

# IMMIGRATION AND CITIZENSHIP<sup>1</sup>

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What are the ethical issues raised by immigration? How does immigration affect our understanding of democracy and citizenship? I explore these questions in the context of three presuppositions. First, I am concerned primarily with immigration into the rich democratic states of Europe and North America. I leave open the question of the extent to which this analysis extends to other states.

Second, I presuppose a commitment to democratic principles. That requires an interpretation of democratic principles, and my interpretation can be contested, but I do not pretend that my arguments will have any purchase for those who reject democratic principles altogether. I use the term “democratic principles” in a very general sense to refer to the broad moral commitments that undergird and justify contemporary political institutions and policies throughout North America and Europe—things like the ideas that all human beings are of equal moral worth, that disagreements should normally be resolved through the principle of majority rule, that we have a duty to respect the rights and freedoms of individuals, that legitimate government depends upon the consent of the

<sup>1</sup> This chapter draws upon ideas developed more fully in Carens 1987, 1992, 2000a, 2000b, 2002, 2004, 2007, 2008a, 2008b, 2010.

governed, that all citizens should be equal under the law, that coercion should only be exercised in accordance with the rule of law, that people should not be subject to discrimination on the basis of characteristics like race, religion, or gender, that we should respect norms like fairness and reciprocity in our policies, and so on. These ideas can be interpreted in many different ways, and they can even conflict with one another. Nevertheless, on a wide range of topics, like the question of whether it is morally acceptable to force someone to convert from one religion to another, there is no serious disagreement among those who think of themselves as democrats. Many of the questions raised by immigration are interconnected, and a commitment to democratic principles greatly constrains the kinds of answers we can offer to these questions.

Third, for most of my analysis, I am simply going to assume that states normally have a moral right to exercise considerable discretionary control over immigration. I will call this the conventional view. As we will see, there is still much that can be said about the ethics of immigration within the constraints of the conventional view. At the end of the chapter, I will step back and raise some questions about the conventional view.

I take up the following topics: access to citizenship; inclusion; residents; temporary workers; irregular migrants; non-discrimination in admissions; family reunification; refugees; open borders. I begin, however, with an objection that would render the rest of the discussion pointless if it were sound.

#### SOVEREIGNTY AND SELF-DETERMINATION

Some people think that it is a mistake even to talk about the ethics of immigration. Immigration and citizenship should be seen as political issues, not moral ones, they say. (Hailbronner 1989). On this view, respect

for state sovereignty and democratic self-determination preclude any moral assessments of a state's immigration and citizenship policies.

This sort of attempt to shield immigration and citizenship policies from moral scrutiny is misguided. Consider some examples of past policies that almost everyone today would regard as unjust: the Chinese Exclusion Act of the late 19<sup>th</sup> century that barred people of Chinese descent from naturalization in the United States; the denaturalization policies adopted in the 1930s by many European states (including Germany's infamous Nuremberg Laws); Canadian and Australian policies of excluding potential immigrants on the basis of race.

To criticize such policies as morally wrong does not entail a rejection of state sovereignty or democratic self-determination. We should distinguish the question of who ought to have the authority to determine a policy from the question of whether a given policy is morally acceptable. We can think that an agent has the moral right to make a decision and still think that the decision itself is morally wrong. That applies just as much to a collective agent like a democratic state as it does to individuals. Moral criticism of the Chinese Exclusion Act or the Nuremberg Laws or the White Australia Policy does not imply that some other state should have intervened to change those policies or that there should be an overarching authority to compel states to act morally.

The claim that something is a human right or a moral obligation says nothing about how that right or obligation is to be enforced. In fact, in the world today where human rights have come to play an important role, most human rights claims are enforced by states against themselves. That is, states themselves are expected to (and often do) limit their own actions and policies in accordance with human rights norms that they recognize and respect. The very idea of constitutional democracy is built upon the notion of self-limiting government, i.e., that states have the

capacity to restrict the exercise of their power in accordance with their norms and values. That is the framework within which I am pursuing the discussion of immigration and citizenship in this chapter.

#### ACCESS TO CITIZENSHIP

Who should be granted citizenship and why? I propose the following principles. Anyone born in a state with a reasonable prospect of living there for an extended period should acquire citizenship at birth. Anyone raised in a state for an extended part of her formative years should acquire citizenship automatically over time (or, at the least, acquire an absolute and unqualified right to citizenship). Anyone who comes to a society as an adult immigrant and lives there legally for an extended period ought to acquire a legal right to naturalization—ideally with no further requirements but at most upon meeting certain modest standards regarding language acquisition and knowledge of the receiving society. Finally, people should normally be allowed to acquire dual or even multiple citizenships where they have a legitimate connection to the states in question. A democratic state should not make renunciation of other citizenships a requirement for access to its own citizenship whether its citizenship is acquired at birth or through naturalization.

To understand why settled immigrants and their descendants have a moral right to citizenship, we have to think about why the descendants of citizens have a moral claim to citizenship. Consider what we might call the normal case: children who are born to parents who are citizens of the state where their children are born and who live in that state as well. In other words, the baby's parents are resident citizens. Every democratic state grants citizenship automatically to such children at birth. It may seem intuitively obvious that this practice makes moral sense, but I want to make the underlying rationale explicit, and that rationale is not self-

evident. Birthright citizenship is not a natural phenomenon. It is a political practice, even when it concerns the children of resident citizens. What justifies this practice from a democratic perspective?

