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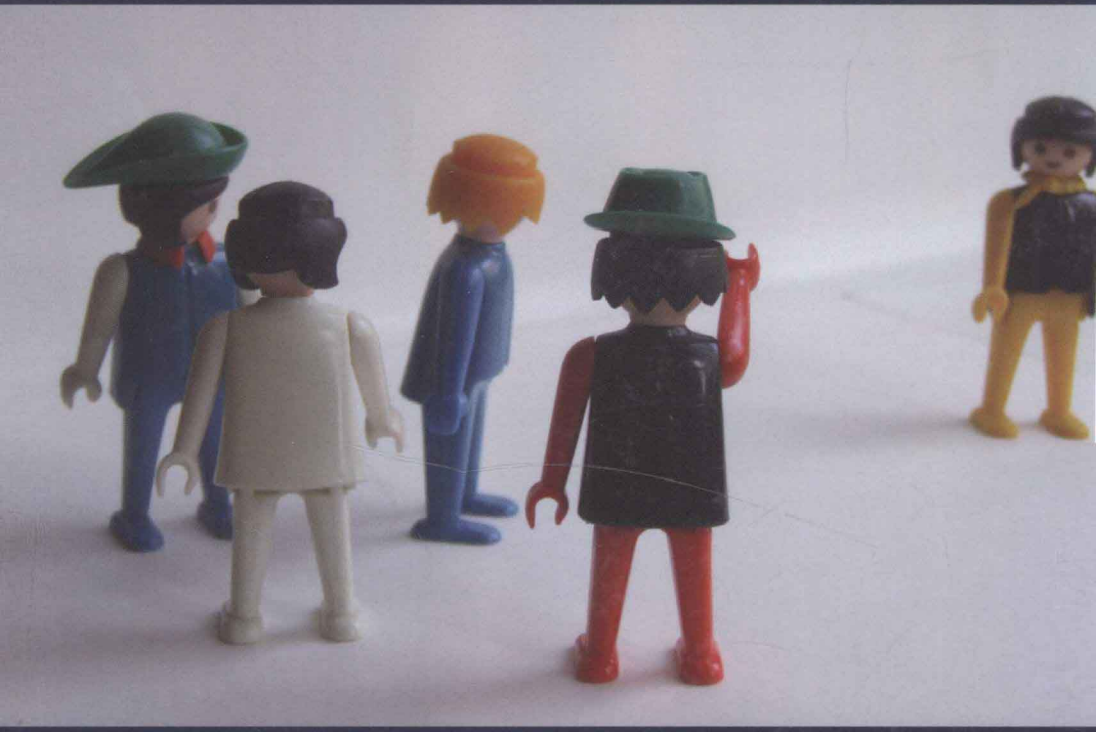
ON THE RIGHT OF EXCLUSION

LAW, ETHICS AND IMMIGRATION POLICY



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On the Right of Exclusion

On the Right of Exclusion: Law, Ethics and Immigration Policy addresses Western immigration policies regarding so-called 'normal migrants', i.e. migrants without a legal right to admission. The book argues that if authorities cannot substantially justify the exclusion of a normal migrant, the latter should be admitted. By contrast, today authorities still believe they may deny normal migrants admission to the territory without giving them proper justification. Bas Schotel challenges this state of affairs and calls for a reversal of the default position in admission laws. The justification should, he argues, involve a serious accounting for the interests and reasons applicable to the normal migrant seeking admission. Furthermore, the first burden of justification should lie with the authorities. To build this case, the book makes three types of argument: legal, ethical and institutional. The legal argument shows that there are no grounds in either sovereignty or the structure of law for current admission practices. Whilst this legal argument accounts for a duty to justify exclusion, the ethical argument shows why the authorities should carry the first burden of justification. Finally, the institutional argument explores how this new position might be implemented. An original, yet practical, undermining of the logic that underlies current immigration laws, *On the Right of Exclusion: Law, Ethics and Immigration Policy* will be essential reading for those with intellectual, political and policy interests in this area.

Bas Schotel is Assistant Professor of Legal Theory at the University of Amsterdam. The book is based on a PhD thesis sponsored by the Vrije Universiteit Brussel.

