should not have control over American’s internal affairs. Worse yet, Americans would think it inappropriate for Mexico unilaterally to

107 Bradley Blakeman, *Mexico’s President Has Some Nerve Lecturing His U.S. ‘Amigos’*, Fox News, <http://www.foxnews.com/opinion/2010/05/21/bradley-blakeman-felipe-calderon-congress-arizona-immigration-democrats-mexico/> (accessed March 6, 2012).

108 Noel Sheppard, *Calif. Congressman Blasts Calderón’s Ariz. Comments and Dems for Applauding*, News Busters, <http://newsbusters.org/blogs/noel-sheppard/2010/05/21/california-congressman-blasts-Calderóns-speech-and-dems-applauding> (accessed March 6, 2012).

pass a law repealing the Arizona law especially if the Mexican government proceeded to send troops into the U.S. to block enforcement of the Arizona law. Similarly, what if a foreign state unilaterally decided to repeal the American Civil Rights Act of 1964 and sent military forces to ensure that all schools were re-segregated? Would Americans not object and not simply on the grounds that we now find segregation wrong but also on the grounds that foreigners should not meddle in our affairs, much less force us to do what they want? In cases like these, most Americans—indeed, most people of other countries as well—would object to any moves made by foreign powers to enforce these views even if they ultimately agreed with the views expressed by the foreign government. Foreign leaders, they might say, have no business telling us what to do in our country. Not only would many feel insulted by this, but they might also argue that since Americans are the ones dealing with American issues it is Americans who would know best how to order American affairs (though, of course, this is not necessarily true in all cases). Even if a foreign state could order American affairs better than Americans, that foreign state would still have no right to meddle in the affairs of Americans.

Wellman believes that actions like these, involving foreign powers unilaterally ordering the affairs of another country, are wrong in principle but the only way to explain this is to assume the principle of political self-determination. In other words, if you agree that it is wrong for Mexico unilaterally to enforce a repeal of the Arizona law, then your reasoning must depend on your belief that states, as a group, have a moral right of self-determination. Foreign powers telling Americans how to order their affairs undermine this moral right. There is, of course, a caveat to all this which was also present when I discussed a parent's right of self-determination. The caveat is that in order for a mother to be entitled to the moral right to raise her own child as

she sees fit, she must be a decent parent. Similarly, a state is entitled to this moral right only if it is a legitimate state. A *de facto* state—that is, one that has only *de facto* control over its territory without having earned legitimacy—has no such right. Recall that Wellman argues states are legitimate only if (a) they protect the human rights of their constituents and (b) respect the human rights of all others. If America were committing mass genocide on its own people, then it would not be a legitimate state and so would have no irreducible moral right of self-determination. In such a case, Wellman argues that it might be permissible for a legitimate foreign state to interfere with the internal affairs of the U.S. This is why Wellman does not feel it was impermissible when the Allied Powers prosecuted and punished German citizens for crimes committed against their fellow citizens during the Nuremberg Trials.¹⁰⁹ Germany was merely a *de facto* state and was illegitimate.

In sum, then, it is for the reasons just mentioned that Wellman believes we should accept his first premise, that legitimate states are entitled to political self-determination. More precisely, the best explanation for the wrongness of unilateral foreign interference is that there exists a moral (irreducibly collective) right of self-determination that legitimate states have. Additionally, Wellman argues that this right that legitimate states (and decent parents) have does not arise, nor is lost on consequentialist grounds. He believes that as long as we stipulate legitimacy (or minimal decency in the case of parents), consequentialist concerns about the maximization of the good lose most of their force (in standard non-doomsday cases). An agent is not required to maximize the provision of presumptive benefits for those it is entrusted with, but rather do at least a sufficient job of securing the provisions for them. Thus, given that a state satisfies the

109 Wellman and Cole, *Debating the Ethics of Immigration*, 15.

criteria of legitimacy, its moral right of political self-determination rests on deontological, as opposed to consequentialist, grounds. Ultimately, I contend that even if we accept Wellman's first premise, the principle of least infringement—that is, proportionality—will limit the extent of political self-determination a state is permitted to use. We will reserve that discussion for the next chapter. In the following section we will look at one concern raised by his first premise. In the end, this concern may not rise to the level of a defeater but we need to be aware of it so that the account of political legitimacy we use from hereon remains plausible.

5.2.2 Concerns About Wellman's Account of Political Legitimacy

The concern I have with Wellman's account of political legitimacy is one raised by *a posteriori* anarchism, that is, whether legitimate states are possible. If such states are not possible, then we are left without Wellman's deontological grounds for the right of political self-determination. Thus, we must ask how perfectly a state needs to meet Wellman's criteria for political legitimacy. Are states required to consistently, perhaps without exception, protect the rights of their own constituents and respect the rights of all others? If so, then given the world as we know it, this seems quite difficult to do, if not impossible. Moreover, even if Wellman's first premise is true, it would make it irrelevant for our world since it could consist only of *de facto* states as opposed to perfectly legitimate ones. Let us first look at why we might think that this reading of Wellman's account of political legitimacy is impossible in our world and then look at a couple of attempts to clarify his account so that the threshold it requires for legitimacy may be lowered.

The most developed and powerful states in the world today are frequently accused of grave human rights violations. A study of internal memos and documents regarding U.S.–

Vietnam relations conducted between 1945 and 1967 titled *The Pentagon Papers* revealed several disturbing incidents that appeared to show the U.S. displaying no regard for the human rights of outsiders. In one particular instance, U.S. President Richard Nixon was confronted by Nobel laureate Henry Kissinger with the question of civilian casualties in Vietnam and responded to Kissinger by saying: “The only place where you and I disagree ... is with regard to the bombing. ... You’re so goddamned concerned about the civilians and I don’t give a damn. I don’t care.”¹¹⁰ This is an instance demonstrating not only the possible violation of the human rights of others by the U.S. administration, but also a display of complete lack of any remorse for doing so. To my mind, this demonstrates a malicious intent to violate human rights. Moreover, not only is there an abundance of evidence of human rights abuses conducted by the U.S. and other developed states on foreigners, but there is also plenty of evidence of abuses of their own constituents. The U.S. has existed as an independent state for nearly two and a half centuries, but it has only granted its ethnic and racial minorities equal civil rights for fewer than fifty of those years. Many would argue that the U.S., along with many other developed states, continues to violate the rights of its gay constituents by denying them a right to marry whom they choose. Even Norway, a state that Wellman considers as good a candidate for a legitimate state as any there is,¹¹¹ has recently been accused of complicity in human rights abuses in Burma because of its multi-billion dollar investments in companies that are involved in abuses such as forced labor, killings, and uncompensated land confiscation in Burma.¹¹² These are contemporary examples of states failing to consistently and perfectly meet Wellman’s criteria for political legitimacy, but

110 Richard Miller, *Globalizing Justice* (New York: Oxford, 2010), 187.

111 Wellman and Cole, *Debating the Ethics of Immigration*, 17.

112 EarthRights International, *Broken Ethics: The Norwegian Government’s Investments in Oil and Gas Companies Operating in Burma (Myanmar)*, December 2010, <http://www.earthrights.org/publication/broken-ethics>.

human history is littered with many more examples. Thus, in order for Wellman's first premise to be plausible at all, his criteria cannot demand this level of perfection and he certainly never argues that it must. After all, in the case of individual parental rights of self-determination, we do not require parents to be perfect in order to be entitled to raise their children without interference.

Refugee

So, if a state is not required always to meet the criteria perfectly, then how does it qualify for legitimacy and how low may the threshold go? To help answer the question, let us consider again the analogous parenting case. For the most part, it seems fairly clear when a parent is at least minimally qualified to raise a child and, on average, most parents meet this standard. The standard of decency does not require the parent to earn a "Parent of the Year" award—it does not require perfection or even excellence. Hugh LaFollette, in arguing for the need to license parents, suggests that the standard for minimally decent parenting:

does not demand that we license only the best parents; rather it is designed to exclude only the very bad ones. . . . Although we do not have infallible criteria for picking out good parents, we undoubtedly can identify bad ones—those who will abuse or neglect their children. . . . [W]e do not wonder if a parent who severely beats or neglects a child is adequate. We know that person isn't.¹¹³

The only thing the standard seems to require, then, is that the parent not be abusive, not be criminally neglectful, or more generally, not violate any of the child's human rights. Beyond that, one need not do anything else that we normally associate with being a particularly good parent such as attending the child's school functions, buying them birthday gifts, or even caring deeply for them. The problem is that this low threshold is not clearly sufficient in the context of political states and this is primarily due to a question of human rights. For instance, is the United States or

113 Hugh LaFollette, "Licensing Parents," in *What's Wrong? Applied Ethicists and Their Critics*, eds. David Boonin and Graham Oddie (Oxford University Press, 2004), 344.

Norway as clearly legitimate as decent parents are decent? The U.S. is culpable of a significant number of human rights violations committed not only today but also in the past. Decent parents are also culpable of making mistakes when raising a child, some quite significant, but they do not rise to the level of human rights violations. Thus, the problem with this comparison is that the kinds of rights violations that states like the U.S. make—which may sometimes result in things like the deaths of foreign civilians under the guise of questionable pretenses or the causation of environmental disasters on a global scale—cannot sensibly be compared with the kinds of acceptable errors of judgment parents make. Even in the case of Norway, which may be complicit in gross violations of human rights in Burma, there does not seem to be a morally equivalent kind of mistake committed by parents that, even if they committed it, would permit them to continue parenting. Suppose, for example, that a mother had knowledge or suspected that her husband was physically abusing their children (a human rights violation). If the mother did nothing to stop the abuse, then she would be complicit in it. In such a case, it seems both parents would be liable to lose custody. Moreover, I suspect most people would say parents ought to lose any rights they have to raise their child (at least temporarily) after a single instance of child abuse and especially after a consistent pattern of abuse even if the parent attempts to make amends for the abuse. Note also that another key difference between parents and states is that most parents are not child abusers while arguably most, if not all, political states do violate or at some point in the past have violated the human rights of their constituents or outsiders. If the legitimacy of states is compared to the legitimacy of parents, a comparison that Wellman himself makes,¹¹⁴ then surely few states, if any, should be entitled to political self-determination,

114 Wellman and Cole, *Debating the Ethics of Immigration*, 23.

even those who are merely complicit in human rights violations.

