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## IS DEONTIC EVALUATION CAPABLE OF DOING WHAT IT IS FOR?

*Nathaniel Sharadin and Rob van Someren Greve*

MANY PHILOSOPHERS think the function of deontic evaluation, unlike the functions of other kinds of evaluative judgment, is to guide action. The idea is often put in terms of the *point* of deontic evaluation; guiding action is what deontic evaluation is *for*, or what it *aims* at. To explain: although non-deontic evaluative judgment and its corresponding concepts, such as GOOD and BAD, serve to guide our evaluative thinking about the world, *deontic* evaluation and its corresponding concepts, such as RIGHT, WRONG, and OBLIGATORY, serve to guide our evaluative thinking *in order to guide action*.<sup>1</sup> And it is not supposed to be an accident that deontic evaluation plays this role in our evaluative thought and talk, in the way it is an accident that coffee mugs play the role of holding plants in one's office. (The mugs were handy, the concepts were handy.) Instead, guiding action is precisely what deontic evaluation is in the *business* of doing. Here is Holly Smith:

Can natural events, such as rainstorms or late frosts, be right? No: we say that such events and states can be *good*, but not that they can be *right*. The reason for this is that such entities are not voluntary—they are not the objects of effective *choice*. . . Rightness is reserved for entities, namely acts, that are controllable by choosing agents.<sup>2</sup>

Smith's suggestion is that the objects of deontic evaluation exhibit a certain unity, in that only entities "controllable by choosing agents"—in other words, actions—can properly fall under the concepts of RIGHT, WRONG, or OBLIGATORY.<sup>3</sup> Granting that the objects of deontic evaluation exhibit this unity, we might wonder *why* this is so. Smith, again:

1 We adopt the convention of using small capitals to refer to concepts.

2 Smith, "Moral Realism, Moral Conflict, and Compound Acts," 342.

3 Two remarks: First, there might be entities other than actions that are controllable by choosing agents. For instance, perhaps some range of (propositional) attitudes, or emotions, are controllable by choosing agents. For present purposes, this does not matter. We

The obvious answer is that the criterion for rightness provides the kind of evaluation of choosable events which can form the basis for *guiding* choices with respect to those events. *It is precisely because we need some standard of evaluation to serve this function that we have criteria of rightness in addition to criteria of goodness.*<sup>4</sup>

In a similar context, Eric Wiland makes the same point: “Your actions are . . . under your control, and it is *because* of this that the concepts of RIGHT and WRONG have application” to your actions, and to nothing but your actions.<sup>5</sup> Other philosophers accept similar explanations.<sup>6</sup> It is important to note that these suggestions are not offered as merely possible explanations, but rather as the *best* explanation of why actions are the only thing that can properly be evaluated in deontic terms. If this is indeed the best explanation of the unity exhibited by the objects of deontic evaluation, we can go on to infer that providing guidance with respect to actions is the point or purpose of deontic evaluation, or, as Wiland puts it, “the point of morality.”<sup>7</sup> Going forward, to fix terms, we will say that the *function* of deontic evaluation is to guide action, and we will refer to this claim as “Guidance Function.”

It is possible to object at this point. This argument for Guidance Function looks a lot like walking into someone’s office, noticing that all of their coffee mugs contain house plants, and concluding, on these grounds, that housing plants is the function of coffee mugs. But that is unfair. The coffee mug argument is not suitably general; if you walk into the kitchen, say, you will also see coffee mugs being used to house creamers, sugar, and stirrers, to take up space in the sink, and even, in rare cases, to house coffee. Here, the idea is that the *only* thing we ever discover deontic evaluation being used to do is apply to, and thereby guide, actions (house coffee). Our situation with respect to deontic evaluation is thus meant to be akin to an anthropologist who discovers, of some tribe’s artifact, that members of the tribe only ever use that artifact to dig up roots. It would be reasonable to conclude, on that basis, that the function of the artifact is *digging*

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will focus here on the case of actions. Second, the myriad issues concerning what it takes for an entity to be “controllable” in the relevant sense will not matter to our arguments, so we will ignore them in what follows.

- 4 Smith, “Moral Realism, Moral Conflict, and Compound Acts,” 342–43, second emphasis added.
- 5 Wiland, “How Indirect Can Indirect Utilitarianism Be?” 292; emphasis in original and small capitals added.
- 6 Carlson, “Deliberation, Foreknowledge, and Morality as a Guide to Action”; Bykvist, “Violations of Normative Invariance.”
- 7 Wiland, “How Indirect Can Indirect Utilitarianism Be?” 292.

up roots. Similarly, it is reasonable to conclude that the function of deontic evaluation, given its actual restricted domain of application, is to guide action.<sup>8</sup>

In any case, in this paper we are not interested in fighting over Guidance Function. Let us just suppose it is true. What we are interested in is whether we can put Guidance Function to *work* for us in any interesting ways. To anticipate: we cannot. Here is how the paper goes. In the section 1, we will explain the general form of the argument by means of which philosophers have tried to put Guidance Function to work. There, we will identify a hitherto unrecognized gap in this argument. In section 2, we will examine four arguments intended to fill this gap and argue that none of them work. The interim conclusion is thus that arguments that start from the functional role of deontic deliberation and attempt to generate interesting results are no good. In section 3, we will consider the general prospects for making arguments, of the sort we are interested in here, work. We will sketch a methodology that would do the trick. Unfortunately, as we will explain, although this methodology would bridge the gap in arguments that put claims about the function of deontic evaluation to work, it would do so in a way that vitiates any interest we might have in such arguments. In section 4, we summarize.

#### 1. PUTTING THE FUNCTION OF DEONTIC EVALUATION TO WORK

Suppose, then, that we grant that deontic concepts only apply to actions. And suppose we grant that the best explanation of this fact is that the function of deontic evaluation is to guide action, i.e., Guidance Function. Can we put Guidance Function to work for us? That is: Can we generate interesting, substantive results from the idea that the function of deontic evaluation is to guide action? A range of philosophers think we can. For example, Smith uses this idea to argue that deontic principles must disallow conflicting verdicts on actions.<sup>9</sup> Wiland appeals to this idea in critiquing utilitarianism.<sup>10</sup> It shows up as a premise in Eric Carlson's objection to actualist accounts of moral obligation and in Karl Bykvist's discussion of the principle of normative invariance.<sup>11</sup> David Copp uses Guidance Function (albeit without an appeal to the contrast between deontic and other forms of evaluative judgment) in his defense of

8 We will say more about this issue in section 3.

9 Smith, "Moral Realism, Moral Conflict, and Compound Acts."

10 Wiland, "How Indirect Can Indirect Utilitarianism Be?"

11 Carlson, "Deliberation, Foreknowledge, and Morality as a Guide to Action"; Bykvist, "Violations of Normative Invariance."

“ought implies can.”<sup>12</sup> The details of these arguments and their particular conclusions will not interest us here. Instead, we will sketch the general form of the argument used to put Guidance Function to work. We will then point out a hitherto unrecognized gap in the argument that renders it invalid as it stands. After that, we will consider the prospects for filling the gap. But first, the argument.

The general form of the argument putting the function of deontic evaluation to work is simple; it goes like this:

1. The function of deontic evaluation is to guide action (Guidance Function).
2. If deontic concepts have feature *X*, then deontic evaluation would not be able to guide action (Disabling Condition).
3. So, it is not the case that deontic concepts have feature *X* (Substantive Result).

The idea is to move from a claim about the function of deontic evaluation (Guidance Function) to a substantive conclusion about the nature of deontic concepts (Substantive Result) by way of a particular claim about what would block deontic evaluation from functioning (Disabling Condition). In other words, we can generate substantive results about the nature of deontic concepts by reflecting on what would, or would not, allow deontic evaluation to function. In particular, features of deontic concepts that would rob them of their ability to guide action are ruled out as impossible features of our deontic concepts. Smith puts the point nicely, saying that while “criteria of goodness may have structural features that disable them for this job [i.e., guiding action], criteria of rightness must be free of such disabilities.”<sup>13</sup>

Although we will not be interested in arguing over the details of particular instances of this argument schema, and instead will focus attention on the schema itself, it is worth seeing what an application of it looks like in a particular case. Smith’s version of 2 is:

12 Copp, “‘Ought’ Implies ‘Can,’ Blameworthiness, and the Principle of Alternate Possibilities.” Other philosophers have made related claims and attempted to put them to use. Our argument here is focused on the claim in the case of deontic evaluation, and though we believe a parallel argument would work against these attempts to put such broader claims to use, exploring this issue is mostly beyond the scope of this paper. But see note 30 below. For cases of similar claims about the “point” of morality, see Hudson, “Subjectivization in Ethics”; Pritchard, “Duty and Ignorance of Fact”; Jackson, “Decision-Theoretic Consequentialism and the Nearest and Dearest Objection”; Mason, “Consequentialism and the ‘Ought Implies Can’ Principle”; Wallace, “‘Ought,’ Reasons, and Vice”; Ross, “Foundations of Ethics,” esp. ch. 7.

13 Smith, “Moral Realism, Moral Conflict, and Compound Acts,” 343.



- 2S. If the concepts RIGHT and WRONG ever apply to the same action, then deontic evaluation would not be able to function.

So, from (Guidance Function) and 2S, Smith concludes:

- 3S. It is not the case that the concepts RIGHT and WRONG ever apply to the same choosable event.

Note that 3S is a substantive, first-order normative result: it tells us that deontic principles that yield conflicting results about the same action are incorrect.<sup>14</sup>

It should be clear how to generate other substantive results concerning the nature of deontic concepts using this argument schema. One simply identifies some feature of deontic concepts that would plausibly block deontic evaluation from being able to function and proceeds accordingly. This, in effect, is what Carlson, Bykvist, and Wiland each does.<sup>15</sup>

So that is the recipe for getting from Guidance Function to substantive conclusions about the nature of deontic concepts. How successful is the argument? Here, as we have said, we are not interested in whether Guidance Function is true. As we suggested in the previous section, a range of philosophers have thought that its truth is the best explanation of why deontic concepts only apply to actions. This seems plausible and, in any case, for present purposes, we are happy to grant Guidance Function. What about Disabling Condition? Whether any particular instance of Disabling Condition is true will be a complicated matter. For example, in Smith's version of the argument, we might challenge the idea that an action's falling under the concepts WRONG and RIGHT really blocks deontic evaluation from guiding action. But, again, this certainly seems plausible. And in any case, we are happy to grant any particular instance of Disabling

14 Smith's argument is explicitly directed at the act-utilitarian principle proposed by Tännsjö, "Moral Conflict and Moral Realism." The problem for act utilitarianism that occupies Tännsjö and Smith was first noted by Castañeda, "A Problem for Utilitarianism."

15 For present purposes, it does not matter what particular conclusions Carlson, Bykvist, and Wiland each draw from arguments of this form. But for the record: Wiland is the only author of these three who endorses the conclusion of the resulting argument. Both Carlson and Bykvist reject the respective conclusions they consider, but they do so for other reasons than those canvassed in what follows—both of them instead focus on what it takes for deontic evaluation to be capable of guiding choice. The important point here is that, as we are going to argue, the argument schema they use to reach the relevant conclusions (that they go on to reject) is invalid. So our argument is of interest in evaluating Carlson's and Bykvist's positions, since they assume the argument is valid, but it is not (or so we will argue). Hence if we are right, Carlson and Bykvist might be happy with the result, while Wiland, who endorses the conclusion of the argument, might not.

Condition for present purposes. What we want to focus on instead is the move from Guidance Function and Disabling Condition to Substantive Result.

Notice that for the move from Guidance Function and Disabling Condition to Substantive Result in *any* case to be defensible, the following must be true:

*Capable*: Deontic evaluation is capable of guiding action.

Capable is the gap in the argument alluded to above. It should be clear why Capable must be true in order for the move from Guidance Function and Disabling Condition to Substantive Result to be valid. After all, we can only validly infer that whatever features would prevent deontic evaluation from functioning do not obtain only if we are certain that deontic evaluation really *is* capable of functioning, i.e., guiding action. Otherwise, we might just as well conclude, in lieu of Substantive Result, that, however unfortunate it might be to discover, deontic evaluation is not capable of functioning. So, without Capable, the argument from Guidance Function to Substantive Result appears to be toothless. It might well be the case that deontic evaluation would not be able to function if this or that were the case. But we have no reason to think these things are not the case unless we also think that deontic evaluation is capable of functioning.

Despite being crucial to the success of the argument, Capable is not defended either by Smith or by any of the others who offer arguments along the same lines.<sup>16</sup> In fact, Capable is not even made explicit in their presentations of the argument. Hence, there is an unfilled gap in arguments that move from claims about the function of deontic evaluation to substantive claims about the nature of deontic concepts. In the next section, we will examine the prospects of four arguments intended to fill this gap. Before that, let us make two quick remarks.

First, you might, of course, have a range of worries with arguments such as 1–3. For instance, Hughes has argued that, due to failures of luminosity, there will necessarily be cases in which deontic concepts fail to guide action.<sup>17</sup> One way to understand Hughes's point is as an argument, based on a luminosity condition on agential guidance, against an epistemically unrestricted version of Capable. In other words, Hughes argues—and we agree—that if the idea is that deontic evaluation is capable of providing guidance *whatever the epistemic state of the agent*, then this idea is false. And hence this idea cannot be used in argu-

16 In recent work, Smith has explored what the requirement that an acceptable moral principle be capable of providing guidance amounts to; see Smith, "Using Moral Principles to Guide Decisions." Note that, as Smith herself is quick to point out, offering an account of what providing guidance would amount to is not at all the same thing as moving from a claim that the point of deontic evaluation is to provide such guidance to the claim that is capable of doing so.

17 Hughes, "Luminosity Failure, Normative Guidance and the Principle 'Ought-Implies-Can.'"

ments to substantive results such as that “ought implies can.” In what follows, we will assume we are dealing with some restricted version of Capable, e.g., deontic evaluation is (subject to certain epistemic conditions on the agent) capable of guiding action. What we will argue is that we do not have any reason to accept Capable *even so restricted*.

Second, you might think that, although philosophers do sometimes talk of the point, purpose, or function of deontic evaluation and also talk of our deontic evaluations guiding our action, we should not take such talk too seriously. Such talk is meant to be taken figuratively or metaphorically. Thus, it is a bit strange to try and formalize such arguments and assess their soundness without first explaining how we should interpret this figurative language. Surely (the thought continues) someone like Smith does not think either that deontic evaluation has a purpose in the sense of, say, having been created for the sake of some end or that deontic evaluations guide us in anything like the way that a guide dog directs the actions of its blind owner. So before we can assess an argument such as Smith’s argument against conflicting oughts, we need to figure out what she means by any such metaphorical language. And once we do *that*, Capable will drop out of the picture.

For instance, here is a suggestion for how we might seek to eliminate such imprecise and metaphorical language when it comes to arguing against conflicting oughts:

1. The concept of ought is such that, for any subject *S* and any act *X* available to her, if *S* believes that she ought to *X*, then she is rationally required to intend to *X*.<sup>18</sup>
2. If the concept of ought were such that it is possible both that a subject ought to  $\phi$  and that that same subject ought to refrain from  $\phi$ -ing, then the concept of ought would not be such that, for any subject *S* and any act *X* available to her, if *S* believes that she ought to *X*, then she is rationally required to intend to *X*.
3. Therefore, the concept of ought is not such that it is possible both that a subject ought to  $\phi$  and that that same subject ought to refrain from  $\phi$ -ing.

Note that this argument is valid. There is no suppressed premise as with the other argument. And thus there is no need to defend Capable or any other suppressed premise. Why not go this route?

We have no problem with taking this route. (Or rather, we do not have the same problems.) But that is not the route Smith and others take. What they do

18 This is roughly Broome’s Enkratic Requirement (*Rationality through Reasoning*, 170).

is start with what is supposed to be an *uncontroversial* claim about the function of some area of our thought and talk, point to cases that are supposed to convince us that this function is part of what distinguishes this area of our thought and talk from other, closely related areas (such as “merely” evaluative discourse involving concepts such as GOOD and BAD), and then argue *from* this uncontroversial claim about function *to* a controversial substantive claim. Above, in the suggested revision, we have an argument that starts with a *controversial* claim regarding what agents are rationally required to intend on the basis of their beliefs about the deontic status of things and ends with a controversial claim regarding a deontic concept. In principle, this way of arguing that the deontic concept OUGHT precludes conflict strikes us as perfectly fine. (Though again, there are plenty of worries one might have.) But if this is the (sort of) argument Smith and others mean to make, why mention the function of deontic evaluation *at all*? It is *completely irrelevant* to the argument just adduced. But it is manifestly *not* irrelevant to the arguments Smith and others give: the function of deontic evaluation plays a crucial role as a premise in those arguments. Hence in evaluating the soundness of *those* arguments, it is fair to see whether we can provide some defense of the suppressed premise Capable. In the next section, we will consider four such attempts to defend Capable.

## 2. DEFENDING CAPABLE

### 2.1. *The Platitude Argument*

The platitude argument for Capable appeals to platitudes about deontic concepts. The argument will look slightly different depending on the deontic concept in question; here, we will focus on the platitude argument in the case of the deontic concept RIGHT. Nothing crucial hangs on focusing on RIGHT: similar remarks apply, *mutatis mutandis*, to other deontic concepts.

The argument starts with the idea that it is a platitude about the property *rightness* that it is capable of guiding action. Thinking of an action that it is right, the idea goes, tends to motivate an agent, *ceteris paribus*, to choose that action in her deliberation about what to do. If this is correct (and we are happy to grant that it is), then it is a correspondingly platitudinous truth about the deontic concept RIGHT that it too is capable of guiding action. This is because thinking of an action that it instantiates the property *rightness* involves thinking of the action that the deontic concept RIGHT correctly applies to it. So, the argument concludes, it is a platitude about deontic evaluation that is capable of providing guidance with respect to actions. After all, platitudinously, thinking of some

action that it is right can guide one, thinking of an action this way is a matter of applying a deontic concept (RIGHT) to it, and applying our deontic concepts just is what deontic evaluation amounts to. In other words, the evidence that deontic evaluation is capable of guiding action just is that, as matter of evident fact, it regularly does so.

For the sake of argument, we will grant the purported connection between thinking of something in terms of its deontic properties and thinking of that thing in terms of deontic concepts. The problem with this argument is that it equivocates on the notion of “guidance” between several different notions. On some notions, while it is platitudinously true that deontic concepts are capable of (this sort of) guidance, that is not the (sort of) guidance deontic concepts are required by the argument schema 1–3 to be capable of providing. Hence the argument fails. On other notions, while this might well be the (sort of) guidance deontic concepts are required by the argument schema 1–3 to be capable of providing, it is certainly not platitudinously true that deontic concepts are capable of providing that (sort of) guidance. Hence, again, the argument fails. Let us explain in detail. We can start by distinguishing two senses of “guidance.”

First, take the notion of *actual guidance*. A concept is capable of *actually guiding* when an agent’s thinking about something in terms of that concept helps settle, for the agent, what they shall do in the sense that it helps determine the agent’s answer to the question “What ought I to do?” and (at least in part) motivates the agent toward doing that thing. Now, in this sense, as we have already seen, it is platitudinous that deontic concepts are capable of guiding—that is, *actually guiding*—action. Typically, when agents think of some action that it is RIGHT, or OBLIGATORY, this helps settle for them what they shall do, and they are—again, typically—motivated at least in part to do that thing. Similar remarks go for WRONG and other deontic concepts. More on this in just a moment.

Second, take the notion of *correct guidance*. A concept is capable of *correctly guiding* when an agent’s thinking about something in terms of that concept helps *correctly settle*, for the agent, what they shall do in the sense that it helps determine the agent’s answer to the question “What ought I to do?” *correctly* and (at least in part) motivates the agent toward doing that thing. Now, in this sense, as we are about to explain, it is *not at all* platitudinous that deontic concepts are capable of guiding—that is, *correctly guiding*—action.

This is because deontic concepts are capable of *correctly* guiding action only if the actions to which they are *actually* capable of guiding agents in fact possess the properties they ascribe to them. But it is manifestly not a platitude that the actions to which deontic concepts ascribe deontic properties in fact possess those properties. To see this quite clearly, notice that *deontic error theory*—or,

more generally and familiarly, *moral error theory*—is not platitudinously false. According to moral error theory, moral properties—including deontic properties—such as *rightness* and *wrongness* do not exist, and we systematically err when attempting to think and speak about them by, e.g., using deontic concepts such as *RIGHT* and *WRONG*. To be clear, we are not here arguing that moral error theory is *true*. What we are pointing out, and what is important in the present context, is that it is not a *platitude* that moral error theory is false. Since it is not a platitude that moral error theory is false, by the same token it cannot be a platitude that deontic concepts are capable of *correctly guiding*, since deontic concepts can only correctly guide on the condition that moral error theory is false.

So, it is a platitude that deontic concepts can *actually* guide agents' actions, and it is not a platitude that deontic concepts can *correctly* guide agents' actions. Obviously, we want to avoid equivocation in our argument; hence if the platitude argument in favor of Capable is to be successful, it must be that the sense of "guidance" in the entire argument schema 1–3 is *actual*—and not *correct*—guidance. Unfortunately, that cannot be right. The sense of "guidance" intended in the argument schema 1–3 must be *correct* guidance. Actual guidance is too weak a notion to do the work assigned to the idea of guidance in arguments such as 1–3. Very briefly—more on this below—this is because interpreting "guidance" as "actual guidance" robs arguments such as 1–3 of any substantive interest. It is therefore neither here nor there to point out that deontic concepts are (platitudinously) capable of *actual* guidance; what is required is a defense of the claim that they are capable of *correct* guidance. And as we just saw, it is *not* a platitude that deontic concepts are capable of correct guidance.

To see why interpreting "guidance" in Capable as "actual guidance" robs arguments such as 1–3 of any substantive interest, consider what happens to the schema in which Capable figures, and which Smith and others deploy in order to drive out substantive results regarding the nature of deontic concepts, when we interpret "guidance" as "actual guidance":

1. The function of deontic evaluation is to guide action (Guidance Function).
2. If deontic concepts have feature *X*, then deontic evaluation would not be able to guide action (Disabling Condition).
3. So, it is not the case that deontic concepts have feature *X* (Substantive Result).