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It is one thing to write a thesis and defend it publicly. It is quite another to have it published by an international publisher. A few people helped me frame my book

proposal, suggested contacts or simply told me – in advance – never to give up if I was turned down. I should explicitly mention Jo Carens, Phillip Cole, Dora Kostakopoulou, Kees Groenendijk and Thomas Spijkerboer. Special thanks go to Peter Fitzpatrick for encouragement and for introducing my work to Routledge. I was also fortunate to call on the expertise of Marike Schipper when writing my book proposal. The final stage reworked my thesis to a more accessible and shorter book. This was probably the most difficult task of the entire project as it involved killing babies and, worse, discovering many additional weaknesses. My director at the University of Amsterdam, Peter Rijpkema has been of enormous help in ensuring time was allocated to finish the book. The process was monitored by the people at Routledge. I am especially grateful to Colin Perrin and Melanie Fortmann-Brown who seem to understand the delicate balance between patience and pressure.

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The essence of unconditional love and support is that one can take it for granted – because it is *unconditional*. But this is precisely why I do not take it for granted, and I thank Pa, Ma and Lutein for being my family.

As to Nicole, zonder jou was het ook gelukt, maar was ik eenvoudigweg niet zo verliefd en gelukkig.

Contents

Introduction

This book is about immigration policy. It concentrates on what I call normal migrants, i.e. migrants who do not have a legal right to admission. Normal migrants *may* be admitted when beneficial to the receiving country. Yet there is no legal duty to admit them, contrary to migrants with a right to admission (e.g. refugees, family members of a permanent resident). This book starts with the simple observation that today authorities believe they can deny normal migrants admission to a country without giving them proper justification for their exclusion. The central objective of this book is to challenge this current practice and call for a change in admission laws and policies. First, when authorities are denying normal migrants admission they must justify the exclusion *vis-à-vis* the excluded migrant. Second, if the authorities fail to give proper justification to the normal migrant they cannot refuse his admission. Third, in principle it is up to the authorities to come up with the relevant facts and reasons to substantiate their denial of admission. In other words, the authorities carry the first burden of proof. The admission logic is to be reversed. Finally, the adequacy of the justification is to be measured against the yardstick of the proportionality principle, especially the necessity test. The authorities must have shown that the exclusion is necessary to obtain the objectives of the immigration policy and that exclusion was the only and the least burdensome measure available. Ultimately, it should be up to the courts to check whether the exclusion satisfies the necessity test.

Over the years many invaluable critical accounts of immigration policy have appeared, calling for changes and improvements. Though often very intelligent, they did not seem to have any significant impact on concrete policy. What can this book possibly add to the growing body of scholarship? More importantly, why would we expect it to have any impact on policy? I believe that the book may bring three new elements to the table, which might make it more difficult for officials to ignore calls for change. First, virtually every account of immigration policy focuses on the effects or outcomes produced by immigration policy. Accordingly the policies provoke a particular state of affairs or a situation that may be economically inefficient, unethical, inhumane or detrimental to our political community. Conversely, this book concentrates not so much on the outcome

of immigration policies but rather on the way the authorities adopt and administer immigration policy. The key insight is that when authorities deny normal migrants admission to a territory they do so without giving them proper justification. In other words, immigration policy is a matter of exclusion without justification. The novelty is not understanding immigration policy in terms of exclusion; the point is the absence of proper justification.

Second, the book contends that this problem (i.e. exclusion without justification) is fundamentally a *legal* problem. At first glance, it seems preposterous to claim that taking a legal perspective on immigration policy brings anything new to the table. Immigration policy is obviously a matter of law as the policies are laid down in and executed by legal instruments. Furthermore, immigration law has become an area of law in its own right[1] with highly specialized experts and practitioners. Some of these experts have been keen to point out the shortcomings of immigration policies. One of the major deficits of current policy is the lack of effective legal remedies. This means that when normal migrants are denied admission there is virtually no effective way to challenge the denial before an independent court. This issue is closely related to the absence of justification as we will see later. So what is the 'legal' novelty of the book? Though some experts of immigration law are rightly very critical about our immigration policies, they do not contend that there is a problem with the legal *foundations* of current immigration policies. The legal shortcomings may be serious, yet they do not pose a fundamental legal problem. Apparently, the shortcomings just need a small fix, preferably as soon as possible, but the *legality* or the *legal nature* of immigration policies is not really at risk. Consequently, there is no need to look at the legal structure and foundations of immigration policies. The practical effect is that officials who are making and executing immigration policies are put in a comforting position. Immigration policies may be criticized from the perspective of economics, demographics and morality, yet there is nothing *fundamentally* wrong from a legal perspective. There are, of course, some legal shortcomings but no policy is – legally – perfect. Without overestimating the normative and motivational force of the law, it is difficult to deny how important it is for officials to feel backed up by the law. The novelty of my argument lies in the contention that legal shortcomings are not peripheral but are at the core of immigration policies. Immigration policy contains a fundamental legal flaw, which may affect the legality and legal nature of immigration policies. To substantiate this claim we will have to look into an area which has been left virtually untouched by experts of immigration law, public law and legal theory: the legal 'logic' and theory of immigration policy. If this inquiry into the legal foundations of immigration policy is successful, it will bring something genuinely new to the debate. It will make fixing the legal problems really urgent. More importantly it brings the problem to where it really belongs, i.e. the officials. The legal shortcomings are