None of what I have argued necessarily undermines Wellman's first premise since perfectly legitimate states could still be entitled to self-determination; nevertheless, if the state case truly is analogous to the parenting case, then the premise might entail that no current state is entitled to political self-determination, which leads us to *a posteriori* anarchism. On the other hand, we can admit that the analogy is false, at least as far as the concern I just raised about human rights violations, and instead make the argument that, though human rights violations are wrong and though most states commit them, there would be far more rights violations in a world without any states at all. Recall that Wellman argues that "political society provides the most precious benefits imaginable because it rescues us from continual peril and, in doing so, destroys one of the most formidable obstacles to meaningful life."¹¹⁵ The political society he has in mind here is, of course, a state. The state need not always and perfectly secure the human rights of its constituents nor always and perfectly respect the human rights of others in order to rescue us from the continual peril of the state of nature. The most we might be able to say, then, is that a state is sufficiently legitimate, and earns the right of self-determination, as long as it is able to rescue its constituents from the peril of the state of nature even when it is complicit with some abrogations of human rights. While this may not be as clean an account of political legitimacy as we might have hoped for, it at least has the benefit of setting the threshold low enough that many modern states can actually be considered politically legitimate. The alternative would have to be *a posteriori* anarchism, but if that were the case then Wellman's first premise would no longer be relevant and there would be no need to continue to arbitrate Wellman's deontological case for

115 Wellman, "Toward a Liberal Theory of Political Obligation," 742.

closed borders. Thus, in order to continue we must allow that sufficiently legitimate states exist and that they do not lose their legitimacy on the basis of committing some human rights violations.¹¹⁶

5.3 Wellman's Deontological Case for Closed Borders

In addition to the first premise we examined above, Wellman adds two more to generate the conclusion that legitimate political states are morally entitled to unilaterally design and enforce their own immigration policies, even if such policies include closed borders.¹¹⁷ He formalizes his argument as follows:

1. Legitimate states are entitled to political self-determination.
2. Freedom of association is an integral component of self-determination.
3. Freedom of association entitles one to *not* associate with others.

These three premises together entail the conclusion that legitimate states have a presumptive right not to associate with foreigners—in other words, a presumptive right to exclude potential immigrants. Wellman stresses that the argument he advances is a *pro tanto* argument, meaning that the right of exclusion is only presumptive and may be outweighed by competing considerations but he remains convinced that the right is not outweighed by traditional accounts of open borders. To that extent, I agree with Wellman but the aim here is not to show why the other open borders argument fail. Rather, the aim in this section is merely to introduce the idea of freedom of association and the role it plays in the remaining two premises of Wellman's

¹¹⁶ Without appealing to strict consequentialist formulations to compare the overall number of human rights violations between the state of nature or a particular state, though, it seems to me the amount of violations necessary to lose legitimacy is anyone's guess.

¹¹⁷ Wellman and Cole, *Debating the Ethics of Immigration*, 13.

argument. As with the first case, I will raise a few preliminary concerns with these two premises. Moreover, this section and the concerns I raise here will set us up nicely for the next chapter because they will demonstrate why Wellman's argument is problematic unless we add proportionality to it. The upshot will be that Wellman's argument, even if sound, does not entail the right of a state to close its borders as it sees fit in most cases.

5.3.1 *Freedom of Association*

Wellman's case for the right of exclusion is heavily dependent on the freedom of association. He believes that freedom of association is integral to self-determination and that it entails a right not to associate with others. To understand why freedom of association is integral to self-determination Wellman asks us to consider what life would be like without it.

Imagine a stark case in which one's familial relations were determined at the discretion of one's government. Suppose, for instance, that a governmental agency were empowered to decide not only who would marry and who would remain single, but who would get married to whom, whether or not various couples would get divorced (and after what duration of marriage), and which children would be assigned to be raised by whom. ... I suspect readers will be aghast at this imaginary society. If so, it is because they share the widespread conviction that each of us enjoys a privileged position of moral dominion over our self-regarding affairs, a position which entitles us to freedom of association.¹¹⁸

There are two key points to take away from this observation. First, our uneasiness with the case just described regarding marriage demonstrates that we do highly value freedom of association in marriage. Second, our uneasiness does not subside if we merely have a right to get married. After all, having a right to get married does not necessarily mean having the right to *choose* whom to marry—as people forced into arranged marriages and gay constituents of states that ban same-sex marriage know all too well. Freedom of association entails not only having a right to get

118 *Ibid.*, 31.

married, but also having a right to reject potential suitors or to remain single indefinitely. More generally, as Wellman explains, “part of what makes freedom of association so important is that it necessarily includes the discretion to *reject* a potential association.”¹¹⁹

There are a couple of additional important features to note about Wellman’s views on the freedom of association. First, this freedom is a presumptive right not only of intimate associations like families but also of non-intimate, even trivial, associations such as clubs. This is so primarily because self-determination is valuable in both contexts; it is not unique to intimate contexts. Since freedom of association is integral to self-determination and non-intimate associations may place great value in ordering their own affairs, it follows that they too are entitled to freedom of association and by extension to a presumptive right of exclusion. As Wellman notes, “one cannot limit freedom of association without restricting self-determination”¹²⁰ and this is true not only of the right of political self-determination of intimate but also non-intimate associations.

This leads us to the second important feature, which is that freedom of association generates only a presumptive right of exclusion. Wellman insists that his case is only a *pro tanto* argument for the right of exclusion and so he is not an absolutist about it. This means that the right can be outweighed by significantly important competing considerations. An example Wellman gives involves the Augusta National Golf Club, which currently excludes women from membership. He notes that in general we ought to begin with a presumption in favor of letting the club set its own membership policies. However, all things considered, there may be good reasons for overriding their right of exclusion in this case. In the United States, women continue

119 Ibid., (emphasis Wellman’s).

120 Ibid., 34.

to experience significant systematic disadvantages. Permitting them into clubs like Augusta National that are hotbeds for networking may help women break through the glass ceiling that keeps them from reaching the same level of success as men. Wellman does not specify if he agrees with this particular argument, but he does believe that in principle, this demonstrates that reasons may be produced to constrain or entirely outweigh the right of exclusion.

In sum, the final two premises of Wellman's argument heavily rely on freedom of association. The freedom of association is needed in order to sensibly believe that we have moral dominion over our self-regarding affairs. Additionally, freedom of association demands not only that we have the right to do something but also the right to refrain from doing it. That is, it requires that we have a right to choose and in the context of states, just as in the context of marriage, this entails that we may choose to reject others from associating with us. In the remainder of this section I will raise a concern related to Wellman's final two premises. The concern I will raise is that Wellman's argument permits illiberal and morally unacceptable criteria in choosing which new members a state may decide to associate with.

5.3.2 Selection Criteria

One of the main problems with the deontological case for the right of exclusion is that it seems to permit states to exclude immigrants solely on the basis of illiberal criteria such as race, sexual orientation, religion, gender, or nationality. If these criteria were put in terms of interests (for example, a state restricts migration to secure its interest in preserving a particular race or religion), then the argument I advanced in the previous chapter regarding what count as legitimate interests would find them problematic. Recall that there are three conditions that a

state's interests must meet in order to justify the use of harmful measures to secure them: (1) they must not require the agent to inflict gratuitous harm; (2) they must be 'legitimate-making' interests or they must be justified by independent moral principles; and (3) they must be sufficiently morally weighty that the harmful measures used to secure them can be used on all individuals alike, whether they are immigrants or citizens. According to these conditions, a state that excludes immigrants on the basis of race, sexual orientation, religion, gender or nationality violates at least the second condition, but it may also violate the other two conditions as well. All criteria of this sort fail the second condition because they are neither legitimate-making interests nor independently morally justified. A state will also violate the first condition if it inflicts disproportional harm to secure the interest, such as if it excludes all people from another country on the basis of that other country's predominant religion even if some of the migrants from that country do not practice the religion. A state will also violate the third condition if it fails to expel its own citizens who threaten these illiberal interests. I am inclined to believe that, for the most part, the conclusion that these interests or criteria are impermissible is in tune with the deepest intuitions of liberals and they match up with what we ordinarily find to be unacceptable criteria that a state may use to determine membership. The theory I have advanced in this dissertation and the conditions I have defended for permissible interests that may be secured through selective immigration policies lines up with these intuitions but we need to see if Wellman's account of the right of exclusion does as well.

One of the problems with Wellman's account is that it has much more difficulty answering the question of criteria in a satisfactory way. If a legitimate state has the right not to associate then it seems to follow that it may choose not to associate with whomever it chooses

whether it be all immigrants or only all immigrants who are, for example, of a specific race, gender, or religion. On Wellman's account, the criteria a state uses need not meet anything like the three conditions that my theory of proportional infringement supposes. Wellman writes: "In my view, there are deontological reasons to respect a legitimate state's right of political self-determination, and so those countries that qualify have a deontologically based moral right to freedom of association. *Thus, whether they exercise this right rationally or not, it is their call to make.*"¹²¹ This means that even if the constituents of the state simply have an irrational, groundless xenophobic fear that people of a particular race will bring upon hell on earth if they are allowed into their country, Wellman's account suggests it is permissible for them to restrict the migration of people of that race into their country. Since denying membership on these grounds violates no one's human rights, a state may go ahead and do so while maintaining its legitimacy. Wellman's theory seems incapable of handling illiberal criteria in a way that agrees with our deepest intuitions about the wrongness of excluding others on the basis of morally arbitrary characteristics like race and gender. This is especially problematic in contexts where there has been a history of racial, gender, or other forms of unjust discrimination and even more significant when the effects of that discrimination continue to be felt. Wellman acknowledges that this poses a concern for his theory: "It seems to me that there must be something wrong with a country's denying admission on the basis of race, for example. I must confess, however, that I find it surprisingly difficult to provide an entirely satisfactory argument for this conclusion."¹²²

Despite the difficulty in providing such an answer, Wellman nevertheless attempts to do so. He begins by anticipating the argument I presented above:

121 Ibid., 90, (emphasis mine).

122 Ibid., 143-144.

Given how strenuously I have defended a legitimate state's right to exclude all potential immigrants, one might assume that I would support a country's right to design its immigration policy in whatever fashion it likes. After all, if no prospective immigrant has a right to enter, then on what grounds could a rejected applicant object to the criteria used to screen potential immigrants. I am not sure that this is correct, however. Even if states have the right to exclude all outsiders, it does not necessarily follow that they may screen applicants in any fashion they choose.¹²³

Thus, though Wellman asserts early on that a state may exclude outsiders as it sees fit, here he now hedges that assertion. What he wants to be able to do is provide a reason compatible with his deontological case for the right of exclusion that suggests a state may not exclude outsiders as it sees fit if that means excluding them on illiberal grounds like race. He appeals to a solution provided by Michael Blake.¹²⁴ Wellman argues that the best account of moral equality is relational. Wellman believes that inequalities in exploitative relationships are pernicious. There is nothing inherently wrong with two people having unequal status or opportunities especially if these people never meet and their inequality is not the result of an injustice the more well-off person performed on the less well-off person. However, there is something deeply wrong with two people having unequal status and opportunities if their inequality is the result of an exploitative relationship. If one person, through some form of oppression, has disadvantaged another person, then the oppressor has violated the moral equality of the oppressed. It is important to understand this in order to see why a state may not use illiberal criteria to exclude. According to Blake, if a state chooses to exclude on the basis of race, then the state is implying something iniquitous about the status of its own constituents who are members of that race:

To identify the purpose of the state with the preservation of a cultural group is inevitably to draw an invidious distinction against those citizens who do not happen to belong to that community. In all cases in which there are national or ethnic minorities—which is to

123 Ibid., 143.

124 Ibid., 148.

say, the vast majority of actual cases—to restrict immigration for national or ethnic reasons is to make some citizens politically inferior to others. . . . Seeking to eliminate the presence of a given group from your society by selective immigration is insulting to the members of that group already present.¹²⁵

In short, then, excluding immigrants on the basis of criteria like race, gender, culture and other illiberal criteria is wrong, not because it fails to respect the rights of immigrants but rather because it makes some current citizens politically inferior to others—it violates their right to moral (relational) equality.