We are embodied creatures. Most of our activities take place within some physical space. In the modern world, the physical spaces in which people live are organized politically primarily as territories governed by states. The state can and should recognize even a baby as a person and a bearer of rights. Beyond that, the state where she lives inevitably structures, secures and promotes her relationships with other human beings, including her family, in various ways.

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When a baby is born to parents who are resident citizens, it is reasonable to expect that she will grow up in that state and receive her social formation there and that her life chances and choices will be affected in central ways by that state's laws and policies. She cannot exercise political agency at birth, but she will be able to do so as an adult. If she is to play that role properly, she should see herself prospectively in it as she is growing up. She needs to know that she is entitled to a voice in the community where she lives and that her voice will matter. In addition, political communities are also an important source of identity for many, perhaps most, people in the modern world. A baby born to resident citizens is likely to develop a strong sense of identification with the political community in which she lives and in which her parents are citizens. She is likely to see herself and be seen by others as someone

who belongs in that community. All of these circumstances shape her relationship with the state where she is born from the outset. They give her a fundamental interest in being recognized immediately as a member of the political community. Granting her citizenship at birth is a way of recognizing that relationship and giving it legal backing.

Most of the same considerations apply to a child of immigrants who is born in the state where her parents have settled. She, too, is likely to grow up in the state, to receive her social formation there, and to have her life chances and choices deeply affected by the state's policies. If these are reasons why the children of resident citizens should get citizenship at birth, they are also reasons why the children of immigrants should get citizenship at birth. So, too, with the cultivation of political agency. The child of immigrants should be taught from the beginning that she is entitled to a voice in the community where she lives and that her voice will matter. And so, too, with political identity. Like the child of resident citizens, the child of immigrants has a deep interest in seeing herself and in being seen by others as someone who belongs in the political community in which she lives.

Settled immigrants may leave, returning to their country of origin or going elsewhere and taking their children with them, but that is also true of resident citizens. This possibility does not provide a good enough reason to treat the child's membership in the political community as a contingent matter.

Finally, what about the issue of dual citizenship? Does the fact that the children of immigrants get their parents' citizenship at birth provide a democratic state any grounds for denying the children citizenship in the state where they are born and where their parents live?

No, for two reasons. First, citizenship in the country of origin of one's parents is not an adequate substitute for citizenship in the country where

one lives. The most important civic relationship a person has is the one with the state where she lives. Second, dual citizenship is now widespread, unavoidable, and accepted for the children of citizens because more and more children have parents with different nationalities and inherit citizenship status from each of them. It is no longer plausible to claim that this creates any serious practical or principled problems. If dual citizenship is acceptable for the children of citizens, it should be acceptable for the children of immigrants as well.

In sum, the most important circumstances shaping a child's relationship with the state from the outset are the same for the child of immigrants as they are for the child of resident citizens. So, the child of immigrants has the same sort of fundamental interest in being recognized immediately and permanently as a member of the political community.

Now consider immigrants who arrive as young children. From both a sociological and a moral perspective, these children are very much like the children born in the state to immigrant parents. They belong, and that belonging should be recognized by making them citizens.

All the reasons why children should get citizenship as a birthright if they are born in a state after their parents have settled there are also reasons why children who settle in a state at a young age should acquire that state's citizenship. The state where an immigrant child lives profoundly shapes her socialization, her education, her life chances, her identity, and her opportunities for political agency. Her possession of citizenship in another state is not a good reason for denying her citizenship in the state where she lives, and for reasons we have just seen in the discussion of dual citizenship there is no good reason to require her to give up any other citizenship as a condition of gaining citizenship in the place where she lives. The state where she lives is her home. She has a profound interest in seeing herself and in being seen by others as a member of that

political community, and the state has a duty to respect that interest because it has admitted her. The state's grant of citizenship to immigrants who arrive as young children should be unconditional and automatic, just as birthright citizenship is for the children of resident citizens and settled immigrants.

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Finally, what about immigrants who arrive as adults? The moral claims that adult immigrants have to citizenship rest on two distinct but related foundations: social membership and democratic legitimacy (Baubock 1994; Rubio-Marin 2000). Their moral claims to citizenship on the basis of social membership are similar in many respects to the moral claims that their children have, namely that their lives are deeply affected by and tied to the state in which they live and others who live in that state. Having the legal status of citizenship in the state where they live is the only way that their membership can be properly recognized and their interests properly protected. As we have seen before, there are no good reasons for the state to require them to renounce their previous citizenship as a condition of acquiring a new one in the place where they live.

Immigrants who arrive in a state as adults have received their social formation elsewhere. For that reason, they do not have quite as obvious a claim to be members of the community as their children who grow up within the state and may even be born there. Nevertheless, living in a community also makes people members. As adult immigrants settle into their new home, they become involved in a dense network of social associations. They acquire interests and identities that are tied up with

other members of the society. Their choices and life chances, like those of their children, become shaped by the state's laws and policies. The longer they live there, the stronger their claims to social membership become. At some point, a threshold is passed. They have been there long enough to ensure that they simply are members of the community with a strong moral claim to have that membership officially recognized by the state by its granting of citizenship, or at least a right to citizenship if they want it.

The principles of democratic legitimacy give rise to a second basis for adult immigrants to assert a moral claim to citizenship. It is a fundamental democratic principle that everyone should be able to participate in shaping the laws by which she is to be governed and in choosing the representatives who actually make the laws, once she has reached an age where she is able to exercise independent agency. Full voting rights and the right to seek high public office are normally reserved for citizens, and I will simply assume that practice in this chapter.