1 It is difficult to ignore the irony of 'in its *own right*' when it comes to immigration 'law'.

not a mere imperfection of immigration policy. The situation may be much worse for the officials – as long as the legal problems remain, officials cannot assume they are backed up by the law.

Finally, in spite of all its complexity and richness, the current debate too often leaves out the main character: the normal migrant. The different accounts of immigration policy take very diverging views; these may benefit or be detrimental to the position of normal migrants. Still they have one thing in common. They do not make room for the normal migrant's point of view. To put it differently, the debate is between experts (e.g. officials, scholars, NGO's, lawyers, etc.) but does not give a voice to one of its most important stakeholders. Yet various disciplines have pointed out the importance of ensuring the direct involvement of stakeholders, especially laymen (see for example participatory technology assessment; insights from philosophy and sociology of science; alternative dispute resolution; associative democracy). To be clear, I shall not make any representations of the normal migrant's point of view. I will certainly not try to speak on behalf of normal migrants. Rather, the point of the book is to find ways to give the floor to the normal migrant 'directly'. If successful the arguments in this book will show how to give the normal migrant a voice within the institutional framework. Admittedly, this voice will capture only thin fragments of the normal migrant's view because the voice must speak the language of the law. Positive law recognizes only particular arguments, interests and idioms. The normal migrant will be unable to voice many important mental, physical, material, and cultural aspects of his life, because they simply do not fit the legal categories: they are legally irrelevant (e.g. happiness, love). But with all its limitation, this 'legal' voice may turn out to be the only one that the officials will listen to.

In a way the book makes three kinds of claims: legal, ethical and institutional. The first argues that current immigration policies regarding normal migrants are untenable from the legal perspective. The ethical claim contends that there are overriding reasons from (liberal) political theory to change the policies. The institutional claim suggests that a change is institutionally feasible. Chapter 1 starts by framing immigration policy regarding normal migrants in terms of exclusion without justification. It shows how the law sanctions this practice by the 'rule of inherent sovereign power': states have the power inherent in sovereignty to admit or exclude aliens 'as they deem fit'. The greater part of the book then concentrates on rebutting this rule of inherent sovereign power from the legal perspective. Chapter 2 demonstrates that the rule simply does not fit or follow from the normal powers associated with sovereignty. So apparently the rule has an exceptional – legal – status of its own. The strongest[2] argument in this respect is the exclusion

2 I single out the strongest version of theses that account for the alleged special status of the rule of inherent sovereign power and immigration law. Weaker versions already acknowledge that some normative constraints apply to exclusion. As a result they admit that exclusion is not beyond justification.

thesis, which posits that exclusion is prior to and constitutive to any political and legal order. The ultimate and inevitable implication is that exclusion is fundamentally beyond justification – hence, the rule of inherent sovereign power. Chapter 3 draws on elements of Carl Schmitt's legal and political theory, as well as on recent mobilizations of his theory by Giorgio Agamben and Hans Lindahl. Conversely, Chapter 4 seeks to refute the exclusion thesis. It points out the empirical, logical and conceptual flaws in the assumptions underlying the exclusion thesis. It rejects the centrality of exclusion for *founding* an order. Also, it refuses to adopt an exaggerated understanding of legal order as unity and oneness. By contrast it explores a more plausible and practice-based understanding of legal order as multiple connections. Chapter 5 presents another legal argument against the rule of inherent sovereign power. It relies on the general fact that legal authorities claim that their laws should be obeyed. Immigration law is not an exception. However, due to their lack of justification, immigration policies may be so defective that authorities cannot even claim obedience from normal migrants. As they treat normal migrants as *objects* of law (as opposed to subjects – individual agents), immigration laws may cease to count as law with regard to normal migrants.

