JUSTICE AND AUTHORITY IN IMMIGRATION LAW

COLIN GREY

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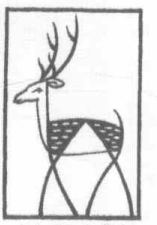

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JUSTICE AND AUTHORITY IN IMMIGRATION LAW

This book provides a new and powerful account of the demands of justice on immigration law and policy. Drawing principally on the work of Adam Smith, Immanuel Kant, and John Rawls, it argues that justice requires states to give priority of admission to the most disadvantaged migrants, and to grant some form of citizenship or non-oppressive status to those migrants who become integrated. It also argues that states must avoid policies of admission and exclusion that can only be implemented through unjust means. It therefore refutes the common misconception that justice places no limits on the discretion of states to control immigration.

To RL

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Introduction

I. Four Predicaments

TO BECOME A migrant is to enter a precarious condition. Migrants uproot themselves. They put themselves at the mercy of their states of destination and transit. Their journeys may test the limits of endurance for privation and inhumanity. And, not always but uncomfortably often, the experience ends badly. This may seem a melodramatic way to begin a work of legal and political philosophy, but the special vulnerability that attends migration is too often ignored in the academic philosophical literature on the subject. Because the most striking migration flows today run from poorer to richer parts of the world—because Americans, Australians, and Europeans are not huddling into boats bound for Haiti, Indonesia, and Libya—the debate over justice in immigration governance is sometimes subsumed within larger discussions of international or global distributive justice. Alternatively, when immigration *is* the primary focus, the literature has largely concentrated on whether and how a right of exclusion or to admission can be justified in principle. While an inquiry into justice in immigration governance must be undertaken against background concerns about international or global justice, and while the possibility of rights of admission or exclusion are clearly important to any such inquiry, we should not overlook the many adverse consequences that the exercise of state power to control immigration may have, whether or not a gun is ever brandished at the border.

The vulnerability of migrants is one of four predicaments an inquiry into justice in immigration governance must confront. The second predicament is that of the states, and their members, doing the governing. Anyone who has studied immigration will have been struck by the recurrent patterns of rhetoric and policy response. To see this, it is enough to compare the waves of American nativism in the nineteenth and early twentieth centuries, chronicled in John Higham's classic work *Strangers in the Land*,[1] to contemporary reactions in countries facing large influxes. To be sure, these anti-immigrant refrains betray more than a measure of alarmism. However, they also reflect the defensible anxiety that, through the introduction of new human beings, immigration may significantly change the societies affected by it, and that such changes will disadvantage some and benefit others. At the limit, and ascending to abstraction, immigration can destabilize a

[1] J Higham, *Strangers in the Land: Patterns of American Nativism* (New York, Atheneum, 1981).

state's political conception of justice. And the alarmism itself is part of this destabilizing dynamic.

Yet despite the potential threat posed by immigration, it is a striking fact that no prosperous liberal constitutional democracy (our concern here) bars immigration outright. There is an important reason for this forbearance. The governance of immigration is an inescapably 'properly public purpose', one that, together with natural reproduction, is one of two ways states have of 'creating, sustaining, and improving' their political conceptions of justice, over time.[2] Like the family, by injecting new cohorts of prospective members, it ensures the 'orderly production and reproduction of society and its culture from one generation to the next'.[3] Immigration, then, is both essential to the ongoing viability of justice within wealthy liberal constitutional democracies and a threat to it. Faced with this tension, such states have concluded that the best policy options are inegalitarian, tending toward admitting the advantaged and imposing greater restrictions on the less advantaged. Such policies run up against prevailing worldwide migration flows. As a result, less advantaged migrants are more likely to suffer adverse consequences—to be arrested and detained; to be exploited, abused, raped, or murdered; to die in deserts of dehydration; to asphyxiate in cargo containers; or to drown or get eaten by sharks at sea. The upshot is a troubling correlation between disadvantage and vulnerability during the migration process.

Political–moral inquiry into immigration governance should focus on whether this form of self-reproduction by states is consistent with social justice. At the very least, we should ask whether social justice has any purchase in this domain. Otherwise, our liberal constitutional democracies may be built on an injustice not of some centuries-old colonial past, but that daily renews itself.