Therefore, to meet the requirements of democratic legitimacy, every adult who lives in a democratic political community on an ongoing basis should be a citizen, or, at the least, should have the right to become a citizen if she chooses to do so. Prior to this point, I have not emphasized the democratic legitimacy argument because I have been talking about the citizenship claims of young children who are not old enough to vote or to participate formally in politics, though they have the same sort of claim prospectively, as it were, and the democratic legitimacy argument would apply to them if they reached adulthood without receiving citizenship.

## INCLUSION

Even if immigrants and their descendants have appropriate access to the legal status of citizenship, they can still be marginalized economically, socially, and politically. If citizens of immigrant origin are excluded from

the economic and educational opportunities that others enjoy, if they are viewed with suspicion and hostility by their fellow citizens, if their concerns are ignored and their voices not heard in political life, they are not really included in the political community. They may be citizens in a formal sense but they are not really citizens in a fuller, more meaningful sense of the term. They are not likely to see themselves or be seen by others as genuine members of the community. In many important ways, they will not belong.

That is clearly wrong from a democratic perspective. No one thinks that democratic equality requires citizens to be equal in every respect, but the democratic ideal of equal citizenship clearly entails much more than the formal equality of equal legal rights. It requires a commitment to some sort of genuine equality of opportunity in economic life and in education, to freedom from domination in social and political life, to an ethos of mutual respect, compromise and fairness. Democratic theorists have long worried about the tyranny of majorities over minorities in democracies. Citizens of immigrant origin are an important vulnerable minority. So, democratic principles require the substantive, not merely formal, inclusion of citizens of immigrant origin.

What does substantive inclusion entail? Social scientists who study immigration empirically spend a lot of time trying to figure out what makes for the successful inclusion of immigrants, and especially what sorts of public policies can aid in this process. In conducting these studies, they usually deploy, implicitly or explicitly, a normative standard of proportional equality. That is, they compare how well immigrants and their descendants do on various indicators of well-being and success in economic, social, and political life (e.g., education, economic achievement, social acceptance, political participation) with how well the rest of the population is doing. The general expectation (again often implicit) is that immigrants themselves should not lag too far behind the rest of the

population on these indices and that the descendants of immigrants should do pretty much as well as those whose ancestors have been here longer. If this expectation is not met, then there is a puzzle that needs to be explained through social scientific analysis and perhaps a problem that needs to be addressed through social policy.

Explaining why citizens of immigrant origin are not fully included and what policies might remedy that failure are tasks for empirical researchers. What political philosophers can do is show how democratic principles guide and limit the policies that states may use to promote the inclusion of citizens of immigrant origin. One important constraint is that democratic states cannot demand social and cultural assimilation as a prerequisite for inclusion. For example, everyone recognizes that a democratic state cannot require its citizens to adopt the religious views of the majority even if religious differences are a source of social friction. In a contemporary democracy, people have to live with profound differences and build a shared political community in a context of social and cultural pluralism.

The deep connection between democratic principles and respect for difference is one reason why pronouncements about the “death of multiculturalism” seem so inappropriate from an ethical perspective. Multiculturalism is a term that can be used in many different ways, but often the social, cultural and religious diversity that people attribute to multiculturalism is simply the unavoidable consequence of respecting the individual rights and freedoms that democratic states are supposed to provide to all their members (such as rights to religious freedom and rights to live one’s life as one chooses so long as one is not harming others). It is dismaying to see how often contemporary democratic states are willing to override their own principles out of fear and anxiety about differences of culture and identity, as for example in the banning of various forms of religious dress and religious architecture.

Democratic justice requires even more than respect for individual rights, however. To achieve justice it is necessary to pay attention to the ways in which laws and practices may implicitly privilege some over others, and to be willing to treat all citizens fairly, even those who are a minority. That will sometimes entail accommodations of various sorts for citizens of immigrant origin and even public recognition of and support for their culture and their identity. It also involves the creation of a public culture in which citizens of immigrant origin are recognized as full members of society and treated with respect. What is at issue here is the way people behave, especially public officials but also ordinary citizens. The value of legal citizenship and formal equality is greatly reduced if the representatives of the state and the rest of the citizenry treat immigrants as outsiders who do not really belong and who have somehow acquired a status that is undeserved.

Immigrants bring change with them. That is inevitable. It is not grounds for constructing the immigrants as a threat or a problem. What is needed instead is some sort of mutual adaptation between citizens of immigrant origin and the majority in the state where the immigrants have settled.

This mutual adaptation will inevitably be asymmetrical. Citizens with deep roots in the society are always in the majority, and that matters in a democracy. They have a legitimate interest in maintaining most of the established institutions and practices. Formal and informal norms are pervasive in any complex modern society. They are often an important kind of collective good, making it possible for people to coordinate their activities without direct supervision or instruction. Most of these formal and informal norms do not conflict with individual rights and freedoms or with the legitimate claims of minorities. To a considerable extent, it is reasonable to expect that citizens of immigrant origin will learn how things work in the receiving society and that they will conform to these formal and informal norms. This applies even more to their children. The

children of immigrants grow up in the state to which their parents have moved. As we have seen, they should grow up as citizens, and, if the educational system functions properly, they should acquire all of the social tools required to function effectively in the society, including mastery of the official language and many other social capacities as well. This does not mean, however, that the children of immigrants can be expected to be like the children of the majority in every respect or that the immigrants themselves have to conform to every established practice.

