

## Border Control, Territorial Rights and Feasibility

When people cross international boundaries, they typically come up against the enforcement power of states. Walls, surveillance and militarised border guards are all regularly employed to prevent unauthorised access to states' territories. If a state decides not to allow you entry, they will usually make it difficult, and dangerous, for you to get in. And if you do succeed in entering a state's territory without authorisation, you may find yourself imprisoned and forcibly removed.

States make claims to territories (politically-defined areas of land) and make and enforce laws and directives that are supposed to apply universally over their claimed territory. They also claim (and are widely taken to have) reasonably extensive discretionary rights to determine who may or may not enter their territory. All of the world's habitable land is claimed by some state or other (and some, of course, is disputed between more than one). To the extent that state border enforcement is effective, people's ability to move around the world becomes dependent on the (largely unilateral) decisions of foreign states. These practices have not always been a feature of international affairs.<sup>1</sup> They also have a huge impact on the lives of people around the world. (In 2014, for instance, over 3500 people died attempting to travel across the Mediterranean to Europe, a tragedy fairly clearly attributable in part to the border control practices of European states.<sup>2</sup>) It is thus imperative to consider how, or whether, the global border regime can be justified. De facto, most states possess the *capacity* to enforce their immigration policies, but what could give states the *moral* right to act in this proprietary way over particular territories?

The recent global prominence and urgency of such questions have been accompanied by rapidly increasing philosophical attention. It is no longer the case that this is a neglected area of political philosophy. Nevertheless, I think there is an important underexplored element of this debate. In this paper, I will argue that if we take seriously two key desiderata for any account of states' right to exclude, it starts to appear indispensable to ask questions about *feasibility*. The most plausible way of meeting these desiderata (if they can be met at all) appeals to the *infeasibility* of achieving some important value without the state's exclusive border control. As well as highlighting an important set of questions for normative research into states' right to exclude, this conclusion on its own has substantive implications, I will suggest, for how we should think about and treat existing border-control practices.

I will begin by setting out the two desiderata. Next, I will argue that arguments that understand the right to exclude as a constituent element of the freedom rights of states (or other groups) fail

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<sup>1</sup> See, for instance, Jones (2017).

<sup>2</sup> Brian and Laczko (2014)

to meet these. I will then outline the form of argument suggested by the desiderata, involving an appeal to some independent value promoted by granting the right, in which a crucial role is played by claims about feasibility. Some existing arguments, I think, can be interpreted as arguments of this form. If they are going to meet the desiderata, I argue, they will *need* to be interpreted in this way, and when they are it becomes apparent that assessing the permissibility of exclusionary practices will benefit from more thought about considerations of feasibility than they are sometimes given.

## Two Desiderata

The practices of border-control engaged in by existing states, and the claims they make, form the subject matter of this paper. The question is how, or whether, these practices can be justified and these claims vindicated. What kind of argument, if any, can a state make to show that its exercise of border control is legitimate and not mere collective might? But I will not take immigration decisions or policies one by one. That is, I will not ask what it takes to justify the enforcement of one particular immigration decision or policy rather than another, but instead how, or whether, we can ground the general right or authority to exercise discretion (within some limits) in deciding who to admit and who not to admit to a territory, and to enforce those decisions. Relatedly, my concern with the legitimate authority over immigration control can be distinguished from the question of the substantive justice of immigration rules.<sup>3</sup> The latter kind of question asks what a good (just) or justifiable immigration policy for a particular territory would be. My question is what gives a state (or other group) the standing to determine what the immigration rules are and to enforce them, i.e. to determine (forcibly) who can enter an area of land. A group that had such standing (which I will sometimes refer to as a ‘right to exclude’) would be justified in exercising some degree of discretion in making and enforcing decisions about entry.<sup>4</sup> That discretion need not be absolute; the question is whether a group can be

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<sup>3</sup> See Stilz (2019) 188. We might reserve the language of ‘justification’ for questions of substantive justice, but for the purposes of this paper, when I talk about justifying an action, I refer to the provision of an all-things-considered moral justification.

<sup>4</sup> If a state were justified in claiming a right to exclude (in my sense), it may still be that some of the possible immigration policies it has a right to pursue would be substantively *unjust*. Having the right to *choose* an immigration policy is consistent with there being further reasons in favour of some options and against others. Some writers understand a ‘right to exclude’ as a claim right against others interfering in your excluding, and as involving a right to do wrong (e.g. Wellman and Cole (2011) 7-8 and Cole (2011) 163). That is not how I will understand the term. As I understand it, a right to exclude is a general moral *permission* or *justification* for making and enforcing immigration restrictions. If you have such a right, it could be that justice demands you *not* make certain decisions that you have a right to make, but if you decide to ignore that, you will still be *all-things-considered* justified in making the unjust choice, because it was *your decision to make*. Most defenders of a right to exclude will not take the discretion it grants to be total, and it may be considerations of justice that fix the limits on the right, but any decisions you make within the scope of the right will not be *all-things-considered* wrong for you to make and enforce. (This is independent of whether the legitimate authority over exclusion includes a claim right that others *obey* your immigration laws (see Bertram (2018) 49), on which I will not take a stand.)

justified in claiming *any* discretion, in, for instance, deciding to exclude some outsiders on the basis of its own sectional preferences, or making such decisions attributing some extra weight to its own members.

The primary question for practical purposes, of course, *is* what justifies the forcible exclusion of an individual in a particular case. In some instances, it may be possible to justify excluding a particular individual from a territory by pointing to facts about their particular case: perhaps we have good reason to believe that if we don't exclude you from this territory, you will go on to murder large numbers of people. This is a case where the substantive justifiability of an exclusion is sufficient on its own for us to be all-things-considered justified in doing it. But cases like that are rare. Most of the time, the only plausible avenue for justifying an individual's exclusion will be an appeal to something more general. The kind of justification that I am interested in here is one that appeals to a right to discretionary control over immigration. That is, we justify excluding *you* by claiming that it is *up to us* to decide who gets to enter the territory (within certain limits).