This challenge leads to the last two predicaments, one legal and one methodological, which can be taken up together. Traditional liberal theories have tended implicitly or explicitly to presume bounded communities, despite the fact that the idea of limiting our moral obligations territorially seems antithetical to the core liberal premise of equal moral personhood. And it is well known that John Rawls in particular develops his theory of justice for the basic structure of a well-ordered but closed society, entered only at birth and exited only at death.[4] This is so well known, and so often mentioned, that I feel apologetic for repeating it. However, it will come up again and again in the pages that follow.

Rawls's limitation to his theory resonates in the realm of immigration governance in part because it tracks the foundational legal doctrine of immigration

[2] A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, Harvard University Press, 2009) 26–27.

[3] J Rawls, 'The Idea of Public Reason Revisited' in S Freeman (ed), *Collected Papers* (Cambridge, Harvard University Press, 1999) 595. Walzer makes the same connection between immigration and natural reproduction: M Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York, Basic Books, 1983) 34–35.

[4] J Rawls, *A Theory of Justice*, revised edn (Cambridge, MA, Belknap Press, 1999) 7; J Rawls, *Political Liberalism*, expanded edn (New York, Columbia University Press, 1996) 20; J Rawls, 'The Idea of Public Reason Revisited', above n 3 at 577.

law, under which states enjoy broad discretion over immigration governance. The third, legal predicament that arises in the study of immigration law is how to interpret this discretionary doctrine. At its strongest, it is sometimes interpreted as unfettered, which naturally suggests a corresponding view in political morality according to which justice has no role to play in immigration governance. Henry Sidgwick, in *The Elements of Politics*, calls this kind of political–moral view the 'national ideal' of immigration governance. This ideal holds as follows:

> [T]he right and duty of each government is to promote the interests of a determinate group of human beings, bound together by the tie of a common nationality—with due regard to the rules restraining it from attacking or encroaching on other states—and to consider the expediency of admitting foreigners and their products solely from this point of view.[5]

Views of this kind, which I will throughout call 'absolutist', consider that justice does not constrain immigration governance. Though the ongoing validity of the strong reading of the discretionary legal doctrine is disputed, it is fair to say that states generally continue to govern immigration as though they have an absolute right to exclude any and all migrants based exclusively on some conception of national self-interest. This style of immigration governance, and the corresponding interpretation of the discretionary legal doctrine, would be legitimized if absolutism could be defended.

I will argue that absolutism is implausible. Yet if we are to reject it some method for specifying the principled limits of states' discretion over immigration governance must be arrived at. That is the fourth predicament.

II. Justifying Immigration Policies: Rawls, Kant, and Smith

The vulnerability of migrants, the pressures faced by states governing immigration, and the ambiguous but possibly extraordinarily permissive legal doctrine under which such governance takes place, motivate the two questions asked in this essay: Do obligations of justice toward migrants constrain immigration regimes? If so, what principles of justice apply? With absolutism as foil, I have sought to address these questions by drawing on Rawls's work, together, most importantly, with that of Immanuel Kant and Adam Smith.

The chief advantage of placing Rawls's work at the centre of this inquiry is the rich and systematic way in which, over the course of his writings, he lays out and elaborates his methods of justification. Heavy reliance on Rawls brings the obvious drawback that those inclined against his theory will be inclined against the argument presented here. Perhaps more to the point, objections that tell against

[5] H Sidgwick, *The Elements of Politics* (New York, Cosimo Inc, 2005) 295.

Rawls may tell against my argument.[6] These disadvantages are outweighed, in my judgement, by the benefits. In particular, Rawls's systematicity facilitates the adaptation of his justificatory methods to the problem of justice in immigration governance. Thus, at different points, I examine if and how Rawls's methods of wide reflective equilibrium and constructivism, as well as his idea of public reason, which is not properly called a method, can be applied to the problem of immigration governance. Even if one disputes the validity of these approaches to justification, or the conclusions that they give rise to, their adaptation and application advances the debate over justice in immigration governance by making mistakes clearer and disagreements easier to pursue. This has seemed to me a promising way forward.