**The democratic ideal of equal citizenship requires a commitment to some sort of genuine equality of opportunity in economic life and in education, to freedom from domination in social and political life**

It is not reasonable to insist that nothing change as a result of immigration. The distinctive experiences, values and concerns of the immigrants are relevant to an evaluation of the society's formal and informal norms. The way things are done in a society may reflect unconscious and unnecessary elements that come to light only when they are confronted by people who object to them. If citizens of immigrant origin have reasons for wanting things to be done differently, they deserve a hearing and their interests must be considered. Sometimes practices can be changed without any real loss to anyone else beyond adjustment to the change. Sometimes it may be appropriate to leave existing rules or practices in place and provide exemptions for immigrants. Instead of pretending that the social order is culturally neutral or that it is acceptable to expect citizens of immigrant origin simply to conform to the majority, what is needed is what I have called elsewhere a conception of justice as even-handedness, i.e., a sensitive balancing of considerations that takes the interests of citizens of immigrant origin seriously and gives them weight without assuming that those interests will always prevail (Carens 2000a).

## LEGAL RESIDENTS

So far I have focused on access to citizenship and on the inclusion of people of immigrant origin who have become citizens. How should immigrants be treated before they have been settled long enough to become entitled to citizenship?

Let's start with legal residents, i.e., immigrants who have been admitted on an ongoing basis but who have not yet acquired citizenship (whether they are eligible for it or not). Democratic justice greatly constrains the legal distinctions that can be drawn between citizens and residents. Once people have been settled for an extended period, they are morally entitled to the same civil, economic, and social rights as citizens. In a democratic state, these immigrants should enjoy all the rights that citizens enjoy, except perhaps for the right to vote, the right to hold high public office, and the right to hold high policy-making positions.

This is not such a radical claim as it might sound. With a few significant qualifications, permanent residents do generally enjoy these legal rights in Europe and North America. But why should they?

One answer is that democratic states have an obligation to protect the basic human rights of everyone subject to their jurisdiction. The claim is true as far as it goes, but it does not go far enough. Even tourists and visitors are entitled to protection of their basic human rights, but immigrants with legal residence status have many rights that visitors do not possess. Indeed if we were to place visitors, residents, and citizens as three categories along a continuum as holders of legal rights, the biggest gap would not be between citizens and residents but between residents and visitors, i.e., not between citizens and non-citizens but between two different kinds of non-citizens. Most of the legal rights created by modern democratic states are neither rights granted to everyone present nor

rights possessed only by citizens. Instead, they are rights possessed by both citizens and permanent residents. Let's see why that makes moral sense.

What is it that residents and citizens have in common that is morally significant and makes it justifiable to give them legal rights that are not given to visitors? The answer is obvious. They live in the society. Living there gives them interests that visitors do not have, interests that deserve legal recognition and protection. Living there makes them members of civil society. Someone might object that this is circular, that it begs the question of why the visitors are only visitors. Perhaps they would like to become residents too and are not being allowed to do so. But that is an issue I will consider later. For the moment I am just assuming the legitimacy of the state's right to decide which non-citizens will become residents and asking how states should treat those to whom it has granted resident status.

Let's start with some of the areas where residents do generally enjoy the same rights as citizens and see why this arrangement makes moral sense. Consider first the right to seek employment. In any society in which acquiring the means to live depends upon gainful employment, denying access to work to people who reside there is like denying access to life itself. It would be contradictory to allow people to live in a society while denying them the means to do so. For the same reasons, to deny residents the kinds of labour rights that other workers enjoy (e.g., the protections provided by health and safety legislation, the right to join unions, etc.) would be to place them at an unfair disadvantage. I know of no one advocating such a course.

If we consider social insurance programs financed by compulsory deductions from workers' pay (old age pensions, unemployment compensation, compensation for workplace accidents), we can see that it

would hardly be reasonable to require people to pay into these programs and then to deny them access to the benefits they provide. The principle of reciprocity on which such programs are based requires that those who pay should be eligible. (Some programs of this sort have minimum periods of employment that must be fulfilled before one can collect, and, of course, it is appropriate to impose the same limits on non-citizens—but not longer ones.) Again, I don't think this principle is seriously contested even if it is sometimes breached in practice.

**For the vast majority of the rights of membership there is no plausible case to be made for distinguishing between residents and citizens, apart from political rights**

Finally, consider access to general social programs such as publicly-funded education and health care provided to the general population. Of course, different states provide different levels of benefits, but one rarely hears arguments for treating legal permanent residents differently from citizens with regard to these programs. The reason why seems obvious. Residents also pay the taxes that fund these programs. Again, an elementary sense of reciprocity makes it clear that excluding residents from the benefits of such general public expenditure would be unjust.

So, for the vast majority of the rights of membership there is no plausible case to be made for distinguishing between residents and citizens, apart from political rights. The debates come at the margins, mainly around security of residence, access to public employment and access to redistributive social programs. I do not have the space to develop the arguments here, but I have argued elsewhere that during the early stages of settlement it is permissible to limit rights to redistributive benefits and protection against deportation, but the longer people stay in a society, the

stronger their moral claims become (Carens 2002). After a while they pass a threshold that entitles them to virtually the same legal status as citizens, whether they acquire formal citizenship status or not. Restrictions on access to public employment are a form of illegitimate discrimination, except for policy-making or security positions.

#### TEMPORARY WORKERS

May democratic states admit people to work but only for a limited period? If so, what legal rights should these temporary workers have? In my view, democratic states may admit people to work while limiting the duration of their stay and their access to redistributive social programs, but other sorts of restrictions are morally problematic.