Our argument in this paper is that Capable is a suppressed premise without which this argument schema is invalid. In our view, the argument including Capable is valid but, as we are now busy showing, we have no independent reason

to accept Capable. The present suggestion, on behalf of the platitude argument, is that we interpret “guidance” in 1 and Capable as “actual guidance.” Our view is that, understood in this way, we might have reason to accept Capable, and so to accept the arguments in which it figures, but doing so would either make the corresponding instances of Disabling Condition *far* less plausible, or would make any true instances of Disabling Condition *far* less interesting. We will explain.

First, notice that particular instances of Disabling Condition are far less plausible when “guidance” is read as “actual guidance” rather than “correct guidance.” Recall Smith’s version of Disabling Condition:

- 2S. If the concepts RIGHT and WRONG ever apply to the same action, then deontic evaluation would not be able to guide action.

While 2S has some plausibility if the point of deontic evaluation is to *correctly* guide action, it lacks any such plausibility if the point of deontic evaluation is simply to *actually* guide action. For suppose the point of deontic evaluation is simply to actually guide agents with respect to what actions to perform. And suppose deontic evaluation is capable of doing so. Why should we think that the fact that the concepts WRONG and RIGHT apply to the same action would somehow interfere with this capacity? At most what is true is that *thinking* these two concepts apply to the same action would make it more difficult in practice—though not at all *impossible* in practice—for deontic evaluation to actually guide action. To explain: the fact that the concepts WRONG and RIGHT might sometimes apply to the same action does not show that deontic evaluation is incapable of guiding action. Notice that an agent’s ability to *actually* be guided by deontic evaluation in her action is not even affected by the fact that these two concepts apply to the same action unless, as a matter of fact, she thinks both concepts apply. And while it might well be true that on thinking correctly that both concepts apply to the same action an agent is incapable of being *correctly* guided by her deontic evaluation (after all, that evaluation cannot correctly settle for her what to do), it is not true that on thinking correctly that both concepts apply to the same event an agent is incapable of being *actually* guided by her deontic evaluation.<sup>19</sup> At worst what will happen is that the agent will find herself being actually guided toward the action (since it is right) and actually guided away from it (since it is wrong), with the result that, in the end, she will either perform it or not. What-

19 This fact, that an agent cannot be *correctly* guided when both concepts apply is, in effect, what Smith argues for in support of 2S. Thus we think it is correct and not merely actual guidance she means to appeal to. See Smith, “Moral Realism, Moral Conflict, and Compound Acts,” esp. 342–43.



ever she does, as a matter of fact *she will have been actually guided*.<sup>20</sup> In short, the point is that deontic evaluation's being capable of actual guidance does not at all preclude, in the way that its being capable of correct guidance intuitively does preclude, the sort of deontic conflict identified in premises like 2s.

The second, related, problem is that it is not clear that there is *any* interesting instance of 2 that is true when "guidance" is interpreted as "actual guidance." This is because a kind of evaluation's being capable of actually providing guidance with respect to choosable events is an astonishingly weak requirement, one that does not plausibly put any interesting restrictions on the nature of the concepts involved in that kind of evaluation. To see this, notice that in order for a kind of evaluation to be capable of actually providing guidance with respect to actions, all that is required is that the concepts employed in that kind of evaluation must be capable of being thought by agents who deploy those concepts to bear on whether or not to perform certain actions. Non-deontic evaluative concepts such as GOOD and BAD meet this requirement with ease. So too do astrological concepts, such as TAUREAN. Of course, such concepts might have "structural features" that disable them from *correctly* guiding action.<sup>21</sup> But in the present context this is irrelevant. So long as the concepts are capable of being taken by the agent to bear on the choice between actions, this is enough for those concepts to be actually capable of guiding such choices. We cannot learn anything interesting about the features, structural or otherwise, that these concepts have simply by reflecting on the fact that they are in the business of *actually* guiding action.

To drive home the point, compare a platitude argument for the astrological version of Capable:

*Astrology-Capable*: Astrological evaluation is capable of guiding action.

It is a platitude about the property *being born between April 21 and May 21* that it is capable of guiding action. For example, thinking of oneself that one is born on April 30, if one believes in astrology, tends to motivate one to choose certain actions in one's deliberation about what to do. If this is correct (and we are happy to grant that it is), then it is a correspondingly platitudinous truth about the astrological concept TAUREAN that it too is capable of guiding action. This is because thinking of oneself that one instantiates the property *being born between April 21 and May 21* just is thinking of oneself that the astrological concept TAUREAN applies to one. So, the argument concludes, it is a platitude about astrological evaluation that it is capable of guiding action. After all, platitudinously, thinking

20 It does not help to assume that the agent can do nothing, for doing nothing will in a situation like this have a deontic status.

21 See Smith, "Moral Realism, Moral Conflict, and Compound Acts."



of oneself that one is born between April 21 and May 21 can guide action, thinking of oneself in this way is a matter of applying an astrological concept (TAUREAN) to oneself, and applying astrological concepts just is what astrological evaluation amounts to. In other words, the evidence that astrological evaluation is capable of guiding action just is that, as a matter of evident fact, unfortunately, it regularly does so.

Of course, since (we hope) we are all error theorists about astrology, this not only does not amount to an argument for the claim that astrological concepts are capable of *correct* guidance, we in fact know that astrological concepts are *not* capable of this sort of guidance. In any case, we cannot infer from the fact that a kind of evaluation (and the concepts it involves) provides guidance of the first sort—the sort involved in *actually* guiding our actions—to the fact that it provides guidance of the second sort—the sort involved in *correctly* guiding our actions. And Capable, in the sense needed for arguments of the form above, from Guidance Function to Substantive Result via Disabling Condition, to be valid and to deliver interesting results is a claim about the ability of deontic evaluation to provide guidance of the second sort: it is the claim that deontic evaluation can correctly guide our actions.<sup>22</sup>

The upshot is this: interpreting “guidance” as “actual guidance” robs arguments from Guidance Function to Substantive Result of any interest. For there do not appear to be any interesting features that concepts must have above and beyond being able to be taken by agents to bear on the choiceworthiness of an action—an incredibly low bar to clear, as we have seen—in order to be capable of actually, as opposed to correctly, guiding action. And so, since there will be no true interesting instances of Disabling Condition, when “guidance” is read as “actual guidance,” arguments from Guidance Function via such Disabling Conditions to Substantive Results will either be unsound or uninteresting. Since proponents of these arguments certainly do not mean for such arguments to be unsound or uninteresting in this way, we think it is most charitable to interpret them as understanding “guidance” as “correct guidance.” But, as we have already discussed, if we understand “guidance” as “correct guidance,” then the platitude argument in favor of Capable does not go through. For, again, it is not a platitude that deontic evaluation can provide correct guidance; this is so even while we should admit that, like astrological evaluation, it is capable of providing actual guidance. We conclude, therefore, that the platitude argument for Capable fails.<sup>23</sup>

22 As we understand things, proponents of astrology also mean for Astrology-Capable to be taken in this second sense, the difference being that this is easily demonstrably false in the case of astrology.

23 Thanks to an anonymous referee for comments on this section.

## 2.2. *The Platitude Argument for Real(ists)*

We just argued that the only interesting version of Capable in the present context, where the relevant notion of guidance is understood as *correct* guidance, is not platitudinously true. In effect, our argument was that there are clearly those—for instance, error theorists and (some) anti-realists—who do not accept this claim. Since it is not a platitude that (say) error theory is false, and since the truth of Capable would entail that error theory is false, Capable cannot be platitudinously true. But you might worry that this argument, even assuming it works, misses the mark.<sup>24</sup> This is because the target of this paper is those who are inclined to make arguments such as 1–3. But (the thought goes) anyone inclined to make an argument such as 1–3 already thinks that there *really are* deontic properties (in contrast to the error theorist). Thus our argument that it is not platitudinous that deontic evaluation is actually capable of correctly guiding action that relies on the fact that it is not platitudinous that such properties *exist* is illicit. This is because, in the context of arguments over the function, purpose, or point of deontic evaluation, proponents of arguments such as 1–3—the very arguments that rely on Capable—are within their rights to assume that deontic properties exist. And if they are within their rights to assume that these properties exist, then pointing out that it is not platitudinous that they can correctly guide by way of pointing out that it is not platitudinous that they exist will be a bit of a non sequitur.

So, the worry is that our argument now fails to find a target. In particular, metaethical *realists* are supposed to be the sorts of creatures who go about using arguments such as 1–3. And they use arguments such as 1–3 in the context of arguing with *other realists* over the nature and shape of deontic properties (and concepts). And in that context, it is perfectly platitudinous to say that

*Correct Capable*: Deontic evaluation is actually capable of correctly guiding action.

That is true even if, when arguing with (say) anti-realists, it is *not* platitudinous to say such a thing.

What to do? First, it is important to recall the context in which Correct Capable is being put to use. It is the elided premise in arguments that have the form:

1. The function of deontic evaluation is to guide action (Guidance Function).

<sup>24</sup> Thanks to an anonymous referee for pressing this point and for encouraging us to be clear about how the platitude argument works in the case of realists.

2. If deontic concepts have feature *X*, then deontic evaluation would not be able to guide action (Disabling Condition).
3. So, it is not the case that deontic concepts have feature *X* (Substantive Result).

As discussed earlier in the paper (section 1), arguments such as 1–3 are invalid without Correct Capable. Without Correct Capable, we are not licensed to infer anything about the nature of deontic properties or concepts from noticing that this-or-that feature (say, yielding conflicting verdicts) would disable them from actually correctly guiding action. We might just as well conclude, unhappily perhaps, that Correct Capable is false: that deontic concepts cannot actually correctly guide action. What we are now in the business of litigating is whether Correct Capable is platitudinously true (and so not apt for falsification in this way). The present suggestion is that for everyone interested in using arguments such as 1–3, Correct Capable is platitudinously true. So, the relevant question becomes: for whom is Correct Capable platitudinously true? Let us divide parties to the dispute into realists and anti-realists. As we showed in section 2.1, it is obvious that for (at least most) anti-realists, Correct Capable is not platitudinously true (since, after all, it is not even true).

Is Correct Capable platitudinously true among realists? Notice, this question is *not* the same as the question, “Do realists take Correct Capable for granted in presenting arguments such as 1–3?” The answer to *that* question is yes. But that is neither here nor there in the present context. This point is crucial: of course, we are perfectly willing to admit that plenty of realists take Correct Capable for granted in presenting arguments such as 1–3; in effect, the point of this paper is to argue that they do so only *illicitly*. Since (as we are now busy arguing) we have not been given a reason to think that Correct Capable is (platitudinously) true, realists are not actually licensed to take Correct Capable for granted in whatever their particular versions of the argument schema 1–3 are.

One quick qualification: in section 3, we suggest that there is *one* group of realists who *are* licensed to take something like Correct Capable for granted in presenting “arguments” (really, pseudo-arguments) such as 1–3. These are those realists who embrace the pragmatist, or functionalist, methodology according to which the nature of deontic concepts can be simply read off the function of those concepts. On that view, as we explain in detail later, there is no gap between discovering of a concept that its function is thus-and-so and the question of whether the concept can fulfill its function. Very briefly, this is because on the functionalist or pragmatist view the concepts are simply *defined* as those that are capable of playing the relevant role, of fulfilling the relevant function. But as we

explain, these pragmatist realists are not those who offer arguments such as 1–3. And that is not surprising. This is because such arguments lose any substantive interest if one is a pragmatist: they are really just roundabout restatements of one's particular functionalist commitments. We refer the reader to that discussion (section 3) for details.

So the question is whether realists who do *not* embrace the functionalist or pragmatist methodology are licensed in treating Correct Capable as a platitude. They are not; and they are not licensed in doing so even when arguing with other realists over the nature and shape of deontic properties.

It is no surprise that realists interested in offering arguments of the form 1–3 are not licensed in virtue of their realism in treating Correct Capable as a platitude, but rather must treat it as something to be established—even when arguing with other realists over the nature and shape of deontic properties. This is because, as with any set of concepts or properties, being a kind of generic realist about those concepts is, in the first place at least, a relatively low bar, a relatively thin requirement. In effect, all it takes to be a generic realist about concept *X* in the relevant sense is to accept the thought that concept *X* picks out some real property or properties of *X*-ness. And being a realist about the relevant properties is, in turn, itself a relatively thin requirement: it just requires thinking that whether and to what extent objects possess the real property (e.g., *X*-ness) is independent of (roughly) people's thoughts, sayings, or doings.

But notice that thinking *that*, that some property exists independently (roughly) of people's mental lives, is not yet to think anything at all about whether and to what extent that property is *accessible*, let alone *useful*, in the sense of playing a particular role in their mental lives, e.g., via the correct application of the concept that picks it out. But it is this latter claim that would have to be true in order for Correct Capable to be a platitude, *even among realists*. For you might well think that *rightness* is a real property of actions without also thinking that the property of *rightness* is capable of correctly guiding agents' actions (say, via the correct application of the concept RIGHT). This shows that being a realist about the deontic just is not sufficient to license treating Correct Capable as a platitude. And, once again, it is *certainly* not licit to treat Correct Capable as a platitude by pointing out that, after all, if Correct Capable were false, then deontic evaluation would not be able to achieve whatever (let us agree) its function is. That, in effect, is precisely our point: since we have been given no reason to think Correct Capable is (here, platitudinously) true, on discovering that this-or-that feature of deontic concepts (or properties) would preclude them from fulfilling their function, we might as well conclude that, unhappily, unfortunately, regrettably, deontic evaluation cannot do what it is for.

Let us put the point another way. Realists about deontic concepts are (we can safely suppose) realists about deontic properties. This means (again, roughly) that such realists think that deontic properties exist independently of what anyone thinks of the matter. Such realists might then go on to argue with each other over the nature and shape of those properties. According to some, the deontic properties are shaped by the evaluative properties, whereas according to others, things are reversed; in other words, there is some debate among realists over whether (in the familiar slogan) the good is prior to the right, or vice versa. So, are such realists, in conversation with one another, licensed to assume that, whatever the shape of the deontic concepts, and so the deontic properties they pick out, the application of those concepts is capable of correctly guiding agents' actions? Of course they are not. It is one thing for realists to agree with one another that the subject matter the nature of which they disagree about is *real*, in the sense that its existence does not depend on what anyone thinks of the matter. It is another thing altogether for realists to agree with one another that the subject the nature of which they disagree about is *capable* of playing a very specific role, viz., the role of correctly (*not just actually*) guiding agents' actions. We do not see any reason to think realists should (or indeed do) agree on this latter matter as a platitudinous truth.

Here is an example. It seems reasonable to suppose that (say) Mill is a realist in the relevant sense; that is, he thinks that deontic properties, such as *rightness*, exist and are instantiated regardless of what anyone thinks of the matter. Nevertheless, Mill is not—and famously does not take himself to be—licensed in assuming that deontic properties, such as *rightness*, are capable of correctly (i.e., accurately) guiding agents' actions. Instead, as we see in *Utilitarianism*, Mill is at pains to argue that, *even if* deontic properties as he conceives of them *are not* capable of correctly guiding action—because, say, those properties do not resonate with agents, or because they are too difficult to accurately capture because too complex—*still*, his overall moral theory *is* capable of correctly guiding agential behavior (via the application of rules, say).<sup>25</sup> There are complications here: some take this to be evidence that, in fact, Mill is a sort of *indirect* consequentialist, and that rightness is not after all a matter of maximizing overall (expected) happiness but instead is a matter of according behavior to rules the adoption of which has that result. But again, in the present context we can ignore that complication. That is because the point is that even *if* one is a realist (as it seems fair to assume Mill is) about deontic properties, that does not immediately, platitudinously, license one in assuming that the deontic properties

25 See especially the discussion of the two “demandingness” objections Mill considers in *Utilitarianism*, ch. 2.

are thereby capable of guiding agential behavior (via the correct application of deontic concepts, say).

Hence realism about a thing or things together with a claim about the function of that thing is just far too weak a set of commitments to obviously, *platitudeously* entail that that thing is capable of doing what it is (admittedly) for doing. The platitude argument for realists in favor of Capable fails.

### 2.3. *The Characteristic Function Argument*

What we will call the characteristic function argument in favor of Capable has been suggested to us as a response to the failure of the platitude argument. Despite the fact that, as we will see, it suffers the same problem as the platitude argument, we include it here since it has been, surprisingly in our view, a common reaction. Here is how it goes. Above we said that Smith and others endorsed a version of an argument according to which

1. The function of deontic evaluation is to guide action (Guidance Function).

According to the present idea, attributing such an argument to Smith and others is a mistake. Instead, these authors should be understood as endorsing an argument according to which

1. The *characteristic* or *normal* function of deontic evaluation is to guide action (Characteristic Guidance Function).

The idea, then, would be that, as one reader put it, “just about everyone in moral philosophy” accepts that deontic concepts do characteristically or normally guide choice. So, presumably, just about everyone should also accept that deontic concepts are capable of doing so: after all, they characteristically or normally do so.

Unfortunately, this argument suffers exactly the same equivocation as the platitude argument: we are happy to agree that, when “guidance” is read as “actual guidance,” deontic concepts do achieve their characteristic function of providing guidance. That is something that “just about everyone in moral philosophy” should accept. As we have already noted, agents regularly use deontic concepts in the course of deciding what to do. But, again, this does not mean that those concepts characteristically or normally provide *correct* guidance. When “guidance” is read as “correct guidance,” we see no reason to suppose, as this revised version of the argument would do, that deontic evaluation is capable of guiding action, whether that function is *characteristic*, *normal*, or otherwise. (If you are not convinced, consider the astrological version of the argument from 1–3.)

In other words, altering our understanding of the *point* of deontic evaluation to one where it is (merely) a *characteristic* or (statistically?) *normal* point does nothing to show, without further argument, that deontic evaluation is actually capable of achieving it.

#### 2.4. *The Existence Argument*

The existence argument for Capable goes as follows. If deontic evaluation was not capable of doing what it is for, there would not be a practice of deontic evaluation. We would not have and use the concepts RIGHT, WRONG, and OBLIGATORY if the sort of evaluations that these concepts allow us to make were incapable of providing (correct) guidance. And if we did have and use them (as we do), our having and using these concepts would be a mystery, if deontic evaluation was not capable of doing what it is for: Why would we engage in such an odd practice, if we did not thereby manage to do what this practice is for? Denying Capable therefore saddles us with an explanatory burden that cannot be met; so we have sufficient reason to accept that deontic evaluation is capable of doing what deontic evaluation is for. And given that its function is to (correctly) guide action, we can infer that deontic evaluation is capable of (correctly) guiding action.

The existence argument fails. The mere fact that we evaluate actions using deontic concepts is perfectly compatible with deontic evaluation being incapable of correctly guiding action. Consider, again, the analogy with astrology: many people rely on astrology in forming attitudes toward the future, yet astrology is not a correct guide to future events. People rely on astrology in forming attitudes toward the future because they believe astrology is capable of doing what it is for; the fact that many people have this belief is sufficient to explain why people make use of astrological evaluation. Perhaps we are in a parallel situation when it comes to deontic evaluation. Many people believe that deontic evaluation can guide action. But if, for instance, some form of error theory is true, then these people are all radically mistaken.<sup>26</sup> All that is needed for a successful explanation of why there is a practice of deontic evaluation is a sufficiently widespread belief that deontic evaluation is capable of doing what it is for, *viz.*, correctly guiding action; whether or not it does so *in fact* is neither here nor there.

Here is another way to put the same point: everyone owes us an explanation of why we engage in the practice of deontic evaluation. One explanation of this fact is that deontic evaluation is for guiding action, and it is capable of correctly doing so. But if our focus is just on an explanation of why we engage in the practice of deontic evaluation, the following explanation looks equally

<sup>26</sup> This is presumably the view of Mackie, "Ethics." More recently, it has been defended by Streumer, *Unbelievable Errors*.



good: deontic evaluation is for guiding action, and people *believe* it is capable of correctly doing so. Accepting that deontic evaluation fails to do what it is for therefore does not saddle one with an explanatory burden that cannot be met, and thus the mere fact that the practice of deontic evaluation exists does not provide support for Capable.<sup>27</sup>

The fan of the existence argument might reply: while we perhaps can explain why there is such a thing as deontic evaluation if we grant that it cannot do what it is for, when we reject Capable we find ourselves having to accept the unappealing implication that the practice of deontic evaluation can be abandoned without cost. But this would be too quick. For even if we cannot always rely on our judgments using deontic concepts in making practical decisions (that is part of what rejecting Capable entails), that hardly shows that we have no use for such concepts. After all, these concepts allow us to think and talk about deontic properties. Even if the primary context in which we are interested in using these concepts is practical deliberation, we also think and talk using deontic concepts in other contexts. For one, we are sometimes interested in the moral evaluation of past actions (both our own and those of others). For another, by referring to deontic properties by deontic concepts, we might express our view that these properties are the properties of actions that we consider to be most important. The ability to perform this expressive maneuver may in itself be reason enough to maintain the practice of deontic evaluation even in the face of its incapacity to provide correct guidance. Even if deontic evaluation fails to be capable of providing guidance, we would therefore still have a use for such concepts. So the existence argument fails.

### 2.5. *The Presupposition Argument*

The presupposition argument is related to the existence argument. According to the presupposition argument, it is a presupposition of engaging in deontic evaluation that such evaluation is capable of guiding choice and action. In other words, in order to engage in deontic evaluation, one must assume that Capable is true. Recall, that idea was suggested in the preceding discussion as an explanation of the existence of the practice of deontic evaluation. And, the argument continues, while we might not be able to show that Capable is true, this merely represents a *logical* gap: it is a gap anyone who is engaged in deontic evaluation must assume is closed. Those engaged in deontic evaluation therefore need not

<sup>27</sup> To be clear, the argument we are offering does not itself support moral, in particular deontic, skepticism or error theory, understood as the view that there are no deontic properties of things, or that deontic concepts have no proper extension. For all we have said, there might well be deontic properties of things, and so deontic concepts that have proper extensions.



argue for the truth of Capable because anyone who is engaged in deontic evaluation will also assume the truth of Capable. And so we need only care about Capable when speaking to deontic skeptics. But perhaps, as some have argued, we need not worry about deontic skeptics: if that is right, it might appear that we need not worry about defending Capable.

The problem with this argument is that, as we have already seen, the interest in Capable is not in its use or presupposition by people actually engaged in deontic evaluation. If that were where Capable earned its living, then the presupposition argument would be sufficient to rescue it. But that is not where Capable is put to work. Instead, Capable is put to work—or rather, is assumed to be capable of working—in metanormative arguments (by Smith and others) over the nature of deontic properties and concepts. The context in which Capable appears as an elided premise is therefore not a context in which we must assume Capable is true in order to “go on,” for the context is not one of actually engaging in deontic evaluation—of ascribing deontic properties to things by way of our deontic concepts. Instead, the context in which Capable is at issue is one in which we are arguing over the metanormative features of deontic properties and concepts—whether, for instance, *wrongness* and *rightness* are compossible.