There are other kinds of general facts that might do the job. We could justify excluding you by justifying a *policy* of excluding a class of would-be immigrants or restricting immigration flows to a certain level, without appealing to a general discretionary right to exclude. If it turns out that a particular policy of exclusion is beneficial to the utilitarian calculus of overall global welfare, that may be a reason to adopt it. Perhaps, for instance, some migration at high levels would undermine social cooperation in host societies as well as causing brain-drain effects in sending societies, thus harming both societies overall.<sup>5</sup> For a utilitarian, that fact suffices not only for the substantive justifiability of such a policy, but also for us to be justified in enforcing it. If we are not utilitarians, that fact on its own might not be enough, but when the overall welfare gain from such a policy is very large, that might suffice as a justification for the use of force. This, though, would only justify the enforcement of a particular immigration policy insofar as it is the best feasible policy in terms of aggregate welfare (or the best feasible way of avoiding a severe welfare loss);<sup>6</sup> it would not give a state discretionary control of its borders, and would in principle justify the policy's enforcement by any agent. (In addition, an argument of this kind has no basis for distinguishing, as a matter of principle, between internal and international migration: if migration from the north of England to the south, for instance, would have significant harmful effects on welfare overall, the utilitarian case for restrictions would be just as strong.) I will set aside

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<sup>5</sup> More nuanced versions of these empirical claims are made by Collier (2013); I do not intend to endorse them.

<sup>6</sup> It would have to be the case that there are not feasible alternatives to immigration restrictions that could do as well or better in utilitarian terms. (For instance, it would have to be the case that negative effects of immigration on social trust would not be better addressed by designing institutions to *create* social trust than by restricting immigration, as Pevnick (2009, pg. 150) and Cole (2011, pg. 270) suggest.)

defences of border controls of this kind, but it is worth noting that if the kind of discretionary rights to exclude that will be my focus turned out to be unjustifiable, that need not mean that no restrictive policy could ever be justified.<sup>7</sup>

This focus on discretionary authority over immigration is motivated by a concern with the kinds of border control rights states actually claim. (Although states do not typically claim *total* discretion, they do usually claim to be the legitimate authority, within some fairly expansive limits, over their own borders.<sup>8</sup>) This concern with existing practices also suggests two desiderata for any justification of border control rights. A good account of states' right to exclude need not, of course, justify *all* existing practices of border control. Few will want to go that far. But an account of the right to exclude will not succeed in justifying anything that looks much like the real-world border regime unless it can justify a practice with certain basic features. First, state border control is *territorial*. That is, states admit people to, and exclude people from, geographical pieces of land, over which they claim exclusive rights. These decisions are significantly different from decisions to admit or exclude people from, for example, an online forum or database, or decisions about admission to a discussion group or chess club. Second, state border control is *enforced*. That is, states use force, and the threat of it, in an attempt to ensure that would-be entrants have *no real choice* about whether or not to comply with their decisions of admission or exclusion.<sup>9</sup> (This enforcement is, of course, not always effective, but it is now fairly widespread that at least some attempt is made to enforce immigration policy, and in some cases the resources put into this attempt are quite substantial.<sup>10</sup>) A plausible defence of a practice of this sort, I think, will need to meet at least two desiderata:<sup>11</sup>

- 1) It should account for a state's right to exclude from a *territory*.

As I have said, actual practices of border control are territorial in nature. Of course, states admit and exclude at multiple levels. Some of these boundaries that states create are not territorial, or physical, at all. For instance, states make decisions about *citizenship* or *membership*, which are usually separated from decisions about territorial admission. The rights associated with

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<sup>7</sup> A fully act-utilitarian justification would have to take each immigration decision separately, but as soon as this utilitarian argument moves to the level of *policy*, it is likely to give the group *some* discretion over the details. A utilitarian argument of this sort could thus be thought of as a highly limited version of the form of justification I will lay out below.

<sup>8</sup> See Bertram (2018).

<sup>9</sup> Miller (2010) denies that immigration controls are *coercive* at least in a sense that demands democratic justification. I do not find this plausible (and I think Abizadeh's (2010) response is convincing), but I am not relying here on the claim Miller denies. That immigration controls are *enforced* in this sense is, hopefully, harder to deny.

<sup>10</sup> See, for instance, Jones (2017) pp. 34-5.

<sup>11</sup> These desiderata apply generally to justifications of border control practices at the level of particular individuals, as well as at the general level that I focus on.

membership in a state are not typically distributed on a wholly territorial basis (members of a state are not necessarily present in its territory, and in some cases may never have been present, while not all of those present are granted membership). States' decisions about admission to membership raise important normative questions in their own right, and we might be able to give a defence of a right to exclude from membership in *political associations*. But if we are to be able to think about the existing border control regime as justifiable in anything like its actual form, we will need more than that. An account of the right to exclude from membership on its own will not do, unless it *also* provides an explanation of how that right can give rise to a right to exclude from *territory*.<sup>1213</sup>

2) It should provide a justification of exclusion that could be offered to the excluded.<sup>14</sup>

What is at question is whether states can demand of people that they not enter a particular territory and whether they can permissibly enforce these demands. These demands and their enforcement are targeted at outsiders. The subjects of immigration law and enforcement are non-members of the state.<sup>15</sup> If we are to be able to think of these demands and their enforcement as justifiable, and not simply as self-interested exercises of brute force, there needs to be a justification of them that could in principle be offered to those excluded and not merely to the state's members.<sup>16</sup>

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<sup>12</sup> It might be said that territories as they currently exist are effectively human creations (at least to some extent), created by politically-organised groups, and so exclusion from membership and from territory may not be as easily separable as I make out. That territories are to some extent human creations is no doubt true, but that does not prevent membership and territorial presence from being separable. We still need an explanation of what gives groups of people rights to exclude from human-created territories. It may be that some story can be told to answer that question by appeal to a group's being responsible for, or in some way significantly connected to, the creation of or value of the territory (Nine (2008) and Kolers (2009) can both be read as telling quite different stories of this kind), but such an account is an attempt to meet (1).