In the previous section I asserted that a person's moral claims in a society grow over time. That applies to residence as well. The longer someone stays, the stronger her claim to remain becomes. One implication of that principle is that those who are present for a limited period do not establish a strong claim to remain. So, if a democratic state admits someone to work on a temporary visa and that person has no other moral claim to remain, the state may reasonably require her to leave when her visa expires. However, if the state renews a temporary visa repeatedly, the state is eventually obliged to convert the temporary visa into a permanent one. That follows from the idea that the moral claim to stay grows over time. The European Union has recognized this principle in its recent directive recommending that third country nationals (that is, people from outside the EU) be granted a right of permanent residence if they have been legally residing in an EU state for five years (European Council, 2003).

The arguments for granting temporary workers most of the legal rights that citizens and residents possess are based on the commitment of

democratic states to general human rights, to the principle of reciprocity, and to whatever standards a state establishes as the minimum morally acceptable conditions of employment within its jurisdiction.

As I noted previously, even visitors and tourists enjoy general human rights, such as security of person and property. So, I will just assume that temporary migrant workers are entitled to those rights as well.

What about other rights? Let's distinguish among three general areas: working conditions (which include things like health and safety regulations and laws regarding minimum wages, overtime pay, and paid holidays and vacations), social programs directly tied to workforce participation (which include things like unemployment compensation and compulsory pension plans), and other social programs (which include income-support programs, health care, education, recreation, and anything else the state spends money on for the benefit of the domestic population).

Temporary migrants should enjoy the same rights with respect to working conditions as citizens and permanent residents. The purpose of these rules and regulations is to set the minimum acceptable working conditions within a particular democratic community based on the understanding of what is acceptable that is generated by the community's internal democratic processes. Temporary migrants are working within the state's jurisdiction. Therefore, the policies that regulate working conditions for citizens and permanent residents should apply to them as well.

What about programs tied to workforce participation? When programs are designed as contributory schemes, the injustice of excluding temporary migrant workers from them is especially obvious. It is blatantly unfair to require people to pay into an insurance scheme if they are not eligible for

the benefits. This violates an elementary principle of reciprocity. But the basic principle of including temporary migrant workers in the programs or compensating them for their exclusion does not rest solely on the method by which the program is financed. As long as the rationale of the program is intimately linked to workforce participation, it should include all workers, temporary migrants or not.

Finally, every state provides a wide range of services to those within its territory, including such things as police and fire protection, public education, libraries, recreational facilities, and so on. There is no justification for excluding temporary workers from most of these programs. In practice, the programs from which temporary workers are most likely to be excluded and the ones where the normative justification of the exclusion seem most plausible are programs that are financed by some general tax and that have as their primary goal the transfer of resources from better-off members of the community to worse-off ones. I have in mind things like income-support programs and other programs aimed at poorer members of society such as social housing. I am not suggesting that it would be wrong to include temporary workers in such programs. On the contrary, I think it would be admirable to include them, and some states do. I am simply saying that it is morally permissible to exclude temporary workers from programs that have redistribution as their primary goal. If such programs are not based directly on a contributory principle, excluding recent arrivals from them does not violate the principle of reciprocity. Since the goal of the programs is to support needy members of the community and since the claim to full membership is something that is only gradually acquired, exclusion of recent arrivals does not seem unjust (although it may be ungenerous). Of course, these programs are funded out of general tax revenues and temporary workers also pay taxes, but their claim to participate in a program based on redistributive taxation—taking from better-off members of the community to benefit the less well-off—is not as powerful

as their claim to participate in a program whose benefits are directly tied to the worker's contributions. The moral claims of temporary workers to be able to participate in redistributive programs grow over time, but, as we have seen, so does their claim to permanent, full membership.

#### IRREGULAR MIGRANTS

Now consider immigrants who have settled without authorization, whom I will call irregular migrants. What legal rights, if any, should they have?

Given my initial assumption of the state's right to control immigration, it follows that states are morally entitled to deport irregular migrants if they apprehend them. Nevertheless, I want to claim that irregular migrants should enjoy most of the civil, economic, and social rights that other workers enjoy, and that states should normally create a firewall between the enforcement of immigration laws on the one hand and the protection of the legal rights of irregular migrants on the other so that these rights can be really effective. Furthermore, I argue that over time irregular migrants acquire a moral right to remain and to have their status regularized.

At first blush, it may appear puzzling to suggest that irregular migrants should have any legal rights. Since they are violating the state's law by settling and working without authorization, why should the state be obliged to grant them any legal rights at all? A moment's reflection, however, makes us aware that irregular migrants are entitled to at least some legal rights. Unlike medieval regimes, modern democratic states do not make criminals into outlaws—people entirely outside the pale of the law's protection. Irregular migrants are clearly entitled to the protection of their basic human rights. The right to security of one's person and property is a good example. The police are supposed to protect even irregular migrants from being robbed and killed. People do not forfeit their

right to be secure in their persons and their possessions simply in virtue of being present without authorization. The right to a fair trial and the right to emergency health care are other examples.

The fact that people are legally entitled to certain rights does not mean that they actually are able to make use of those rights. It is a familiar point that irregular migrants are so worried about coming to the attention of the authorities that they are often reluctant to pursue legal protections and remedies to which they are entitled, even when their most basic human rights are at stake. This creates a serious normative problem for democratic states. It makes no moral sense to provide people with purely formal legal rights under conditions that make it impossible for people to exercise those rights effectively.