In 2012, Rick Santorum, a U.S. candidate for President, suggested that if Puerto Rico—currently a U.S. territory that grants citizenship to all its constituents—desires to become a U.S. state, it must adopt English as its main language. In the wake of making the comment, many argued that what was wrong with it was not necessarily that states should not have a primary language but rather that no other U.S. state requires this. It was taken as an insult to Spanish speaking U.S. citizens. ABC News quoted Oreste Ramos, a former Santorum supporter and one-time Puerto Rican senator, saying: “As a Puerto Rican and Spanish-speaking U.S. citizen, I consider the position of Mr. Santorum offensive.”¹²⁶ It is easy to see why not only were Puerto Ricans offended but also other Spanish-speaking constituents residing in the fifty states of the U.S. For many people, it was hard not to read into the Santorum’s comment as a suggestion that in some sense, Spanish speaking citizens are inferior to non-Spanish speaking citizens. It seems clear that this would not have been nearly as controversial if no American citizens anywhere spoke Spanish. In that case, making the adoption of English a requirement of statehood would

125 Michael Blake, “Immigration,” in *A Companion to Applied Ethics*, eds. R.G. Frey and Christopher Wellman (Malden, MA: Blackwell, 2005), 232-233.

126 Matthew Jaffe and Shushannah Walshe, *Rick Santorum Defends Call for Puerto Rico to Adopt English After Delegate Defection*, ABC News, <http://abcnews.go.com/blogs/politics/2012/03/rick-santorum-defends-call-for-puerto-rico-to-adopt-english-after-delegate-defection/> (accessed March 19, 2012).

seem far less pernicious. While this is not a case of selection criteria, it still neatly illustrates, in practice, the claim that Blake and Wellman advance with regard to selection criteria. Wellman's conclusion, then, is that using criteria such as race to exclude immigrants is a violation of the moral (relational) equality of the constituents who are members of the excluded race.

There are many reasons to think that this solution is inadequate, though. Wellman himself notes two problems. First, the solution fails to explain what is wrong with excluding on the basis of race in a racially homogenous country. While it may be unrealistic to suppose that modern states could be racially homogenous, in theory it is possible. Wellman writes:

Of course, as Blake himself emphasizes, virtually no state in the real world is entirely homogenous, so this concern may be of minimal practical significance. Still, most of us would be horrified even if a homogeneously white state explicitly excluded all prospective black immigrants, and (as Blake acknowledges) his arguments by themselves do not justify any such objection.¹²⁷

Wellman himself seems to share the discomfort with the theoretical implication that illiberal criteria may be used to exclude immigrants in homogenous states but he is unable to provide an answer to this problem. The second problem Wellman finds with this solution involves cases where a certain group of immigrants are granted membership, but after a period of time, subsequent members belonging to that group are henceforth excluded. The example he provides asks the reader to suppose that Norway allows a certain number of Pakistani immigrants but later decides to begin excluding all subsequent Pakistani immigrants. Wellman explains, "I'm, not convinced that this would necessarily be unjust, even though it seems likely that many existing Norwegian citizens who had previously immigrated from Pakistan might understandably be insulted by this policy."¹²⁸ To my mind, though, something continues to seem intuitively

¹²⁷ Wellman and Cole, *Debating the Ethics of Immigration*, 149.

¹²⁸ *Ibid.*, 150.

pernicious about the exclusion of Pakistanis simply on the basis of being Pakistanis even if other Pakistanis were previously allowed to migrate. How is that relevantly different than instituting a total ban on any *further* non-White immigration into the state as the National Front of Britain advocates doing in their manifesto?¹²⁹

Additionally, the conclusion Wellman draws here does not seem entirely open to him if he appeals strictly to Blake's position anyway. If Wellman accepts Blake's answer to the problem of illiberal criteria, then it is unclear on what grounds he can argue that excluding subsequent Pakistani immigrants, in a country with some Pakistani constituents already residing there, is permissible. Wellman, therefore, must either accept what Blake's solution entails and agree that denying membership to Pakistanis (on the basis of their nationality) is wrong as long as there already are Pakistani members of the state, modify it to account for his intuition that excluding future Pakistanis is just, or reject it altogether. Given what Wellman says about Norway's right to exclude future Pakistanis, he is unable to commit to the first option but he does not make any attempt for the second option (likely because he finds no solution better than the one Blake offers) and so it seems he must take the third option. However, if he does this, Wellman must admit that his theory simply entails what most of us would find to be a *reductio ad absurdum*, namely that racist and other illiberal criteria can be used to exclude immigrants. It is for reasons like these that Wellman admits to failing to be fully satisfied with his theory's answer to the problem of illiberal criteria but he does not offer any alternatives.

A related problem is that Blake's solution makes impermissible even criteria Wellman

129 Panikos Panayi, *The Impact of Immigration: a Documentary History of the Effects and Experiences of Immigrants in Britain Since 1945 (Documents in Contemporary History)*, (Manchester University Press, 1999), 145.

considers unproblematic. In fact, I argue that it implies that closed borders are necessarily impermissible. To see this, consider that while Wellman notes in the Pakistani case that subsequent Pakistanis can be excluded qua being Pakistani, a second way to understand the exclusion would be to suggest that subsequent Pakistanis can be excluded qua being immigrants. The former criteria, that of being Pakistani, seems illiberal since it is a criteria used for exclusion on the basis of nationality but it could also quite easily have been based on race or some other illiberal attribute. I believe that the reason Wellman remains unconvinced of the impermissibility of excluding further Pakistanis is because he does not interpret the criteria this way. Instead, he seems implicitly to be looking at the Pakistani exclusion as an exclusion of immigrants *simpliciter*, not an exclusion of Pakistanis. The confusion arises because most people believe excluding immigrants *simpliciter* is permissible, whereas excluding Pakistanis because of their nationality is not.

My own view is that neither Wellman nor Blake have any grounds to make this distinction if their argument is that the latter turns some constituents into second-class citizens but the former does not. This is why I also claim that if we take Blake's solution seriously, it entails that closed borders are impermissible. I contend that any criteria, liberal or illiberal, will necessarily make some constituents appear to be second-class citizens even if the criteria itself is simply that one acquired citizenship after birth (citizen-after-birth) through migration or some other means as opposed to acquiring it at birth (citizen-at-birth). The core of any closed borders theory is that the default standing between a constituent of a state and a non-constituent is that the former is a citizen-at-birth and the latter is not (though, of course, migration changes this but the base distinction, at birth, between the two is still the default position). While a state may

decide to allow some people who are not citizens-at-birth to become members through naturalization, it is critical to understand that the default position in closed borders theories is that it is nevertheless the choice of the state to decide what people will become members if any. Once one appreciates that base distinction between those who are citizens-at-birth and those who are not, it is then easy to see why Blake's solution makes the project of closed borders problematic. Just as black constituents of a state are considered second-class citizens so long as a state excludes black immigrants, the constituents of a state who are not citizens-at-birth are considered second-class citizens so long as a state excludes others who are not citizens-at-birth by default. This is true even if the state previously permitted some black immigrants or other immigrants (people who are not citizens-at-birth) respectively. If the state finds enough inherently wrong with people who are not citizens-at-birth that it decides to exclude them, then it seems Blake's account would entail that the state is necessarily drawing a division between its constituents who are citizens-at-birth and those that are not. It is the right to exclude people who are not citizens-at-birth that Wellman and other closed borders advocates are trying to ground. For comparison, recall that this is impermissible on my account because it violates the second condition (and likely the third as well) for an interest that may be secured through harmful measures. The interest in having constituents who are citizens-at-birth is not needed to rescue people from the perils of the state of nature, nor can it be well-grounded on independent moral principles and this is why it fails to meet the second condition. Additionally, this interest fails the third condition as well unless the state is willing to expel its own constituents who are not citizens-at-birth (something the British National Front movement also advocates in its manifesto). If the state refrains from doing this, then it would be demonstrating that the interest is

not actually that important. Thus, on my account the exclusion of immigrants *simpliciter* is impermissible (there must be a good reason to proportionally restrict such migration) but not on Wellman's account.

What I have just argued is not merely a hypothetical possibility, we can see the issue in practice today. Remember, it is the effect that exclusion has on the constituents that matters in Blake's account. In the United States, it is illegal for persons who are not citizens-at-birth to run for President. Popular opinion may find very little wrong with this, but it seems liberals should. What is the distinction between a citizen-at-birth and a citizen-after-birth that makes the former an adequate candidate for the office of Presidency but not the latter? This is a particularly dubious distinction if the citizen-after-birth was brought to the U.S. at a very young age. Are such people incapable of being as patriotic, politically active, culturally assimilated, and intelligent as any citizen-at-birth candidate for President? Moreover, when people use offensive rhetoric against immigrants (most citizens-after-birth), it affects other immigrants, even those considered legal, as well. It is not uncommon to hear some constituents accuse immigrants, as a group, of increasing crime, abusing social programs, taking jobs, and in general being a tax, rather than a boon, on the state. At this point, it is important to recall that Wellman argues states are entitled to exclude foreigners whether they exercise this right rationally or not. For Wellman, simply excluding foreigners or immigrants *simpliciter* is permissible even if the reason a state does so is on the basis of the irrational kinds of popular anti-immigrant concerns I listed above. Now, given all that, how should people who are not citizens-at-birth not think of themselves (and be perceived by others) as second-class citizens in the same way that black people who live in a state that excludes black immigrants may think of themselves (and be perceived by others) as

second-class citizens? David Miller recognizes this problem:

It is not easy to set out arguments for limiting immigration without at the same time projecting a negative image of those immigrants who have already been admitted, thereby playing directly into the hands of the far Right ideologues who would like to see such immigrants deprived of their full rights of citizenship and/or repatriated to their countries of origin.¹³⁰

Thus, it seems implausible to suggest that only racist and other illiberal criteria would make second-class citizens of some constituents by violating their moral (relational) equality. Any exclusionary criteria, whether it be the exclusion of people who are black, female, Pakistani, suffer some sort of handicap, are low-skilled, do not have a college education, or who are just immigrants *simpliciter* has this consequence of creating relational inequality between constituents. The upshot is that if we take Blake's solution seriously, all exclusionary criteria is impermissible because it seems to turn some constituents into second-class citizens.

There is one final concern I have with Wellman's appeal to Blake's solution that I will mention only briefly. The concern is that it's not clear this move is even available to Wellman. The reason he favors Blake's solution is because, according to him, it is the best of those available for the problem of illiberal selection criteria and this is supposed to help rescue his theory from a *reductio ad absurdum*. In other words, if he does not want to bite the bullet and allow for purely racist and other illiberal selection criteria, then he must adopt something like Blake's solution. However, that appeal only helps him if Blake's solution actually entails that illiberal criteria generates relational inequality. But why should we think it necessarily does? We might say that in actuality, when a state uses racist criteria, constituents are more likely to treat other constituents who are members of the excluded race as inferior but this is not necessary.

¹³⁰ David Miller, "Immigration: The Case for Limits," in *Contemporary Debates in Applied Ethics*, eds. Andrew I Cohen and Christopher Wellman (Malden, MA: Blackwell Publishing, 2005), 193.