The presupposition argument therefore fails: while it might be true (as above) that people engaged in the practice of deontic evaluation have license to or even must assume that Capable is true, it is neither true that those engaged in the practice of thinking about the nature of deontic properties and concepts—such as Smith—have license to do so nor true that they must. And so it does not follow that Capable is not in need of defense by such people.

### 3. PRAGMATISM AND DULLING THE ARGUMENT

Things look pretty grim. What to do? Here is a thought: maybe the trouble began, unnoticed, at the outset; what happened was that we misunderstood what kind of claim Guidance Function was meant to be. We have been treating Guidance Function as a claim about the function of deontic evaluation where that function is the kind of thing we discover on the basis of an investigation that is independent of our investigation into the nature of deontic evaluation *per se*. On this way of understanding things, importantly, we are negotiating two independent things—the *function* of deontic evaluation and what deontic evaluation *is*—and it is the fact that these two things are independent that generates the trouble with Capable.

An analogy will help. Suppose we are anthropologists studying a tribe and we learn through an informant that each household possesses an instance of the

same artifact. Now, there are two questions we might have about this artifact, which can in principle be answered separately, via two separate investigations. One is the question of what this artifact *is*. To answer this question, we examine an instance of it: it is a wooden U-shaped artifact with an arm's-length piece of wood attached to the bottom of the U. (Picture a giant wooden tuning fork.) To confirm our answer, we obtain and examine more instances: all ten we have examined also resemble giant wooden tuning forks. The second question—likely the more interesting question—is what this artifact is *for*. Now, although it might turn out that our answer to the first question helps us answer the second—perhaps it turns out to be *for* tuning giant wooden instruments—there is no guarantee of that. One way our investigation into the question of what the artifact is *for* might go is by way of observing how the tribe uses the artifact, what function it serves for them. And, importantly, because these are strictly separate questions, there is no guarantee that, given the kind of thing the artifact *is* (something that resembles a giant wooden tuning fork) it is *capable* of doing what it is *for* (perhaps the tribe tries to use it as a divining rod, or a spoon).

Back to deontic evaluation and *its* point. We have been treating deontic evaluation like the giant wooden tuning fork, as subject to two questions that are in principle separable: (i) What is it? (answer: it is the deployment of *these* concepts, e.g., RIGHT, WRONG, OBLIGATORY) and (ii) What is it *for*? (answer: it is for guiding action). Hence we face our troublesome gap: there's no guarantee that, given the kind of thing deontic evaluation *is*, it is capable of doing what it is *for*.

But there is a different way to approach things, where the answers to our two questions—what something is and what it is for—get negotiated together, rather than separately. The view sometimes gets called “pragmatism,” other times “functionalism.” Here is Simon Blackburn—he calls it pragmatism—on the approach:

You will be a pragmatist about an area of discourse if you pose a ... question: how does it come about that we go in for this kind of discourse and thought? What is the explanation of this bit of our language game? And then you offer an account of what we are up to in going in for this discourse, and the account eschews any use of the referring expressions of the discourse ... or any semantic or ontological attempt to “interpret” the discourse in a domain, to find referents for its terms, or truth-makers for its sentences. ... Instead, the explanation proceeds by talking in different terms of what is done by so talking. It offers a revelatory genealogy or anthropology or even a just-so story about how this mode of talking and

thinking and practising might come about, given in terms of the functions it serves.<sup>28</sup>

On this way of approaching matters, our gap—Capable—does not open up. This is because on learning what this bit of our language game—the deontic bit, the bit involving deploying the concepts RIGHT, WRONG, and so on—does, we thereby learn what these parts of our conceptual scheme—the deontic concepts—are like. We are not interested, then, in whether the deontic realm turns out, on ontological investigation, to support the idea that deontic evaluation is capable of (successfully) guiding action; instead, we are interested in discovering what the deontic concepts do for us, and we simply identify the deontic concepts as *whichever concepts in fact do that*. Since we agree—at least, we have said that we are happy to agree for the purposes of this paper—that what marks off the deontic from the (merely) evaluative is its distinctive functional role in (properly) guiding action, we get for free the idea that deontic concepts can do this; the deontic concepts are defined as the concepts that are capable of playing this role for us, and so there not only is not, there also cannot be any logical gap—such as Capable—between their point and their ability to achieve this point. As we said, this view—better: methodological approach—goes by different names. We will follow Blackburn in calling it pragmatism.<sup>29</sup>

So, if we are pragmatists, the trouble with Capable, and so with the attending arguments from a claim about the point of a domain of evaluation to substantive results about the nature of concepts in that domain, seems to disappear. Perhaps, then, the charitable way to interpret Smith is as being committed to this methodology, and so correspondingly interpret their arguments as not relying on a defense of Capable that, as we have argued above, is not available. But as we will now explain, interpreting the arguments' proponents in this way completely vitiates any interest we might have in those arguments. Hence we are left with a dilemma: either we interpret proponents of these arguments as pragmatists (of the relevant sort), in which case the arguments lose all interest, or we do not, in which case their arguments are invalid without Capable, and therefore unconvincing without a defense of Capable, which as we have argued is not likely to be forthcoming.

Recall the argument schema we are interested in here:

28 Blackburn, "Pragmatism," 78.

29 This brand of pragmatism should not be confused with the pragmatism of William James and John Dewey (let alone that of Charles Peirce). In some ways, the "functionalism" label is preferable, but that too is already taken.

1. The function of deontic evaluation is to guide action (Guidance Function).
2. If deontic concepts have feature *X*, then deontic evaluation would not be able to guide action (Disabling Condition).
3. So, it is not the case that deontic concepts have feature *X* (Substantive Result).

This schema represents an attempt to move *from* a claim about the function of deontic evaluation *to* a substantive result regarding the nature of deontic concepts. But if we are pragmatists about deontic evaluation, although instances of this argument schema do not require a defense of Capable, they are also completely otiose: rather than representing independent arguments for novel, surprising conclusions about the nature of deontic concepts, they are simply long-winded ways of reiterating one's view about the functional role of deontic evaluation. For deontic concepts will just be *whatever concepts are capable of playing the role deontic evaluation assigns to them*. If *what it is* to be a deontic concept is to be something that plays the role of (properly) guiding action in deontic evaluation, then *of course* a feature of that concept that would disable the concept from playing that role can be ruled out as a feature of that concept. Hence interpreting proponents of instances of this argument schema—such as Smith—as committed to the pragmatist approach appears to vitiate any interest in the arguments they adduce. So that cannot be right.

Let us be clear. It is not that we think this methodology is mistaken, or somehow always gets off on the wrong foot. Quite the contrary: we ourselves are attracted to it for a range of reasons, not least of which is its ability to *shut down* disputes over whether, e.g., deontic evaluation is capable of doing what it is for. But pragmatism's ability to shut down such disputes comes at a cost: it blocks instances of the schema 1–3 from being *interesting*, i.e., it blocks them from providing us with any substantive results. That is not a cost that proponents of particular versions of arguments that take this form will likely be willing to pay, given their interest in using such arguments to actually deliver substantive results. And in any case, it does not appear to be how proponents of such arguments think of what they are up to: they think of themselves as moving *from* a story about the point of a domain of evaluation *to* some view about the nature of the concepts involved in that domain, where in principle at least the nature of those concepts is specifiable independently from the story about what use we put them to. (They are like our anthropologist, negotiating two questions independently.) Hence proponents of these arguments appear to face a dilemma: either embrace the pragmatist approach, in which case they must give up the

ambitious, substantive-result-delivering version of the arguments, or provide a defense of Capable. And as we argued above, no defense of Capable appears forthcoming. We would be happy to hear of their embrace of pragmatism, but it seems to us that it makes mysterious—certainly, as we have said, otiose—the adducement of the argument from the *point*, e.g., of deontic evaluation to the *nature*, e.g., of deontic concepts.<sup>30</sup>

#### 4. SUMMARY

Arguments from the point, purpose, or function of deontic evaluation to substantive results about the nature of deontic concepts are exciting: they promise to provide us with insight into the nature of the deontic by way of reflection on the use to which we put deontic concepts. Unfortunately, in order for such arguments to work, their proponents must defend the claim that deontic evaluation is not only *for* guiding action, it is *capable* of doing so. This leaves proponents of such arguments in a bind. On the one hand, no defense of this claim appears to work—we argued here that four *prima facie* plausible ones do not, and no others are forthcoming. On the other hand, although it is possible to remove the need to defend the claim that deontic evaluation is capable of doing what it is for by retreating to what we have called the pragmatist methodology, in that case such arguments will not be interesting. Neither option is appealing.

Where to go from here? As we said, we are sympathetic to the pragmatist methodology. So, rather than attempting to provide a novel defense of Capable, that is where we are inclined to move. But adopting that methodology requires giving up a certain degree of ambition when it comes to limning the nature of the deontic by way of our practices. Or rather, it requires giving up any thought that, in doing so, one is limning the nature of some *independent realm of facts* that can be characterized independently from the way in which it is embedded in the lives of creatures like us. Now, those ambitions—which tend to take on a metaphysical character—do not seem all that lofty to us, and we are not bothered

30 It is worth pointing out that some philosophers have taken this approach to understanding concepts in a different evaluative domain, namely normative epistemology. The idea there, very briefly, is that we can gain insights about the nature of central epistemic concepts, e.g., knowledge, by investigating the role those concepts play in our (cognitive, epistemic) lives. For instance, Greco says that “We can ask what our concept of knowledge and our knowledge language are for. We can ask what roles they play in our conceptual economy. . . . By doing so, we suggest, we gain further insight into how our concepts . . . can be expected to behave” (*Achieving Knowledge*, 139). For the classic source of this idea, see Craig, *Knowledge and the State of Nature*. For more recent expressions of it, see the essays collected in Henderson and Greco, *Epistemic Evaluation*.

by giving them up. But whether doing so will be appealing to others will likely come down to temperament.<sup>31</sup>

The College of New Jersey  
natesharadin@gmail.com

rob.vsg@gmail.com

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## DOES DEPORTATION INFRINGE RIGHTS?

*Kaila Draper*

CONSIDER THE MIGRANT who illegally crosses an international border, and suppose that agents of the state she has entered apprehend and detain her and then forcibly return her to her country of origin.<sup>1</sup> Some opponents of aggressive deportation policies believe that, barring unusual circumstances, this process of using coercion and force to expel the migrant is an infringement of the migrant's rights. Many of those who disagree contend that because a state has a right to enact and enforce immigration restrictions, most deportations do not infringe rights. I maintain that, absent an adequate argument to the contrary, one can conclude presumptively that the typical deportation is an infringement of the migrant's rights. The primary aim of this paper is to show that certain serious arguments to the contrary are inadequate.

### 1. ASSUMPTIONS AND PRESUMPTIONS

The term "deportation" is used in a variety of ways, especially in connection with immigration enforcement in the United States. To avoid confusion, I will simply stipulate that, by "deportation," I mean, "the use of force or coercion (i.e., threat of force) by a state to remove someone from land that it claims as territory." Thus, even "voluntary departure," as that expression is defined in US immigration law, counts as deportation because threats of forcible removal are used to motivate the migrant to "voluntarily" return to her country of origin.<sup>2</sup>

- 1 Throughout this article, I use expressions like "law" and "illegal" in the broad sense in which some laws do *not* have authority, and one can behave illegally merely by breaking rules that a government establishes, even if the government is illegitimate or is acting beyond the scope of its authority in establishing the rule. Thus, in saying that a migrant has illegally crossed a border, I do not mean to imply that the migrant has done anything even presumptively wrong.
- 2 In US immigration law, "voluntary departure" is a remedy offered to some persons who have been placed in removal proceedings. The individual is permitted to remove themselves from the country but is subject to civil penalties and forcible removal should they fail to do so. Thus, coercion is involved. Even "administrative voluntary departure," which occurs when



Because the question about deportation that I am addressing is a moral one, it can be answered only from within a moral framework. Of course, like every other moral framework, my own is controversial. But the discussion I am joining presupposes that moral rights exist. Perhaps, then, I will not exclude too many discussants by starting with the following assumptions:

*Assumption 1: Any competent person has a moral right to freedom from compulsion—i.e., a right not to be subjected to force or coercion.* On my own Lockean conception of moral rights, this right sits at the heart of the right to liberty, which is itself a component of the right to one's own person, but I do not assume that conception here.

*Assumption 2: The right to freedom from compulsion is limited.* Some uses of coercion and force do not infringe rights. At a minimum, one's own right to freedom from compulsion is limited by the enforcement rights of others. It does not include, for example, the right not to be subjected to necessary and proportionate coercion or force to prevent one from murdering or kidnapping or trespassing or otherwise violating enforceable rights.

*Assumption 3: The right to freedom from compulsion is not absolute.* Sometimes one can justifiably infringe rights, including the right to freedom from compulsion. Suppose, for example, that I am fleeing a deadly threat and that, without securing your consent, I push you out of my way. I thereby infringe your right not to be subjected to force. But if I was reasonably confident that my life depended on pushing you and that pushing you would not cause you or anyone else significant harm, then that infringement of your rights might well have been justified. To oversimplify quite a bit, rights can be infringed justifiably if the expected benefits of the infringement *far* outweigh the expected costs.<sup>3</sup>

It is important for our purposes to recognize that assumptions 2 and 3 are distinct. To say that the right to freedom from compulsion is limited is to say that not all compulsion infringes that right. To say that the right to freedom from compulsion is not absolute, on the other hand, is to say that some infringements of that right are morally justified. Because our question is whether deportation

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someone is stopped at the border and is given the opportunity to retreat, involves detainment. Thus, both count as deportations on my broad use of that term.

3 Following many others, I use the expression "violate a right" to refer specifically to *unjustifiably* infringing a right. I do not use the term "right" to refer to a mere permission. To possess a right is, at least in part, to possess some valid claim against others.

*infringes* rights, assumptions 1 and 2 will play larger roles in our discussion than assumption 3.

Given assumption 1, there is a presumptive case that the typical deportation does infringe rights. For deportation involves the use of coercion or force to relocate someone against her will. Even if, as some have argued, the right to liberty does not include a right to cross international borders, this presumptive case stands.<sup>4</sup> For even if there is no right to cross international borders, it does not follow that one's right not to be seized, detained, and moved by means of coercion or force disappears when one crosses an international border. If there is no right to cross international borders, then certain kinds of noncoercive border controls—border walls, for example—might not even presumptively infringe rights, but the issue here is whether *deportation* infringes rights.

It might be suggested that the presumption that deportation infringes the right to freedom from compulsion can easily be defeated. For it is widely recognized that a (legitimate) state's right to enforce its laws limits other rights, including the right to freedom from compulsion. A state's *political authority*, including its authority to enact and enforce law, is thought to include its *civic authority*, which is the authority it has over its own citizens, and its *territorial authority*. The latter is conventionally regarded as including multiple (possibly overlapping) components. One of these is *territorial jurisdiction*, which is the authority a state has over anyone who happens to be inside the state's territory. A second component is the authority a state has to control resources within its territory, and a third is the authority a state has to control the movement of persons and objects across its borders.<sup>5</sup> Obviously a state's civic authority does not limit the rights of foreign migrants. But defenders of deportation can argue that the migrant's rights are limited by the state's territorial authority, including its right to enact and enforce immigration law.

I am not a skeptic about territorial authority, but I see no reason to *presume* that the scope of that authority includes the right to deport. The fact that states routinely claim such authority provides no such reason, for states have routinely claimed authority they do not possess for millennia. Moreover, states typically do not even try to identify the basis of their alleged authority to deport. If someone subjects you to coercion or force and cannot provide a reasonable basis for doing so, you may presume that they are infringing your rights. The same is true when the agent of coercion or force is a state.

4 See, for example, Miller, "Is There a Human Right to Immigrate?" 11–31.

5 I am following Miller here; see Miller, "Territorial Rights." For a more detailed classification of types of political authority, see Simmons, *Boundaries of Authority*, 2–6.

## 2. A TAXONOMY OF ARGUMENTS

Presumptions aside, arguing that the typical migrant's right to freedom from compulsion is *not* infringed by deportation requires invoking assumption 2 and arguing for the existence of a relevant limit to the right to freedom from compulsion. So far as I can see, four kinds of arguments are possible. My focus in subsequent sections will be on specific instances of two of those four kinds of arguments; but, in this section, I want to briefly discuss the full range of possibilities. Though regrettably superficial, this discussion may be of some use to those who want to assess the overall prospects for a successful argument to the conclusion that the typical deportation does not infringe rights. Here, then, are the four possibilities.

1. *Relinquishment arguments.* One kind of argument to the conclusion that the typical deportation does not infringe the deported migrant's rights is based on the premise that the deported migrant has voluntarily relinquished (or at least waived) her right not to be deported. I call arguments of this kind "relinquishment arguments." Famously, John Locke tried to ground civic authority in express consent and territorial jurisdiction in tacit consent.<sup>6</sup> Both of those justifications identify the relinquishment of rights as the source of state authority. But is it plausible to suggest that those who illegally enter, or illegally reside in, a state have somehow consented to that state's having the authority to deport them? Express consent is, of course, a nonstarter. But even an appeal to tacit consent looks unpromising. Tacitly consenting to territorial authority would require one to voluntarily accept benefits from the state, benefits that are offered in exchange for relinquishing that portion of one's rights that must be relinquished if one is to be subject to the territorial authority of the state. Thus, it is difficult to see how the deported migrant could have tacitly consented to her own deportation. Prior to entry, the migrant has not received the benefits of being in the state they eventually enter. Moreover, even the migrant who illegally remains in a state is not being offered benefits in exchange for relinquishing some portion of her rights. Rather, the law itself is demanding that, instead of accessing the benefits of being in the state, the migrant must forgo those benefits by leaving the state.

To my knowledge, no one has put forward a serious relinquishment argu-

6 Locke, *The Second Treatise of Government*, ch. VIII. Locke's "consent theories" are sometimes characterized as theories of political obligation, but he also intended them to justify political authority. Consent to obey the law does not guarantee the state's authority to enforce obedience to the law. (I can consent to follow the rules of a board game, but that does not give anyone the right to use coercion or force to ensure that I follow those rules.) Thus, a tacit consent theory of territorial authority can be used to justify deportation only if the migrant tacitly relinquishes their right not to be subject to coercion by the state.

ment. Perhaps, though, the materials for constructing such an argument can be found in Locke's political philosophy. Locke believed that the citizens of a legitimate state have voluntarily relinquished (through express consent) part of their right to liberty (including part of their right to freedom from compulsion) in order to provide the state with the powers it needs to fulfill its proper function. One of those powers is what Locke calls the "federative power," which includes, among other components, the power to make treaties with foreign states.<sup>7</sup> If this power does exist, then the fact that there are international treaties that require respect for state sovereignty could be used as a premise in a relinquishment argument. For a state's sovereign rights are generally understood to include a right to restrict immigration. Thus, one could argue that the citizens of any legitimate state that is a signatory to a treaty requiring respect for state sovereignty have, through those who exercise the federative power on their behalf, consented to the use of deportation by at least some foreign states (perhaps only signatories to the treaty) to enforce the immigration laws of those states.

Can such an argument succeed? Some political libertarians might doubt that states have a broad, treaty-making power. I do not share that doubt, but I do doubt that an individual citizen who is not acting as an agent of her own state can violate an international treaty to respect the sovereignty of other states. Such a treaty binds only states and, by extension, groups and individuals acting as agents of a state. As agents of their state, for example, an invading foreign army and its members can take part in a state's violation of a treaty requiring respect for the sovereignty of other states. But the individual migrant who, acting on her own behalf rather than as an agent of her state, illegally crosses an international border would neither violate nor participate in the violation of any international treaties that require respect for state sovereignty.

2. *Liability arguments.* In my judgment, a more promising approach to defending the thesis that the typical deportation does not infringe rights is to argue that the migrant who illegally crosses an international border, or illegally remains in a state, infringes the rights of that state, or the rights of some group within the state, or the rights of at least some of the state's individual citizens or residents. If such an argument is successful, then the typical deportation merely enforces rights, and few would deny that the right to enforce rights limits the right to freedom from compulsion.

We should avoid, however, the common mistake of assuming that if a migrant's illegally entering, or illegally remaining in, a state does infringe rights, then it follows immediately that deportation does not infringe that migrant's rights. In the first place, some rights are *unenforceable* in the sense that no one

7 Locke, ch. XII, paras. 145–46.

has the right to use coercion or force to secure the right in question. If I promise to help you move into your new home, for example, you have a right against me that I help you move, but your use of coercion or force against me to enforce that right would nevertheless infringe my rights. Other rights are enforceable, and that means that the one who infringes or threatens the right is “morally liable” to the use of coercion and force (and to the infliction of harm) to enforce the right in question. Nevertheless, such liability extends only to necessary and proportionate enforcement: unnecessary or disproportionate enforcement still infringes the rights of the liable party.<sup>8</sup> Thus, a successful “liability argument” must show not only that the migrant who violates immigration law infringes, or poses a threat to, a right, but also that the right in question is an enforceable one, and that deportation is a necessary and proportionate enforcement of that right.

Another relevant distinction here is that between punitive, reparative, and defensive liability. Given that deportation is not a criminal punishment and is not aimed at compensating anyone for a loss, it appears that the relevant sort of liability is liability to defense. (I use “defense” to include both self-defense and defense of others.) Liability to defense is incurred by posing (or taking part in a group’s posing) a threat of unjust harm, where one poses a threat of unjust harm if and only if, unless one is prevented from doing so, one will, as a consequence of infringing an enforceable right, damage or at least jeopardize interests protected by that right.<sup>9</sup> Thus, the success of a liability argument depends on whether the migrant who illegally enters or illegally remains in a foreign state thereby poses a threat of unjust harm, and whether deportation is a necessary and proportionate defensive response to that threat.

Most serious arguments in defense of the suggestion that the typical deportation does not infringe rights are, at least implicitly, this sort of appeal to defensive liability. Indeed, on the assumption that the migrant who illegally crosses a border does not relinquish (or waive) her right not to be deported, perhaps the *only* possible basis for the conclusion that deporting her would not infringe her rights is the proposition that, because the migrant herself infringes or threatens rights, she is liable to the use of necessary and proportionate coercion or force to enforce the rights she infringes or threatens.