## **Irregular migrants should enjoy most of the civil, economic, and social rights that other workers enjoy**

What is to be done? There is at least a partial solution to this problem. States can and should build a firewall between immigration law enforcement on the one hand and the protection of basic human rights on the other. We ought to establish as a firm legal principle that no information gathered by those responsible for protecting and realizing basic human rights can be used for immigration enforcement purposes. We ought to guarantee that people will be able to pursue their basic rights without exposing themselves to apprehension and deportation. For example, if irregular migrants are victims of a crime or witnesses to one, they should be able to go to the police, report the crime and serve as witnesses without fear that this will increase the chances of their being apprehended and deported by immigration officials. If they need emergency health care, they should be able to seek help without worrying

that the hospital will disclose their identity to those responsible for enforcing immigration laws.

I cannot develop the details here, but roughly the same pattern of argument applies to many other areas of legal rights. The children of irregular migrants should be entitled to a free and compulsory education in the public schools (because that sort of education should be regarded as a basic human right for anyone living within a society). There should be a firewall between the provision of these educational services and the enforcement of immigration laws. Irregular migrants should be legally entitled to their pay if they work and should be legally entitled to the same rights and protections with regard to working conditions as other workers, because these rights and protections reflect a particular democratic state's minimum standards for acceptable working conditions within its territory. Again, these rights can only be effective if they are backed up by a firewall with respect to immigration enforcement.

## **States can and should build a firewall between immigration law enforcement on the one hand and the protection of basic human rights on the other**

As the list of rights grows, one might ask whether there are any rights that authorized immigrants have to which the unauthorized immigrants are not entitled. Given the initial assumption about the state's right to control its borders, I would say that irregular migrants are not normally morally entitled to receive the benefits of income-support programs, and, of course, they are not morally entitled to stay. Even these constraints are not absolute, however. The longer one stays in a society, the stronger one's claim to membership. That applies even in the case of those who have settled without authorization. When people settle in a country they form connections and attachments that generate strong

moral claims over time. After a while, the conditions of admission become irrelevant.

This recognition of the moral importance of the length of stay, even if unauthorized, is reflected in the practices of many states, both in the granting of general amnesties to unauthorized residents which are almost always limited to those who have already been in the country for an extended period and in the common practice of allowing for exemptions from the normal rules of deportation on compassionate and humanitarian grounds, which in turn are almost always linked to long residence in the country. I do not mean to suggest that everyone accepts this, however. The law almost never recognizes an individual right of unauthorized residents to stay (except occasionally with respect to those who have been present as children). Moreover, many would object to amnesties (whether individual or collective) on the grounds that they reward lawbreaking and encourage more unauthorized immigration. Nevertheless, in my view, long-term settlement does carry moral weight and eventually even provides grounds for a moral right to stay that ought to be recognized in law.

#### NON-DISCRIMINATION IN ADMISSIONS

Let me turn now to questions about who should get in. In what ways, if any, is the state's right to control admissions morally constrained? As with citizenship, people sometimes say that control over immigration is a fundamental feature of sovereignty and self-determination and so cannot be subject to any normative constraints external to the community's will. But no one really believes this if pressed. There is no moral *carte blanche*. One obvious constraint on immigration policies is the principle of non-discrimination. No one today would claim that a democratic state could legitimately bar African and Asian immigrants just because of their racial

or ethnic origins, though this is precisely what Canada, the United States, and Australia did quite openly in the past. To exclude immigrants on the basis of race or ethnicity is a fundamental violation of democratic principles. The same principle applies to religion. There is no possible justification within a democratic framework for excluding people because of their religion. Today, of course, it is Islam that is the focus of exclusion, though religion is often intertwined here with race and ethnicity. Many people in Europe and North America are afraid of Muslims (as in years past they were afraid of Catholics and Jews). Western states know that open discrimination against Muslims is incompatible with their principles, and that is precisely why, if they do seek to exclude Muslim immigrants, they usually try to conceal what they are doing when they restrict such entrants. They do not openly announce these exclusions (as they did in their racially exclusive policies in the past), but find other pretexts and justifications—couched in neutral terms but designed to have particular effects. As the old saying goes, hypocrisy is the tribute that vice pays to virtue.

In addition to not discriminating, there are at least two other important moral limits on the state's right to control immigration and to admit or exclude whomever it wants: family reunification and refugees.

#### FAMILY REUNIFICATION

Democratic states are morally obliged to admit the immediate family members of citizens and residents. It is worth noting first that family reunification is primarily about the moral claims of insiders, not outsiders. The state's obligation to admit immediate family members is derived not so much from the claims of those seeking to enter as the claims of those they seek to join: citizens or residents or others who have been admitted for an extended period. It is not a question here of a cosmopolitan challenge to the

state's control over admissions but rather of the responsibilities of democratic states towards those whom they govern. Democratic states have an obligation to take the vital interests of their own members into account. The whole notion that individual rights set limits to what may be done in the name of the collective rests upon this supposition.

People have a deep and vital interest in being able to live with their immediate family members. No one disputes this. But why must this interest in family life be met by admitting the family members? Could it not be satisfied just as well by the departure of the family member(s) present to join those abroad (assuming that the state where the other family members reside would permit this)? Why is the state obliged to shape its admissions policies to suit the locational preferences of individuals?

The answer to this question is that people also have a deep and vital interest in being able to continue living in a society where they have settled and sunk roots. Of course, people sometimes have good reasons of their own to leave and sometimes face circumstances that require them to make painful choices. (If two people from different countries fall in love, they cannot both live in their home countries and live together.) So, people must be free to leave. But no one should be forced by the state to choose between home and family. Whatever the state's general interest in controlling immigration, that interest cannot plausibly be construed to require a complete ban on the admission of non-citizens, and cannot normally be sufficient to justify restrictions on family reunification. I add the qualifier "normally" because even basic rights are rarely absolute, and the right to family reunification cannot be conceived as absolute. States do not have an obligation to admit people whom they have good reason to regard as a threat to national security, for example, even if they are family members. But the right of people to live with their family clearly sets a moral limit to the state's right simply to set its admissions policy as it

chooses. Some special justification is needed to override the claim to family reunification, not merely the usual calculation of state interests.