These exclusions do not necessarily entail that the rights of any constituents are being violated. They may make constituents feel as if they've been disrespected but this need not be because their rights have actually been violated. In other words, it may be that they simply *feel* as if they are being perceived as inferiors but as long as the state does not actually treat its constituents as inferiors, then no rights are, as a matter of fact, violated. To see this, consider once again the case of Rick Santorum's comments on Puerto Rico. Even if the U.S. agreed with Santorum's advice and rejected Puerto Rico on the basis of language, does that mean Spanish speakers in the U.S. would become second-class citizens? Not necessarily. Many of them, especially Spanish-speakers, might feel deeply offended but they would not lose any of their own rights as a result of this decision by the U.S. The state could continue to perform its function of protecting the rights of its Spanish-speaking constituents as long as they don't resort to evicting Spanish speakers or acting as if they are inferior when compared to non-Spanish speakers. So, it may turn out Blake's solution does not provide the best explanation of the impermissibility of using illiberal criteria for exclusion. Therefore, Wellman cannot appeal to this solution to avoid the charge that his theory allows the use of illiberal criteria to exclude immigrants. Additionally, putting the issue in the terms just described may take some of the sting away from the use of illiberal criteria as long as the rights of constituents are not actually violated by the use of this criteria. Of course, this might turn out to work much better in theory than in practice.

In sum, Wellman must bite the bullet and allow racist and other illiberal selection criteria for exclusion. Unfortunately, if he does this, then his theory is open to the charge that a consequence most of us find problematic follows from it, namely that it is permissible to exclude immigrants solely on the basis of things like race, gender, nationality, and religion. However, if

he or others find such an implication unacceptable, then the theory itself must be abandoned.

5.4 Concluding Remarks

Before proceeding to the next chapter where I apply proportionality to the deontological case for closed borders, let us review the case here. The three premises of Wellman's argument are that legitimate states are entitled to political self-determination, that freedom of association is an integral component of self-determination, and that freedom of association entitles one to *not* associate with others. The motivation behind the first premise is that the best way to explain our intuition that unilateral foreign interference is wrong is that there exists a moral (irreducibly collective) right of self-determination that sufficiently legitimate states have. This right of self-determination entails that legitimate states have a further right to decide whom it associates with (the second premise), which means not only that it has the right to accept any association it so chooses but also the right to reject any association (the third premise) as well. I have raised a few initial concerns with the argument that may make the argument independently troubling, but I have also offered suggestions about how these concerns might be addressed. Thus, there may be some reasons to take issue with the argument on its own, but my intention in the following chapter is to accept Wellman's deontological argument and show that it still fails to entail the robust right of exclusion Wellman believes it does.

CHAPTER 6

PROPORTIONALITY AND SELF-DETERMINATION

6.1 Introduction

In the previous chapter, I presented the first stage of Wellman's deontological case for the right of exclusion. Wellman argues that the right of exclusion is a *pro tanto* right so it can be outweighed by other considerations. Thus, the second stage of his argument is to show that the right of exclusion is not outweighed by any of the traditional open borders arguments. We will not necessarily be addressing the second stage of Wellman's argument here (at least not in the way Wellman anticipates) because my own account does not rely on any of the traditional open borders theories. Moreover, my account suggests that even if Wellman is correct that no traditional account of open borders outweighs the right of exclusion, his own case for the right of exclusion does not necessarily entail that the borders may be closed in nearly any fashion the state chooses. The main reason for this is that Wellman is far too quick in his presentation of the right of exclusion. He assumes it is more robust than it plausibly can be. The right of exclusion may not be outweighed by traditional open border theories, but it is nullified whenever it entails the infliction of gratuitous harm. In other words, there may be a right of exclusion but the right exists only on those occasions when it does not inflict gratuitous harm. These occasions will turn out to be very limited and far less common than Wellman believes.

As I mentioned back in chapter three, the principle of least infringement rules out gratuitous harm on both consequentialist and deontological grounds. It is not solely the amount of gratuitous harm that matters (though, of course, more of it is worse on a consequentialist account), but also its very existence and this is true on a deontological account as well. People have a *right* not to be inflicted gratuitous harm and this is, by definition, an absolute right, not merely a *pro tanto* right—otherwise, the harm would not be gratuitous but necessary. Recall, on interest-based accounts of closed borders, harm that is inflicted in the process of sufficiently securing legitimate interests is permissible and necessary. Harm beyond this is gratuitous. For Wellman’s deontological account we must use different language, but the principle of least infringement still applies. In short, harm that is inflicted in the process of sufficiently exercising the moral right of political self-determination is permissible and necessary but any harm beyond that point is gratuitous. Thus, as long as the right of self-determination can be exercised in a morally sufficient way without the need of exclusion, then exclusion is impermissible. The right of exclusion only exists when a particular exercise of the right of self-determination requires it. To see this, it is important to think of self-determination not as the desire to achieve a single, indivisible goal without interference, but as the desire to achieve a bundle of separable important goals without interference. Achieving some of those goals may require different sorts of harm and, perhaps, some of them may require exclusion (or expulsion) of certain kinds of people but not all goals actually require either harm or exclusion to achieve. This is what I find to be the basic flaw with Wellman’s deontological case for the right of exclusion, namely that it takes no account of proportionality. In this chapter, I will unpack in detail the argument I just advanced in this introduction. In the end, I believe we will be able to save Wellman’s account, but it will

require sacrificing the robust right of exclusion he assumes it entails.

6.2 The Importance of Consequences in the Deontological Case

Wellman's deontological case for the right of exclusion unfortunately lacks precision, which leads to the mistake Wellman makes in assuming that his account generates a very robust right of exclusion. This imprecision is evident in three different central places but they are all related. First, and most important, the account is imprecise in the fact that there is no clear guide to determine at what exact point may a *pro tanto* (or presumptive) right be outweighed. This directly creates the second imprecision, which is the fact that the precise domain (scope and range) of permissible exercises of self-determination is never specified. Finally, this then creates the third imprecision, which is the fact that the precise domain of freedom of association is never specified either. Without this precision, it is easy to see why Wellman reaches his conclusion. If the right of self-determination is entirely unrestricted (or, at most, only very vaguely restricted by *pro tanto* considerations), then it seems that it can generate a very unrestricted right to freedom of association, which does indeed entail that the agent with the right of unrestricted (or only vaguely restricted) self-determination may choose to not associate with anyone it so pleases (even on the basis of things like race and gender). The problem is that the only way to get to the final step, where the agent can choose to not associate with anyone it pleases, is to agree to the previous steps, which are highly implausible in their imprecise and unrestricted formats. In this section, we will look only at the first step (the first imprecision) and provide Wellman's account with a more precise limit to his *pro tanto* clause. In subsequent sections we will examine the remaining steps and reformulate Wellman's argument to take into account the precisions I offer,

which will make his argument far more plausible, but will also remove the robust right of exclusion it entails in its current implausible formulation.

6.2.1 The Value of Freedom of Association

Let us begin by revisiting Wellman's defense of his third premise. He argues that a legitimate state's freedom of association with regard to membership is analogous to an individual's freedom of association with regard to marriage. Just as an individual has the right to marry whomever she chooses who also chooses her, to remain single indefinitely, or to reject any potential suitors, so a legitimate state has the right to accept or reject any new members as it sees fit. An individual who may choose whom to marry but who is not permitted to reject a suitor if one should ask her for marriage does not have freedom of association. In other words, to qualify for this freedom it is not enough for an individual merely to have options in deciding among several suitors, if any. She must also be allowed to say no to any suitors she does not want for any reason she chooses. Likewise, says Wellman, freedom of association in the political realm means a state must not merely have options in deciding which outsiders with whom to associate with, it must also be allowed to say no to any outsider with whom it does not wish to associate with.

One response that Wellman anticipates, which I will refer to as the intimacy objection, is that the analogy fails because there is a morally relevant difference between the two cases. In the marriage realm, the kind of association necessary for marriage is very intimate and so the right to choose and reject suitors is very important. Freedom of association in this realm is absolutely essential for an individual to have the ability properly to exercise her liberties of conscience and expression.¹³¹ The right to reject potential suitors is necessary to protect these core liberties, but

¹³¹ Wellman appeals to Stuart White for this line of reasoning, see Wellman and Cole, *Debating the Ethics of*

the same cannot be said about a state's right of exclusion. In the political realm, associations are not nearly as intimate, if they are intimate at all, and so the right to choose or reject members is far less important. It is far from obvious that migrants, even a large number of them, would necessarily hinder anyone's liberties of conscience and expression. Thus, while it is quite clear that freedom of association entails the right to reject potential suitors in the marriage realm, it is not clear that it entails a right of exclusion in the political realm. Wellman's answer to this will actually play a crucial role in getting us to the theory of proportional infringement. Before getting there, though, let us examine what his answer is.

The first point Wellman makes in response is a general observation about liberty. Wellman notes that while freedom of association is necessary in some contexts to secure the liberties of conscience and expression, which are basic and fundamental rights, freedom of association itself may also be a fundamental right. The intimacy objection fails to recognize that freedom of association may be an end in itself and not merely a means to other ends. Wellman writes that "the connection between association and expression is irrelevant" and stresses that we should be just as respectful of freedom of association in its own right as we are of the freedoms of conscience and expression.¹³² He admits that because other, arguably more, fundamental rights are at a higher risk of violation in intimate contexts, freedom of association may be more important in these contexts, but that does not entail that it is entirely irrelevant in others. Religious associations, for example, are non-intimate but most people recognize that freedom of association is still an important right for religious groups. To be clear, though Wellman is arguing that freedom of association is a basic right, he is not claiming it is absolute in either intimate or

Immigration, 32.

132 *Ibid.*, 33-34.

non-intimate contexts; rather, he says, it is only a presumptive right. Keep in mind, Wellman is making a *pro tanto* case in which he acknowledges that any rights to association and exclusion can be outweighed by more substantial considerations. It may simply be that the threshold to justify outweighing these rights is far higher in intimate contexts like marriage or in familial associations and perhaps much lower in non-intimate contexts like golf clubs, religious groups, or even states.

Still, the question remains, what makes freedom of association a fundamental right in non-intimate contexts? Wellman's primary explanation boils down to two things: numbers and voting rights. Members of even non-intimate groups care about the rules of membership because they care about how the number of members will affect the experience of being a member in the group for better or worse. Sometimes, more members will be a boon for groups that are too small to carry out their proper functions whereas in other cases more members will be a drain on the group because there will not be enough resources to go around. Thus, freedom of association is important because it helps the group manage its numbers. Members also care about the rules of membership because they are concerned about the future course of their group. When new members are admitted, typically they will gain the right to vote in that group and with the right to vote, new members can affect the future shape of the group. If we put this in terms of a state's right to exclude immigrants, Wellman's argument suggests that a legitimate state, though it is a non-intimate institution, is entitled to freedom of association because its constituents care about *how their experience will be affected* by the number of immigrants and the impact immigrants may have on their culture, economy, and political arrangements among other things. He writes,

The crucial point is that—whether one interacts personally with them or not—one's

fellow citizens all play roles in charting the course that one's country takes. And since a country's immigration policy determines who has the opportunity to join the current citizens in shaping the country's future, this policy will matter enormously to any citizen who cares what course her political community will take. This connection between a group's membership and its future direction underscores why freedom of association is such an integral component of self-determination.¹³³

In sum, Wellman seems to be saying that what makes freedom of association a presumptive right is that it is valuable for constituents in the sense that it is necessary to manage the number of members they want in the association and the effect new members will have on the future shape of the association. Moreover, since freedom of association entitles one not to associate with others, we can ultimately also derive the right of exclusion from the value it provides for constituents to manage the number and effect of potential members.