3. *Extraordinary limit arguments.* It is uncontroversial that both moral liability and relinquishment of rights narrow the scope of the right to freedom from compulsion. But whether there are further limits to that right is controversial. Let us refer to such additional limits, if there are any, as “extraordinary.” Some

8 I argue that unnecessary and disproportionate defense infringes rights in Draper, *War and Individual Rights*, ch. 5.

9 I argue that defensive liability has this scope in Draper, *War and Individual Rights*, ch. 3.

arguments that extraordinary limits exist are motivated by the perception that conventional views about the scope of political authority cannot be justified by appealing only to relinquishment or liability. This same perception, however, can lead to a principled skepticism about political authority. Thus, a convincing appeal to an extraordinary limit must include an adequate defense of the existence of the proposed limit.

One possibility is to appeal to a “non-voluntarist” theory of political authority as a basis for the suggestion that there are extraordinary limits to the right to freedom from compulsion. Some non-voluntarist theories of political authority, however, fall short of justifying the use of coercion or force. On one prominent theory, for example, the authority of the law derives from its instrumental value in helping those subject to that authority do what they ought to do. Thus, Joseph Raz writes:

The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.<sup>10</sup>

Even if such a theory provides a plausible basis for political obligation, and a corresponding limit to the right to liberty, it may not justify deportation. For the mere fact that the law ought to be obeyed is insufficient to show that states are morally permitted to use coercion and force to ensure such obedience. Furthermore, to use such a theory to justify enforcing immigration restrictions, one would need to provide some reason to think that the law can be trusted to provide sound moral advice when it urges migrants not to cross international borders. I doubt that the law provides *any* moral guidance on such matters. Crossing an international border is not *malum in se*. Thus, laws that prohibit crossing international borders do not provide guidance about what, independently of the law, an individual ought to do.

Perhaps the most promising sort of extraordinary limit argument would appeal to a “necessity theory” of political authority. Broadly speaking, such a theory attempts to justify political authority, including the right to use coercion and force to execute the law, on the grounds that functioning states are necessary, and a state cannot fulfill its function(s) without an adequate amount of authority to enact and enforce law. Establishing the truth of such a theory is,

10 Raz, *Ethics in the Public Domain*, 214.

of course, no easy task. But even on the assumption that such a theory is true, there is no guarantee that the theory provides the basis for the conclusion that the typical deportation does not infringe rights. For, *pace* Hobbes, no plausible theory of political authority, including no plausible necessity theory of political authority, says that the scope of political authority is unlimited. Thus, the assumption that some necessity theory is true still leaves open the question of whether the scope of political authority includes the right to use deportation to enforce immigration law. Furthermore, a theory that grounds political authority in *necessity* is apt to be ill suited as a basis for the claim that the scope of political authority extends to enforcing *unnecessary* immigration restrictions. Thus, even in the face of an adequate necessity theory of political authority, the opponent of deportation may be able to make a case that most actual enforcement of immigration restrictions infringes rights. Indeed, some cosmopolitan theorists argue that humanity would be substantially better off with open borders. If they are correct, then one might doubt that a state's authority to close its borders can be grounded in necessity.

4. *Indirect arguments.* I include in this category any argument that reaches the conclusion that deportation does not infringe rights but does not explain why there is no infringement. Such arguments are likely to be “cantilever arguments” in that they reach their moral conclusion not by identifying the moral principles that ground that conclusion, but rather by “arguing sideways” from moral judgments that are at the same level of generality as the conclusion.<sup>11</sup> One argument of this sort will be considered in detail in the next section of this paper. The strategy, as we will see, is to argue that at least most of us have beliefs about the scope of a state's authority that commit us to recognizing that, under certain common circumstances, the state has the authority to deport. Although I try to undermine the argument in question, I suspect that the strongest case for the conclusion that the typical deportation does not infringe rights may well be some sort of indirect argument.<sup>12</sup>

The remainder of this paper is an attempt to undermine one indirect argument and three liability arguments. By attacking these arguments, I do not see myself as defending what many refer to as the “libertarian argument for open borders.” Indeed, I am not defending open borders at all, nor am I defending the thesis that the typical deportation *violates* (i.e., unjustifiably infringes) the

11 Miller uses and perhaps coined the expression “cantilever argument” in “Is There a Human Right to Migrate?” 15–16.

12 One possibility here that I have not yet seen in the literature would be to argue that one cannot be a skeptic about the right to enforce territorial rights without also being a skeptic about the right to enforce ordinary property rights.



migrant's right to liberty. I am defending only the more modest thesis that the typical deportation *infringes* the migrant's right to freedom from compulsion.<sup>13</sup> One need not be a political libertarian to accept my thesis (and I am not a political libertarian). One need only recognize the existence of a right to freedom from compulsion and doubt the existence of any limit to that right that can be invoked to show that it is not infringed by the typical deportation.

I should add that, although I provide support for the thesis in question, I doubt that it is even possible to conclusively establish its truth. Regardless of how many liability arguments are defeated, for example, it will remain an epistemic possibility that some new argument will demonstrate that, in the typical case, migrants who illegally enter or illegally remain in a state do pose a threat of unjust harm and that deportation is a necessary and proportionate defensive response to that threat. Nevertheless, unless the claim that the migrant does pose such a threat, or for some other reason lacks a right not to be deported, can be shown to be a reasonable one, the presumption must be that deportation would be an infringement of the migrant's rights.

### 3. JOSHI'S INDIRECT ARGUMENT

Recent work by Hrishikesh Joshi suggests the possibility of defeating this presumption by way of an indirect argument (although he does not *explicitly* advance the argument I have in mind).<sup>14</sup> Joshi appeals to three kinds of state coercion that most people regard as justified. He argues that if those three kinds of state coercion are justified then, under certain common circumstances, so is the state's use of coercion and force to control its borders.

One of the three is state coercion aimed at preventing negative externalities, and Joshi offers the example of penalizing battery manufacturers that dump the toxic by-products of production into a river. The second is state coercion for the sake of protecting intrinsically valuable things such as national parks. The third is state coercion for the sake of protecting the interests of the domestic population with the lowest socioeconomic status. Establishing serious penalties for

13 Relying on assumption 3, I am inclined to defend some border enforcement; but I am also inclined to think that most border enforcement in my own nation, the United States of America, violates the right to freedom from compulsion. Some of those violations are horrifically unjust. Detaining people for months or even years pending an immigration hearing, for example, or sentencing migrants to prison for criminally crossing a border, typically involves so great and harmful a deprivation of liberty and such uncertain social benefit that I regard it as an egregious violation of the migrant's basic rights.

14 Joshi, "For (Some) Immigration Restrictions."



violating minimum wage laws, for example, is accepted by most as a justifiable form of state coercion.

Joshi suggests that all but a few “anarcho-libertarians” believe that state coercion is justified in these three kinds of cases, and he thinks that most of us are therefore committed to the belief that the enforcement of immigration law aimed at protecting the interests of the domestic population with the lowest socioeconomic status, or protecting something intrinsically valuable, or preventing negative externalities, is justifiable. Joshi goes on to show that various immigration restrictions have at least one of these aims. Thus, he takes himself to have shown that, unless the scope of political authority is much narrower than most of us think, using coercion to enforce a variety of actual immigration restrictions is justified.

Even if his argument is sound, it does not settle the issue of concern here. For each of the three uses of coercion to which Joshi appeals might be justified for either of two reasons. First, it might be justified partly because it is *within the scope of a state’s authority* and so does *not* infringe rights. Alternatively, it might infringe the rights of those subject to it but do so justifiably because it is extremely beneficial. Our interest is in the first possibility. If Joshi is appealing only to the second possibility, then his argument is less interesting, because it would show only that using coercion to enforce certain sorts of immigration restrictions might be beneficial enough to be justified even if such coercion does infringe the rights of migrants. That conclusion is not in dispute, nor should it be. Thus, let us simply assume that Joshi is arguing for the conclusion that state coercion to enforce some immigration restrictions does not infringe rights.

With that assumption in mind, let us assess his argument. The first prong of the argument rests on the suggestion that most of us think that it is within the scope of a state’s authority to enact and enforce laws aimed at preventing negative externalities. I suspect that he is right about that, but I want to resist the idea that this commits most of us to the conclusion that it is also within the scope of a state’s authority to enact and enforce immigration restrictions aimed at preventing negative externalities. My worry stems from the fact that, as Joshi’s example of the battery manufacturer illustrates, laws that prevent negative externalities typically impose penalties on those who would otherwise violate the enforceable rights of others. Thus, Joshi is not in a position to appeal to them as a basis for defending laws that restrict immigration, for he does not take himself to have shown that migrants who are deported are thereby prevented from violating rights. He does claim that immigration’s externalities sometimes include rising crime rates, and he uses statistics on crime in Germany and Sweden to

justify that claim.<sup>15</sup> But this is not analogous to the case of the battery manufacturer. For in the latter case it is the one who is responsible for the externality who is liable to punishment. Immigration restrictions aimed at reducing crime, on the other hand, are imposed not only on those immigrants who pose a criminal threat of inflicting harm but also on those who do not.

There is another flaw in Joshi's argument that undermines all three of its prongs. Consider, for example, the third prong. Here Joshi begins with the suggestion that most would agree that it is within the scope of a state's authority to use coercion to enforce laws aimed at advancing the interests of the domestic population with the lowest socioeconomic status. That seems right. Few of us would deny the right of a state to establish and enforce minimum wage laws, to use Joshi's example. Moreover, we generally think that the state may enact and enforce minimum wage laws and other laws that regulate the economy even if the expected benefits of such restrictions do not *far* outweigh their expected costs.

Furthermore, as Joshi points out, immigration restrictions can certainly be enacted for the sake of the economy, including for the sake of economically disadvantaged members of the domestic population. And although the overall economic impact of illegal immigration in various nations is hotly debated, no one doubts that sometimes specific groups of domestic workers are disadvantaged by foreign immigration. Is there not a presumption, then, that immigration restrictions aimed at protecting the economic interests of disadvantaged domestic workers are within the scope of a state's authority and so do not infringe rights?

I concede that, for example, minimum wage laws are within the scope of a state's authority, but Joshi is mistaken if he thinks that this concession commits me to accepting the conclusion that immigration restrictions are also within the scope of a state's authority. For the fact that a state has the authority to restrict the liberty of persons who are within its territorial jurisdiction does not establish that a state has the authority to determine who is within its territorial jurisdiction. Imagine Joshi's argument being applied to justify deporting certain citizens for the sake of providing more economic opportunity for the members of the lowest economic class. I think most of us would resist the conclusion that we are committed to the belief that such forced emigration is within the scope of a state's authority. Minimum wage laws control the behavior of those who reside within the state's territorial jurisdiction. Immigration law determines who is legally permitted to be within the state's territorial jurisdiction. There is a substantial gap between the premise that the former is within the scope of a state's authority and the conclusion that the latter is within the scope of a state's authority.

15 Joshi, "For (Some) Immigration Restrictions," 193.

This objection to Joshi's argument is substantially buttressed by the fact that, although most if not all extant accounts of territorial jurisdiction imply that a state's controlling in various ways the behavior of persons inside the state is within the scope of a state's territorial authority, several of them do not yield the conclusion that immigration restrictions are within the scope of a state's territorial authority. As we have seen, even a successful tacit consent theory of territorial jurisdiction will fail to justify deportation because the suggestion that the one who is deported has, by accepting benefits from the state that deports her, tacitly consented to her own deportation is implausible. Fair play and gratitude accounts of territorial jurisdiction would also fail to justify deportation because they too depend on the premise that territorial jurisdiction is grounded at least partly in the fact that those subject to it have received benefits from being inside the state. Thus, the question of whether a state, for economic reasons, has the right to use compulsion to exclude people from its territory cannot be answered in the affirmative simply on the basis of the fact that a state has the right to use compulsion to regulate the economic behavior of those persons who are inside its territory. At a minimum, the fundamental question, "What is the correct theory of territorial authority?" cannot be avoided.<sup>16</sup>

Using Joshi's approach, however, someone could argue that, although barriers to trade such as tariffs and embargos typically involve controlling not just what happens within a state but also what goods enter or leave a state, most think that the state is "within its rights" to create them. And if we recognize the state's right to create barriers to international trade, should we not also recognize the state's right to create barriers to international migration?

My response here would be that various accounts of territorial authority, including tacit consent, fair play, and gratitude accounts, are consistent with the conclusion that restricting foreign trade falls within the scope of a state's authority but restricting immigration typically does not. On such accounts, territorially

16 Jeremy Waldron usefully distinguishes two conceptions of a sovereign state ("Exclusion"). On the "Sovereign Ownership conception," a state owns its territory, and its territorial authority is a consequence of that ownership. On the "Sovereign Responsibility conception," a state does not own its territory and its territorial authority is limited to governing the ever-changing human population within its territory. The suggestion that minimum wage laws aimed at benefitting economically disadvantaged domestic workers are within the scope of the state's territorial authority is consistent with each conception. But the suggestion that immigration restrictions aimed at benefitting economically disadvantaged domestic workers are within the scope of the state's authority is consistent only with the Sovereign Ownership conception. Waldron defends the Sovereign Responsibility conception but, regardless of how successfully his defense of that conception of sovereignty is, the point here is that he might well complain that Joshi's argument simply begs the question against the Sovereign Responsibility conception.

excluding goods is relevantly different from territorially excluding persons. For the individual within a state's territorial jurisdiction who is subjected to the exclusion of her goods is not thereby deprived of the public benefits that, on these accounts, ground the duty to obey the state's laws. But the individual who is subjected to the exclusion of her person is thereby deprived of the public benefits that, on such accounts, ground the duty to obey the law. Thus, the fact that a state has the authority to create barriers to trade does not by itself show that it has the authority to create barriers to immigration. One might object that some states are prepared to bring criminal charges against those who, although they never set foot within that state's territorial jurisdiction, arrange for the illegal movement of even harmless goods across the state's borders. I believe that, in those cases, the state in question has acted beyond the scope of its authority. That belief may be contestable, but it is not at odds with any commonsense views about the scope of state authority that all but a few "anarcho-libertarians" would readily accept.

#### 4. WELLMAN'S LIABILITY ARGUMENT

Let us turn our attention to liability arguments. There are many such arguments to be found in the relevant literature, and I cannot address all of them here. I discuss Christopher Heath Wellman's well-known and highly regarded liability argument in this section.<sup>17</sup> Then, in the final two sections, I discuss two members of the family of liability arguments that, in my opinion, have the best prospects for generating a successful argument to the conclusion that the typical deportation does not infringe rights.

Wellman argues that, because a legitimate state has a right to freedom of association, it also has a right to deport migrants who illegally cross its borders or illegally remain within those borders. He writes:

Legitimate political states are entitled to a sphere of political self-determination, one important component of which is the right to freedom of association. And since freedom of association entitles one to refuse to associate with others, legitimate political states may permissibly refuse to associate with any and all potential immigrants who would like to enter their communities. In other words, just as an individual may permissibly choose whom (if anyone) to marry, and a golf club may choose whom (if

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

anyone) to admit as new members, a group of fellow citizens is entitled to determine whom (if anyone) to admit into their country.<sup>18</sup>

Wellman provides a lengthy defense of the claim that a legitimate state has a right to freedom of association. His argument to that intermediate conclusion is admirably clear and rigorous, and I do not engage with it here. I want to take issue, however, with his claim that a state's refusing to allow a potential immigrant to enter or remain in a state is simply an exercise of a state's right to freedom of association, analogous to refusing to marry someone, or refusing to admit new members into a private golf club.

Notice that, as formulated in the quoted passage, Wellman's conclusion is ambiguous. The conclusion could be the claim that a legitimate state has a right to *civically or politically exclude*, that is, a right to deny to noncitizens the opportunity for citizenship or for political participation. Or the conclusion could be that a legitimate state has a right to *territorially exclude*, that is, a right to deny noncitizens the opportunity to enter or remain in its territorial domain. Ultimately, Wellman makes it clear that he believes that both conclusions follow from the fact that states have a right to freedom of association. He fails to show, however, that states have a right to use deportation as a means of territorial exclusion.<sup>19</sup> It might be objected immediately that Wellman does not specifically address deportation, preferring instead to argue only that states have a right to territorially exclude. But Wellman does claim that a state has a right to determine how it will enforce its immigration policies, and so I assume that he believes that deportation falls within the scope of that right.<sup>20</sup> If I am wrong about that, then I have no quarrel with him.

To use an analogy resembling the one used by Sarah Fine in her excellent critique of Wellman's argument, imagine that the members of Wellman's private golf club meet at a public park to enjoy a picnic.<sup>21</sup> Because the members of the club do not own the park, their right to freedom of association does not give them the right to demand that no one else enter or remain in the park during their picnic. Analogously, if the state does not own its territory, then the state's right to freedom of association does not give it a right to demand that noncitizens stay off its territory.

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

19 For other criticism of Wellman's arguments in defense of a right to exclude, see Fine, "Freedom of Association Is Not the Answer"; Wilcox, "Do Duties to Outsiders Entail Open Borders?"; Cavallero, "Association and Asylum"; and Blake, "Immigration, Association, and Antidiscrimination."

20 Wellman and Cole, *Debating the Ethics of Immigration*, 45.

21 Fine, "Freedom of Association Is Not the Answer," 354.

Of course, Wellman is free to argue that a state's right to freedom of association is different from a private golf club's right to freedom of association, and that some important difference between the two explains why the former right includes a right to restrict the freedom of movement of nonmembers in ways that the latter does not. Wellman does not, however, offer such an argument. Thus, he provides no reason to suppose that migrants who illegally cross borders infringe a state's right to freedom of association.

Furthermore, if a state does own its territory and so has a right to territorially exclude on that basis, then any appeal to a right to freedom of association as a basis for territorial exclusion would be superfluous. An analogy here would be a golf club owning its clubhouse: the club members can appeal to their ownership of the clubhouse as a basis for insisting that golfers who are not members of the club exit or refrain from entering the clubhouse. They do not need to appeal to any right to freedom of association, although they might point out that the strength of their interest in associating exclusively with each other is one reason why trespassing would be a significant rather than merely trivial infringement of their property right. By analogy, a state's freedom of association might be a significant interest shielded by its ownership of territory. But then it would be more relevant to whether and when a state's right to territorially exclude is overridden by consequentialist considerations than to the basic question of whether there is a right to territorially exclude. Of course, in a theory of rights, freedom of association might also be put forward as constituting part of the foundation of territorial ownership. Then it would play a crucial role in the argument that, because states own their territory, they have a right to territorially exclude. But Wellman does not propose any such foundational role for freedom of association.

Wellman is aware of this sort of objection, and, responding to Fine, he claims that "the objection can be countered once one appreciates that states are necessarily territorial." He continues:

The familiar but nonetheless crucial point is that because (1) potential conflicts require interaction and (2) we typically interact most extensively with those who are proximate, a set of legal institutions could peacefully settle conflicts only if it has effective authority over all those who are spatially proximate. . . . And if political unions could not perform their legitimating functions unless they were territorially delineated, there is no reason to be suspicious about the citizens of a given state alleging that their rights to freedom of association entitles them to keep foreigners out of their association *and off of their territory*.<sup>22</sup>

22 Wellman and Cole, *Debating the Ethics of Immigration*, 100.

Wellman's argument is not that a state, being necessarily territorial, in some sense owns its territory and so has a territorial right that, like an individual property right, includes a "power of exclusion." Instead, he argues that states are necessarily territorial in the sense of necessarily having jurisdiction in at least one contiguous geographical area. As he puts it, a state cannot perform its function of peacefully settling conflicts unless it "has effective authority over all those who are spatially proximate."

However, even if we concede to Wellman that legitimate states necessarily have territorial jurisdiction, this does not by itself enable him to reach his conclusion that legitimate states have a right to territorially exclude. For a state's having authority over all those within its territory does not imply anything about the scope of that authority in terms of what laws it can legitimately enact and enforce within its jurisdiction. Thus, Wellman's appeal to territorial jurisdiction fails to provide an answer to the question of whether a state has a right to deport those who violate its immigration laws.

Furthermore, even if Wellman could show that the migrant who illegally enters or remains in a state infringes the associational rights of that state (or of its citizens), this would fall well short of showing that deportation is a necessary and proportionate means for enforcing those rights. Again, Wellman claims that a state has a right to determine how it will enforce its immigration policies, but he ought to concede that no state has the right to enact enforcement policies that are unnecessary, disproportionate, or otherwise violate rights. And he does not show that deportation is a necessary and proportionate defense of the right of a state to freedom of association.

Perhaps Wellman should have argued that a state is necessarily territorial in the sense of necessarily owning (in the sense of having a property or property-like right to) the land within its borders. He could then have maintained that, like the owner of private land, a state has an enforceable right to exclude others from entering, or remaining on, the land to which it has a right. Be that as it may, Wellman chose not to offer such an argument. He appeals to a state's right to freedom of association and to territorial jurisdiction, neither of which entail ownership of territory.

##### 5. MILLER'S LIABILITY ARGUMENT

Some philosophers do appeal to ownership of some kind to defend at least some deportation. In this section and the next, I want to assess two such arguments, one of them David Miller's and the other Anna Stilz's.<sup>23</sup> Although there are other

23 Miller, "Territorial Rights"; Stilz, *Territorial Sovereignty*.



“ownership arguments” that are also worthy of consideration, I hope that my discussion of Miller’s and Stilz’s respective efforts will illustrate some of the kinds of challenges such arguments face.<sup>24</sup>

Neither Miller nor Stilz uses the term “ownership” to describe the rights to which they respectively appeal. Thus, let me be clear that my use of the term “ownership” may well be broader than theirs. On my use of the term, those who seek to defend a state’s right to deport on grounds of ownership need not claim that ownership of territory and ordinary private ownership of land are exactly alike in terms of the nature, strength, or basis of the respective ownership claims. (Similarly, those who speak of self-ownership need not claim that self-ownership and ownership of external property are closely akin in any of these ways.) They do, however, need to appeal to some right that resembles a property right in certain crucial respects. Thus, when I speak of “appropriation” or “ownership” of territory, I am speaking of acquiring or enjoying a property *or property-like* right to territory that includes at a minimum two component rights that are also components of ordinary property rights: first, an enforceable right to occupy and use the land in question, and second, an enforceable right to physically exclude others from that land. I will call the first of these component rights a *right of occupation and use* and the second a *right against trespass*.