<sup>13</sup> It is worth noting that there are multiple kinds of exclusion from territory: sometimes states just prevent people from accessing their territory altogether, other times they deny people the right to *settle* in their territory (i.e. to remain there beyond some fixed period of time), and deport them if they remain too long. Considerations that might justify excluding settlers (permanent or long-term immigrants) might well be different from those needed to justify excluding tourists or visitors. My main concern is with exclusion from settlement, but I assume that a justification of exclusion from entry will need to do at least as much, if not more.

<sup>14</sup> For a defence of something like this idea, see for instance Bertram (2018).

<sup>15</sup> As pointed out by, e.g., Carens (2013) 257, Cole (2000) 186, and Abizadeh (2008).

<sup>16</sup> Abizadeh (2008) makes a stronger version of this point. I do not claim, as he does, that immigration controls need to be *democratically* justified to their subjects, just that they need to be *justifiable* to them: we need a justification that we could reasonably expect the excluded to accept.

Moore (2015) rejects the demand for an individualist demand for justification to each would-be immigrant on the grounds that it involves a fallacy of composition (188-9). I think this is a mistake, though. To say that state S's policy of exclusion must be justifiable to would-be immigrant A is not to say that S's interest in excluding A must outweigh A's individual interest in entering the territory. (Moore is right to reject the need for the latter; she points out that in very few individual cases will this be true.) One way of justifying exclusion to A is just to point out that a general *policy* of exclusion (which permits A's exclusion) is justifiable and whatever justifies it outweighs A's individual claim to enter. (This is the kind of justification Moore prefers.)

## Territorial Rights and Deontic Justifications

I will argue below that a good justification of a state's right to exclude, if it is to meet the above desiderata, will take the form of an appeal to some independent *value* promoted by a general practice of granting a state some degree of discretionary control over entry to a particular territory. And, I will argue, consideration of *feasibility* will be essential to such an argument. (Such a justification is not *act*-consequentialist: act-consequentialism could justify excluding a particular individual in a particular case, but not a general right to discretionary authority over immigration. But it is consequentialist in a wider sense: it takes the 'two-step' form familiar from, for instance, popular justifications of the institution of property in the vein of Hume, which claim that a practice overall serves some value, and then justifies individual actions in terms of their instantiation of the practice.<sup>17</sup>) But first, of course, we must acknowledge that there are common and prominent ways of thinking about the right to exclude that are more direct. That is, they justify the right not by a two-step appeal to its promotion of some independent value, but by a one-step appeal to the right's bearing a *constitutive* relation to some value or moral imperative. It is common to justify a state's (or other group's) right to exclude in terms of the idea that the group (or members of the group) have certain freedom rights of which the right to exclude is held to be a constituent element. I think the most plausible of these direct justifications (which I will refer to as 'deontic') fail to meet the above desiderata (unless reinterpreted along the consequentialist lines I will lay out in the next section).

More specifically, these arguments fail to provide a justification of exclusion from a particular *territory*. To justify excluding you from a *territory*, and not merely from our group seen as a kind of private association, we need to establish some kind of connection between the group and the territory that you will have reason to respect. What right could we have to exclude you from a piece of land unless it is in some sense *ours*, i.e. unless we have certain rights over that piece of land that others do not have?

It is worth noting, though, that not any old rightful connection will do. First, we may have a right to be in a piece of land or to use a piece of land in certain ways without having any right to exclude others from it. My friends and I have every right to go for a stroll in public Victoria park, but it is not our business to decide who else may or may not be in it. There may be occasions where one's ability to continue to use a territory that one inhabits depends on excluding certain others from it, but that is not in general the case, so no right to discretionary control over entry follows automatically from the right to continue to use or inhabit a territory in particular ways.

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<sup>17</sup> See Essert (2016) 267-71.

Second, we can distinguish jurisdictional territorial rights (the right or authority to make and enforce laws or directives *over a particular geographical area*, i.e. over *anyone* physically located in this area) from property-like territorial rights, including *exclusionary* rights.<sup>18</sup> There is no reason to assume that property-like rights will automatically follow from jurisdictional rights.<sup>19</sup> Creating and enforcing law in a given territory need not involve determining who is, or can be, in that territory.<sup>20</sup> To provide the needed kind of connection to territory, then, we will need to be careful to do more than justify our *use* of it or *jurisdiction* over it.

There is one family of deontic approaches to justifying the right to exclude that has achieved a certain degree of dominance in the philosophical literature and which, in addition, reflects a widespread way of thinking about immigration controls in public discourse. This family of views takes various forms, but all have in common an appeal to collective or communal rights to *self-determination*.<sup>21</sup> That is, the right to exclude is held to be grounded in the right of states, nations or peoples to be self-determining, to collectively control the course of their communal lives. Certain collective entities are thought to have self-determination rights analogous in content to those held by individuals, and which are most often assumed to be derived in some way from individuals' interest in autonomy or self-determination. It is then supposed that such collective self-determination rights involve as a constitutive element some sort of right to control the constitution of the collective 'self', or to determine the future course of the self-determining group, or to decide together with whom to associate. Such arguments from group self-determination rights have been subject to extensive criticism.<sup>22</sup> Critics have persuasively shown, I think, that there is good reason to doubt that the groups in question (states/nations/peoples) have self-determination rights of a kind that requires broad discretionary control over membership. But there is a deeper problem for these views, which arises even if we grant that group self-determination rights support control over membership. The problem is that these views just do not provide an answer to the question at hand; they do not offer a way of meeting

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<sup>18</sup> Cf. Ypi (2013) 242; Simmons (2016) 4-5; Miller (2011) 253.

<sup>19</sup> Some (e.g. Stilz (2009) and (2011), Simmons (2016) and Miller (2011)) do seem to assume the contrary.

<sup>20</sup> Ypi (2013) convincingly argues that there is good reason to doubt whether the available accounts of jurisdictional rights, even if successful as such, will be able to ground rights to exclude. See also Nine (2019) and Sandelind (2015). Moore (2015) argues that the authority to make rules about entry and exit is a part of jurisdictional authority (196). In some sense, this is true. But there are good reasons to keep rules about immigration separate. There may be good reasons for granting jurisdictional authority in the narrow sense (i.e. the right to determine and coercively enforce rules over *whoever* is in a given territory) that do not support a right to determine *who may be in* that territory.