Phillip Cole notes something odd about this attempt at grounding the rights of freedom of association and exclusion. Wellman claims he is “arguing for a *deontological* right to limit immigration” and that his argument “does not depend on any controversial claims about the importance of preserving a country's economic, political, or cultural status quo.”¹³⁴ However, Cole aptly points out that “a crucial stage of [Wellman's] argument is driven precisely by consequentialist concerns about the importance of preserving a country's economic, political, or cultural status quo—not particular concerns Wellman raises, but the concerns of the hypothetical citizens of his legitimate state.”¹³⁵ As noted above, these are the concerns that provide the value for the freedom of association—even in non-intimate contexts—which in turn seems to supply the grounds for the right to that freedom and the right to exclude immigrants. Cole continues: “Wellman says the fact that citizens care about the effect immigrants will have on their

133 Ibid., 40.

134 Ibid., 46, (emphasis Wellman's).

135 Ibid., 242.

community show why they *value* the right to freedom of association, not why they *qualify* for this right. But we can read him as saying that the reasons why they value the right qualify them for it. It is hard to see why else they hold it.”¹³⁶ In other words, constituents are granted the freedom of association merely because they value it but Wellman seems to believe they value it precisely because it is *necessary* (through control of numbers and votes) to bring about the particular consequences (we might even say package of consequences or interests) that they care about. The question we will need to answer in a moment is whether and what kinds of freedom of association are actually necessary to bring about these consequences (noting that whenever the freedom not to associate is not necessary to bring them about, any harm inflicted by the freedom is gratuitous). While Wellman’s argument is clearly not like other interest-based arguments for closed borders, a core part of it nonetheless relies on interests (or the value citizens place on particular consequences). As I have argued earlier, it is my contention that all interest-based closed borders theories fundamentally rely on the consequentialist goal of satisfying some good, whether it is the good that the constituents themselves decide upon through self-determination, as Wellman argues, or the good of nationalism and solidarity that nationalists like David Miller¹³⁷ appeal to, or the good of culture,¹³⁸ or the good of security, or even the good of preserving a primary language.

6.2.2 *Gratuitous Harm and Self-Determination*

This finally leads us to the problem I highlighted in the introduction to this section: the

136 Ibid., 242, (emphasis Cole’s).

137 For an example of this argument, see David Miller, *On Nationality* (Oxford University Press, 1995) or Yael Tamir, *Liberal Nationalism* (Princeton University Press: Princeton, 1993).

138 For an example of this argument, see Samuel Huntington, *Who Are We?* (New York: Simon & Schuster, 2004) or David Miller, *National Responsibility and Global Justice* (Oxford: New York, 2005), 201-230.

imprecision of Wellman's *pro tanto* clause. The reason this is crucially important is because, without being more precise, we do not really know what weight to give consequences in Wellman's theory. It is too loose simply to make obvious broad claims in order to avoid generating a *reductio ad absurdum*. Wellman does recognize that if he were an absolutist about the right to freedom of association, he would have to say the right holds no matter how dire the consequences are from the exercise of the right. To most people, this is clearly implausible and Wellman agrees. He writes: "If my marrying Anna Kournikova would somehow cause an insanely jealous Vladimir Putin to launch a massive nuclear strike against the United States, for instance, then presumably Kournikova's and my presumptive rights to marry would be outweighed by the consequences of a nuclear holocaust."¹³⁹ This much seems obvious, but this also entails that it must be the case that if the consequences were as dire as Wellman implies here and the only way to avoid them was for Wellman be forced to marry Kournikova against his will, then presumably his presumptive right not to associate with Kournikova would also be outweighed. It seems very few people would disagree with these conclusions, even if they also held that (legitimate) agents have a presumptive right of self-determination.

In the previous chapter, I presented one additional example Wellman uses to demonstrate how the presumptive right might be outweighed in the context of non-intimate clubs. Recall that Wellman argues that the Augusta National Golf Club has a presumptive right to exclude women from membership because we ought to begin with a presumption in favor of letting the club set its own membership policies. However, due to the history and continued oppression of women in the United States, Augusta National's presumptive right to freedom of association may be

139 Wellman and Cole, *Debating the Ethics of Immigration*, 36.

“outweighed by a sufficiently compelling interest in advancing the cause of oppressed women.”¹⁴⁰

The problem with this case and the previous one involving the Kournikova marriage is that Wellman uses to demonstrate how the right to freedom of association might be outweighed is that they are too obvious, too imprecise, and too (for lack of a better term) grandiose to provide us with any sort of fine line to distinguish exactly where and when consequences are allowed to play a role. This is not to say that both examples are unrealistic, clearly the Augusta National example is very real and relevant. Instead, the issue is, as I mentioned before, that his use of *pro tanto* may be too loose to give us a proper metric to determine when, precisely, the right may be outweighed. On the one hand, Wellman argues “consequences are largely beside the point” with regard to grounding (that is, granting or take away) an agent’s, such as a parent’s or state’s, right of self-determination.¹⁴¹ On the other hand, consequences do matter a great deal in the two grandiose examples: “my presumptive right to marry would be outweighed by the consequences of a nuclear holocaust.”¹⁴² Moreover, even when Wellman is merely introducing the case for the deontological right of self-determination, he appeals to consequences to motivate the argument: “consider what life would be like if one were denied freedom of association.”¹⁴³ Wellman does claim later that these consequentialist concerns merely demonstrate “why [agents] may *value* their right to freedom of association” but it does not show why they qualify for it. Though, as Cole correctly points out, Wellman must be saying that the sole reason why the default position is that there is a presumption in favor of (or a *pro tanto* case for) the right to

140 Ibid., 35.

141 Ibid., 23.

142 Ibid., 36.

143 Ibid., 29.

freedom of association at all is precisely because agents value it. To repeat Cole's claim, Wellman is "saying that the reasons why [citizens] value the right qualify them for it. It is hard to see why else they hold it."¹⁴⁴ Wellman offers no other grounds and it is hard to imagine what the alternative grounds could possibly be.

Furthermore, agents value this right because they consider what life would be like if they were denied freedom of association or, more generally, self-determination and, Wellman notes, while ceding the ordering of one's affairs to others "may lead to the best possible lives ... it is also possible (to put it mildly) that [it] may not."¹⁴⁵ However, Wellman denies that consequences are what ultimately matter just moments later when he writes: "whatever one thinks of the prospects that a governmental agency could do a good job of designing appropriate familial associations for its constituents, one thing is clear: the lives of the citizens in this society would not be self-determined."¹⁴⁶ One wonders, though, why he found it salient to point out the possibility that ceding control to another might produce either good or bad consequences if they are entirely irrelevant to his argument. To my mind, it is the fear of having no control over preventing potentially miserable consequences that seems to be providing much of the force behind Wellman's argument for the right of self-determination. Clearly, most of us would agree with him (supported by our intuition) that we, each of us, is the best judge over our own affairs to determine what will produce for ourselves the best consequences. Suppose, though, that scientists developed a very reliable portal into the future that was able to calculate a number that measured your potential misery and happiness ranging from -100 for absolute misery to 100 for

144 Ibid., 242.

145 Ibid., 30.

146 Ibid.

absolute happiness, but that the portal was unable to tell you what precise actions led to that number. On your 18th birthday you were told that the portal detected a number of -95 if you maintained control over the affairs of your life but a number of 95 if you ceded control to the government. It is not clear to me that everyone (or even most people) would continue to opt for self-determination over ceding control to the government in that scenario. Suppose, further, that rather than ceding individual autonomy, we were concerned with ceding government control to a foreign power. If the portal revealed to us that our current government would produce, on average, a score of -95 for all citizens but ceding control to a foreign government (at least on some matters) would yield a score of 95, it seems again that many people would prefer to opt to cede some or even all sovereignty to the foreign power. Consider that if self-determination or the freedom of association always (or mostly always) produced only very bad consequences, Wellman's argument would lose its force. If these assumptions are correct, then it is consequences that ultimately matter here, not the right of self-determination. However, this is only true in the abstract. Given that a utility-detecting portal into the future does not exist and our intuition that self-determination is the best way (we might even say, it is at least contingently *necessary*) to achieve the consequences we most want, then there must be a right of self-determination. Nonetheless, even ceding that point to Wellman, we can still say that consequences do play a crucial role in grounding the right of self-determination. Consequences necessarily matter, and not only in grandiose cases. In Wellman's account, the concern is not that self-determination is important because it *will* bring about the best possible consequences but that it is the best manner available to us (it is necessary) to attempt to bring about the best consequences for us—the consequences *we* most want.

There are two related takeaways from the preceding discussion. First, that we need a metric to help us know when the presumptive right to freedom of association and self-determination can be outweighed and second, that it is the value of the consequences *we* most want to achieve that grounds our right of self-determination. The argument I aim to advance is that proportionality gives us that metric while at the same time allowing us to grant full moral weight to the right of self-determination because the right is contingently necessary to secure the consequences *we* want.

Wellman's metric is too inexact; he may get the obvious cases correct but it is the cases in the middle that remain entirely too vague. One might try claim that any *pro tanto* claim is inherently vague, but there are different degrees of vagueness and I argue that the degree Wellman supplies is far too vague. We can get more precise by applying the idea of gratuitous harm to Wellman's account. Since gratuitous harm is always impermissible, regardless of degree, we can say that at the very moment that the presumptive right of self-determination or freedom of association inflicts any degree of gratuitous harm, then the right is nullified. Everyone has an absolute right not to have gratuitous harm inflicted on them. Since harm is *prima facie* wrong, any time the infliction of it is completely unnecessary, unjustified, and avoidable it is wrong regardless of context or the ethical theory one subscribes to. The difficult question is how we determine what counts as gratuitous harm. In previous chapters, I defined it in terms of any harm inflicted beyond what is sufficient to secure a legitimate interest. However, since we are here addressing the deontological case for the right of exclusion, which rests on the right of self-determination, we must use different language. To that extent, we might say that gratuitous harm is any harm inflicted beyond the least sufficient necessary to exercise the right of

self-determination. If you are sufficiently able to order your affairs *as you see fit* by inflicting a certain amount of harm, then any harm in excess of that is impermissible. This is still required by the principle of least infringement, though we are now addressing deontological concerns. Given the case I made above regarding the role of consequences in the justification of self-determination, it should now be clear how I intend to limit Wellman's account by proportionality. A state has the right of political self-determination as long as it achieves the consequences for which self-determination is necessary, through proportional (the least harmful sufficient) means. It loses that right in those cases when it does more harm than is necessary to achieve the consequences it wants to achieve, whatever those consequences may be (in short, the whole package of goals the constituents wish to achieve).