Miller argues that nations (and indigenous peoples) are the primary bearers of territorial rights and that states enforce the territorial rights of the nations they govern. He proposes that “when a group has interacted with the land in such a way as to *increase its value*, this gives the group a prima facie right to hold the land so as to be able to enjoy the enhanced value—to reap the fruits of the cultivated land or to travel down the roads they have built.”<sup>25</sup> The increase in value is not solely economic or material. Miller emphasizes that a nation’s historical sites, national monuments, landmarks, etc., can have deep symbolic meaning so that a nation losing its territory “would be to lose much that is of symbolic value to the group, and therefore essential to its continuing identity as a people.”<sup>26</sup>

Miller’s justification for both a nation’s right of occupation and use and its right against trespass is, however, only partly a backward-looking appeal to the nation’s historical success in increasing the material and symbolic value of land. It is also partly a present and forward-looking appeal to the interest a nation has in enjoying today and in the future the value of the land that, historically, the nation has enhanced. Miller emphasizes the strength of that interest, even going so far as to suggest that when “land has been shaped in a way that reflects the

24 See, for example, Simmons, *Boundaries of Authority*; Nine, “A Lockean Theory of Territory.”

25 Miller, “Territorial Rights,” 259.

26 Miller, “Territorial Rights,” 259.



group's distinctive culture, continued occupancy of that land becomes essential if the group is to live a flourishing life."<sup>27</sup> This appeal to interests plays an especially important role in his argument that nations have a right against trespass. Miller proposes that, given that the members of a nation have a "deep interest in the territory as the repository of their cultural values," the presence in that territory of too many people, or too many people of another culture, can make it "impossible for land to be used in the way the group's values require." And if citizenship is to be granted to long-term residents (Miller assumes that it must), then the presence of too many immigrants may ultimately lead to the state's decisions being shaped partly by cultural values foreign to the nation, which, again, could undermine a nation's interest in using the land in ways that reflect its own culture and values.<sup>28</sup>

Miller's argument is a serious one, but I am unconvinced that a right against trespass can be established in this way. Setting aside possible theoretical concerns about interest-based theories of rights, I believe that Miller has not shown that the interest a nation has in excluding outsiders is sufficiently powerful to generate a right against trespass *in spite of the countervailing interests that outsiders might have in not being excluded*. The strength of those countervailing interests should not be underestimated. They are capable of motivating people to take the risks associated with illegal immigration, to migrate to a land whose cultural values are foreign to them, to leave behind family and friends, and to abandon their homeland in spite of the fact that it is the repository of their own cultural values. It is far from obvious, then, that the interests that motivate such sacrifices are generally less weighty than the interests to which Miller appeals in his attempt to establish an interest-based right against trespass. Thus, I think it is fair to say that his argument is incomplete.

I concede, however, that I have not shown that the argument cannot be completed. Thus, let us grant for the moment Miller's Lockean principle that a group can acquire territory by increasing the material and symbolic value of the land its members occupy. As we have seen, Miller wants to move from that principle of appropriation to the conclusion that nations typically own territory. Such ownership, which includes an enforceable right against trespass, can then serve as the basis for arguing that the typical deportation does not infringe rights. There are, however, several obstacles in Miller's path.

One of them arises from the fact that not every member of a nation that increases the value of land contributes to that increase. This fact makes it unclear why every member of a nation should share in the collective ownership of ter-

27 Miller, "Territorial Rights," 260.

28 Miller, "Territorial Rights," 265.

ritory. Miller anticipates this sort of concern and replies to what he describes as “the objection which asks how later generations who inherit land can claim rights to territory that they have not themselves improved.” Ultimately, his reply appeals to the present and forward-looking dimension of his argument. Thus, although he concedes that “living on historically improved land is in one sense an undeserved benefit,” he points out that “being excluded from that land is certainly an undeserved loss.”<sup>29</sup>

Miller’s theory does, however, exclude from collective ownership those citizens of a state who are not members of the nation that has increased the value of the relevant land. That seems to leave them as second-class citizens no less vulnerable to exclusion than the citizens of other states. Moreover, given that many of these citizens have themselves contributed to enhancing the land, it seems unfair to exclude them from the class of joint territorial right holders—especially since some members of that class have not made any contribution at all.

The general problem here for theories of territorial ownership, the *problem of citizen exclusion*, is that of identifying a principle of territorial appropriation that does not exclude certain classes of citizens from the collective that is supposed to own territory. A related problem, the *problem of noncitizen inclusion*, is that of identifying a principle of territorial appropriation that does not include noncitizens or even those illegally residing in a state as members of the collective that owns territory. In Miller’s case, the latter problem is that, in most cases where (some) members of a nation have enhanced the land they occupy, many people who are not members of that nation will have also made contributions to enhancing that same land, including some who illegally reside there, and even some foreign persons who have never set foot on the land that they have improved from afar. Thus, it seems that Miller’s principle of territorial appropriation leads to the conclusion that many immigrants who illegally reside on the land occupied largely by the members of a nation, and even some foreign nonresidents, are among the joint owners of the territory that, according to him, is owned by that nation.

These difficulties concern the identity of the joint owners of territory, but Miller also faces difficulties concerning the boundaries of the territory that is owned. Given that many nation-states claim as territory land the value of which has not been improved by anyone, it is unclear how Miller can justify claiming that a nation owns all of the territory the state claims on its behalf. Borrowing Stilz’s expression “ancillary territory” to describe territory that is neither occupied nor used, I refer to the general problem here as the *problem of ancillary territory*. The problem is especially significant because of the tremendous amount of

29 Miller, “Territorial Rights,” 260–61.

undeveloped and unoccupied land that states such as the United States claim as territory. Indeed, it is difficult to imagine a principle of territorial appropriation whose reach could extend to all the ancillary territory of the United States. Miller concedes that his Lockean principle of appropriation cannot ground a right to ancillary territory, but he appeals to the value of efficiency to fill the gap:

It should be conceded that a considerable degree of historical contingency enters into the precise placing of state boundaries. This should not disturb us so long as we continue to accept the general justifying argument for the territorial state. It belongs to that argument that state boundaries should be clear, continuous and in normal cases reasonably straight for reasons of efficiency.<sup>30</sup>

This response is inadequate, however, because, even if territorial jurisdiction in ancillary territory might be defensible on grounds of efficiency, it is not at all clear that an enforceable right against trespass can be justified on such grounds.<sup>31</sup>

Another kind of problem that any attempt to establish collective ownership of territory must solve emerges because most nations and the states that represent them did not acquire their territory by satisfying some reasonable criteria for territorial appropriation. Instead, they used force or coercion to seize land from earlier inhabitants. Miller is well aware of this *problem of bad pedigree*, and he concedes that “a nation cannot gain territorial rights simply by displacing another people and then undertaking some value-creating activities in the place in question.”<sup>32</sup> But he never explicitly offers a solution to the problem. He does say that acquiring territorial rights requires long occupation because the necessary transformation of the land takes many years to achieve. Thus, on his account, when a nation appropriates territory that it originally seized by force, it does so long after those who unjustly took the land from others are dead. Perhaps, then, one could argue on his behalf that those who are not at fault for any historical injustice are the ones who, because they have enhanced the land that was originally stolen, collectively acquire a territorial claim to it.<sup>33</sup> That solution seems

30 Miller, “Territorial Rights,” 263.

31 Even if Miller were to restrict his defense of ownership of territory to “core territory,” one could still question whether Miller’s theory can justify national ownership of territory. The problem is that different groups within a nation, perhaps exemplifying different subcultures, have enhanced the value of different parts of the nation’s territory. Hence, Miller needs to explain why his principle of appropriation does not lead to the conclusion that a nation’s core territory should be carved up into smaller territories, each owned by a subset of the nation’s members.

32 Miller, “Territorial Rights,” 261.

33 Miller, “Territorial Rights,” 258–62.

plausible enough, but if Miller were to embrace it, then he would be walking a fine line. For if a nation's past usurpation of territory does not invalidate its current claim to that territory, then one wonders why a nation's past enhancement of land can play any role in establishing the current validity of that claim.

A related difficulty that I call the *problem of forfeiture* stems from the fact that many nations and states have failed to respect the sovereignty and territorial rights of others. Thus, they may have forfeited any right they would otherwise have to demand that others respect their own territorial rights. Given the extent to which, historically, the United States has interfered in the internal affairs of Guatemala, for example, it would be difficult to take seriously a justification for deporting Guatemalan immigrants that was based on the claim that Guatemalans must respect the sovereignty of the United States.

It appears, then, that Miller's ownership argument is unconvincing even if we grant him his principle of appropriation. Furthermore, that principle itself can be challenged on the grounds that it is too broad, for it appears to permit the appropriation of land that is already privately owned. I cannot acquire a claim to *your* land by enhancing it, nor can any group do so. If, for example, I (or a group to which I belong) enhance the material value of your land by raising bees that, foreseeably, pollinate your vegetation, I do not thereby acquire a claim to your land or its vegetation, nor should I. Thus, Miller's argument is once again, at best, incomplete, for it lacks an explanation of how a nation can acquire ownership of territory that includes parcels of land privately owned by individual members (or even nonmembers) of that nation. I call the problem of providing such an explanation the *problem of overlapping ownership*.<sup>34</sup>

## 6. STILZ'S LIABILITY ARGUMENT

Ownership arguments like Miller's rely on an attempt to identify a principle of territorial appropriation to serve as a basis for the claim that some collective, either a nation (Miller's view) or a state (a common alternative view), owns

34 It is also important to keep in mind that, even if nations or states do own the land that they claim as territory, and so illegal immigration (typically) infringes a nation's right against trespass, reaching the conclusion that the typical deportation does not infringe rights would still require showing that deportation is a necessary and proportionate means of enforcing that right. That is no easy task. After all, most migrants who illegally reside in a state do not prevent others from, to echo Miller, reaping the fruits of the cultivated land or traveling down the roads they have built. Nor do they pose a serious threat to the symbolic value of the land. I suspect that only in rare cases would the threat posed by immigration be serious enough that the harm that is inflicted by the typical deportation would be proportionate to that threat.

territory. As Miller's argument illustrates, however, it is no easy task to find a *plausible* principle of territorial appropriation that assigns ownership of the right geographical area (problem of ancillary territory) to the right collective (problems of citizen exclusion and noncitizen inclusion) in spite of that collective's moral shortcomings (problems of bad pedigree and forfeiture) and in spite of the fact that much of the territory in question is also privately owned (problem of overlapping ownership).

Stilz's ownership argument avoids most of these problems because she does *not* attempt to show that a state or a nation owns territory. Rather, employing an interest-based account of rights, she argues that, by having place-based interests in land, individuals acquire what she calls "occupancy rights." These pre-institutional rights include a right to occupy and use the "area fundamental to their located life plans" and a right to exclude others from occupying that area should such occupation set back those plans. In my terms, then, Stilz's occupancy rights include, as components, both a right of occupation and use and a right against trespass. They are, therefore, ownership rights, and, on her view, the state's right to enact and enforce immigration restrictions is a right to enforce these ownership rights.<sup>35</sup>

Because she is not trying to establish collective ownership of territory, the problems of citizen exclusion and noncitizen inclusion do not arise. On her view, most but not all citizens and some noncitizens have occupancy rights within the territorial jurisdiction of the state. Because one of the state's core functions is to protect the rights of those within its territorial jurisdiction, she concludes that the state sometimes fulfills one of its core functions through deportation. The problem of overlapping ownership also does not arise because the state's right to enforce occupancy rights does not require the state's acquiring ownership of the land to which individuals have pre-institutional ownership rights. As for the problem of bad pedigree, Stilz readily concedes that occupancy rights do not include a power to exclude others from occupying land that has been unjustly seized from them. Although issues of correcting historical injustices enter in here and complicate matters, at worst Stilz's view requires only qualification to accommodate the relevant claims. Furthermore, her view is better equipped to solve the problem of forfeiture than views that posit national or state ownership of territory because her occupancy rights are held by individuals who typically are not responsible for even the contemporary injustices of the nation or state to which they belong, let alone any historical injustices.

Stilz does struggle with the problem of ancillary territory, however, because most ancillary territory is not fundamental to anyone's "located life plans" and

35 Stilz, *Territorial Sovereignty*, ch. 2.

so, on her view, no one acquires a right of occupancy to it. She hints at the possibility of a necessity account of why, in at least some cases, states have a right to exclude foreign persons from ancillary territory, but, ultimately, she concedes that some states may lack that right.<sup>36</sup> Nevertheless, if she can establish that a state has a right to exclude foreign persons from its core territory, this is still a very significant conclusion, because many states have little or no ancillary territory and, even in states that do, foreign migrants are seldom to be found there.

Although I find Stilz's approach to be promising, I want to challenge the principle of appropriation at the foundation of her argument. That principle is offered as an improvement on Locke's principle of first appropriation and, following Locke, Stilz recognizes what she calls a "fair use proviso" intended to accommodate the idea that everyone has an equal initial claim to natural resources, including land. Specifically, she says that an occupancy right does not include a right to exclude those who cannot enjoy flourishing located life plans where they are now and, in order to enjoy such plans, must occupy an area to which others have occupancy rights.<sup>37</sup> I want to argue that this proviso is too narrow, and so her principle of appropriation is too broad.

Stilz's proviso is an example of what I call a "same use proviso," for she proposes that land can be appropriated to be used to advance located life plans so long as others have an equal opportunity to use land in the same way, namely, to advance their own located life plans. Locke's proviso that "enough and as good" must be left for others is sometimes interpreted as a "same use proviso." So understood, Locke was proposing that, if one is to appropriate a previously unowned resource for a certain use, one must leave "enough and as good" of that resource for others to appropriate *for that same use*. But resources, including parcels of land, often have multiple potential uses. Thus, even if a same use proviso is in place in Locke's state of nature, this would not prohibit someone from appropriating all of the land that is available for a specific purpose so long as that person does not use the land for that purpose. Suppose, for example, that I want to appropriate land for farming. A same use proviso would require me to leave enough land that is just as suitable for farming so that others have the same opportunity to farm that I have. But now suppose that, although I satisfy that requirement, the land I appropriate contains a rare, medicinally useful moss that would be destroyed by farming. A same use proviso would create no obstacle to my appropriation of that land for farming even though that appropriation would potentially deny others the opportunity to meet their medical needs. Or suppose that the land I want to appropriate for farming must be crossed to access

36 Stilz, *Territorial Sovereignty*, 56–57.

37 Stilz, *Territorial Sovereignty*, 69.

the only local pass through a mountain range. Again, if there is plenty of land equally suitable for farming left for my neighbors, and I have no interest in travel, a same use proviso would not block my appropriation of the land in question.

This strikes me as a basis for doubting that Locke understood his own proviso as a same use proviso. He took very seriously the difficulty of justifying first appropriation of land, for he understood that every first appropriation of land diminishes the rights of all but the appropriating party by restricting the scope of the right to liberty of others and by making others liable to coercion and force should they commit a trespass on the appropriated land. Moreover, if we begin with the assumption that land is collectively owned by all until it is removed from the commons for private use, then every appropriation reduces what is owned in common and hence reduces all but the appropriator's share of resources.

In response to the challenge of justifying first appropriation, Locke sought to show that incentivizing productive labor by allowing appropriation on its basis benefits nearly everyone and that even those who do not benefit still have no basis for complaint because, so long as "enough and as good" is left for others, appropriation is "of no prejudice to any [person]." If Locke's argument is to make sense, then we must interpret "enough and as good" broadly enough so that first appropriations that do not violate the proviso are genuinely of no prejudice to anyone. A same use interpretation of the proviso fails to do that. In my two examples, appropriation of the land in question would be "of prejudice" to those who wanted to use the land in question for certain purposes other than farming—medicine in the first example, and travel across the mountain range in the second.

Setting aside the question of how to interpret Locke, I see no more reason to suppose that Stilz's principle of appropriation should be limited only by a same use proviso than there is to suppose that Locke's principle for first appropriation should have only that limitation. The supposition that, so long as everyone has a place to pursue located life plans, individuals or groups can, by acquiring occupancy rights, create substantial obstacles to travel, economic opportunity, access to family, etc., is inconsistent with recognizing the equal initial claim that everyone has to unowned resources.

Stilz might contest this by appeal to her interest-based theory of rights. Thus, she could argue that human interests are better served by a same use proviso than by a more restrictive proviso. But can such a claim be adequately evidenced? Stilz recognizes that to "argue for a moral right of occupancy, we must compare the strength of the interests protected under the proposed right against the strength of possible countervailing considerations."<sup>38</sup> I would add that, in

38 Stilz, *Territorial Sovereignty*, 47–48.



making such an assessment, it is important to keep separate the two components of Stilz's moral right of occupancy. Much of what she says in defense of this right is a defense of its first component: the right to occupy and use the area fundamental to one's located life plans. In citing the powerful interests that she believes justify occupancy rights, for example, she rightly points out that removing someone from his home and community "destroys many of his life plans at once."<sup>39</sup> But the interest in not being removed from one's home supports only the first component of an occupancy right, and the right to deport requires the second component: the right to exclude others from occupying (i.e., entering or remaining in) that area should such occupation set back the located life plans of current occupants. It is here where I remain unconvinced that the balance of interests is so heavily tipped toward current occupants as opposed to potential occupants that, on an interest-based theory of rights, the right to exclude ought to be recognized. (I also reject interest-based theories of rights, but that is a longer story.) Stilz herself points out that the desire to relocate can be motivated by the most fundamental autonomy interests—a desire to escape political oppression, the desire to join one's family, the desire to pursue a career that is not an option in one's own country, etc.—as well as by more trivial interests.<sup>40</sup> The desire to exclude outsiders from one's territory can also be motivated by fundamental interests—an interest in limiting economic competition, an interest in crime reduction, etc.—as well as by more trivial interests.<sup>41</sup> I do not see any basis for thinking that, on balance, the latter interests are so much weightier than the former that they ought to be protected by a right that would undermine the former interests and would generate liability to coercion and force in the form of deportation.

Furthermore, if we begin with common ownership of resources in a state of nature, as Stilz does, appealing to speculations about what would best serve interests overall is not good enough.<sup>42</sup> One cannot justify depriving me of what we jointly own on the grounds that your interest in exclusive ownership is weightier than my interest in joint ownership. To put it in Lockean terms, recognizing the second component of Stilz's occupancy rights is "of prejudice" to many. Of course, in extreme cases, unrestricted immigration could completely and disastrously undermine the most vital interests of those who reside in some area. But then assumption 3 would come into play and we could say that, although immi-

39 Stilz, *Territorial Sovereignty*, 48.

40 Stilz, *Territorial Sovereignty*, 205–6.

41 Stilz, *Territorial Sovereignty*, 43–44, 199–202.

42 Stilz, *Territorial Sovereignty*, 22.



gration restrictions would infringe the rights of would-be immigrants to this area, the benefits of such restrictions are so great that the restrictions are justifiable.

#### 7. CONCLUSION

Stilz or Miller may have an adequate response to my objections, or there might be a way to modify one of their positions to overcome those objections, or perhaps other ownership arguments will succeed even if theirs do not. Furthermore, there may be some other kind of liability argument, or perhaps an indirect, relinquishment, or extraordinary limit argument, that establishes that the typical deportation does not infringe rights. At this moment, however, it seems to me that the presumption that the typical deportation infringes rights has not been defeated. And that means that I am morally opposed to, and even prepared to use necessary and proportionate force or coercion to prevent, most deportations.

University of Delaware  
kai@udel.edu

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## TERRITORIAL EXCLUSION

### AN ARGUMENT AGAINST CLOSED BORDERS

*Daniel Weltman*

SUPPORTERS OF OPEN BORDERS sometimes argue that the state has no *pro tanto* right to restrict immigration, because such a right would also entail a right to exclude existing citizens for whatever reasons justify excluding immigrants. They argue that if a state can refuse to admit an immigrant into its territory and refuse to grant citizenship to an immigrant, it can also remove existing people from its territory and strip citizenship from a citizen or refuse to grant citizenship to newly born potential children.<sup>1</sup> Thus one is excluded from a state if one ends up without a right to presence or citizenship in that state, and this exclusion can be visited upon current and incipient citizens just as much as it can be visited upon potential immigrants. Some argue that immigration restrictions would license the exclusion of anyone or almost anyone.<sup>2</sup> Others argue that it would license the exclusion of people with certain political views

- 1 Theorists who endorse “closed borders,” or in other words a *pro tanto* right for states to exclude immigrants, and who are thus targets of these arguments, include Blake (“Immigration, Jurisdiction, and Exclusion”), who argues that exclusion can be carried out in order to keep newcomers from unjustly imposing duties of redistributive justice on existing members; and Buechel (“A Presumptive Right to Exclude”), who offers a modified version of Blake’s view. Theorists who argue that the state can exclude in order to preserve the character of a community (e.g., Walzer, *Spheres of Justice*; Miller, *On Nationality and Strangers in Our Midst*; and Pevnick, *Immigration and the Constraints of Justice*) say citizens have a right to claim the benefits of the institutions they have contributed to and the right to exclude others from obtaining those benefits. Other theorists endorse a strong right to freedom of association, which entails a freedom to refuse to associate with potential immigrants (Weltman, “Immigration and Freedom of Association”; Altman and Weltman, *A Liberal Theory of International Justice*), and a strong right to political self-determination, which entails rights to preserve the character of the community or otherwise determine its makeup (Moore, *A Political Theory of Territory*, 189–97).
- 2 Cole, *Philosophies of Exclusion*, 51; Hidalgo, “Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation”; Freiman, “The Marginal Cases Argument for Open Immigration”; Mendoza, “Enforcement Matters”; Akhtar, “Stripping Citizenship.”

or other cultural characteristics.<sup>3</sup> Still others suggest that it would license the exclusion of newborn children.<sup>4</sup>

The thought is that exclusion in these ways is bad, and any theory that licenses exclusion is therefore bad, so we should reject these arguments that defend closed borders. We should not think states have a *pro tanto* right to exclude immigrants. To a large extent these arguments have gone unanswered, with the exception of replies from Thomas Carnes and Hrishikesh Joshi (discussed below).<sup>5</sup> One potential way of responding is to draw a disanalogy between immigrants and existing citizens by arguing that there is a right to stay put, a right that allows existing citizens to remain but that also allows the state to exclude immigrants.<sup>6</sup>

In this article I present a new form of the exclusion argument against closed borders that escapes this kind of reply. I do this by describing a new kind of ex-

3 Kates and Pevnick, "Immigration, Jurisdiction, and History," 191–92.

4 Lægaard, "Territorial Rights, Political Association, and Immigration," 660–61; Brezger and Cassee, "Debate." Kieran Oberman offers a similar argument, which is that if it is OK to block immigration, it is OK to permanently deny citizenship to noncitizen residents. See Oberman, "Immigration, Citizenship, and Consent."