Most democratic states acknowledge this principle, and that is a major reason why there has been a significant continuing flow of immigrants into Europe even after European states stopped recruiting guest workers. We now see some European states trying to restrict this right at the margins (e.g., Denmark's raising of the marriage age, the French debate over DNA tests, the Dutch insistence that potential family immigrants pass a test before admission). These restrictions deserve criticism because they conflict with the principle of family reunification, but so far no European state has directly attacked the principle itself, nor could any state do so without abandoning its commitment to democratic principles and human rights.

### **The right of people to live with their family clearly sets a moral limit to the state's right simply to set its admissions policy as it chooses**

Finally, the concept of family reunification raises interesting questions about cultural variation in the definition of family. I cannot pursue those issues here, but let me simply assert the proposition that justice requires that democratic states admit same-sex partners for purposes of family reunification. Some states already do this.

#### REFUGEES

Now consider refugees. For these purposes, let's just define refugees in broad terms as people forced to flee their home countries with no reasonable prospect of returning there in the foreseeable future. They

need new homes. Who should provide those homes? What obligations do we have, if any, to admit refugees?

Let's distinguish first between refugees for whose plight we are responsible and refugees for whose plight we are not responsible. Clearly, we have a moral responsibility to find homes and permanent solutions for refugees who have had to flee their homes because of our actions. Americans—whether supporters or opponents of the war—recognized this in the wake of the Vietnam War and took in hundreds of thousands of refugees from Vietnam, Cambodia, and Laos. Americans have the same sort of obligation towards refugees from Iraq and Afghanistan, especially those who have been forced to flee because their lives are in danger as a result of their cooperation with Americans. This issue should have nothing to do with whether one supports or opposes these wars. It is deep moral failure that Americans have done so little in this regard.

All rich countries have responsibilities for refugee flows that we can already foresee. We should already be starting to think about who ought to take in ecological refugees—people forced to flee their homes because of global warming and the resulting changes in their physical environment. Clearly the rich industrial states bear a major responsibility for the changes that are already taking place. It is our responsibility, not those of geographically-proximate states, to find a place for these people to live. Given the divergence between what justice requires and what serves our interests in this case, I am not optimistic about the likelihood of our meeting our responsibilities, but that is no reason not to acknowledge them in a philosophical inquiry like this one.

Finally, we have obligations to respond to the plight of refugees even when we are not responsible for their situation. The failure of other states to

respond to the plight of Jews fleeing Hitler is one of the great shames of modern history. The Holocaust was an important part of the impetus behind the creation of the modern refugee regime, a regime that promised that no refugee would be turned away, that refugees would be able to find new homes.

Some will object that many people claim to be refugees when they are really just economic migrants, looking for a better life. There is no doubt that some people, even many people, seek refugee status who would not qualify even under a generous interpretation of the provisions of the Geneva Convention or other refugee legislation. It is also the case, however, that the rich industrial states have systematically tried to prevent everyone who might be able to file a plausible refugee claim from coming. All rich states have imposed visa requirements and carrier sanctions that are entirely indiscriminate in their exclusions (Gibney 2006). When people do arrive seeking protection, they are often met with narrow legal interpretations that deny them refugee status even though officials cannot send them back where they came from because they know that they would be in danger. They wind up in limbo for years. This is a profound moral failure, but I confess that the gap between our interests and our moral duties is so great here that I despair of a feasible solution.

#### OPEN BORDERS

Finally, let's reconsider this idea that we are morally entitled to control our borders, an idea that will seem so self-evident to many people that it will appear preposterous to challenge it. Why should borders be open?

Borders have guards and the guards have guns. This is an obvious fact of political life but one that is easily hidden from view—at least from the

view of those of us who are citizens of affluent Western democracies. If we see the guards and guns at all, we find them reassuring because we think of them as there to protect us rather than to keep us out. To Africans in small, leaky vessels seeking to avoid patrol boats while they cross the Mediterranean to southern Europe, or to Mexicans willing to risk death from heat and exposure in the Arizona desert to evade the fences and border patrols, it is quite different. To these people, the borders, guards, and guns are all too apparent, their goal of exclusion all too real. What justifies the use of force against such people? Perhaps borders and guards can be justified as a way of keeping out terrorists, armed invaders, or criminals. But most of those trying to get in are not like that. They are ordinary, peaceful people, seeking only the opportunity to build decent, secure lives for themselves and their families. On what moral grounds can we keep out these sorts of people? What gives anyone the right to point guns at them?

To most people the answer to this question will seem obvious. The power to admit or exclude non-citizens is inherent in sovereignty and essential for any political community. Every state has the legal and moral right to exercise that right in pursuit of its own national interest and of the common good of the members of its community, even if that means denying entry to peaceful, needy foreigners. States may choose to be generous in admitting immigrants, but, in most cases at least, they are under no obligation to do so.

I want to challenge that view. In principle, I argue, borders should generally be open and people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind current citizens in their new country. The argument is strongest when applied to the migration of people from poor, developing countries to Europe and North America, but it applies more generally.