<sup>21</sup> These include Walzer (1983), Wellman (2008, 2011), Altman and Wellman (2009), Pevnick (2011), Moore (2015), Miller (2016), Song (2018) and Stilz (2019). For a survey, see Fine (2013). Walzer (1983) (and, at a stretch, maybe Pevnick (2011)) may be reinterpretable according to the framework I will set out below, but this seems not to be true of Wellman (2008, 2011).

<sup>22</sup> See especially Abizadeh (2008), Fine (2010) and (2013), Hidalgo (2014a) and van der Vossen (2015). See also Song (2018) ch. 3.

the desideratum under discussion. Even if we accept the self-determination argument as an account of states' or peoples' (seen as *associations*) right to exclude from membership, it still will not provide a justification of the *territorial* exclusionary practices of states *unless* it is coupled with an independent defence of states' exclusionary rights over their territories (which will then be doing the heavy lifting).<sup>23</sup> That we as a group have a self-determination right to decide who else gets to be a member of the group is irrelevant to whether or not we can permissibly exclude you from a piece of land, unless we have some sort of rightful claim over that land (and, in addition, the right sort of rightful claim).

This problem is well known. But some defenders of the self-determination view have attempted to bridge the gap (and maintain the deontic character of the view) by bringing in the plausible claim that to admit people to a territory (for the long term, at least) without admitting them to membership of the state that exercises jurisdiction over that territory would create a sub-class of 'resident aliens' inconsistent with the egalitarian demands of democracy. To avoid this undemocratic form of oppression or injustice, states have a responsibility *not* to deny membership to any long-term inhabitants of their territory. Thus, the right to communal self-determination (and to determine membership of a political association) must also support a right to decide who may become a long-term resident of their territory.<sup>24</sup>

But this seems to get things backwards. First, this argument quite clearly still depends on assuming that the self-determining group has *jurisdictional* rights over the territory. If the group had no right to exercise jurisdiction in a territory, then the fact that exercising jurisdiction over immigrants without admitting them to membership would be oppressive or unjust obviously does not give the group a right to exclude people from the territory in which they wrongfully exercise jurisdiction; rather, they must stop exercising jurisdiction (or, if they are going to continue doing so, they ought at least to grant membership to anyone that enters the territory).

But even if we grant states jurisdictional rights, the above argument does not on its own support a right to exclude from the territory over which they have jurisdiction. Note first that, although it is very plausible that a voluntary association minding its own collective business has some sort of rights to be self-determining and to decide who to associate with, as with any individual rights to freedom or autonomy, there are limits: no right to be self-determining includes a right to coerce others as you see fit. (You may have the right to use force to prevent others from interfering

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<sup>23</sup> Fine (2013, pg. 262) and (2010, pp. 353-5) makes this point, and Abizadeh's (2008) argument depends on noticing something like this.

<sup>24</sup> See Wellman (2008) 133-4 and Walzer (1983) 59. Fine (2013, 259) discusses this argument, and points out some problems with the argument, but I think its difficulties in fact are deeper.

with your self-regarding group activities, but not to interfere with *their* legitimate self-regarding activities.) Note also that jurisdictional rights will come with limits; as we said before, we should not *assume* that they include the right to exclude.

Second, to make jurisdictional claims over a territory is to make a claim against all others in the world. To claim a right to set and enforce laws over a territory is to claim that whoever might wish to enter or use that territory is subject to your jurisdiction and enforcement in doing so. Further, it is to claim the right to *coercively force* others to comply with your rules as far as that territory is concerned. Claiming jurisdictional rights is to claim rights to far more than the self-regarding behaviour most obviously covered by self-determination rights. At least, this is the case unless there is some independent reason to think you as a group have exclusive rights over the territory (i.e. it is in some sense *yours*, and so comes within your self-regarding sphere). Thus, your group right to self-determination does not allow you to use your jurisdiction however you please. In particular, presumably your right to jurisdiction does not permit you to set and enforce laws that are excessively oppressive or unjust (in particular, laws that subjugate a group of subjects as second-class citizens).

Thus, if your group's exercising jurisdiction necessarily relegates non-members present in the territory to an oppressed subclass, you have breached the limits of your jurisdictional right. You consequently have an obligation to remedy this: you must either admit everyone present to membership or stop exercising jurisdiction over them. That you as a group have a right to be self-determining (and so to determine your own membership) changes nothing. No right to self-determination includes a right to coerce others at will. Without some independent account of the group's exclusionary rights over the territory, we cannot assume that non-members do not have every right to be there. And no right to jurisdiction includes a right to enforce oppressive laws. Only if there is some independent reason to think that immigrants do *not* have every right to be in the territory (and so coercively enforcing rules for the territory falls within the group's self-regarding sphere) does your group right to self-determination support excluding them.<sup>25</sup> In other words, it is only if a group has independent grounds for *exclusionary* territorial rights that its right to self-determination supports the right to exclude. But if there are such independent grounds, then we already have an argument for the right to exclude.

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<sup>25</sup> I am not here assuming, as Miller (2010) contests, that *border controls* are coercive, merely that a jurisdictional claim includes a claim to coerce. Because it does, a group's right to self-determination does not allow the group to exercise jurisdiction over people who have every right to be present in a territory without including them in the group.

Underlying this version of the self-determination argument (that appeals to the wrongfulness of denying membership to people present in the territory) is the idea that a group's self-determination rights make it immune to acquiring certain sorts of moral obligations to others (such as obligations to include outsiders in the group).<sup>26</sup> The thought, then, is that if admitting outsiders to the territory triggers such an obligation, the group must have a right to exclude from the territory. But groups that exercise coercive jurisdictional rights are the wrong sort of groups to have an immunity of this kind. Nobody's self-determination rights support immunity from obligations acquired through the coercion of others. Groups' self-determination rights just do not contain, as a constituent part, rights to control entry to *territory*.