The dependence on Rawls does not mean I assume his conception of justice as fairness, with its two well-known principles of justice. I do not need to, so I do not. I do, however, take on a number of Rawls's methodological starting points and guiding ideals. Most important is the liberal ideal, incompatible with absolutism, of reciprocity: the idea that immigration governance can be undertaken, and justified, on terms that do not require migrants to view themselves as subservient, dominated, or worse but instead evince respect for them as free and equal persons (though, crucially, not as free and equal *citizens* or *members* engaged in social cooperation). Further, while the bulk of the argument assumes, more or less, our own, non-ideal world, when I turn at last in Chapter Seven to developing principles for policies of indefinite admission, I assume that the problem is one of establishing principles for the governance of immigration into an ideal, well-ordered liberal society within a non-ideal world. By a well-ordered society, I mean what Rawls means, namely, a domestic society in which members accept, as compatible with their sense of justice, and know that all other members accept in the same way, a reasonable political conception of justice that regulates all major social and political institutions.[7] By a non-ideal world, I mean a world that comprises at least one well-ordered society and a disordered remainder. This configuration of ideal and non-ideal theory allows us to provide guidance for the evaluation and reform of the immigration regimes of wealthy liberal constitutional democracies in today's world of vast global inequalities.[8]

This is not the approach that Rawls himself takes to immigration, which explains why the answer he comes up with is in part unsatisfying. In *The Law of Peoples*, he writes that: 'The problem of immigration ... is eliminated as a serious problem in a realistic utopia.'[9] Here Rawls is concerned only with the ideal part

[6] Joseph Carens avoids such an approach largely for this reason: J Carens, *The Ethics of Immigration* (New York, Oxford University Press, 2013) 298.

[7] J Rawls, E Kelly (ed), *Justice as Fairness: A Restatement* (Cambridge, MA, Belknap Press, 2001) 8–9; Rawls, *Political Liberalism*, above n 4 at 35; Rawls, *Theory*, above n 4 at 397–405.

[8] On this role for ideal theory see Rawls, *Theory*, above n 4 at 215; AJ Simmons, 'Ideal and Nonideal Theory' (2010) 38 *Philosophy & Public Affairs* 5.

[9] J Rawls, *The Law of Peoples* (Cambridge, Harvard University Press, 1999) 9.

of his theory of international justice. He is relying on the contention that what he takes to be the major causes of immigration—persecution, oppression, famine, and population pressure—would not arise in a reasonably just world. Rawls makes only two other vague remarks about immigration governance. Still operating within the realm of the ideal, he suggests that there is 'at least a qualified right to limit immigration'[10] that flows from the need for a state's government to ensure the capacity of its territory to support its members in perpetuity. Members from one state 'cannot make up for their irresponsibility in caring for their land and its natural resources by conquest in war or by migrating into another people's territory without their consent'.[11] When he further extends his ideal theorizing to relations between liberal and non-liberal but 'decent' hierarchical states, he argues that the latter should 'allow and provide assistance for the right of emigration', although he denies that this implies a corresponding 'right to be accepted as an immigrant'.[12] Here treatment of the issue stops. In Rawls's non-ideal international theory, he considers only how to bring so-called outlaw states and burdened societies within the society of well-ordered peoples,[13] but he never considers how immigration should be governed during this period of transition. Since the transitional period is likely to last a long time, this seems like a regrettable omission.

Many who have sought to go beyond Rawls have worked within a framework of debate between closed and open borders, or, between an absolute right to exclude and an absolute right to migration. This framing of the debate, indeed, follows Sidgwick, who thought that if we reject the 'national ideal', the alternative is to embrace the 'cosmopolitan ideal', under which:

> [A state's] business is to maintain order over the particular territory that historical causes have appropriated to it, but not in any way to determine who is to inhabit this territory, or to restrict the enjoyment of its natural advantages to any particular portion of the human race.[14]

There is no reason, though, to suppose immigration governance has only these two extreme alternatives open to it. Instead, I will argue that Rawls is right to say there is a 'qualified right to limit immigration'. This proposition suggests, though it does not follow as a matter of strict logic, a right of immigration of some sort on the part of some migrants. But how do we get to that conclusion? And how can we come to an understanding of either right so that we can assess, first, the absolutist claim and, second, if absolutism turns out to be unsupportable, the scope of just immigration governance? From the perspective of Rawlsian theory, these are 'problems of extension',[15] which require lifting the closed-society presumption.