It may be helpful here to recall the important distinction we borrowed from H. L. A. Hart's penal theory between the *why* and the *how* question (or the *jus ulscici* and the *jus in talionis* criteria). On Wellman's deontological account of the right of exclusion, we may ask *why* a state may inflict harm on others? According to the argument, the answer is that legitimate states are entitled to political self-determination and the exercise of this right may sometimes require the infliction of some harm. Thus, a state satisfies the *jus ulscici* criterion as long as it is a legitimate state and has the right of self-determination. The next question is *how* a state may inflict harm. My contention is that it may do so to the degree necessary to achieve the goals that self-determination is needed to achieve, and no more. Thus, a state satisfies the *jus in talionis* criterion by inflicting the least harm sufficient when exercising its right of self-determination. The mistake Wellman makes is a similar one to the mistake made by theorists who argue for interest-based accounts for exclusion and that is, namely, that Wellman simply presumes that a

sort of unrestricted freedom of association (which ultimately gives him a robust right of exclusion) is absolutely essential to the proper exercise of the right of self-determination. However, this is not always the case and the more plausible Wellman's argument becomes, the less robust (less unrestricted, more proportional) this freedom needs to be. As we have already seen, Wellman himself admits the most plausible reading of his account permits the restriction of the right of self-determination when it is outweighed by "sufficiently compelling considerations"¹⁴⁷ or a "sufficiently compelling interest."¹⁴⁸ What I have been arguing is that what counts as *sufficient* is too vague. The examples I offered from Wellman do not necessarily involve cases of gratuitous harm (although, perhaps the Augusta National example might be framed in that way), but rather they serve merely as demonstrations of different possible kinds of considerations or interests (albeit too specific to generate a metric) that outweigh the right of self-determination. To those considerations I have added the right not to be inflicted with gratuitous harm. I am here contending only that any time that self-determination is necessary to achieve certain aims, if they can be achieved with less harm by doing *X* rather than *Y* then the harm from *Y* is a sufficiently morally weighty consideration (or interest) to restrict the right of self-determination and obligate the agent to use *X* instead.

Wellman is somewhat aware of the considerations I have raised in the foregoing discussion, but addresses them only in passing and fails to see why proportionality and gratuitous harm are so important here. Before examining Wellman's response, it is important to acknowledge and stress the uniqueness of his deontological argument for the right of exclusion.

147 Christopher Wellman, "Immigration and Freedom of Association," *Ethics* 119, no. 1 (2008), 114 (emphasis mine).

148 Wellman and Cole, *Debating the Ethics of Immigration*, 35 (emphasis mine).

Wellman is correct that his approach is quite distinct from all other closed border theories that came before his since those were clearly interest-based. Wellman himself presents the critiques that other scholars have offered against the traditional approaches including David Miller’s account from national solidarity, the account from culture, the account from the economy, and the account from national security.¹⁴⁹ The argument I presented in chapter three is also applicable to each of these traditional interest-based accounts of closed borders. Wellman’s approach is novel and an indispensable contribution to the philosophical literature on immigration policy. Unlike the traditional approaches, on Wellman’s account the particular interests of the state do not matter. For him, it is not the case that culture, national security, the economy, or any other single interest is sufficiently important enough to require and permit the restriction of migration. Instead, as he puts it, his “account focuses on the country’s legitimacy, rather than whether its constituents share a common and distinctive culture. ... [I]f they are collectively willing to perform the requisite political function of adequately protecting and respecting human rights, then they are entitled to political self-determination.”¹⁵⁰ Having acknowledged all this, and given the discussion thus far in this chapter, it seems that Wellman commits some handwaving when, immediately after this, he argues that consequences demonstrate “only why [citizens of a legitimate state] may *value* their right to freedom of association; it is not what qualifies them for this right.”¹⁵¹ What Wellman fails to admit here—though he implies it in various other places as we have noted above—is that the very reason there is even a presumption in favor of the right is precisely because the citizens value it. It seems we must read *presumption in favor* of the right as

149 Ibid., 48-51.

150 Ibid., 52.

151 Ibid.

the same thing as *qualifying* for it. Yet, Wellman wants to maintain that:

In response to anyone who argues that we may justifiably limit immigration in order to preserve X, critics will invariably ask both (1) Is limiting immigration really necessary and/or sufficient to secure X? And (2) Even if limiting immigration is necessary and sufficient, do those who seek to restrict immigration actually have a moral right to X? Fortunately, there is no need for us to answer these questions. For our purposes here, we need only emphasize the distinctness of my approach and, accordingly why I need not grapple with these questions.¹⁵²

In one sense, he is correct, because on his account, the right of exclusion does not depend on the ability to secure a single, particular interest. But in another sense, he is failing to acknowledge that it does depend on the ability to secure all the interests (or the package of interests) that self-determination is (contingently) necessary to secure. This leaves open the door for the proportional infringement theory because my argument is that the package of interests, which legitimate states are justified in securing given their right of political self-determination, can be secured through means less harmful than exclusion in some (and perhaps most) cases. Thus, Wellman commits handwaving when he claims that there is no need for him to answer the important question he raises: Is limiting immigration really necessary and/or sufficient to secure X? If limiting immigration is not necessary to sufficiently secure X, then limiting immigration inflicts gratuitous harm. This will all become more evident if we restrict the domain of permissible forms of self-determination (as I believe we must), which we will now explore in the subsequent section.

6.3 Four Formulations of Wellman's Deontological Case for Closed Borders

In the preceding section I offered a metric to help us determine when Wellman's *pro tanto* right

¹⁵² Ibid.

of self-determination may be outweighed. In this section, I will offer some revisions to his argument that I believe will make it more plausible. The original version of Wellman's argument is listed here again for convenience:

Wellman's Right of Exclusion Argument, Formulation A:

1. Legitimate states are entitled to political self-determination.
2. Freedom of association is an integral component of self-determination.
3. Freedom of association entitles one *not* to associate with others.

I will begin this section by specifying why the argument in its original formulation is implausible without revision. I will then suggest why we must restrict the domains of both self-determination and freedom of association, which will entail an important restriction (from proportionality) of the right of exclusion.

6.3.1 The Unrestricted Account

In Wellman's original formulation, his argument is ambiguous and may justify far too much, making it unacceptably implausible. This is because one might read it in the following way:

Wellman's Right of Exclusion Argument, Formulation B:

1. Legitimate states are entitled to unrestricted political self-determination.
2. Unrestricted freedom of association is an integral component of unrestricted self-determination.
3. Unrestricted freedom of association entitles one to *not* associate with others as it sees fit.

This argument is logically valid but the problem with this reading of the argument is that it

makes Wellman's first premise false; it is clearly not true since it generates a contradiction. On Wellman's account, legitimate states are legitimate only if they protect and respect human rights but unrestricted political self-determination entails that the state may violate these rights. Thus, the first premise cannot be true. The second and third premises are certainly true but the argument fails because of the first premise. Wellman will undoubtedly say that this is an uncharitable reading of his argument because he is making only a *pro tanto* case and it assumes merely a presumptive right of self-determination. The presumption transfers to the right to freedom of association and hence generates only a presumptive right of exclusion. Fair enough, but this still demonstrates that in order for his argument to avoid ambiguity of this sort, we need to qualify (or add the precision I suggested above to) all three premises.

6.3.2 Restricting Self-Determination

Once we supply precision to the *pro tanto* clause, we can also transfer the precision down so that we are able to provide a plausible domain of the right of self-determination and therefore also the domain of the right to freedom of association. At a very minimum, I believe we must say that self-determination is authorized as long as it does not generate gratuitous harm relative to *any* interest that self-determination is necessary to secure. In principle, this may seem like it is not very much of a limit to the domain of self-determination. In practice, however, it provides quite a robust limit. Most states, especially liberal states, have a finite number of interests they want to secure and in most cases (though certainly not all cases) the interests are not obviously immoral or illegitimate. These interests will usually include a panorama of things like those we examined in chapter four, namely the protection of human rights and a host of other discretionary interests.

Thus, at a minimum, we might say that the legitimate state is entitled to secure any package of presumptive and discretionary interests it chooses and the only stipulation is that it must not inflict gratuitous harm in securing any of the interests in this package, whatever they may be.

Of course, it is also possible to restrict the domain of self-determination further and, as we have seen several times, Wellman seems inclined to accept a certain degree of this. Recall his comment:

Given how strenuously I have defended a legitimate state's right to exclude all potential immigrants, one might assume that I would support a country's right to design its immigration policy in whatever fashion it likes. ... I am not sure that this is correct, however. Even if states have the right to exclude all outsiders, it does not necessarily follow that they may screen applicants in any fashion they choose. It seems there must be something wrong with a country's denying admission on the basis of race, for example.¹⁵³

Notice, depending on how we restrict the domain of self-determination, denying admission on the basis of race may or may not inflict gratuitous harm, which means that here we would be restricting the domain even beyond the restriction I introduced from gratuitous harm. To see this, consider that the (in principle) minor limit that gratuitous harm places on the right of self-determination would merely suggest that if no rights are actually violated by a racist admissions policy, then a legitimate state may go ahead and have such a policy but it must do so without inflicting gratuitous harm. That is, if its interest is in preserving racial homogeneity, then it cannot, on that basis, refuse admission to someone who is of that race but is impoverished. To refuse admission to someone who is impoverished without inflicting gratuitous harm, the state would need a further interest in preserving a certain level of economic status that it could secure without violating human rights. Thus, at the very least, the state must be limited in this way.

However, this is not the concern Wellman raises. Instead, he believes additional moral

¹⁵³ Ibid., 143.

considerations may be in play that nullify the state's right of self-determination when it is used to create racist admissions policies. We explored this concern in the previous chapter so there is no need to present it here again. It is raised here simply to demonstrate that for Wellman's argument to remain plausible, the domain of self-determination must be restricted by the right not to be inflicted gratuitous harm as well as additional weighty considerations.

My own contention is that the only permissible interests that a state may secure through the right of self-determination are those interests that I referred to as legitimate interests in chapter four. In so doing, the state must abide by the three conditions I set forth there: (1) they must not require the agent to inflict gratuitous harm; (2) they must be 'legitimate-making' interests or they must be justified by independent moral principles; and (3) they must be sufficiently morally weighty that the harmful measures used to secure them can be used on all individuals alike, whether they are immigrants or citizens. This is, of course, a much more limited domain of self-determination than the domain that is merely concerned with gratuitous harm, but it also appears to me to be a more plausible domain. I have argued for these three conditions in chapter four so I will not argue for them again here. I all add, though, that the arguments I advanced in chapter four for each of these conditions apply to Wellman's deontological case for the right of exclusion as well because, again, his argument crucially depends on the package of consequences or interests that the constituents of a legitimate state value. Nonetheless, we can bracket this particular contention of restricting the domain of self-deter further through my three conditions and call it the strong account of proportional infringement. This is certainly the account I would advance, but it is not necessary to significantly restrict the right of exclusion on Wellman's account; the weak account that is

concerned only with restricting gratuitous harm relative to *any* package of consequences or interests that citizens desire is sufficient for this purpose.