Some defenders of the self-determination view do attempt to complete the argument by supplying independent grounds to think that self-determining groups *do* need exclusionary rights over a territory, for instance by appealing to the necessity of exclusive control of a particular territory for a functioning state, or for the maintenance of a shared culture.<sup>27</sup> But this, then, becomes the crucial claim. It is a claim about the importance of territorial control for achieving some independent good, rather than about the direct requirements of the freedom rights of political associations. This is the kind of argument I will turn to in the next section. An argument of this form *might* remain more fully focused on self-determination, if it appealed in a consequentialist fashion to some *value* realised by self-determination, for which exclusive territorial control is needed.<sup>28</sup> Still, though, this is an indirect argument about the necessity of exclusionary territorial control for realising some value, not a deontic argument about freedom rights of groups.

The thought that groups with self-determination rights possess a moral immunity from acquiring certain sorts of obligations to others also underlies another kind of defence of the right to exclude. This kind of defence fails to establish a connection to territory for identical reasons. These are arguments that appeal to the existence of special obligations among members of a state (obligations they have to each other in virtue of their shared state membership but not to other humans), or owed by a state to its members.<sup>29</sup> It is then claimed that our right to avoid these extra obligations justifies excluding others from joining the special-obligation-generating

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<sup>26</sup> [Removed for anonymisation.]

<sup>27</sup> The first appeal seems to be made by Pevnick (2011, pg. 57) and Wellman (2008, pg. 131; 2011, pg. 100), and the second by Miller (2005, pp. 199-201).

<sup>28</sup> Some of the existing arguments might be read in this way. Cole (2011) suggests that Wellman's version of the argument, despite official protestation to the contrary, depends on making a claim of this kind (242).

<sup>29</sup> These appear in, for instance, Fine and Sangiovanni (2014) and Blake (2013).

relationship. Michael Blake goes as far as to say that ‘we have a presumptive right to be free from others imposing obligations on us without our consent’.<sup>30</sup>

This is usually coupled with the claim that the special obligations owed to all fellow *members* of our state also extend to others resident in the territory governed by our state.<sup>31</sup> Without this, it is clear that the argument will not justify exclusion from *territory*. But when this claim is added, the argument starts to resemble the version of the self-determination view just discussed. The argument again seems to presuppose exclusionary rights over the state’s claimed territory. It may be plausible that we can exclude you from a territory that is *ours* on the grounds that, if you do enter the territory, we will acquire new burdensome obligations to you. But if we have no exclusionary rights over a territory, then it is hard to see that we have any right against acquiring the obligations that you impose on us by being there.<sup>32</sup> If you have every right to be in an area, then it is just unfortunate for us if your being there gives us certain obligations. (This seems to be the case, for example, when you join me in an otherwise empty public park that we both have every right to be in. Now that you are there, I have certain new obligations, such as not to take up an excessive amount of space, not to make an antisocial amount of noise, and so on.) What is needed is some reason to think that outsiders *do not* have every right to be in a state’s territory. Again, I think there *is* a version of the special-obligations argument that attempts to provide such a reason, but I think such an argument will have a quite different form, that of an appeal to the independent value of meeting special obligations, rather than to deontic rights against their imposition.<sup>33</sup> I will return to this idea in the next section.

Not all deontic arguments, though, neglect territory. Lockean theories purport to provide deontic grounds for *territorial rights*. They rely on the idea that transformation or improvement of land or, in the Lockean phrase, the ‘mixing of labour’ with it, can give rise to certain exclusive entitlements to control the land. These arguments come in individualist versions, according to which individuals gain *property* rights over land in this way and transfer certain incidents of those rights to the state through consent, and collectivist versions, according to which *groups* (peoples, states, nations, communities) gain such entitlements by *collectively* transforming or improving the land.<sup>34</sup> I will not address these views properly here. I suggest that the value-based form of argument I will describe is the most plausible way of meeting the two desiderata because,

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<sup>30</sup> Blake (2013) 115.

<sup>31</sup> See, for instance, *ibid.* 114.

<sup>32</sup> Blake does seem to think that we all have quite *general* presumptive rights to avoid unwanted obligations, but, as Hidalgo (2014b) points out, this strong version of the view seems to have absurd implications.

<sup>33</sup> Blake explicitly wants to avoid such an argument (*ibid.* 105).

<sup>34</sup> Representative of the former is Simmons (2016) as well as Locke himself (1980); representative of the latter are Nine (2008) and (2012). Elements of this view also seem present in Meisels (2005) and Miller (2007, 2011).

whatever their success as accounts of jurisdictional and resource rights, I am sceptical that Lockean accounts can ground rights to *exclude* from territory.<sup>35</sup> I do not have space to argue this here, though, so I will simply acknowledge that these views stand as possible alternative ways of meeting my two desiderata to the kind of argument I lay out in the next section.

### **Value and Feasibility**

I thus think that the most plausible way in which a justification of a right to exclude might seek to meet my two desiderata is by taking the form of an appeal to an independent *value* achieved by granting a state or group discretionary control over a particular territory. But there are two, perhaps obvious-seeming, though nevertheless significant, consequences for such an indirect argument that follow from my second desideratum, the need to offer a justification to the excluded.

The first is that we will need to identify a value that others (the excluded, and not just the members of the excluding state) have reason to care about. It would not do, for instance, to point out that exercising exclusive control over a territory is something that our culture attributes value to, *unless* we could also argue convincingly that outsiders ought to care about this culturally-specific value. This means that, *either* we must be able to make a case for the identified value being of universal (culture-independent) value, that is, for its being something whose value everyone ought to be able to recognise (whether or not they in fact do), *or* the identified value must be something that the diverse value-systems of all would-be immigrants in fact *do* (at least implicitly) recognise. None of this is to say that we must identify a benefit *received* by the excluded. This desideratum does not rule out, then, justifications that only appeal to benefits to insiders (members of a state); all that is demanded is that these benefits have value that outsiders are able (or ought to be able) to recognise. A further corollary of this point, though, is that the value identified must outweigh any value that would be associated with the migration of outsiders into the territory (or their ability to do so) and any disvalue or wrong associated with the *enforcement* of border control policy itself.<sup>36</sup>

The second consequence of the second desideratum is that it will not do just to show that the practice of forcible discretionary exclusion from a territory has *some* value, nor even that the value realised outweighs any value that would be realised by the immigration of those excluded. To show that a border control policy realises some value (even a very significant value, or one more important than any that could be realised by the prevented immigration) is not to show

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<sup>35</sup> For critical discussion of these views, see Ypi (2013).