Chapter 6 concentrates on another aspect of the book's call for a change: the reversal of the burden of justification. While the legal arguments (see Chapters 1–5) show that authorities must justify the exclusion of normal migrants, the law cannot tell us who is first to justify: the authorities or the normal migrant. Allocating the first burden of justification is largely an inquiry into what *in the abstract* is the normal or default position. It asks the question whether in advance and in general the reasons for the admission of normal migrants are stronger than the reasons for their exclusion. Here we will draw on what has become an almost special branch of liberal political theory, i.e. the ethics of migration.

The final part of the book is informed by the notion that 'ought' implies 'can'. Legal and ethical arguments may suggest that authorities *ought* to justify exclusion and carry the burden of proof. Yet authorities must also have the *capacity* to actually perform the justification. The success of my call for a change depends on its feasibility. To this end Chapter 7 explores how this duty to justify can be institutionally embedded. It concentrates on giving a legal voice to the normal migrant through introducing the proportionality test, especially the necessity criterion, in migration policy. This test is an essential feature of public law, but is ignored when it comes to normal migration policy. Using a draft directive proposed by a group of immigration law experts I will show why the necessity test is a promising institutional vehicle for changing immigration policy from within.

Having briefly spelt out what line of argument to expect, it may be helpful to clarify what *not* to expect. This book is not a ticket to a policy of open borders. My account defies the 'traditional' divide between 'strict' versus 'relaxed' admission policies. If the authorities come up with adequate justifications *vis-à-vis* the normal migrant, and on paper there are good grounds for exclusion, then there is no obstacle to his exclusion.

Yet the question is of course whether those good reasons obtain in the context of concrete cases. A lot exclusions today and in the past cannot be properly justified. Consequently, the admission rate under a new immigration policy (where exclusion must be justified) may be significantly higher than under the current regime. However, this is not the same as endorsing an open border policy.

Neither do I argue in favor of a *legal right* to admission or a *fundamental or human right* to free movement. I contend that the authorities (the state) have a legal duty to justify the exclusion. Failure to do so results in the absence of a legal power to prevent the normal migrant from entering the territory. So due to a lack of justification, the normal migrant may end up entering and staying in the territory. Still, the basis for the admission of the normal migrant need not be a human or fundamental right to free movement or admission. To many this is simply wordplay or nerdish legal sophism. What's the difference? Why are we anxiously keeping the fundamental and human rights discourse at bay? People typically consider human and fundamental rights as the quintessential vehicle for emancipation and justice. So framing my case in terms of human rights would be an astute tactic. Yet for several reasons, which will be elaborated in Chapter 7, I do not pursue the human rights route. I believe that the human rights approach will not be productive and politically feasible in the short and medium term. Also, adding another star to the human rights firmament may contribute to inflating the notion of human rights. More importantly, human rights typically turn an issue into an international concern. Now, at its face immigration is by definition an international phenomenon requiring an international response. By contrast, I believe that too much focus on an internationally coordinated response distracts us from what we already ought and can do in a national and regional context.

It is difficult to ignore moral intuition when reflecting on immigration policy. My own thoughts on migration policy were initially driven by moral intuition – probably to do with liberty and distributive justice. The exclusionary nature of immigration policy goes against a deep sense of individual liberty: every man who does not seek to do harm should be able to move freely. Moreover, while clearly arbitrary, one's place of birth is highly significant for one's prosperity. Exclusionary immigration policies prevent people from escaping the poverty of their place of birth and reinforce the unequal distribution of wealth in the world. I believe many people thinking about immigration policy will share these thoughts. In fact, many scholars writing on the ethics of migration or normative theory of migration start from the same place.[3] I will draw on these writings. I will use

3 One of the leading political theorists suggested quite rightly (and not without a touch of drama) that the current exclusion of aliens or rather the denial of free movement is our modern version of bondage; 'Liberals objected to the way feudalism restricted freedom, including freedom of individuals to move from one place to the other. 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?' Joseph H. Carens, 'Migration and morality: A liberal egalitarian perspective' in Brian Barry and Robert E. Goodin (eds), *Free Movement. Ethical Issues in the Transnational Migration of People and Money* (London: Harvester Wheatsheaf, 1992), at 26–7.

insights from the ethics of migration to make a very specific point, namely to shift the burden of proof to the authorities. Yet my argument is ultimately not a moral appeal, but a legal claim.