5 Carnes, "The Right to Exclude Immigrants Does Not Imply the Right to Exclude Newcomers by Birth"; and Joshi, "Is Liberalism Committed to Its Own Demise?" Altman and Wellman try to preempt the argument that their view allows for exclusion; see *A Liberal Theory of International Justice*, 184. I take Sahar Akhtar's reply to be compelling; see "Stripping Citizenship." Assuming Akhtar's reply fails, though, Altman and Wellman's response relies on the wrongness of kicking someone out of the territory they reside in, so it is not effective against my argument below. Louis Philippe Hodgson does not address immigration or exclusion directly, but he does argue that it can be wrong to impose duties of redistributive justice on people by having children, which could serve as a basis of an argument that licenses exclusion of newborns (although this would require modifications to Hodgson's specific argument, which is focused on the impact of newborns on other communities, not the community into which they are born); see "A Problem for Global Egalitarianism." Hodgson has a brief discussion of exclusion, although for a number of reasons it is not relevant here; see "A Problem for Global Egalitarianism," 198.

6 Carnes, "The Right to Exclude Immigrants Does Not Imply the Right to Exclude Newcomers by Birth," 30–31. Many endorse a right to stay put of some kind without committing one way or another to this particular debate over exclusion. See Nine, "A Lockean Theory of Territory"; Stilz, "Nations, States, and Territory"; Oberman, "Immigration, Global Poverty and the Right to Stay"; Miller, "Territorial Rights"; Stilz, "Occupancy Rights and the Wrong of Removal"; Moore, *A Political Theory of Territory*; Lefkowitz, "Autonomy, Residence, and Return," 540; Buckinx and Filindra, "The Case against Removal"; and Ottonelli, "The Right to Stay as a Control Right." As noted above, Altman and Wellman also endorse a right to stay put in response to the exclusion argument (*A Liberal Theory of International Justice*, 184). See also Stilz's defense of occupancy rights that entails the interesting combination of a limit on some exclusions, an endorsement of other exclusions, and open borders for cases in which immigration is innocuous ("Settlement, Expulsion, and Return" and *Territorial Sovereignty*).

clusion that has not been discussed in depth, which I call “territorial exclusion.”<sup>7</sup> Territorial exclusion is the process according to which the group that wishes to exclude current citizens secedes from the territory in which those citizens reside.<sup>8</sup> For instance, the forty-nine other states in the United States could secede from the worst state, Florida, effectively expelling Floridians from the country. I argue that defenders of closed borders cannot explain what is wrong with this sort of exclusion without vitiating the argument for closed borders. Thus, either states have a right to exclude via secession for whatever reasons they can exclude immigrants, or arguments in favor of a *pro tanto* right to exclude immigrants fail.

A virtue of this approach is that the territorial exclusion argument against closed borders does not rely on the idea that immigration restrictions are coercive.<sup>9</sup> This is important because one might respond to existing exclusion arguments by making the following argument: states coerce people inside their borders but not people outside their borders, and thus states have a duty to grant citizenship to (and therefore not exclude) existing residents, but no duty to grant citizenship to outsiders. If we do not grant that immigration restrictions are coercive, then existing exclusion arguments are defeated by the coercion response. So, naturally, those who deploy exclusion arguments might claim that immigration restrictions are coercive. However, there are two issues with this reply on the part of existing exclusion arguments. The first is that this is controversial: many disagree that immigration restrictions are coercive.<sup>10</sup> The second is that if we *do* grant that immigration restrictions are coercive, then it is not clear why we would need existing exclusion arguments. We could simply

7 Akhtar ends her discussion of exclusion with a brief paragraph on territorial exclusion in which she notes that endorsing the possibility of territorial exclusion is “a counterintuitive result” (“Stripping Citizenship,” 433).

8 Adam Cox uses the phrase “territorial exclusion” to describe people kept out of a territory, as compared to people who are allowed into a territory but barred from certain benefits, like public assistance (“Three Mistakes in Open Borders Debates”). This is not the idea of “territorial exclusion” that I refer to here. Daniel Philpott uses the term “exclusion” to describe a situation in which “the citizens of one state do not want to allow an outside group of citizens to join,” a problem he says is “insoluble” (“In Defense of Self-Determination,” 381n55). One might worry that the similar situation in which most citizens of one state do not want to allow an inside group to continue to belong is similarly insoluble. I hope what I say below allays this concern.

9 The paradigmatic coercion-based open-borders argument is Arash Abizadeh’s “Democratic Theory and Border Coercion.” Other examples include those made by Huemer, “Is There a Right to Immigrate?”; and Freiman, “The Marginal Cases Argument for Open Immigration.” See also Carens, *The Ethics of Immigration*, 257.

10 Altman and Wellman, *A Liberal Theory of International Justice*, 184; Miller, “Why Immigration Controls Are Not Coercive.”

rely on the coercion-based open borders argument. There is no way to draw a distinction between insiders and outsiders with respect to exclusion (according to exclusion arguments). But if this is true then coercion of insiders and outsiders is also equivalent, and thus coercion-based open borders arguments should be sufficient. Thus we might think that existing exclusion arguments are otiose: they succeed only if the coercion arguments for open borders also succeed (both kinds of arguments rely on the idea that immigration restrictions are coercive, because no distinction can be drawn between insiders and outsiders), and if those coercion arguments succeed, then we do not need these exclusion arguments. The territorial exclusion argument does not need the coercion argument for open borders at all.<sup>11</sup> It will thus be able to convince those who reject coercion arguments.<sup>12</sup>

In section 1, I define key terms and briefly recap the existing exclusion arguments in favor of open borders and the objections to them. In section 2, I outline the territorial exclusion argument, which allows the opponent of closed borders to respond to these objections. In section 3, I discuss objections to the territorial exclusion argument. In section 4, I take stock and suggest that the best way to understand the territorial exclusion argument is not as one in favor of open borders but rather as one against closed borders and in favor of a more considered approach to which borders ought to exist in the first place.

- 11 Because my argument does not rely on coercion, it can serve as the basis of a similar cosmopolitan argument in favor of global duties of distributive justice. It can do this because some argue that coercion gives rise to duties of distributive justice and thus there are no substantial global duties of distributive justice absent a global scheme of coercion; see Nagel, "The Problem of Global Justice"; Blake, "Distributive Justice, State Coercion, and Autonomy" and "Agency, Coercion, and Global Justice"; and MacKay, "Coercion and Distributive Justice." What these arguments do not show, however, is that it is permissible *not* to globally coerce people who want to be coerced, which is clear if we imagine the state deciding to stop coercing some existing citizens as a way of getting out of its distributive-justice obligations to those existing citizens. If it would be wrong for the state to do this, then we might think it is equally wrong for a state to refuse to coerce willing outsiders on the grounds of not wanting to acquire duties of distribute justice to them. I discuss this possibility in Weltman, "The Shifting Boundary Problem" and "The Right to Join a State." See also Abizadeh, "Cooperation, Pervasive Impact, and Coercion."
- 12 It will not be much use for those who accept coercion arguments and who thus already accept open borders. But it is nice to have two arguments for the same conclusion that are not redundant in the way that coercion arguments and existing exclusion arguments are redundant. Moreover, as I note in section 4, I think open-borders arguments typically overreach, and this applies to coercion arguments too. I thank an anonymous reviewer for urging me to elaborate on this point.

1. KEY TERMS, THE EXCLUSION ARGUMENT FOR  
OPEN BORDERS, AND RESPONSES

By “open borders” I refer to the idea that states do not have a *pro tanto* right to prevent noncitizens from entering the state, residing in the state, and becoming citizens of the states.<sup>13</sup> Advocates of “closed borders” typically only endorse broad *pro tanto* rights to prevent noncitizens from residing in the state for long periods of time and to prevent noncitizens from becoming citizens. That is, they often accept that states might lack a *pro tanto* right to prevent, say, tourists from visiting for short periods of time.<sup>14</sup> “Immigration” refers to entering a state and residing there for a long period of time. Many people on both sides of the debate, following Michael Walzer, think that a right to immigration entails a right to citizenship, because a state cannot justly deny citizenship to long-term residents.<sup>15</sup> Therefore, unless noted otherwise, a right to immigration entails not just a right to reside in a state long term but also a right to become a citizen.<sup>16</sup> Supporters of open borders therefore think that everyone has at least a *pro tanto* right to immigrate anywhere they choose (and consequently become a citizen), and supporters of closed borders claim there is no such right. “Immigrants” refers to people who want to immigrate long term (and thus become citizens) rather than people merely traveling. A right to immigrate anywhere one chooses entails a correlative duty on the part of states not to violate this right, and the absence of a right to immigrate anywhere one chooses leaves room for a right on the part of states to prevent immigration. Thus a supporter of open borders thinks states have no *pro tanto* right to prevent someone from immigrating and supporters of closed borders think states do have a *pro tanto* right to prevent someone from

- 13 Fine, “Freedom of Association Is Not the Answer,” 342–43. A *pro tanto* right is a right that can be overridden, i.e., a right that is not necessarily absolute. All things considered, a state may have a right to prevent someone from entering, perhaps to stop the spread of an epidemic. One could replace all talk of *pro tanto* rights with talk of conditional absolute rights (or even unconditional absolute rights) without changing the substance of my argument. On this topic generally, see Frederick, “Pro-Tanto Versus Absolute Rights.” Rights arguments could be replaced altogether with arguments about moral considerations via the procedure outlined by Buchanan, *Secession*, 27–28.
- 14 Altman and Wellman, *A Liberal Theory of International Justice*, 178.
- 15 Walzer, *Spheres of Justice*, ch. 2; Miller, *National Responsibility and Global Justice*, 225; Altman and Wellman, *A Liberal Theory of International Justice*, 177–78; and Miller, *Strangers in Our Midst*, 63. For exceptions see Blake, “The Right to Exclude,” 534; and Cox, “Three Mistakes in Open Borders Debates.”
- 16 Thus my approach is different from Clara Sandelind’s, which distinguishes between the two and defends only the right to reside and not the right to citizenship also; see Sandelind, “Territorial Rights and Open Borders,” 498–500.

immigrating. An argument for closed borders must establish that there is no general *pro tanto* right to prevent immigration. There may be justifications for preventing immigration, but unless these apply to most potential immigrants, we must reject closed borders.

The exclusion argument against closed borders goes like this: any argument that explains why it is OK to refuse to admit immigrants will also work as an argument for excluding existing residents of the state, either by revoking their citizenship or by not granting them citizenship when they are born (or at any time subsequent to their birth). For instance, Michael Blake argues that states can restrict immigration because the relationship of co-citizenship entails duties, and people can permissibly avoid having these new duties thrust upon them by immigrants.<sup>17</sup> But these new duties are also thrust upon people when newborn babies are given citizenship.<sup>18</sup> So Blake's argument licenses the denial of citizenship to infants, and that is an unacceptable conclusion. Thus states have no *pro tanto* right to refuse immigrants.<sup>19</sup>

Or, similarly: Altman and Wellman argue that freedom of association, which allows people to associate together by forming states, also allows people to refuse to admit others into the association.<sup>20</sup> But if people can refuse to admit new associates, they can also kick out existing associates.<sup>21</sup> Freedom of association does not require me to associate with people I do not want to associate with, whether they are newcomers or existing associates. So Altman and Wellman's argument licenses the denationalization of existing citizens, and this is an unacceptable conclusion. Thus states have no *pro tanto* right to refuse immigrants.

17 Blake, "Immigration, Jurisdiction, and Exclusion" and "The Right to Exclude."

18 Lægaard, "Territorial Rights, Political Association, and Immigration," 660–61; and Brezger and Cassee, "Debate."

19 Blake himself compasses something very close to the infant-exclusion argument by asking whether his argument licenses "the right to slip birth control into our colleague's coffee to avoid" the "unwelcome burdens" entailed by newly born infants; see "Immigration, Jurisdiction, and Exclusion," 119. He suggests that the right to control one's body overrides someone else's right to secretly administer birth control. Of course, the right to control one's body does not require others to grant citizenship to one's newborn child, so his response here does not fully anticipate exclusion objections. As Blake points out, "nothing [he says] here demands, or permits, the idea that the right to avoid being obligated to others is morally absolute," which leaves room for exclusion arguments to suggest that the wrongs of exclusion outweigh the right to avoid acquiring new obligations to newborn co-citizens (119). See also Brezger and Cassee, "Debate," 374–75.

20 Wellman, "Immigration and Freedom of Association"; Altman and Wellman, *A Liberal Theory of International Justice*, ch. 7.

21 Cole, *Philosophies of Exclusion*, 51; Gibney, "Should Citizenship Be Conditional?" 650; Brezger and Cassee, "Debate," 372; Akhtar, "Stripping Citizenship."



To respond to exclusion arguments without giving up closed borders (and without endorsing exclusion of existing citizens or newborn babies), one must come up with some difference between people inside the state and people external to the state that explains why the former cannot be excluded while the latter can.<sup>22</sup> One option is to say that people have a right to stay put.<sup>23</sup> There are various ways one might defend this right, like a right to live in territory one is attached to, a right not to be coercively removed from one's home, a right not to be uprooted from one's neighbors, and so on. Any sort of argument like this that succeeds will rebut the exclusion argument, at least partially. One might still worry that infants could be excluded, and one might worry that citizenship can be stripped without deporting the noncitizens.<sup>24</sup> But let us assume that a response based on the right to stay put is effective.

## 2. THE TERRITORIAL EXCLUSION ARGUMENT

Responses to the exclusion argument that depend on a right to stay put are powerless against the territorial exclusion argument. So, in effect, the territorial exclusion argument takes us back to where we were before the defender of closed borders points to the right to stay put: it takes us back to the point where, absent some way to distinguish between insiders and outsiders, defenses of closed borders also amount to defenses of exclusion. The territorial exclusion argument goes like this: if it is permissible for a state to use some criteria to refuse to grant citizenship to outsiders, then it is permissible for a state to use the same criteria to cut off some insiders from the state by seceding from the territory in which those insiders reside. But, exclusion via secession is no more acceptable than other forms of exclusion. Or, even if exclusion via secession is more acceptable than other forms of exclusion, it does not reach the threshold of acceptability

22 The language of "internal" and "external" is ambiguous with respect to immigrants who are already physically present in the state and who wish to avoid deportation, gain citizenship, or both. Does it amount to exclusion to deport them or deny them citizenship, or is it only exclusion if it is done to current citizens? I will ignore this complication and for the sake of simplicity treat immigrants as if they are all outside the borders of the state. This is not to imply that the question of open borders can be settled without also examining what this would entail for immigrants already within a state and others who would be influenced by the enforcement of closed borders. See Mendoza, "Enforcement Matters"; and Cole, *Philosophies of Exclusion*, 10–11. This is just to grant *arguendo* that there are no additional issues for the supporter of closed borders beyond exclusion arguments.

23 Altman and Wellman, *A Liberal Theory of International Justice*, 184.

24 This would require denying Walzer's argument that permanent residents must be made citizens.

necessary to make it permissible to the degree that defenders of closed borders think immigration restrictions are permissible. So, to avoid commitment to the permissibility of exclusion, we should reject closed borders.

For instance, if it is OK for a state to close its borders to preserve the character of its community by refusing to admit immigrants who do not share the community's values, the state can also redraw its borders to exclude people living in a territory who do not share the community's values. Perhaps most of the state is one religion and most of the people belonging to another religion are concentrated in one area. The state can redraw its borders so that the territory inhabited by the religious minority is no longer part of the state, thereby withdrawing citizenship from the people in that territory. Such exclusion does not violate the right to stay put. Thus a right to closed borders, even granting a right to stay put, entails a right to territorially exclude. Or, say that it is OK for a state to close its borders so that future newcomers do not impose unwanted duties of distributive justice on existing citizens. Similarly, imagine existing United States citizens do not want continued duties of distributive justice toward Floridians, who constantly require transfers of resources to offset the damage caused by hurricanes. So, the existing citizens all secede from Florida, excluding it from the United States. But exclusions of this sort are not OK. So, these criteria cannot serve as justifications for closed borders, because otherwise they would also license territorial exclusions. It is no help to point to a right to stay put, because the Floridians get to stay put.

If the territorial exclusion argument against closed borders does not work, it is because there is some difference between insiders and outsiders such that exclusion of outsiders is justified but exclusion of insiders is not. We have ruled out one possible difference, which is based on the right to stay put, because this difference will not block either kind of exclusion. Both kinds of exclusion are compatible with the right to stay put. So, to deny the territorial exclusion argument one must come up with a difference between insiders and outsiders that explains why the justification for excluding outsiders (by closing borders) is not also a justification for territorially excluding insiders.

In other words, in the face of the territorial exclusion argument, defenders of closed borders must come up with some answer other than the right to stay put. If, as David Miller argues, states can refuse immigrants because the right to self-determination allows a state to decide whether to incorporate new members who do not share the culture of the state and whom existing members do not trust, then the right to self-determination also allows a state to decide whether to exclude existing members who do not share the culture of a state and whom

other existing members do not trust.<sup>25</sup> If a state can exclude immigrants to keep its population under control, then it can exclude citizens to keep its population under control.<sup>26</sup> For Altman and Wellman, almost any sort of desire no longer to associate with the excluded individuals would ground a right to exclude because nobody has to associate with anyone they do not want to associate with, and this includes existing associates (whom one can exclude) and not just prospective associates (to whom one can close one's borders).<sup>27</sup> Blake argues that immigration limits can be justified by a right to refuse the imposition of unwanted distributive justice duties.<sup>28</sup> His argument relies on "the right to avoid unwanted obligations, except when we have an existing obligation to acquire such new obligations."<sup>29</sup> But this raises the question of why we only have a right to avoid new unwanted obligations rather than existing unwanted obligations. Is there any way to make this distinction that is not *ad hoc*? To do so, we must draw some distinction between insiders and outsiders. And so on for other defenses of limits on immigration.<sup>30</sup>

How compelling is the territorial exclusion argument? As an argument in favor of open borders the territorial exclusion argument is too fast. Some exclusions are objectionable, but others are not. Thus the argument cannot quite establish a requirement of open borders or even a strong presumption in favor of open borders. In fact, no exclusion argument can do either of these. In section 4 I defend the claim that exclusion arguments do not quite get us open borders: the argument above is too ambitious and does not quite succeed.

However, the exclusion argument does establish that we cannot accept closed borders. Recall that closed borders is the view that states have a *pro tanto* right to exclude basically all immigrants. Closed borders would license too

25 Miller, *Strangers in Our Midst*, 63–65.

26 Miller, *Strangers in Our Midst*, 65–66.

27 Altman and Wellman, *A Liberal Theory of International Justice*, 45–48. The only desires that would not ground a right to exclude (according to Altman and Wellman) are those that are objectionable for some other reason beyond the exclusion they license, namely those that disrespect existing citizens. So for instance if Florida was excluded because of a high concentration of Jews, this would not be acceptable—not because the Floridians have a right to stay but because Jews in the other forty-nine states could complain. So long as all the Jews were in Florida, though, this motive would be acceptable; see Altman and Wellman, *A Liberal Theory of International Justice*, 184–87. See section 3.2 for more discussion of this point.

28 Blake, "Immigration, Jurisdiction, and Exclusion."

29 Blake, "Immigration, Jurisdiction, and Exclusion," 119.

30 This is not to say that Miller, Blake, and others have *no* ways to draw a distinction. I countenance possible replies in section 3. The point is just that in the face of the territorial exclusion argument they need some reply.

much exclusion, and exclusion is on its face objectionable. This is true of the territorial exclusion argument, at least, even if it is not true of the other exclusion arguments.<sup>31</sup> There are two reasons the territorial exclusion argument defeats closed borders views, unless the closed border defender can come up with some distinction between insiders and outsiders that is not *ad hoc*.

### 2.1. Widespread Permissible Exclusion Is Unintuitive

The first reason is that the prospect of exclusion of any sort, including territorial exclusion, strikes many as objectionable on its face. Describing something as “exclusion” rather than “secession” rhetorically stacks the deck against it, and this is purposeful. The label highlights the intuitive pull of the territorial exclusion argument. As noted above, Akhtar suggests that “the view that states have authority to unilaterally decide their membership” would require us to say that “casting away unwanted members would . . . be no different from secession,” and this is “a counterintuitive result.”<sup>32</sup> But if the exclusion argument works, then casting away unwanted members *is* no different from secession. Indeed, for theorists like Altman and Wellman, for whom exclusion is licensed by the right to self-determination, exclusion *is* secession.<sup>33</sup> They defend “an unusually permissive stance on state-breaking” according to which a group can secede for basically any reason, so long as it and the state it leaves behind are able to carry out the requisite functions of a state.<sup>34</sup> This permissive approach to secession allows for exclusion just like it allows for any other secession one might imagine.

For theorists who do not endorse permissive views on secession more generally, they are typically at pains to show that their theory does not entail a right to exclude, and so they will not be happy if their theory entails a right to territorially exclude. (This is doubly the case because many may not want to endorse a permissive right to secede at all, but according to the territorial exclusion argument, any limitation on immigrants generates a right to secede, and thus perhaps permits more secession than one would like to otherwise permit.) This is why

31 I think it is true of other exclusion arguments too, although I do not defend that point here.

32 Akhtar, “Stripping Citizenship,” 15.

33 This view would also be defended by other proponents of a permissive right to secede, like Beran, *The Consent Theory of Political Obligation*; and Steiner, “May Lockean Doughnuts Have Holes?” If one can secede for almost any reason, one can engage in territorial exclusion for almost any reason, because territorial exclusion is merely secession described differently. See also section 3.2.

34 Altman and Wellman, *A Liberal Theory of International Justice*, 43.

Carnes attempts to show that closed borders arguments do not license exclusion of insiders.<sup>35</sup>

Territorial exclusion strikes some people as so obviously illegitimate that it is a mistake to even countenance its possibility. As Hilliard Aronovitch puts it, “while we may grant that a seceding unit may somehow sensibly claim an equivalent reason [to no-fault divorce] for leaving a country, surely there is no reciprocal right for the rest of the country to turn around against some part and by a majority decision simply opt to end its relationship to that part.”<sup>36</sup> Similarly, Jason Blahuta suggests that “the ability to leave is not held by both parties when it comes to secession. Were both parties able to remove themselves from their relationship with the other, it follows that a subunit confined to a specific territory and recognized as a people could be expelled from the nation against their will and without provocation (although the most plausible reason would be an economic one). Such an occurrence between peoples seems very counterintuitive.”<sup>37</sup> Aronovitch and Blahuta perhaps go too far if they are suggesting that these possibilities are so *outré* as to be clearly unjustifiable, and in section 4 I will defend the idea that territorial exclusion could in principle be justified in some cases, but one might think that they are both right to claim that territorial exclusion is *prima facie* worrying such that we should reject closed borders, since closed borders license widespread territorial exclusion.