In addition to making precise the right of political self-determination by restricting its domain, we must also make precise the domain of the right to freedom of association. What we must restrict is not the *why* but the *how* of the right. If Wellman's account is correct, then there is good reason to suggest that legitimate states have a right to freedom of association because it is a necessary component of the presumptive right of political self-determination, which is necessary to secure the consequences that the citizens value. This is where we must be careful, though, because the right to freedom of association does not give us the right to secure the association we want (and need) through any means we please; it does not entitle us to inflict whatever harm we want. To see this, consider that a state may attempt to exercise its right to freedom of association to secure a particular association, such as one that is culturally homogenous, by launching nuclear missiles to all other states with members who are of other cultures. Of course, Wellman's theory does not permit this because the state would lose its legitimacy since it would fail to respect human rights. However, why should we think this is the only reason such a measure is impermissible? I have argued that the measure also violates the principle of least infringement—it inflicts gratuitous harm. Indeed, it is plausible to argue that the right not to be killed unjustly is actually derived from the more general right not to be caused gratuitous harm by another agent. If this is so and the association we want (and need) can be sufficiently secured through means that inflict less harm than a nuclear holocaust or exclusion, then those less harmful means are all the state is permitted to use. I do not mean to claim that a nuclear holocaust and exclusion are equivalent in degree, they certainly are not, but both do inflict gratuitous harm if they are not

necessary to sufficiently secure the relevant components of the desired association. If the association we care about is a culturally homogenous one, then we might be able to sufficiently secure the association by requiring that new members pass assimilation courses before they are awarded citizenship. An unrestricted right to freedom of association is not integral to the presumptive right of self-determination; what is needed is that the domain of the right to freedom of association be restricted by proportionality. The new modified, and in my view more plausible, argument looks like this:

Wellman's Right of Exclusion Argument, Formulation C:

1. Legitimate states are entitled to a presumptive right of political self-determination.
2. Proportional freedom of association is an integral component of a presumptive right of self-determination.
3. Proportional freedom of association entitles one *not* to associate with others.

6.3.3 Restricting the Right of Exclusion

As we have already seen, in defense of the third premise of his argument, Wellman writes the following: "I say this because it seems clear to me that one cannot limit freedom of association without restricting self-determination."¹⁵⁴ This is true, but this is also a necessary move.

However, Wellman here seems to suggest that any such restriction is problematic; he seems to imply that we value self-determination so much that we cannot restrict freedom of association because it would also necessarily restrict self-determination. In my view, this implication is driven by the ambiguity (imprecision) Wellman builds into the domain of self-determination.

However, restricting the domain is precisely what we do want to do and what Wellman himself

¹⁵⁴ Ibid., 34

does by limiting self-determination not only in the case of selection criteria but also necessarily so by requiring that only legitimate states are owed self-determination. The very requirement of legitimacy necessarily limits the domain of self-determination and it must to avoid the implausible *Formulation B* of his argument. Thus, while Wellman is correct, he is hesitant to fully press the precision of the observation he makes, which is why he seems content to claim merely that the right to freedom of association is presumptive and leave it at that. What he misses is the fact that his observation about limits (and what that means about the need for precision) actually entails that he cannot generate the robust right of exclusion he believes his argument generates. The right of exclusion his argument generates is actually far more restricted. In the preceding section we saw why the restrictions to the domains of self-determination and freedom of association were necessary. In this final section, we will narrow down precisely what the extent of the right of exclusion is.

Since, as we saw above, the domain of the right to freedom of association cannot be unrestricted, we needed to find a proper way to restrict it. The modification I offered to restrict it was to make it proportional to the package of consequences or interests that the constituents of a legitimate state value. If we do this, though, then it is not true that the restricted domain of the right to freedom of association permits the state to have full reign over who it chooses not to associate with. Since the concern is to secure the package of consequences and interests that constituents value, then the state has only a right to exclude from its association those people who are threats to the package. A proportional account of the right to freedom of association entitles a state only to satisfy its concerns proportionally. If national security is the concern of a state, then it is entitled not to associate with (exclude) those who would threaten its security. If

language is the concern, then it is entitled not to associate with (exclude) those who are unwilling to meet the language requirement. The pattern should be evident by now. In essence, the right of exclusion generated by Wellman's deontological account only entitles states to exclude recalcitrant or less-abled potential immigrants as they were defined previously in this dissertation and only in instances where their membership in the association would actually threaten the package (or a portion of the package) of consequences or interests they value. If, however, these consequences could be secured against these potential immigrants with means less harmful than exclusion such as the measures I suggested in previous chapters, then, again, that is all the state is entitled to do. Thus, even on Wellman's deontological account, legitimate states are not justified in excluding abled amenable potential immigrants and in many (perhaps most) cases they may also not be justified in excluding even recalcitrant and less-abled potential immigrants. When we apply this to Wellman's argument, we get the following—and I would argue most plausible—formulation:

Wellman's Right of Exclusion Argument, Formulation D:

1. Legitimate states are entitled to a presumptive right of political self-determination.
2. Proportional freedom of association is an integral component of a presumptive right of self-determination.
3. Proportional freedom of association entitles one *not* to associate with recalcitrant or less-abled potential immigrants whenever exclusion is the least harmful sufficient means to make the exercise of the presumptive right of self-determination possible.

It is on this formulation of the argument that it seems all three premises are finally true. This proportionally restricted right of exclusion is not the one Wellman originally argued for, though.

The only kind of exclusion permissible on my revised formulation of Wellman's argument is the exclusion of potential immigrants entirely unwilling or unable to keep the state from exercising its presumptive right of self-determination. That is, those who genuinely threaten to prevent the sufficient realization of the package (or a portion of of the package) of consequences that the citizens value. I stress here the sufficient realization of these consequences because it is important to remind the reader that due to concerns about gratuitous harm, efficacy is not what matters, only sufficiency.

6.4 Gratuitous Harm in Wellman's Analogies

Nothing I have argued in this chapter implies that states are the only ones required to refrain from inflicting gratuitous harm. As I mentioned earlier in the dissertation, potential migrants must also refrain from doing this. If the (morally weighty) reasons for their migration will inflict harm on the citizens of the state they intend to migrate into, then the migrant is obligated to use the least harmful means to satisfy those reasons, whether that means fulfilling all of the conditions of membership or, perhaps, even refraining from migration. This is especially important in cases of supreme emergencies like those I mentioned in chapter four (in particular in the case of overpopulation) and this insight is applicable not only on the traditional interest-based accounts but also Wellman's deontological account. If a legitimate state is actually unable to accept any new potential immigrants at all, even the most amenable ones, due to a lack of resources resulting from something like overpopulation, then all potential immigrants necessarily become less-abled potential immigrants. *Formulation D* of Wellman's argument (correctly) permits the state to exclude all potential immigrants in such cases. Under such circumstances,

any potential immigrant who migrates is inflicting gratuitous harm.

It is important to understand the foregoing point because this is what I take to be the main problem with the analogies Wellman relies on throughout his argument. Under most circumstances, the forced admittance of a new potential immigrant is entirely unlike the forced adoption of a new child or the forced marriage of one person. My contention is that this is not merely because of the degree of intimacy or the importance of the right to freedom of association involved in the latter two relationships that is lacking in the former relationship but rather for one additional reason as well. In most cases, the morally weighty consequences valued by citizens and secured by self-determination can be sufficiently secured even when new potential immigrants are admitted and without the immigrants inflicting gratuitous harm. This is not normally the case in the parental or marriage realms. In the marriage context, for example, one of the most valued consequences may be, perhaps, the maximization of attraction and the avoidance of marital rape. The reason self-determination is crucial in that context is precisely because those consequences are so valuable and are significantly and genuinely threatened by forced marriages (by the lack of the right not to associate). Any potential suitor who is unwilling or unable to keep a person from exercising his presumptive right of self-determination to attain these valuable consequences in the marriage realm inflicts gratuitous harm. In nearly all circumstances forced marriages necessarily prevent a person from exercising this right (given the sorts of consequences that are valued in the marital context). Similar points can be made about the parental context. It is precisely because of how contextual gratuitous harm is that we get a disanalogy between the citizenship context and the marital or parental contexts.

6.5 Concluding Remarks

In sum, the problem that the deontological case for closed borders faces is that without modification, it remains implausible, either because it is too ambiguous (*Formulation A*), it generates a contradiction (*Formulation B*), or because a proportional account of the right to freedom of association does not generate an unrestricted right of exclusion (*Formulation C*). The only way to rescue the argument is to supplement it with the theory of proportional infringement, specifying that the *pro tanto* clause requires the state not to inflict gratuitous harm. A legitimate state avoids inflicting such harm if it uses only the least harmful sufficient means available to secure the consequences that its citizens so value and believe self-determination is necessary to secure. This gives us *Formulation D* of Wellman's argument, which may be the most plausible version, but then the right of exclusion generated from Wellman's argument no longer has the teeth he believes it has. The kind of exclusion that it permits is limited by the principle of least infringement.

CHAPTER 7

CONCLUSION

The philosophical discussion on immigration has been dominated by the debate over the state's right of exclusion. Scholars who focus on the question of exclusion have missed an important first step, which needs to be taken before exclusion can be considered at all. This step is to ask what justifies a state to take any kind of harmful measure against immigrants in the first place. Only after that question is answered by showing that states have significant morally legitimate interests that ought to be secured, may we then ask what kinds of harmful measures a state may use against immigrants in order to secure these interests. Exclusion is one such measure, but I have argued that it is not the only one and, in fact, is likely to be a disproportionately harmful measure since less harmful measures can be used to achieve the same goal.

The two-step argument presented in this dissertation for a just immigration policy parallels the traditional two-step justification in just war theory requiring the satisfaction of the two criteria *jus ad bellum* and *jus in bello*. In just war theory, the first step, *jus ad bellum*, determines whether a state is justified in going to war against an aggressor at all. The second step, *jus in bello*, determines what kinds of measures a state may take during the war. When the principle of proportionality is invoked in moral contexts like this, it requires that even when a party is justified in inflicting harm on another party, the wronged party must inflict the least harm

necessary to sufficiently secure its violated legitimate interests and no more. Any further harm is gratuitous, disproportional and impermissible. This is what I referred to in the dissertation as the principle of least infringement. Thus, even when a state is justified in going to war, it is bound by the principle of least infringement to inflict the least harm necessary to sufficiently resist its aggressor and no more.

Similarly, I have argued that the principle of least infringement requires that if legitimate states have available to them the means to secure the vast majority of their legitimate interests (the interest-based account of closed borders) or the package of consequences so valued by its constituents that it entitles the state to a presumptive right of self-determination (the deontological account of closed borders) by inflicting less harm than the harm inflicted by exclusion, then exclusion is impermissible. This is especially true of *abled amenable* immigrants—the majority of actual immigrants in the world today—who accept the moral importance of a state’s legitimate interests and are prepared to do what they can so that they remove the risk they pose (or do not become a risk) to those interests. For example, if a state has a legitimate interest in protecting a language, then abled amenable immigrants can be required to take language classes prior to admission and they would be content to do so in exchange for membership. However, the principle of least infringement also restricts the use of exclusion on many, if not most, *recalcitrant* and *less-abled* immigrants who *choose* not to or are *unable* to (respectively) refrain from violating a state’s legitimate interests unless exclusion is the only means available to sufficiently secure these interests.

This dissertation addresses a major problem that plagues the majority of the philosophical discussion on immigration. This problem is the faulty assumption made by theorists on both

sides of the debate in conflating the two steps in the process required for a just immigration policy. They presume there is only one step such that the ‘securing of legitimate interests’ or ‘the exercise of the right of self-determination’ necessarily entails exclusion. Michael Walzer, for example, famously claimed that “without [exclusion], there could not be *communities of character*.”¹⁵⁵ For Walzer, the fact that a state may have a legitimate interest in maintaining a community of character immediately justifies the use of exclusion to secure that interest. That is, his argument for the importance of communities of character just *is* his argument for exclusion. What justifies the former necessarily justifies the latter. But why should we think this? Why should exclusion be privileged if other options can also do the job? Alternative options of varying levels of harm are available such as the requirement of culture classes (less harmful) or the use of violent military force (more harmful). Exclusion and the sufficient securing of legitimate interests or the sufficient exercise of the right of self-determination are not the same thing and the latter two in no way entail or necessitate the former; indeed, exclusion can often be counterproductive to securing certain kinds of legitimate interests and the exercise of the right of self-determination.