Citizenship in Western democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances. Like feudal birthright privileges, restrictive citizenship is hard to justify when one thinks about it closely. To be born a citizen of an affluent state in Europe or North America is like being born into the nobility (even though most of us belong to the lesser nobility). To be born a citizen of a poor country in Asia or Africa is (for most) like being born into the peasantry in the Middle Ages (even if there are a few rich peasants). In this context, limiting entry to the rich states is a way of protecting a birthright privilege. Reformers in the late Middle Ages objected to the way feudalism restricted freedom, including the freedom of individuals to move from one place to another in search of a better life—a constraint that was crucial to the maintenance of the feudal system. But modern practices of citizenship and state control over borders tie people to the land of their birth almost as effectively. If the feudal practices were wrong, what justifies the modern ones?

My starting point is an assumption of human moral equality, a commitment to the equal moral worth of all human beings. This does not entail the sort of cosmopolitanism that requires every agent to consider the interests of all human beings before acting or that insists that every policy or institution be assessed directly in terms of its effects on all human beings. It does, however, entail a commitment to justification through reason-giving and reflection that does not simply presuppose the validity of conventional moral views or the legitimacy of existing arrangements or our entitlement to what we have.

Freedom of movement is both an important liberty in itself and a prerequisite for other freedoms. So, we should start with a presumption for free migration. Restrictions on migration, like any use of force, need to be defended. Nevertheless, freedom of movement is only one important human interest, and it may conflict with others. There is no

reason to assume that all important human freedoms are fully compatible with one another or with other basic human interests. Restrictions on particular freedoms may sometimes be justified because they will promote liberty overall or because they will promote other important human concerns, but we cannot justify restrictions on the freedom of others simply by saying that the restrictions are good for us. We have to show that they somehow take everyone's legitimate claims into account, that we are not violating our fundamental commitment to equal moral worth.

## **Citizenship in Western democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one's life chances**

A commitment to equal moral worth may not require us to treat people identically in every way, but it does require us to respect basic human freedoms. People should be free to pursue their own projects and to make their own choices about how they live their lives so long as this does not interfere with the legitimate claims of other individuals to do likewise. To enjoy this general sort of freedom, people have to be free to move where they want (subject to the same restraints as others with regard to respect for private property, the use of public property, etc.). The right to go where you want is itself an important human freedom. It is precisely this freedom, and all that this freedom makes possible, that is taken away by imprisonment. Thus conventional immigration controls improperly limit the freedom of non-citizens who are not threatening the basic rights and freedoms of citizens.

A commitment to equal moral worth requires some sort of basic commitment to equal opportunity. Access to social positions should be determined by an individual's actual talents and capacities, not limited on

the basis of arbitrary native characteristics (such as class, race, or sex). But freedom of movement is essential for equality of opportunity. You have to be able to move to where the opportunities are in order to take advantage of them. Again, the conventional pattern of border controls greatly restricts opportunities for potential immigrants.

Finally, a commitment to equal moral worth entails some commitment to the reduction of existing economic, social, and political inequalities, partly as a means of realizing equal freedom and equal opportunity and partly as a desirable end in itself. Freedom of movement would contribute to a reduction of political, social, and economic inequalities. There are millions of people in poor states today who long for the freedom and economic opportunity they could find in Europe and North America. Many of them take great risks to come. If the borders were open, millions more would move. The exclusion of so many poor and desperate people seems hard to justify from a perspective that takes seriously the claims of all individuals as free and equal moral persons.

I have no illusions about the likelihood of rich states actually opening their borders. The primary motivation for this open borders argument is my sense that it is of vital importance to gain a critical perspective on the ways in which our collective choices are constrained, even when we cannot do anything to alter those constraints. Social institutions and practices may be deeply unjust and yet so firmly established that, for all practical purposes, they must be taken as background givens in deciding how to act in the world at a particular moment in time. For example, feudalism and slavery were unjust social arrangements that were deeply entrenched in places in the past. In those contexts, there was no real hope of transcending them in a foreseeable future. Yet criticism was still appropriate.

Even if we have to take such arrangements as givens for purposes of immediate action in a particular context, we should not forget about our

assessment of their fundamental character. Otherwise we wind up legitimating what should only be endured. Of course, most people in democratic states think that their institutions have nothing in common with feudalism and slavery from a normative perspective. The social arrangements of democratic states, they suppose, are just—or nearly so. It is precisely that complacency that the open borders argument is intended to undermine. For I imagine (or at least hope) that in a century or two people will look back upon our world with bafflement or shock in the way we react when we read of Marie Antoinette saying “Let them eat cake.” They will ask themselves how we could have possibly failed to see the deep injustice of a world so starkly divided between haves and have-nots and why we felt so complacent about this division, so unwilling to do what we could to change it.

The argument for open borders provides one way of bringing this deep injustice of the modern world into view. It is only a partial perspective, to be sure, because even if borders were open, that would not address all of the underlying injustices that make people want to move. But it is a useful perspective because our responsibility for keeping people from immigrating is clear and direct whereas our responsibility for poverty and oppression elsewhere often is not as obvious, at least to many people. We have to use overt force to prevent people from moving. We need borders with barriers and guards with guns to keep out people whose only goal is to work hard to build a decent life for themselves and their children. And that is something we could change. At the very least, we could let many more people in. Our refusal to do so is a choice we make, and one that keeps many of them from having a chance at a decent life.

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**>> This chapter discusses the ethical issues raised by immigration to affluent democratic states in Europe and North America. The chapter identifies questions about the following topics: access to citizenship; inclusion; residents; temporary workers; irregular migrants; non-discrimination in admissions; family reunification; refugees; open borders. It explores the answers to these questions that flow from a commitment to democratic principles.**

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