It is true that, far from being a conclusion to avoid, the possibility of territorial exclusion is straightforwardly endorsed by some theorists. The clearest example is Altman and Wellman, who have a quite permissive theory of secession and who thus would have no problem with territorial exclusion.<sup>38</sup> So, one might object to Akhtar, Aronovitch, Blahuta, and others for whom the prospect of exclusion is unintuitive by saying that their intuitions have gone askew. There are two things to say in response to this objection. First, Altman and Wellman accept exclusion because they are so permissive with respect to secession, but permissiveness with respect to secession strikes many people as equally unintuitive. So, although one might commend Altman and Wellman for consistency, they pay for it with plausibility. Ruling out *all* unilateral secession is perhaps too restrictive, but we do not need to be as permissive as Altman and Wellman are. In the fight over intuitions, so to speak, few are going to line up on the side that

35 Carnes, “The Right to Exclude Immigrants Does Not Imply the Right to Exclude Newcomers by Birth.”

36 Aronovitch, “Why Secession Is Unlike Divorce,” 30.

37 Blahuta, “How Useful Is the Analogy of Divorce in Theorizing about Secession?” 246–47.

38 Altman and Wellman, *A Liberal Theory of International Justice*, ch. 3.

permits widespread secession. And if they do not line up on that side, they cannot line up against the territorial exclusion argument.

Second, it could be that, in the terms of bare permissibility, we should license exclusion, but this is no argument in favor of exclusion in any particular case, which means the presumption should still be in favor of no exclusion and in favor of open borders, not because this is the default but because we think this is the result we will arrive at each time. That is, just like Altman and Wellman are happy to grant that the rights to secede and to block immigrants are *pro tanto* rights (albeit very strong *pro tanto* rights that will typically win out unless there are much stronger considerations in the offing), we can grant the same and say that in almost every case there *will* be considerations that trump these *pro tanto* rights. Technically this response does not save the territorial exclusion argument because it grants that exclusion is permissible and that closed borders are permissible. It just pushes the question back to the balancing act: on the one side we have the *pro tanto* right to exclude existing citizens and immigrants and on the other we have whatever other concerns exist. This sort of response will be discussed in section 4, where I suggest that ultimately our approach to the subject should not be an assumption of closed borders or open borders but rather an approach that takes into consideration the balancing that needs to be done.

Either way, the territorial exclusion argument at least brings into sharp focus the fact that one must hold a very permissive theory of secession (that permits exclusion) in order to defend closed borders. In sum, the first reason to endorse the territorial exclusion argument is that exclusion of any sort is intuitively objectionable, and thus we should reject closed borders views because they permit lots of territorial exclusion (unless they can draw a distinction between insiders and outsiders; see section 3.1). I think accepting such a permissive theory of secession is unattractive enough that the territorial exclusion argument defeats closed borders views.

## 2.2. *The Moral Arbitrariness of Borders*

Second, the territorial exclusion argument defeats the closed borders position because it is another way of articulating the challenge of the moral arbitrariness of borders. The moral arbitrariness of borders refers to the idea that where one is born, and thus whether one is an immigrant or a citizen with respect to any given state, is merely up to chance, and thus this at least calls into question the idea that one's life circumstances should be drastically impacted by one's citizenship.<sup>39</sup> There is controversy over whether and how borders are morally arbitrary

39 For an extensive discussion of this point with respect to Blake's attack on it, and a defense of the anti-exclusion view, see Arrildt, "State Borders as Defining Lines of Justice," 13–16. For

and over what conclusions we should draw from their arbitrariness. We do not need to resolve these questions here. We just need to realize that the territorial exclusion argument brings to light one facet of the moral arbitrariness claim: it shows the need for drawing some distinction between insiders and outsiders if one wishes to avoid endorsing exclusion. This is because, as the territorial exclusion argument points out, exclusion can be justified by the same principles that justify closing borders. There is no difference between refusing to let someone in and refusing to let someone stay in unless we introduce some further principle to explain the difference. That is a point that all exclusion arguments raise, but the non-territorial exclusion arguments face the reply from the right to stay put. The right to stay put is a distinction between insiders and outsiders. Because the territorial exclusion argument avoids the right to stay put reply, it brings us back to the status quo. The status quo is that there seems to be no distinction between insiders and outsiders that would justify closed borders but not territorial exclusion.<sup>40</sup>

This can be seen by examining Blake's discussion of something close to territorial exclusion. Blake imagines a state in the United States, or a city in the United States, closing its borders to other United States citizens, which is effectively a form of territorial exclusion, albeit less drastic than full secession.<sup>41</sup> He realizes that if states, cities, and other subunits had rights to exclude, this would be unintuitively strong. He responds by suggesting that such a right to exclude "is anathema to the project of creating a single political community"—there is a "project of shared self-rule entered into at the federal level" that binds existing political entities together and prevents any entity from doing anything that would damage or destroy the community.<sup>42</sup> If the argument is merely that exclusion of insiders is not OK because they are insiders, this is *ad hoc* and it begs the question. If the argument is that there is something special about the existing relationships, then we have a potential reply to the territorial exclusion argument. So it is to this that we now turn.

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more on the moral arbitrariness of borders generally, see Nine, "The Moral Arbitrariness of State Borders" and *Global Justice and Territory*, ch. 5; Fine, "Freedom of Association Is Not the Answer," 338; Armstrong, "National Self-Determination, Global Equality and Moral Arbitrariness"; and Stilz, *Territorial Sovereignty*, 17.

40 This is not to say that there is no hope for anyone who attempts to draw such a distinction. In section 3.1 I cover various attempts to draw the distinction. The point is that, without such a distinction, closed borders entail the acceptability of territorial exclusion.

41 Blake, "Immigration, Jurisdiction, and Exclusion," 122.

42 Blake, "Immigration, Jurisdiction, and Exclusion," 123.



## 3. OBJECTIONS

3.1. *Existing Relationships*

One might object that the territorial exclusion argument fails because it does not take into account one main difference between existing citizens and potential immigrants: there is an established relationship between existing citizens in a state that it would be wrong to eliminate, and this relationship does not exist between citizens and potential immigrants.<sup>43</sup> The relationship could be thought of as a national project or a shared history or a pattern of cooperation or something along these lines.<sup>44</sup> So, we can defend closed borders without also having to defend territorial exclusion, because territorial exclusion disrupts existing relationships whereas closed borders do not. This defense would help keep theorists like Blake from falling prey to the exclusion argument because Blake could draw a distinction between existing relationships (that cannot be severed) and potential future relationships (that we could keep from coming into existence).<sup>45</sup>

The thought is that there is something about existing relationships between co-nationals that undergirds associative duties between the co-nationals and that is valuable. And so, according to this objection, there would be something wrong with losing the valuable relationship, and this is a wrong that does not arise merely from closing borders. Hence, we have an argument against territorial exclusion (that damages the relationship) but not against closed borders (that leave relationships intact). The relationship itself might be valuable because there is something good about “engagement in a joint political venture” with one’s co-citizens.<sup>46</sup> Or maybe the fact that society is “a cooperative venture for mutual advantage” makes the relationship valuable.<sup>47</sup> Or the relationship inspires trust and loyalty that make possible the implementation of a welfare

43 This argument does not work against newborn exclusion arguments unless it ties the relationship to the parents of the infant. It also does not work against immigrants who already live in the country they aim to join and who have thus established relationships, and it does not work against immigrants who have lived near the border for a long time and formed relationships with citizens. It also may not work with respect to hermits and other citizens who have not formed ongoing relationships with their co-citizens; see Lenard, “Democratic Citizenship and Denationalization,” 4. I put all these issues aside because they are not relevant to the territorial exclusion argument.

44 Stilz, “Decolonization and Self-Determination.”

45 Blake, “Immigration, Jurisdiction, and Exclusion.” As noted above, it is also close to an actual argument Blake makes about federalism, so it is likely he would take this route to combat the territorial exclusion argument.

46 Stilz, *Territorial Sovereignty*, 23.

47 Rawls, *A Theory of Justice*, 4.



state.<sup>48</sup> Maybe the relationship came about as a result of a promise and it would be wrong to break the promise.<sup>49</sup> There are two main responses to this objection.

### 3.1.1. *Proving Too Much*

The first response is that we want to be careful that we do not prove too much. This objection, unless it is qualified somehow, rules out pretty much all unilateral secession. (The one exception is that it may not rule out secession by badly mistreated groups, because in this case there is likely no valuable relationship that deserves protection.<sup>50</sup>) When Blake suggests that “the project of creating a single political community” would be damaged by territorial exclusion, he is correct, but unless he wants to claim that all political communities are eternally inviolable, this point is not enough on its own.<sup>51</sup> The principle that existing relationships are special could even rule out emigration on the part of citizens whom the state does not wish to let go.<sup>52</sup> Perhaps it even rules out unilateral divorce, if relationships between people are valuable like relationships between the state and its citizens are valuable.

Since it seems reasonable to say that *sometimes* unilateral secession is permissible and sometimes it is not, and perhaps even *sometimes* emigration restrictions are permissible (like to prevent brain drain) but usually they are not, and of course sometimes unilateral divorces are permissible, this points us toward

- 48 Miller, *On Nationality*, 92–94. One account of the value of the relationship that will *not* work is that the relationship in its current form is affirmed by (or desired by) every member. This is false in cases of exclusion, where some of the members are trying to sever the relationship. If being valued by all the existing members were what makes a relationship valuable, then in cases of potential exclusion there would be no valuable relationship and thus nothing to block exclusion. Thus theorists like Altman and Wellman, for whom the collective value of self-determination depends on the fact that the people want to constitute a “self,” cannot avail themselves of this objection against the exclusion argument; see *A Liberal Theory of International Justice*, 44–48. In exclusion cases, the people no longer wish to constitute a single “self.” For discussion, see Weltman, “Who Is the Self in Self-Determination?”
- 49 Someone who advances this objection is pushed toward a consent theory of political obligation as in Beran, *The Consent Theory of Political Obligation*. Such theories face other issues. See Weltman, “Plebiscitary Theories.”
- 50 The right to secede for mistreated groups is known as the “remedial” theory of secession and is defended chiefly by Buchanan, *Secession*. As Catala notes, there are reasons to worry that remedial theories of secession in fact collapse into theories that rely on nationalist projects or other sorts of relationships, so remedial theories may not even be an exception (“Remedial Theories of Secession and Territorial Justification”). Even if Catala is wrong, remedial theories probably collapse into some other theory when it comes specifically to exclusion, for reasons noted by Dietrich (“Secession of the Rich”).
- 51 Blake, “Immigration, Jurisdiction, and Exclusion,” 123.
- 52 Cole, *Philosophies of Exclusion*, 49.

something of a reconciliation.<sup>53</sup> What we need is a theory according to which we can adjudicate when it is and when it is not OK to unilaterally sever existing relationships. It is too harsh to say we can *never* break them off, so this will not work as a way of ruling out the territorial exclusion argument against closed borders. But it seems equally harsh to say that we can *always* break them off, so this does suggest that, *sometimes*, the territorial exclusion argument will not deliver open borders.

In section 4, I discuss theories of when it is and is not OK to break off ongoing relationships. For now, the relevant point to keep in mind is that this response does not always work against the territorial exclusion argument. It does not establish a general *pro tanto* right for states to close their borders. It could only do this if it established a universal requirement that nobody ever break off any existing valuable relationships, which is implausibly strong.<sup>54</sup>

### 3.1.2. *Taking Stock*

Second, it is worth taking a step back and remembering that, although the debate is about whether some given argument for closed borders also serves as an argument for territorial exclusion, the broader context is whether there are good arguments for or against closed borders more generally. If the best argument we can come up with for closed borders is one that relies on the fact that borders have been closed in the past and that, because of this, certain relationships have been established, we are begging the question. Potential immigrants would like to enter into precisely the sorts of relationships at issue in this objection, and pointing out that they have yet to do so and using this to establish that they have no right to do so is a little perverse.<sup>55</sup> As Johann Frick notes, this procedure (which he labels “double-jeopardy”) is so perverse as to sink all limitations on immigration based on associative duties.<sup>56</sup>

So, even granting for the moment that this objection succeeds in showing that there is an argument for closed borders that does not license territorial exclusion, it may be that this argument for closed borders merely consists of reasserting that borders have been closed so far, which is hardly an argument. As Cole puts it, “the question here is whether non-citizens have a *moral* right of immigration into a state, in a similar way that citizens do, and this cannot be settled by appeal to the fact that citizens are granted this right by the state

53 Oberman, “Can Brain Drain Justify Immigration Restrictions?”

54 I thank Dan Guillery for discussion of this point.

55 Carens, *The Ethics of Immigration*, 282.

56 Frick, “National Partiality, Immigration, and the Problem of Double-Jeopardy.”

while non-citizens are not.”<sup>57</sup> Existing relationships exist between citizens only because citizens have already been granted the right to form and maintain these relationships. “We’ve always done it this way” is, upon reflection, not always a good moral justification for a practice.<sup>58</sup>

### 3.1.3. Pevnick on Existing Relationships

A more focused defense of the existing relationships objection can be found in Pevnick, who argues that groups of people contribute to the creation and maintenance of the state and in virtue of this they get to decide who will make decisions in the future, which gives them a right to exclude immigrants.<sup>59</sup> I have six things to say in response.

First, giving everyone a say in decisions about what future citizens look like is not the same as making sure everyone gets their way, and it is not the same as including all present or future people in that future citizenry. So for instance Floridians might desire that the US let in a million immigrants, but they get outvoted by the rest of the US. Similarly, Floridians might desire that the US let in the next generation of Floridians, or retain the current generation of Floridians, but they get outvoted and excluded. These results are all on a par. Anything justify-

57 Cole, *Philosophies of Exclusion*, 51.

58 This argument shares some features in common with the “distributive objection” attacked by Seth Lazar and first raised by Scheffler; see Lazar, “Debate,” 91; and Scheffler, *Boundaries and Allegiances*. Lazar suggests that the distributive objection is flawed because it assumes a “pre-existing inequality” between universal moral duties (which would be the duties owed to immigrants) and duties based on special relationships, whereas in fact “associative duties and general duties are co-original” (“Debate,” 94). (For more on the distributive objection, see Seglow, “Associative Duties and Global Justice.”) While this argument may have merit against the quick claim that *any* past association is *never* a moral justification for future partiality, it does not defeat my claim here that *some* past associations may fail to justify *some* partialities, in this case the partiality necessary to defend closed borders. For a similar argument, see Frick, “National Partiality, Immigration, and the Problem of Double-Jeopardy.” Hidalgo provides a similar argument against existing relationships grounding a right to close borders in “Associative Duties and Immigration.” His argument contests Lazar’s rather moderate defense of some associative duties; see Lazar, “Debate” and “A Liberal Defence of (Some) Duties to Compatriots.” I am not even sure Lazar thinks that associative duties can ground a right to close borders, so his arguments may be no help for closed borders advocates. For further discussion on the topic of associative duties versus duties to outsiders, see Scheffler, *Boundaries and Allegiances*; and Arneson, “Extreme Cosmopolitanisms Defended.” For more arguments against the notion that special obligations ground a right to close borders, see Abizadeh, “The Special-Obligations Challenge to More Open Borders.” I thank an anonymous reviewer for raising the Lazar point, about which there is more to say than can fit in this footnote.

59 Pevnick, *Immigration and the Constraints of Justice*, 37–45.

ing the immigrant exclusion result will also justify the Floridian exclusion result, despite the fact that Floridians get to vote in all of the decisions.

Second, this works at the individual level too. It still lets us exclude newborns. Pevnick has to wheel in other considerations to explain what is wrong with newborn exclusion.<sup>60</sup> Perhaps it is fine if our response to exclusion arguments is piecemeal like this: one response to territorial exclusion, another to newborn exclusion. But if we can find a holistic theory that answers all exclusion arguments in one go, either by accepting them and endorsing open borders or by giving a more nuanced reply, I think we should at least be pushed in that direction.

Third, it is one thing to say that a state has to include certain people who have contributed. It is another to say it has to include a certain territory. The US might vote to exclude Florida but grandfather in existing citizens, but only for a limited time. If they do not move from Florida and keep contributing to the US (as opposed to contributing to Florida, which no longer counts), then by Pevnick's own lights they will lose the right to be included. Many of them of course will not want to move, so they will end up excluded. Also, all new people born in Florida or immigrating to Florida will be excluded, since they will not have been grandfathered in. This is particularly a problem because this kind of "slow denationalization" is a mirror of the process that most defenders of closed borders endorse for immigrants. They suggest that immigrants should be allowed into a country for a limited period of time, and that deportation is only justified in order to keep them from staying too long and acquiring citizenship, which a state owes to every long-term resident. If it is OK to force an immigrant to move after a period of time to keep from having to give them citizenship, why is it not OK to force a citizen to move after a period of time to avoid losing citizenship? The two situations are on a par.<sup>61</sup>

Fourth, maybe the Floridians have not contributed. Maybe from day one they have been battered by hurricanes and thus they have been a net drain on the society. In fact, this is why the US wants to exclude Florida.<sup>62</sup> This does not make it any more acceptable to exclude Florida than if it had contributed a lot. In fact, although one sort of wrong consists of draining resources from people, another sort of wrong consists of preventing them from contributing. Exploitation is one of the faces of oppression described by Iris Marion Young, but so is

60 Pevnick, *Immigration and the Constraints of Justice*, 64–66.

61 This reply works against others who endorse a right to close borders, like Blake.

62 Compare Hidalgo's case of Leticia in "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation," 265. This is a hypothetical example—I am not taking a position one way or the other on whether Florida has been a net drain on the United States.

“marginalization,” according to which people are rendered “marginals,” or “people the system of labor cannot or will not use.”<sup>63</sup> So, Pevnick’s approach could have the perverse result that people excluded from contributing to society via marginalization are the most liable to being excluded from that society entirely.

Fifth, if there is any case where exclusion maybe *does* seem justifiable, it is precisely the case where people have contributed *a lot*. So for instance if the US wanted to exclude the richest state, which continually pays taxes to other states and supports them (perhaps because that rich state has all the rich capitalists who keep using their money to influence politics, and the US wants to become a socialist utopia) it seems like this is the case where exclusion can most easily be justified. Those people will be quite well-off on their own, with their yachts and whatnot. They have nothing to worry about. Any worries about excluding the marginalized seem inapposite since these people have not been marginalized. So despite being their being intimately tied up with the existing institutions of the US, kicking out the rich does not seem anywhere near as objectionable as kicking out poor benighted Florida.

Sixth, it cannot be the case that questions of inclusion turn solely on this question. Pevnick himself notes that this is just one consideration to add into the calculation.<sup>64</sup> Once we admit this, though, there is the question of how much weight to give it. I suggest that we give this consideration very little weight. That people have contributed to the creation and maintenance of a particular state is in many cases at best an accident of history and at worst a result of systemic oppression and exploitation. If we restrict ourselves only to extremely just states, there are still reasons for thinking that the state’s ability to control what it looks like in the future should be outweighed by other sorts of considerations, like any considerations that would tell in favor of allowing an immigrant to choose where to live. These include global justice considerations, the right to freedom of movement, and worries about whether the right to self-determination (which undergirds the state’s right to determine its future makeup) is strong enough to play the role Pevnick says it should. As Fine points out, we already accept that self-determination is not strong enough to allow the state to prevent existing residents from having children.<sup>65</sup> If Pevnick’s concerns do not answer the infant exclusion argument, why do they answer the territorial exclusion argument?<sup>66</sup>

63 Young, *Justice and the Politics of Difference*, 53.

64 Pevnick, *Immigration and the Constraints of Justice*, 40, 65–66.

65 Fine, “The Ethics of Immigration,” 263–64.

66 I present more arguments for thinking that the right to self-determination is not strong enough to establish Pevnick’s conclusion in Weltman, “Against Innovative Accounts of Self-Determination.”

There are more objections one might make to Pevnick's picture.<sup>67</sup> There is Sarah Fine's point that sometimes outsiders have contributed to a state and thus they should have a right to immigrate. There is Michael Blake's objection to Pevnick's Lockean account of property rights. There is Javier Hidalgo's suggestion that Pevnick does not escape the original non-territorial exclusion argument. Brezger and Cassee suggest the same thing.<sup>68</sup> So, even if my six replies do not work, one need not accept Pevnick's account, and if we can reject Pevnick, the territorial exclusion argument remains undefeated.

### 3.2. *The Motive Does All the Work*

Another possible objection is that an objectionable exclusion is objectionable due to bad motives on the part of the excluders, and it is the motives that explain the wrongness of the exclusion. Wanting to kick out Florida because it is a drain on resources is wrong not because exclusion is wrong but because this is selfish. It would be fine to exclude for other reasons. So, there is nothing wrong with exclusion in principle, so long as the motives are pure.<sup>69</sup>

I can basically accept this objection, because in section 4 I will agree that the territorial exclusion argument does not always get us open borders. But this does not get us closed borders, either. It just gets us the claim that good motives can justify closed borders. It does not yet tell us what good motives are. For all that has been said here, there are no good motives for closed borders. Indeed, we should be skeptical that there are any good motives for the idea that the state has a *pro tanto* right to exclude anyone. That is a very broad right. It would be akin to saying the state has a *pro tanto* right to territorially exclude any existing citizens. It is hard to think of good motives for that. However, adjudicating the balance of reasons for and against exclusion comes later. For now the point is just that we cannot establish the truth of the closed borders view merely by admitting that it is in principle acceptable to practice territorial exclusion. The territorial exclusion argument shows that, to establish closed borders, we must cough up some further justification.

67 See also Jeremy Waldron's examination of a theory similar to Pevnick's, albeit not Pevnick's theory itself, in "Exclusion."

68 Fine, "The Ethics of Immigration," 264; Blake, "The Right to Exclude," 531; Hidalgo, "Self-Determination, Immigration Restrictions, and the Problem of Compatriot Deportation," 268–69; Brezger and Cassee, "Debate," 375–76. Brezger and Cassee's criticism focuses on Pevnick's claim that existing citizens must consent to the arrival of new citizens. Shelley Wilcox offers a similar criticism of Pevnick's claim that does not focus on exclusion particularly but on whether the consent condition can be justified; see review of *Immigration and the Constraints of Justice*, 621–22.