[10] ibid at 39, fn 48. The 'at least', though, seems to reserve the possibility of a stronger right to limit immigration. Note that Rawls here cites Walzer, who I take to be one of strongest exemplars of philosophical absolutism: Walzer, *Spheres of Justice*, above n 3.

[11] ibid at 39.

[12] ibid at 74 and in fn 14.

[13] ibid at 89–90.

[14] Sidgwick, *Politics*, above n 5 at 295.

[15] Rawls, *Political Liberalism*, above n 4 at 20–21; 244–45.

One important aspect of the closed-society presumption is, of course, that Rawls restricted his initial inquiry to the question of which principles of justice would apply to the major social institutions, or basic structure, of a domestic well-ordered society, proceeding only later to questions of international justice. As important when theorizing justice in immigration, however, the presumption only allows for natural entry and exit, through birth and death. The stipulation that members will live out their entire lives within the well-ordered society plays a crucial part in Rawls's argument for the stability of justice as fairness based on his account of moral psychology within a well-ordered society, as well as his argument for the legitimacy of any reasonable political conception of justice arrived at through public reason.

On Rawls's account, the moral development of members within the society into which they are born explains in part why they develop an allegiance toward the principles of the political conception of justice that regulate the society's basic structure and why they are predisposed to turn to those principles when engaged in debates over political matters. That is, the fact that one has come to maturity within a well-ordered society helps explain how one's developed sense of justice comes to be approximately aligned with the developed sense of justice of other members, with the principles of justice governing the arrangements under which they live, and with the specific institutional rules and policies that implement those principles. Public reason, in turn, supports stability because it represents a commitment on the part of members to debate fundamental matters by recourse to reasonable political conceptions of justice that it is believed other reasonable members could accept and because, when debate is carried out on these terms, political obligations of obedience result. Finally, stability is assured because members know that the legitimate expectations, which they form under the rules of society developed through public reason in accordance with their broadly shared conception of justice, will be honoured. Such knowledge allows them to live purposively, to adopt more or less structured plans of life in keeping with some idea of what would be good for them and those to whom they are attached.

So the stability of the well-ordered society depends, perhaps essentially, on its closed nature. And stability for the right reasons, according to Rawls, is a criterion for assessing any conception of justice. Immigration disrupts this stability because it injects cohorts of would-be members who may unsettle existing members' prior expectations, either because migrants will become rival claimants to certain goods or because the public institutional rules of the basic structure, and perhaps the political conception of justice itself, may change. Moreover, the need to come to a just and authoritative agreement over how to resolve such disruptions is hampered by the fact that immigrants will generally be adults who have progressed through the stages of moral development in other societies. At least upon arrival, they will likely have senses of justice that are not supportive of the stability of the political conception of justice in the receiving state. A mismatch results between the senses of justice of migrants and members, as well as a mismatch between migrants' senses of justice and the political conception of justice of the state to

which they have come. This absence of a shared political conception of justice presents an obstacle to public reason, since it will presumably be harder for each group to argue along lines that the other will find reasonable. Thus when we lift the closed-society presumption, new questions present themselves about how to secure the conditions of stability and authority necessary for a state to be well-ordered. These challenges to stability provide the starting point for grasping the nature of the 'qualifications' of the right states might have to exclude and, by implication, the 'qualified' nature of the right migrants might have to enter.

While Rawls's work allows us to pose these questions, it does not allow us to answer them, at least not without adjustments. Thus, to address the problems of justice in immigration raised, I make several moves that take us beyond Rawls, or at least Rawls as he is conventionally understood.