<sup>36</sup> Mendoza (2015) argues for the importance of taking into account the latter. See also Lister (2020).

that that border control policy is *necessary* to realise that value, that is, that the same value could not be achieved in some other way. To provide outsiders with some reason to respect our exclusion policy, we would need to show that there is some significant value realised by our exercising border control that outweighs any value that would be achieved by allowing them into the territory *and that could not be achieved* (without excessive costs) *through some other means*. To point out that our use of force on you produces some significant non-outweighed value does not justify that use of force if that same net value could be achieved *without* the use of force.<sup>37</sup> In particular, we will need to be careful to be sure that the value identified in fact depends on the group's exercising *exclusionary* control over the territory. That is, we need to be sure that the same value could not be achieved simply by allowing them to *use* the territory in certain ways or to exercise *jurisdiction* over it.

The relevant kind of possibility is presumably not logical or metaphysical possibility. We do not need to show that there is no *logically* possible alternative way of achieving the value in question. The relevant notion, I presume, is some notion of *feasibility*. What it is for something to be feasible or not, and what role that notion plays in practical reasoning, are debated matters.<sup>38</sup> It is not clear whether there even is any single, generally privileged notion of feasibility.<sup>39</sup> But *if* there is some notion of feasibility that operates as a constraint on what we can be required to do in this kind of context, then we might be able to construct a justification of border control.

Suppose there is a sense of 'feasibility' such that something's being *infeasible* in this sense rules it out as a possible object of moral requirement. In that case, if we can identify something valuable achieved by a state's exercising border control, and if any alternative ways of achieving that value are *not feasible* in the constraining sense, then that plausibly will justify the practice (so long as the value is not outweighed by any countervailing considerations and so on). But if there are feasible alternative ways of achieving the same value, we will not have done enough.

It seems, then, that a plausible indirect value-based justification of group *G*'s discretionary exclusion from a *territory T* that could be offered to the excluded will meet the following conditions:

- a) It will identify a value realised by *G*'s exercising discretionary border control over *T* that those excluded can be expected to recognise;

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<sup>37</sup> Carens (2013) makes a similar point (269).

<sup>38</sup> See, for instance, Southwood (2018), Brennan and Southwood (2007), Gilibert and Lawford-Smith (2012) and Wiens (2013).

<sup>39</sup> Indeed, I think there is not.

- b) This value must outweigh any value that would arise from the excluded migrating into, or being able to migrate into, *T* and any disvalue or wrong associated with the enforcement of *G*'s immigration policy itself;
- c) There must not be any feasible ways of achieving this value that a) do *not* involve *G*'s exercise of discretionary border control, and b) are not subject to *stronger* moral objections than *G*'s exercise of discretionary border control (in some relevant sense of 'feasible').

I think this helps to see, then, how *versions* of the self-determination and special-obligations arguments *might* be able to meet our desiderata. It is when interpreted as indirect arguments of the above form that these views seem most plausible. As mentioned above, one way in which an argument of this kind could meet the above conditions is by simply *supplementing* a deontic argument with a completely independent appeal to some value promoted exclusive control over a territory. The really important work in such an argument is done by this supplementary step. But the alternative is to *reinterpret* the self-determination or special-obligations arguments as appeals to the independent *value* achieved by collective self-determination. Such an argument just says that there is some significant value promoted by a society's (or a nation's or people's) being able to determine together its own affairs, for instance, and the value of this in part depends on its being able to determine its own composition (the makeup of the collective 'self'). The claim here would have to be that what is valuable about a particular group's self-determination could not feasibly (and morally permissibly) be achieved without the ability to exercise exclusive control over the borders of a particular territory.<sup>40</sup> When interpreted in this way, it becomes clear that one crucial question that such an argument will need to answer is whether it really is the case that what is valuable about a group's self-determination can only feasibly be maintained (in the relevant sense of 'feasible') if it is granted the right to control the borders of a territory. This is partially (but only partially) an empirical question: to answer it we need to know, first, *what* the value of group self-determination is, and then whether the empirical conditions make it infeasible (in the relevant sense) to realise that value without exclusive territorial control.

There are several other values or goods that might be appealed to in an argument of the above form, and some of the accounts of territorial rights in the literature might be understood in this way. 'Functionalist' or 'legitimacy' theories defend territorial rights on the grounds that *territorial* jurisdiction (and insofar as the account defends *exclusionary* territorial rights, then border control

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<sup>40</sup> The argument of Moore (2015) seems to be of this kind.

also) is necessary for a state to be able to perform a morally essential function (protecting human rights, securing distributive justice, guaranteeing the rule of law).<sup>41</sup> The most plausible version of this claim, it seems to me, must be that it is not *feasible* to maintain a condition of right or justice without the state's exercising exclusionary control over a particular territory. Another family of accounts appeals to peoples' or nations' attachment to a territory, and its significance to their cultural life, identity or stability of place.<sup>42</sup> It is easy to interpret such an argument along the above lines. They clearly identify something thought to be of value and assert its dependence on exclusionary control of a territory. Just to claim that a group has an interest in stability of connection to a place, that the place is involved in the core life projects of its members, does not on its own support a right to *exclude* from, rather than a right to *use* or *occupy* a territory. The claim that such an argument needs, I presume, must be that it is not feasible for the group to maintain a stable way of life, a national or political culture, or a shared identity, without control over the borders of a particular territory.

### **Concluding Thoughts**

I have suggested that a plausible defence of the right to exclude, the legitimate authority to make and enforce decisions regarding entry to a territory, seems to need to take the form of an appeal to some independent value achieved by granting such authority and the infeasibility of achieving that value otherwise. An argument of this form, then, will have to pay attention to two key matters that are not always placed centre-stage. First, a case needs to be made for the significance of the value identified. Of course, existing indirect defences of the right to exclude have made significant attempts to show that there is some key value promoted by a group's ability to exclude from a particular territory. But such an account will also need to carefully consider countervailing considerations. That is, it will need to show that the value for outsiders of migrating into the territory (or having the ability to do so) does not outweigh the value identified. The same goes for any harm done by the enforcement of border control itself. It will also need to pay attention to the acceptability of the identified value to outsiders.