The public debate (including debates in the pub) about migration policy is informed not only by moral intuition but also by common sense. While an exclusionary immigration policy can be criticized from a moral point of view, common sense points to its inevitability. A viable political community ultimately requires demarcation and exclusion. This reflects a 'deeper logic' that there cannot be an inside without an outside. Moreover, this common-sense view is closely connected to the idea of scarcity. There are obviously not enough resources – in particular welfare benefits – for everyone. By definition, it is impossible not to have an exclusionary immigration policy. Conversely, another – rather pragmatic – strand of common sense urges for more open borders to cope with labor shortages and to compensate for the ageing population. At first glance, these common-sense views have a strong concrete reality and fact-driven appeal. Hence, the appropriate venue from which to address these views are empirically-oriented migration studies (e.g. economics, sociology, public finance, demography); this is clearly beyond the scope of this book. However, empirical migration studies indicate that the data hardly supports the common sense views. This suggests that rather than being concrete and fact driven, common-sense views are more ideological and normative in nature. This book will deal with them accordingly.

As a final clarification I should say something about a new element that entered into the equation of immigration policy: death. It is one thing to consider liberty and the equal distribution of wealth from a moral perspective. It is quite different when some of the main players wash up dead on sunny beaches. Like the human rights discourse, the drama of the dehydrated, undernourished or simply dead bodies of migrants lying on our shores or stuck in containers, should strengthen any case for changing immigration policy. Similarly, the ubiquitous practice of 'controlling' illegal immigrants through fully fledged detention/prison schemes should alert even the most naïve observer to the fact that something may be fundamentally wrong with our immigration policy. These tragedies may be the inevitable symptoms of a deeply flawed practice.[4] Yet I will not play this card. Far from trivializing these horrors or treating them as mere incidents, I do believe they capture only a small portion of the total number of normal migrants. In fact, the large majority of normal migrants seek entry via the conventional access points (e.g. airports, roads, sea ports). Though emotionally very powerful, the argument from human tragedy will not advance the larger problem, which I am trying to address.

In short, this book need not be understood as another liberal or progressive call for a better treatment of migrants seeking admission. 'Progressive' readers hoping for a highly moralistic or revolutionary account will be disappointed. Similarly,

4 See in this respect the pertinent analysis of Thomas Spijkerboer, 'The Human Costs of Border Control', *European Journal of Migration and Law* 9 (2007), 127–39.

conservative readers should not expect a strange thesis that they can easily discard as merely utopian. By contrast, I hope to show in the following pages that there is nothing utopian, radical or even strange about my critique of current immigration policy. In effect, the stranger in our legal order is not so much the normal migrant seeking admission, but exclusion without justification. The quintessential social institutions and normative systems of Western society, i.e. law and political morality, do not constitute an obstacle to the proposed change in immigration policy. On the contrary, law and political theory call for such arrangements. Probably, the book may be understood as an illustration of the broader claim that accounting for the interests of others is not a matter of *idealism* or *heroism*, but something ordinary people do as a matter of their ordinary practices, in the case at hand the practice of law.

Chapter 1

A legal problem

Exclusion without justification

The main concern of this book is that admission policies regarding normal migrants constitute a practice of exclusion without justification. Furthermore, the authorities believe that this practice is sanctioned by law. But are the policies really so exclusionary? Are not authorities constantly providing reasons for their immigration policies? These are legitimate questions and they call for explanations and empirical material. Also, if we want to proceed with our inquiry we should have a precise understanding of *how* the law sanctions this practice of exclusion without justification. In short, before challenging the current state of affairs we should produce the facts showing that there is something to be concerned about in the first place. Accordingly, this chapter provides the empirical material that constitutes the basis of our central concern. First, it explains what we mean by exclusion and justification. Second, probably superfluously, it substantiates the observation that admission policies can be understood in terms of exclusion. Third, this chapter should show that authorities no longer justify the exclusion. This is a more complicated task as it boils down to showing the absence of something. Finally, we will lay bare the mechanics that legally justify this lack of justification under current normal migration policies. Before addressing these items, we should remark on the type, scope and levels of policy we will be discussing. We must identify the playing field for our discussion.

Policies, authorities and migrants

The central contention of the book is that immigration policies constitute a form of exclusion without justification. Conversely, I claim that this practice is untenable from a legal perspective and that the authorities have a duty to justify. But what do we actually mean by policies? And who are the authorities? And why just concentrate on the so-called 'normal' migrants?

Immigration regimes differ hugely from country to country depending on the level of granularity.[1] In the EU, admission regimes are still governed by each

1 On the issue of divergence and convergence of national policies, see for example François Crépeau and Idil Atak, 'Les politiques migratoires au Canada et en Europe: des convergences', in Jean-Yves Carlier (ed.), *L'étranger face au droit. XX^es Journées d'etudes juridiques Jean Dabin* (Brussels: Bruylant, 2010), 319–49.