The argument begins in Part One by framing the problem of justice and authority in immigration governance. First, in Chapter One, drawing on Smith's *Theory of Moral Sentiments*, I go back to a classical understanding of the concept of justice, and, more importantly, injustice, as unjustified injury wrought by human agency. This concept lays the foundation for later argument in several ways. First, it allows me to address a fundamental absolutist challenge, namely that an inquiry into social justice in immigration governance is not intelligible because social justice is a special relationship. The answers to this challenge turn out to be, first, to deny any strong distinction between social and personal justice or injustice and, second, to claim that the inquiry into social justice in immigration governance is intelligible so long as such governance leads to injuries. The inquiry is simply into whether such injuries are justifiable. The second way that the Smithian concept of justice lays the foundation for later argument is that it allows us to understand the problem of authority as the problem of reconciling conflicting views about justice. While I avoid systematic exegesis, I believe this understanding of the relationship between the ideals of justice and authority is faithful to both Rawls and Kant. I end Chapter One with an abstract statement of the problem of justice and authority in immigration governance. Briefly, this problem is to ensure that the injuries imposed by state immigration regimes on migrants are justified in a manner consistent with the justification of the ongoing political inequality, and the various other inequalities grafted onto this political inequality, between the members and non-members of constitutional liberal democracies.

Chapter Two continues the table-setting begun in Chapter One by doing four things. It lists a series of what Rawls calls 'considered judgements' about justice in immigration governance to be employed in later argument. It provides an overview of the structure of immigration law and policy, in particular by introducing the discretionary doctrine that lies at the heart of immigration law. Finally, it attempts to make the abstract statement of the problem of justice in immigration governance more concrete. If the problem of justice and authority in immigration governance in the abstract has to do with the justification of political inequality between members and non-members of constitutional liberal democracies, a

more urgent though contingent problem is to develop principles that allow us to evaluate the inegalitarianism that in practice characterizes the immigration law and policy of such states. Inegalitarianism here refers to a general tendency among constitutional liberal democracies to favour long-term admission of the moneyed, skilled, or otherwise advantaged and to exclude or impose greater restrictions on the less advantaged. A principal aim of this essay is to evaluate the justice of inegalitarianism in immigration governance.

Having framed the inquiry in Part One, Part Two then seeks to answer the first question: Do obligations of justice toward migrants constrain immigration regimes? I argue that they do because unless immigration regimes strive to be just toward migrants, they will have no authority over them. This argument seeks to refute a second version of absolutism, which makes the contrary claim that immigration regimes can have authority even if they do not strive to be just. I cast the debate between these views partly as an interpretive problem focused on the proper reading of the discretionary doctrine introduced in Chapter Two. The interpretive issue is whether this discretion is to be interpreted as absolute or principled.

In Chapter Three I argue that Kant's political philosophy offers us several important resources for tackling the problem of justice and authority in immigration governance. Chiefly, this is because he begins his account of justice with the idea of individuals in the state of nature and develops from this heuristic the postulate of public right, a principle that requires individuals to place themselves under a 'rightful condition', in the standard case to place themselves under the authority of a state, to escape the insecurity brought about by the indeterminacy of justice. The resulting account, first, gives us a justification of the state as guarantor of a political conception of justice, which, second, provides a plausible justification of the political inequality between members and non-members. Such political inequality is justified first by the achievement of an authoritative political conception of justice, which is a good all persons should recognize. But it is further justified by the joint integration of members' senses of justice with the political conception of justice guaranteed by the state which, among other things, gives rise to legitimate expectations which must be respected. The third conclusion yielded by the Kantian account, I argue, is that the postulate of public right extends to the problem of immigration governance. It instructs states to enter a rightful condition with migrants, hence to govern immigration on socially just terms. This Kantian argument is meant to support the claim that the discretionary legal doctrine in immigration governance must be interpreted by officials of a receiving state as being constrained by this duty. I call this the principled account of immigration governance.

I provide two more arguments in Part Two against the absolutist position that immigration regimes can have authority without seeking to comply with the dictates of justice. First, in Chapter Four, I argue that to support the claims to legitimacy of immigration regimes, and to avoid grotesque moral implications, absolutism must give way to some form of principled account. I make this