Next, attention needs to be paid to the feasibility claim. There are two kinds of question that need to be answered. First, what does it mean for something to be 'feasible' or 'infeasible'? In what sense do alternatives to border control need to be infeasible in order for it to be justifiable

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<sup>41</sup> These labels are applied by Ypi (2013) and Simmons (2016). The most prominent such account is given by Stilz (2009) and (2011).

<sup>42</sup> Arguments of this kind are made by Miller (2007), (2011) and (2016), Meisels (2005) and (partially) Moore (2015) and (2019). Walzer (1983) does not obviously connect his argument up with territorial claims, but he could be understood as making an argument of this sort.

to the excluded? I think there are multiple different ways in which the notion of ‘feasibility’ can be made precise (and so multiple different sets of truth conditions feasibility claims might have), and it is not obvious that any single one of these is privileged as *the* morally relevant notion. If that is correct, work is needed to identify which specification of the term is relevant, i.e. allows a justificatory argument of this kind to succeed. How constrained by short-term or ‘soft’ constraints can we be in justifying such a practice?<sup>43</sup> Second, there is the empirical question of whether these feasibility claims are true. Given the relevant sense of ‘feasible’, is it true that there are no feasible alternatives to border control?

Thinking about the justification of border control in this way helps also to see how certain further questions might be settled. An argument of the above form (at least when fully filled out) will provide straightforward answers to certain questions that a number of existing accounts have found difficult to answer. The exact extent and boundaries of the geographical area a state or group can justifiably exclude from are directly fixed by such an argument. A state or group is justified in excluding from just that area without which it cannot feasibly achieve the value appealed to. If the boundaries of a state’s (or group’s) exclusionary rights are in doubt, we can determine whether it can exclude from a given area at the edge of its territory by asking whether the state or group *needs* to be able to exclude from that additional area in order to realise the relevant value. Is exclusion from this marginal zone essential, for example, to the state’s shared identity or its ability to collectively determine its own affairs? Or is it necessary for the maintenance of a functioning state, or of a system of law and rights-protection? (More precisely, is it *feasible* to achieve these things without excluding from the given marginal area?)

The value-based argument also straightforwardly settles questions about *who* a state or group may permissibly exclude (or, in other words, about the limits of the state’s/group’s discretion). I said above (footnote 16) that we can agree with Moore that justifying a policy of exclusion need not involve showing that, for each excluded individual *E*, the excluding group has an interest in excluding *E* that outweighs *E*’s interest in entering the territory. It would be sufficient to show that a *policy* that permits excluding *E* is needed to achieve something of value that outweighs *E*’s interest in entering (and that of anyone else whose exclusion the policy permits). So we do not determine the limits of a state’s discretion over who to admit by asking, for each prospective entrant, whether the value achieved by excluding *them* outweighs the harm done. But still, justifying a policy of exclusion is not all or nothing. Only if there is no feasible less harmful policy that achieves the value appealed to can a policy be justified. Thus, a state or group is

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<sup>43</sup> On ‘soft constraints’ see Gilabert and Lawford-Smith (2012).

justified in excluding individual *E* only if the least harmful feasible immigration policy that achieves the value in question permits *E*'s exclusion. The extent of discretion that can be justified will be the extent necessary to secure the value identified. So the question will be whether the value identified depends not only on the state's limiting immigration, but also on its having discretion over who to admit.

I want to conclude by saying, lest this paper appear to be a schematic defence of the right to exclude, that it is not intended that way. The challenges for a successful such defence are significant, and I certainly do not want to claim that there *is* a way of meeting these challenges. One thing that seems clear (and I think many defenders of the right to exclude would agree) is that the existing international regime of border control is not justifiable in its entirety. I have presented the conditions that I think an argument would have to meet to justify anything like the core practices of border controls we tend to take for granted, but I leave it open whether there is any way of meeting them. It may turn out, that is, that defenders of open borders are right.<sup>44</sup> But to claim that immigration restrictions involve an absolute wrong and could never be justified seems too extreme. In certain empirical circumstances, a good case for discretionary control over immigration *could* be made *if and insofar as* there is some genuinely significant and non-outweighed universally-recognisable value that depends on it. Insofar as there is *not*, it may still be possible to justify particular instances of exclusion, if and when a particular policy of exclusion achieves some value that outweighs any harm it does to those excluded by it and there is no feasible *less harmful* way of achieving the same value. If the challenges for a defence of the right to exclude are as significant as I am inclined to think they are, though, we might want to phrase the claim I have made here as the claim that a practice of (discretionary) border control cannot be justified *unless* there is some significant, universally-recognisable and non-outweighed value that cannot feasibly be achieved without it.

In addition, there is an important negative conclusion that can be drawn just from noticing that justifying exclusion depends on feasibility premises. It is an implication of this that the right to exclude is not a right that peoples, nations or states have *automatically*. That is, it is not a right they have simply in virtue of being organised into a state, or having some kind of significant connection to the land, or possessing some other morally significant characteristic. The practice of border control can only be justified, if and when it can be justified, *insofar as there is no feasible alternative*. In other words, if there are ways to do without it, those should be taken.

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<sup>44</sup> E.g. Carens (1987) and (2013), Cole (2000), Oberman (2016) and Huemer (2010).