The argument in this dissertation is unique in that while it may turn out to entail *de facto* open borders, it is compatible with securing the central thing that traditional opponents of open borders argue for, namely, the legitimate interests of the state (or the exercise of the presumptive right of self-determination). In short, I have argued that once we clarify the two steps required for a just immigration policy, we can grant full moral weight to any legitimate interest (or package of consequences) the closed border advocate believes requires exclusion to secure—

155 Michael Walzer, *Spheres of Justice*, 63 (emphasis his).

including, perhaps, things like national solidarity, the preservation of culture, the protection of language—and the argument will still show that the justification to secure this interest or this package of consequences will actually fail to entail exclusion in most circumstances.

BIBLIOGRAPHY

- Altman, Andrew, and Christopher Heath Wellman. *A Liberal Theory of International Justice*. Reprint. Oxford University Press, USA, 2011.
- Award of the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse by the United States to Article 22.7 of the DSU*, WT/DS26/21, 15 July 1999, DSR 1999:V, 83.
- Blake, Michael. “Immigration.” In *A Companion to Applied Ethics*, edited by R.G. Frey and Christopher Wellman, 224-237. Malden, MA: Blackwell, 2005.
- Blakeman, Bradley. “Mexico’s President Has Some Nerve Lecturing His U.S. ‘Amigos’,” Fox News, May 21, 2010. <http://www.foxnews.com/opinion/2010/05/21/bradley-blakeman-felipe-calderon-congress-arizona-immigration-democrats-mexico/>
- Buchanan, Allan. “Political Legitimacy and Democracy.” *Ethics* 112, no. 4 (2002): 689-719.
- Carens, Joseph. “Aliens and Citizens: The Case for Open Borders.” *The Review of Politics* 49, no. 2 (1987): 251–273.
- . “Migration and Morality: A Liberal Egalitarian Perspective.” In *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, edited by Brian Barry and Robert E. Goodin, 25-47. University Park, PA: The Pennsylvania State Press, 1992.
- Castles, Stephen, and Mark J. Miller. *The Age of Migration*. 4th ed. Palgrave Macmillan, 2009.
- Christiano, Thomas. “Justice and Disagreement at the Foundations of Political Authority.” *Ethics* 110, no. 1 (October 1, 1999): 165–187.
- Cole, Philip. *Philosophies of Exclusion: Liberal Political Theory & Immigration*. Edinburgh University Press, 2000.

- Decision by the Arbitrators, *Canada-Export Credits and Loan Guarantees for Regional Aircraft, Recourse to Arbitration by Canada Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, paras. 3.9, 3.11, 3.38, WT/DS222/ARB Feb. 17, 2003.
- Dworkin, R. M. *Law's Empire*. Harvard University Press, 1986.
- EarthRights International. "Broken Ethics: The Norwegian Government's Investments in Oil and Gas Companies Operating in Burma (Myanmar)," EarthRights International, <http://www.earthrights.org/publication/broken-ethics>
- Edmundson, William. *Three Anarchical Fallacies*. Cambridge University Press, 1998.
- Ellis, Evelyn. *The Principle Of Proportionality In Laws Of Europe*. Hart Publishing, 1999.
- Feinberg, Joel. "Feinberg, Joel. 'Civil Disobedience in the Modern World.' *Humanities in Society* 2.1 (1979): 37-60." *Humanities in Society* 2, no. 1 (1979): 37–60.
- Fish, Morris J. "An Eye for an Eye: Proportionality as a Moral Principle of Punishment." *Oxford Journal of Legal Studies* 28, no. 1 (April 1, 2008): 57–71.
- Franck, Thomas M. "On Proportionality of Countermeasures in International Law." *The American Journal of International Law* 102, no. 4 (October 1, 2008): 715–767.
- Green, Leslie. *The Authority of the State*. Oxford University Press, USA, 1990.
- Hardin, Garrett. "Lifeboat Ethics." In *The Environmental Ethics & Social Policy Book*, 3rd ed. edited by Donald VanDeVeer and Christine Pierce, 402-408. Belmont, CA: Thomson/Wadworth, 2003.
- Hardimon, Michael O. "Role Obligations." *Journal of Philosophy* 91, no. 7 (1994): 333–363.
- Hart, H. L. A. "Are There Any Natural Rights?" *Philosophical Review* 64, no. 2 (1955): 175–191.
- . *Punishment and Responsibility: Essays in the Philosophy of Law*. First Edition. Oxford University Press, USA, 1968.
- Hirsch, Andrew von. "Proportionality in the Philosophy of Punishment." *Crime and Justice* 16 (January 1, 1992): 55–98.
- Huntington, Samuel *Who Are We?: The Challenges to America's National Identity*. Simon & Schuster, 2005.

Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf>

International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3,

<http://www.unhcr.org/refworld/docid/3ae6b36b4.html>

International Organization for Migration. *Facts & Figures*. International Organization for Migration, <http://www.iom.int/cms/en/sites/iom/home/about-migration/facts--figures-1.html>

Jaffe, Matthew and Shushannah Walshe. “Rick Santorum Defends Call for Puerto Rico to Adopt English After Delegate Defection,” ABC News, March 15, 2012.
<http://abcnews.go.com/blogs/politics/2012/03/rick-santorum-defends-call-for-puerto-rico-to-adopt-english-after-delegate-defection/>

Klosko, George. “Presumptive Benefit, Fairness, and Political Obligation.” *Philosophy & Public Affairs* 16, no. 3 (July 1, 1987): 241–259.

LaFollette, Hugh. “Licensing Parents.” In *What’s Wrong? Applied Ethicists and Their Critics*, edited by David Boonin and Graham Oddie, 340-347. Oxford University Press, USA, 2004.

McBride, Jeremy. “Immigration: The Case for Limits.” In *The Principle of Proportionality in the Laws of Europe*, edited by Evelyn Ellis, 23-36. Hart Publishing, 1995.

Military and Paramilitary Activities in and Against Nicaragua (Nica. v. U.S.), Merits, 1986 ICJ Rep. 14 (June 27).

Miller, David. “Proportionality and the European Convention on Human Rights.” In *Contemporary Debates in Applied Ethics*, edited by Andrew I Cohen and Christopher Wellman, 193-205. Malden, MA: Blackwell, 2005.

———. *National Responsibility and Global Justice*. Reprint. Oxford University Press, USA, 2012.

———. *On Nationality*. Oxford University Press, 1995.

———. “Reasonable Partiality Towards Compatriots.” *Ethical Theory and Moral Practice* 8, no.

- 1/2 (April 1, 2005): 63–81.
- . “The Ethical Significance of Nationality.” *Ethics* 98, no. 4 (July 1, 1988): 647–662.
- Miller, Richard W. *Globalizing Justice: The Ethics of Poverty and Power*. Oxford University Press, USA, 2010.
- Mitchell, Andrew D. “Proportionality and Remedies in WTO Disputes.” *European Journal of International Law* 17, no. 5 (November 1, 2006): 985–1008.
- Nozick, Robert. *Anarchy, State, and Utopia*. Basic Books, 1974.
- Orend, Brian. *The Morality of War*. 1st ed. Broadview Press, 2006.
- Panayi, Panikos. *The Impact of Immigration: A Documentary History of The Effects and Experiences of Immigrants in Britain Since 1945*. Manchester University Press, 1999.
- Pillod, Claude, Yves Sandoz, Cristophe Swinarski, and Bruno Zimmermann. *Commentary on the Additional Protocols: Of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Martinus Nijhoff Publishers, 1987.
- Rawls, John. “Legal Obligation and the Duty of Fair Play.” In *Law and Philosophy*. [New York]New York University Press, 1964.
- Scheffler, Samuel. “Relationships and Responsibilities.” *Philosophy & Public Affairs* 26, no. 3 (1997): 189–209.
- Sheppard, Noel. “Calif. Congressman Blasts Calderón’s Ariz. Comments and Dems for Applauding,” *News Busters*, May 21, 2010. <http://newsbusters.org/blogs/noel-sheppard/2010/05/21/california-congressman-blasts-Calderóns-speech-and-dems-applauding>.
- Simmons, A. John. *Justification and Legitimacy: Essays on Rights and Obligations*. Cambridge University Press, 2001.
- . *Moral Principles and Political Obligations*. Princeton University Press, 1979.
- Tamir, Yael. *Liberal Nationalism*. Princeton University Press, 1995.
- United Nations. *Charter of the United Nations*. 24 October 1945, 1 UNTS XVI, <http://www.un.org/en/documents/charter/index.shtml>
- Vasila, Katya, “6.5% of the EU population are foreigners and 9.4% are born abroad.” *Eurostat*

34/2011, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-034/EN/KS-SF-11-034-EN.PDF

Walzer, Michael. *Just and Unjust Wars A Moral Argument With Historical Illustrations*. 3rd ed. Basic Books, 2000.

———. *Spheres Of Justice: A Defense Of Pluralism And Equality*. Basic Books, 1984.

Wellman, Christopher Heath. “Toward a Liberal Theory of Political Obligation.” *Ethics* 111, no. 4 (July 1, 2001): 735–759.

———. “Associative Allegiances and Political Obligations.” *Social Theory and Practice* 23, no. 2 (1997): 181–204.

———. “Immigration and Freedom of Association.” *Ethics* 119, no. 1 (2008): 109–141.

Wellman, Christopher Heath, and Phillip Cole. *Debating the Ethics of Immigration: Is There a Right to Exclude?* Oxford University Press, USA, 2011.

Wellman, Christopher, and John Simmons. *Is There a Duty to Obey the Law?* Cambridge University Press, 2005.

Wilcox, Shelley. “The Open Borders Debate on Immigration.” *Philosophy Compass* 4, no. 5 (2009): 813–821.

Wolff, Robert Paul. *In Defense of Anarchism*. First Printing. Harpercollins, 1970.

World Trade Organization. *Dispute Settlement: Dispute DS26, European Communities — Measures Concerning Meat and Meat Products (Hormones)*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm

———. *Dispute Settlement: Legal Text, Understanding on Rules and Procedures Governing the Settlement of Disputes Annex 2 of the WTO Agreement*, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm

———. *Dispute Settlement System Training Module: Chapter 3, WTO Bodies involved in the dispute settlement process*, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm

———. *Handbook on Accession to the WTO: Chapter 1, Accession in Perspective*, http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm

———. *Understanding the WTO: The Agreements, Anti-dumping, subsidies, safeguards: contingencies, etc*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm

- . *WTO Analytical Index: Subsidies and Countervailing Measures, Agreement on Subsidies and Countervailing Measures*,
http://www.wto.org/english/res_e/booksp_e/analytic_index_e/subsidies_02_e.htm#article4
- . *WTO Analytical Index: Subsidies and Countervailing Measures, Agreement on Subsidies and Countervailing Measures*,
http://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c1s1p1_e.htm