## References

- Abizadeh, Arash (2008) 'Democratic Theory and Border Control: No Right to Unilaterally Control Your Own Borders' *Political Theory* 36: 37-65
- (2010) 'Democratic Legitimacy and State Coercion: A Reply to David Miller' *Political Theory* 38: 121-30
- Altman, Andrew and Wellman, Christopher Heath (2009) *A Liberal Theory of International Justice* New York City, NY: Oxford University Press
- Bertram, Christopher (2018) *Do States Have the Right to Exclude Immigrants?* Cambridge, UK: Polity Press
- Blake, Michael (2013) 'Immigration, Jurisdiction, and Exclusion' *Philosophy and Public Affairs* 41: 103-30
- Brennan, Geoffrey and Southwood, Nicholas (2007) 'Feasibility in Action and Attitude' in T. Rønnow-Rasmussen, B. Petersson, J. Josefsson & D. Egonsson (eds.) *Hommage à Wlodek: Philosophical Papers Dedicated to Wlodek Rabinowicz* [www.fil.lu.se/hommageawlodek](http://www.fil.lu.se/hommageawlodek)
- Brian, Tara and Laczko, Frank (2014) *Fatal Journeys: Tracking Lives Lost During Migration* Geneva: International Organization for Migration
- Carens, Joseph H. (1987) 'Aliens and Citizens: The Case for Open Borders' *Review of Politics* 49: 251-73
- (2013) *The Ethics of Immigration* Oxford: Oxford University Press
- Cole, Phillip (2000) *Philosophies of Exclusion: Liberal Political Theory and Immigration* Edinburgh, UK: Edinburgh University Press
- (2011) 'Open Borders: An Ethical Defense' in Wellman and Cole (2011)
- Collier, Paul (2013) *Exodus: How Migration is Changing Our World* Oxford: Oxford University Press
- Essert, Christopher (2016) 'Property and Homelessness' *Philosophy and Public Affairs* 44: 266-95
- Fine, Sarah (2010) 'Freedom of Association is Not the Answer' *Ethics* 120: 338-56
- (2013) 'The Ethics of Immigration: Self-Determination and the Right to Exclude' *Philosophy Compass* 8: 254-68

- Fine, Sarah and Sangiovanni, Andrea (2014) 'Immigration' in Darrel Moellendorf and Heather Widdows (eds.) *The Handbook of Global Ethics* London: Routledge
- Gilbert, Pablo and Lawford-Smith, Holly (2012) 'Political Feasibility: A Conceptual Exploration' *Political Studies* 60: 809-25
- Hidalgo, Javier (2014a) 'Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation' *Journal of International Political Theory* 10: 261-82
- (2014b) 'Immigration Restrictions and the Right to Avoid Unwanted Obligations' *Journal of Ethics and Social Philosophy* 8: 1-8
- Huemer, Michael (2010) 'Is There a Right to Immigrate?' *Social Theory and Practice* 36: 429-61
- Jones, Reece (2017) *Violent Borders: Refugees and the Right to Move* London: Verso
- Kolers, Avery (2009) *Land, Conflict, and Justice: A Political Theory of Territory* Cambridge, UK: Cambridge University Press
- Lister, Matthew (2020) 'Enforcing Immigration Law' *Philosophy Compass*
- Locke, John (1980) *Second Treatise of Government* ed. C. B. Macpherson. Indianapolis, IN: Hackett Publishing Company
- Meisels, Tamar (2005) *Territorial Rights* Dordrecht: Springer
- Mendoza, José Jorge (2015) 'Enforcement Matters: Reframing the Philosophical Debate Over Immigration' *The Journal of Speculative Philosophy* 29: 73-90
- Miller, David (2005) 'Immigration: The Case for Limits' in Andrew I. Cohen and Christopher Heath Wellman (eds.) *Contemporary Debates in Applied Ethics* Oxford: Blackwell
- (2007) *National Responsibility and Global Justice* Oxford: Oxford University Press
- (2010) 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh' *Political Theory* 38: 111-20
- (2011) 'Territorial Rights: Concept and Justification' *Political Studies* 60: 252-68
- (2016) *Strangers in Our Midst: The Political Philosophy of Immigration* Cambridge, MA: Harvard University Press
- Moore, Margaret (2015) *A Political Theory of Territory* New York, NY: Oxford University Press

----- (2019) 'The Taking of Territory and the Wrongs of Colonialism' *The Journal of Political Philosophy* 27: 87-106

Nine, Cara (2008) 'A Lockean Theory of Territory' *Political Studies* 56: 148-165

----- (2012) *Global Justice and Territory* Oxford: Oxford University Press

----- (2019) 'Do territorial rights include the right to exclude?' *Politics, Philosophy, and Economics* 18: 307-22

Oberman, Kieran (2016) 'Immigration as a Human Right' in Sarah Fine and Lea Ypi (eds.) *Migration in Political Theory: The Ethics of Movement and Membership* Oxford: Oxford University Press

Pevnick, Ryan (2009) 'Social Trust and the Ethics of Immigration Policy' *The Journal of Political Philosophy* 17: 146-67

----- (2011) *Immigration and the Constraints of Justice* Cambridge, UK: Cambridge University Press

Sandelind, Clara (2015) 'Territorial Rights and Open Borders' *Critical Review of International Social and Political Philosophy* 18: 487-507

Simmons, A. John (2001) 'On the Territorial Rights of States' *Philosophical Issues* 11: 300-26

----- (2016) *Boundaries of Authority* New York City, NY: Oxford University Press

Song, Sarah (2018) *Immigration and Democracy* New York City, NY: Oxford University Press

Southwood, Nicholas (2018) 'The feasibility issue' *Philosophy Compass* 13: e12509

Steiner, Hillel (2008) 'May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction: A Response to Nine' *Political Studies* 56: 949-56

Stilz, Anna (2009) 'Why Do States Have Territorial Rights?' *International Theory* 1: 185-213

----- (2011) 'Nations, States and Territory' *Ethics* 121: 572-61

----- (2019) *Territorial Sovereignty: A Philosophical Exploration* Oxford: Oxford University Press

van der Vossen, Bas (2015) 'Immigration and self-determination' *Politics, Philosophy and Economics* 14: 270-90

Walzer, Michael (1983) *Spheres of Justice: A Defense of Pluralism and Equality* New York City, NY: Basic Books

Wellman, Christopher Heath (2008) 'Immigration and Freedom of Association' *Ethics* 119: 109-41

----- (2011) 'Freedom of Association and the Right to Exclude' in Wellman and Cole (2011)

Wellman, Christopher Heath and Cole, Phillip (2011) *Debating the Ethics of Immigration: Is There a Right to Exclude?* New York City, NY: Oxford University Press

Wiens, David (2015) 'Political Ideals and the Feasibility Frontier' *Economics and Philosophy* 31: 447-77

Ypi, Lea (2013) 'Territorial Rights and Exclusion' *Philosophy Compass* 8: 241-5