69 I thank Tom Parr for discussion of this point.

A second, less conciliatory response is to note that, at least for some closed borders advocates, one's motive has to be quite bad in order to defeat the presumption in favor of a right to closed borders. Walzer, for instance, defends the idea that Australia could close its borders for the sake of creating a racist white ethnostate so long as it practices preemptive territorial exclusion by giving up its excess land to immigrants from Southeast Asia who need a place to live.<sup>70</sup> As he puts it, "White Australia could survive only as Little Australia."<sup>71</sup> This is meant to be a limit on the rights of the white Australians, who do not get to keep all their land. But it is also a defense of the right of the white Australians to limit immigration for objectionable reasons. Obviously Walzer and other defenders of closed borders do not need to be sanguine about racist border controls, and many defenders of closed borders do not go quite as far as Walzer.<sup>72</sup> Altman and Wellman do say that "legitimate states are entitled to reject *all* potential immigrants, even those desperately seeking asylum from tyrannical governments," but they think some reasons for rejection are not legitimate because these reasons disrespect current citizens.<sup>73</sup> If the only citizens who are disrespected are those being excluded (like if Floridians are disrespected, but only because all of Florida is being excluded), then this is no defense against the territorial exclusion argument. Defenders of closed borders can even believe that it is typically a good thing for states not to exercise their right to exclude. But if the *right* to exclude immigrants has any force at all, it needs to be a relatively robust right. As Jeremy Waldron points out, there is little use in speaking of rights if they do not entail "a moral right to do something that is, from the moral point of view, wrong."<sup>74</sup> So if closed borders positions in fact establish a right to exclude immigrants, it is probably most charitable to read them as establishing a right to exclude immigrants for at least *some* objectionable motives. If this is true, then territorial exclusion for objectionable motives would also end up justified, and this is a result we want to avoid.

### 3.3. *Right to Stay Put*

In section 1, I granted for the sake of the argument that the right to stay put is

70 Walzer, *Spheres of Justice*, 46–48.

71 Walzer, *Spheres of Justice*, 47.

72 Altman and Wellman, *A Liberal Theory of International Justice*, 186–87. There are reasons to think that those who do not go as far as Walzer are not justified—that is, perhaps one must be as radical as Walzer if one defends closed borders. Defense of this point exceeds the scope of this article.

73 Altman and Wellman, *A Liberal Theory of International Justice*, 188.

74 Waldron, "A Right to Do Wrong," 21.



effective against other exclusion arguments. The territorial exclusion argument, I claimed, avoids the right to stay put objection because people who are territorially excluded get to stay put. But, one might object, the right to stay put is not just a literal right to sit around, as it were, but rather a right to a variety of things, including a continuing relationship with one's co-citizens, such that territorial exclusion would violate this right to stay put.<sup>75</sup> This is one way to read Carnes's objection to earlier newborn exclusion arguments: he suggests that newborn exclusion is wrong not because of the harm it does to the newborns but because "one's state coercively frustrating" a morally important interest "is presumptively wrong insofar as it constitutes an objectionable harm," and so "a state's right to exclude nonmembers is constrained when that right conflicts with its members' more central right to procreate and raise families."<sup>76</sup> One might think that other rights are central to one's morally important interests, and territorial exclusion would coercively frustrate these rights in ways that excluding immigrants would not.

If this argument works, it would have to be the case that territorial exclusion coercively frustrates morally important interests of those who are excluded.<sup>77</sup> What interests might these be? Notice first that if such interests exist then it is not clear that unilateral secession would ever be justified, as noted in section 3.1.1. This seems too strong.

Second, for this argument to work, the interests cannot be interests shared with potential immigrants, which cuts down on many of the good candidates, like an interest in living in the state of one's choice or an interest in availing oneself of opportunities attached to living in a state of one's choice or an interest in associating with people one wishes to associate with.

Third, as noted in section 3.1.2, we want to be careful not to pick interests that are unique to citizens merely because the state does not currently permit immigrants. That is, if the morally relevant difference between citizens and immigrants is that the citizens are already citizens, this argument is viciously circular: citizens cannot be excluded because they have an interest in remaining citizens, an interest that exists because they are citizens, whereas immigrants can be excluded because they have no such interest, but they lack this interest only because they have been excluded. If that exclusion was unjustified then it should

75 I owe this objection to an anonymous reviewer.

76 Carnes, "The Right to Exclude Immigrants Does Not Imply the Right to Exclude Newcomers by Birth," 38.

77 For a number of reasons I do not think coercive frustration, as opposed to frustration, is morally relevant here. Thus I think a charitable reconstruction of Carnes ought to drop coercion from the picture.

not matter that they lack the interest. If I only allow the men in my class to submit extra-credit assignments, and then I propose to grade only those submitted by freshmen who are men and not those submitted by sophomore men, it is fair to say the sophomore men have an interest in their assignments being graded too, and it is unjust for me to frustrate this interest. I cannot grade any assignments submitted by the women in my class because I have not allowed them to submit the assignments. But the women are being treated just as unfairly as the sophomore men when their assignments are not graded. It is no use for me to say that they do not have an interest in having their assignments graded because they never submitted any. The only reason they did not submit assignments is that I did not let them submit assignments.<sup>78</sup> So, just pointing to an interest that existing citizens have will not do the work. We must also justify the fact that only existing citizens have this interest. Otherwise we beg the question in favor of closed borders views.

#### 3.4. *Carnes and Joshi on Exclusion*

As noted above, the main reply to exclusion arguments is that provided by Carnes. His focus is entirely on infant exclusion arguments, and there are reasons to think his replies do not succeed even against those. Carnes argues that it would be wrong to exclude newborn infants because “state exclusion of newcomers by birth would constitute a genuine harm to those newcomers’ parents.”<sup>79</sup> This implausibly implies that the state does nothing wrong when it excludes newborn orphans. It may also allow the state to deny and later deport children born to noncitizens, and thus denies the principle of *jus soli* that many take to be an important aspect of justice.<sup>80</sup> Moreover, Carnes sums up his argument like this: “if one’s interest in raising a family is central to one’s conception of a good life, and pursuing that interest is not disproportionately burdensome to others, then one’s state coercively frustrating that interest is presumptively wrong insofar as it constitutes an objectionable harm.”<sup>81</sup> But the state does not always coercively frustrate this interest by excluding newborn infants. An infant born to parents

78 See also Frick’s Princeton example, which makes a similar point, in “National Partiality, Immigration, and the Problem of Double-Jeopardy.”

79 Carnes, “The Right to Exclude Immigrants Does Not Imply the Right to Exclude Newcomers by Birth,” 38.

80 Cf. Carnes, “The Right to Exclude Immigrants Does Not Imply the Right to Exclude Newcomers by Birth,” 29n3; and Ferracioli, “Citizenship for Children.” It might also allow the state to deny citizenship to infants who are born to people liable to denationalization. For an overview of denationalization, see Ferracioli, “Citizenship Allocation and Withdrawal.”

81 Carnes, “The Right to Exclude Immigrants Does Not Imply the Right to Exclude Newcomers by Birth,” 38.

who are citizens of another country (or multiple other countries) with *jus sanguinis* laws that grant citizenship to that infant could in many cases be excluded without frustrating the interest the parents have in raising a family. This is potentially true even if the infant *does not* already qualify for other citizenships via *jus sanguinis* or anything else, so long as the parents could find some acceptable way to raise the infant without that infant getting citizenship in its country of birth. For instance, if the parents are rich and well-connected, they may not find it too difficult to raise their infant in another country and arrange for the infant to acquire citizenship in that other country after some time.

Assuming, though, that Carnes can respond to these objections, the most apposite reply to his argument is that, because it is aimed only at newborn exclusion arguments, it has no bite against the territorial exclusion argument.<sup>82</sup> This is one virtue of the territorial exclusion argument: it escapes objections that potentially succeed against other exclusion arguments. Thus even if one finds the present argument less powerful (because states will be more reluctant to lose territory via exclusion than they would be to exclude people via other means) this downside is compensated for by one upside: the argument is less vulnerable to objections.

Besides Carnes, the main reply to exclusion arguments consists of Hrishikesh Joshi's brief discussion of the topic. Joshi realizes that immigration restrictions might be wielded to justify excluding existing citizens on the same basis, and responds that it is less of an imposition on freedom to prevent immigration than it is to deport an existing citizen, and that even if in principle a state would be justified in excluding citizens for the same reasons it excludes immigrants, in practice this would be liable to abuse and thus should be forbidden.<sup>83</sup> It is not clear how compelling either response is, but we can grant for the sake of the argument that they work against existing exclusion arguments.<sup>84</sup> With respect to the territorial exclusion argument, these responses are less clearly compelling.

Start with Joshi's first reply. Is the violation of one's freedoms when one is seceded from against one's will much more drastic than the violation of one's freedoms when one is prevented from immigrating into a state? This is unlikely, for two reasons. First, being deported from one's state entails being kicked out of

82 Two further issues one might have with Carnes are that his approach does not capture the intuition that the *infants* (rather than just the parents) are harmed when they are denied citizenship, and that Carnes must bite the bullet and say there is nothing wrong with denying citizenship to an infant if the parents consent.

83 Joshi, "Is Liberalism Committed to Its Own Demise?" 264–65.

84 I argue that Joshi's claims are not compelling in Weltman, "Illiberal Immigrants and Liberalism's Commitment to Its Own Demise."

one's home and neighborhood and likely entails having to find a new job, make new friends and acquaintances, change many aspects of one's daily routine, and so on. It is a very large upheaval. Having borders redrawn, meanwhile, is less of an upheaval. So, the egregious freedom violations that Joshi has in mind for exclusion are not attendant to territorial exclusion. Second and more crucially, it *cannot* be the case that territorial exclusion is a bigger infringement on freedom than being prevented from immigrating, because they are the *same* freedom infringement: both territorial exclusion and immigration restrictions prevent one from moving to the territory of and gaining citizenship in the state of one's choice. Why would this be a bigger violation of freedom in the case of territorial exclusion than in the case of immigration restrictions?

Turning to Joshi's second argument about freedom violations being ripe for abuse, territorial exclusion is likely not as ripe for abuse as deportation. Territorial exclusion requires a state to give up part of itself, which means it cannot be used merely to get rid of dissidents and malcontents without either great cost to the state (in terms of having to work around an inconvenient patchwork border system) or without quickly exhausting the possibility of making use of exclusion (because the state soon runs out of territory that it can exclude). So, if there is something wrong with territorial exclusion, it cannot be that if states have the right to carry it out they will be able to abuse it in ways much more egregious than they can abuse limitations on immigration.

#### 4. DOES THIS GET US OPEN BORDERS?

We have addressed the chief objections to the territorial exclusion argument. So far, the argument, if successful, has shown that limitations on immigration also ground a right to exclude territory according to whatever criteria license the immigration limitations. What, then, should we conclude?<sup>85</sup>

Because the territorial exclusion argument is similar in form to the other sorts of exclusion arguments, one might think that my goal has been to argue for open borders. Because the permissibility of immigration restrictions entails the permissibility of territorial exclusion, and because territorial exclusion is suspect for various reasons, borders must be open. Although I am sympathetic to this approach, I think our ultimate conclusion should be more measured and complex. What we should conclude is that theories of who is allowed to cross which borders cannot be constructed absent considerations about which borders ought to be there in the first place.<sup>86</sup> Thus rather than rejecting out of hand the possibility

85 I thank Tom Parr and an anonymous reviewer for discussion of this point.

86 See Weltman, "The Shifting Boundary Problem."

of territorial exclusion, we should closely interrogate what is wrong with it and why, and potentially decide that sometimes nothing is wrong with it. Once we have a comprehensive account of what makes it OK to draw borders in the first place, this will allow us to import our conclusions into this present argument in order to figure out whether borders must be open or closed.

My own preferred theory of borders is what Lea Ypi calls a “forward-looking” justification of territorial rights that seeks “a more inclusive perspective” to answer the question of territorial-based “control of people,” including exclusion from territory of the sort entailed by closed borders.<sup>87</sup> This is as opposed to “historical” and “present-oriented” theories that look at how territory has been used so far or that set conditions for what an institution must presently be like in order for it to legitimately control its territory.<sup>88</sup> As Ypi points out, this forward-looking approach is “implicit in many cosmopolitan theories of global justice.”<sup>89</sup> As Wellman puts it, the cosmopolitan position is something like this:

Given that individuals are the only things that ultimately matter morally, and we want states only if and to the extent that they best protect humans, the utterly dismal historical record of state performance on this score seems to suggest an obvious solution: let’s break up the existing states and reorganise the world’s population into a new political configuration that maximally performs the requisite political tasks. Put bluntly, if states are justified in terms of the functions they perform, shouldn’t we organise them in whatever fashion functions best?<sup>90</sup>

The point is indeed put bluntly, but the impetus behind the point is sound. There are reasons not to just take out a pen and start redrawing borders willy-nilly, so the cosmopolitan need not be committed to many immediate radical changes. But the thought is that we should be open to potential changes, and at least we should have a justification for rejecting potential changes, because territorial exclusion represents a potential change that must be evaluated with whatever theory of borders we think is most appropriate.

My aim here is not to defend this particular cosmopolitan approach to territorial exclusion.<sup>91</sup> What is relevant here is whether a plausible theory of borders will license any territorial exclusion at all, and if it will license exclusion, whether it is plausible to think that this serves as an argument against open borders by

87 Ypi, “Territorial Rights and Exclusion,” 251.

88 Ypi, “Territorial Rights and Exclusion,” 242.

89 Ypi, “Territorial Rights and Exclusion,” 251.

90 Wellman, “Cosmopolitanism, Occupancy and Political Self-Determination,” 375–76.

91 For a defense see Weltman, “Cosmopolitan Instrumentalism about Territory.”

suggesting that the state can refuse immigrants for the same reason it can exclude insiders. There are reasons to think that territorial exclusion is at least sometimes justifiable. This is because territorial exclusion is simply unilateral secession, and unilateral secession is not obviously unjustifiable in every possible instance.

For some theorists who argue in favor of closed borders, this simply brings us back to where we were before we started. Specifically, Altman and Wellman already have a theory of secession that is the counterpart to their theory of immigration restrictions.<sup>92</sup> In their case, the exclusion argument just throws into harsher relief their commitment to a wide variety of permissible secessions. But there are reasons to be skeptical of these theories when it comes to whether they can plausibly deliver immigration restrictions.<sup>93</sup> When it comes to the territorial exclusion argument specifically, we can better see these sorts of reasons by considering whether and when territorial exclusion is illegitimate. The territorial exclusion argument thus helps us set limits on justifiable immigration restrictions by pointing us toward what would count as unjustified secessions, and it therefore also asks us to determine when secession is and is not justifiable.

Regardless of what we say about Altman and Wellman, the territorial exclusion argument is certainly effective against anyone who endorses closed borders without also endorsing something like and Altman and Wellman's near-unlimited unilateral right to secede. Thus the territorial exclusion argument forces people like Blake to bite the bullet with respect to secession or give up the argument in favor of closed borders. It is likely reasonable to accept that secession is sometimes justified, but it is much less clearly reasonable to accept that any group can justifiably secede for the reasons that ostensibly allow for excluding immigrants according to defenders of closed borders. Altman and Wellman and nationalist theories like Miller's may accept theories of secession like this, but unless we are this accepting of secession, we will have to give up closed borders.<sup>94</sup> Permissive theories of secession are implausibly strong, and so we should not be this accept-

92 Altman and Wellman, *A Liberal Theory of International Justice*, ch. 3.

93 Fine, "Freedom of Association Is Not the Answer" and "The Ethics of Immigration"; and Lægaard, "Territorial Rights, Political Association, and Immigration." Lægaard provides an alternative account of the right to exclude immigrants, but it is based on territorial rights and thus the territorial exclusion argument avoids all of Lægaard's points; see "What Is the Right to Exclude Immigrants?" In territorial exclusion, the state abdicates its territorial rights with respect to the people being excluded, and thus is under no obligation to justify its legitimacy to the excluded people in the way Lægaard argues states are normally obligated.

94 See Miller, "Secession and the Principle of Nationality."

ing of secession, and thus we should think that states have no *pro tanto* right to exclude immigrants.<sup>95</sup>

One might worry that this approach proves too much. It can justify territorial exclusion, but it can also justify individual exclusion. If we bite the bullet like Altman and Wellman do, we can license closed borders, but even if we say that unilateral secession is justified only in limited circumstances, this still leaves the door open for some exclusion. This is correct: it is too fast to go straight from an exclusion argument to open borders. Defeating a blanket *pro tanto* right to exclude does not establish a blanket *pro tanto* right to immigrate. We should settle for a combination of rejecting closed borders and accepting that we should carefully think through any proposed immigration restrictions to make sure they are compatible with our views about unilateral secession (i.e., territorial exclusion).

Defenders of open borders may not be happy with this. There are two things to say in response. First, the exclusion arguments work by taking the criteria for exclusion of outsiders and showing how these can allow for the exclusion of insiders. It may be that there are *no* good justifications for excluding outsiders. So perhaps we do get an argument for open borders, not via the exclusion argument but via some other route. The territorial exclusion argument certainly does not *rule out* open borders. Second, there may be justifications for excluding individuals that are not as clearly objectionable as other sorts of exclusions would be, or as clearly objectionable as existing exclusions are. So for instance there may be a case for excluding people for national security reasons, like agents of a foreign country who unjustly aim to destroy the country they are resident citizens of. If the spies could live perfectly good lives in the country they are loyal to, perhaps there is nothing wrong with excluding them from their present country and revoking their citizenship there. Public health reasons for exclusion, like hypothetically preventing European immigration to the Americas long ago in order to stop the transmission of communicable diseases, could also be justifiable. These sorts of exclusions are ones that even advocates of open borders are typically fine with.<sup>96</sup> So it may be that, even though the territorial exclusion licenses some border closures, these closures do not actually contest the position typically labeled “open borders.”

95 I thank an anonymous reviewer for suggesting that I clarify this point.

96 See, for instance, Carens, “Aliens and Citizens,” 251; and Kukathas, “The Case for Open Immigration,” 218. Cole is less convinced by national security considerations, both with respect to immigration restrictions and exclusion of existing citizens; see *Philosophies of Exclusion*, 142–43.



## 5. CONCLUSION

There are two main conclusions that we can take away from the territorial exclusion argument. First, arguments for closed borders are also arguments for territorial exclusion, which means one must either bite the territorial exclusion bullet (like Altman and Wellman) or give up a commitment to closed borders. The bullet is not an attractive one, and so we should give up closed borders. Second, because it is not clear if unilateral secession is *always* unjustifiable, it is too fast to go directly from the exclusion argument to open borders. Instead we should formulate a comprehensive theory of borders and then read off from this theory what we can say about territorial exclusion, and for that matter other sorts of exclusion. With the possibility of territorial exclusion in mind, we should take care to craft comprehensive theories that would not license widespread territorial exclusion, because this result is too unintuitive to endorse.<sup>97</sup>

Ashoka University  
danny.weltman@ashoka.edu.in

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## THE WELFARE-NIHILIST ARGUMENTS AGAINST JUDGMENT SUBJECTIVISM

*Anthony Kelley*

ONE WAY to construe subjectivism about well-being is as the view that  $x$  is basically good for  $S$  if and only if, because, and to the extent that  $x$  is valued, under the proper conditions, by  $S$ .<sup>1</sup> Dale Dorsey argues for an idealized, judgment-based theory of valuing, one according to which a person values a thing if and only if, because, and to the extent that she would believe, under the proper conditions, that it is basically good for herself.<sup>2</sup> Call subjectivism about well-being coupled with a judgment-based theory of valuing *judgment subjectivism*.<sup>3</sup>

Judgment subjectivism is a remarkable theory, and Dorsey's case for it is compelling. If the theory is true, then what is good for you is wholly determined by what you believe is good for you. It is somewhat surprising that it has not been the subject of much scrutiny.<sup>4</sup> In this paper, I offer three related arguments against the theory. The arguments are about what judgment subjectivism implies about the well-being of welfare nihilists, people who believe that there are no welfare properties or at least that none are instantiated. I maintain that wel-

- 1 This construal is Dale Dorsey's; see Dorsey, "Subjectivism without Desire," 407. One controversial feature of Dorsey's statement of subjectivism is that it requires that a theory link a person's good to her values in order for it to count as subjectivist. It is more common in the well-being literature to deem as subjectivist any theory that links a person's good to her pro-attitudes more generally (and not only to the pro-attitudes that constitute her values). See, for example, Heathwood, "Subjective Theories of Well-Being," 205; Lin, "Against Welfare Subjectivism," 354; and Sumner, *Welfare, Happiness and Ethics*, 38.
- 2 See Dorsey, "Subjectivism without Desire," "Idealization and the Heart of Subjectivism," and "Why Should Welfare 'Fit'?"
- 3 Each theory—subjectivism, a judgment-based theory of valuing, and judgment subjectivism—includes "because," "to the extent that," and "under the proper conditions" clauses. To make the discussion less onerous, I will mostly drop these clauses when discussing these theories. Also, in what follows, all references to welfare value or to what is good (bad) for a person are references to what is *basically* good (bad) for a person (i.e., good (bad) for the person non-derivatively and as an end).
- 4 An important exception is Lin, "Against Welfare Subjectivism."



fare nihilists can be benefited and harmed. Judgment subjectivism is implausible because it implies otherwise.

In section 1, I explain judgment subjectivism, and in section 2, I present the welfare-nihilist arguments against the theory. In section 3, I explain how my objection to the theory is better, in at least one important respect, than a similar objection in the well-being literature. In section 4, I respond to some objections.

### 1. JUDGMENT SUBJECTIVISM

The central motivation for judgment subjectivism is the alienation constraint, the doctrine that a person cannot be alienated from that which is basically good for her. Sometimes referred to as “internalism about prudential value” or the “resonance constraint,” it is commonly understood as the requirement that in order for something to be good for a person, she must have a pro-attitude toward it.<sup>5</sup> A person’s pro-attitudes are her noncognitive attitudes like being pleased, desiring, enjoying, and liking or her evaluative cognitive attitudes like believing that something is of value.<sup>6</sup> The alienation constraint is motivated by cases where it seems at least plausible to say that something is not good for a person because the person is not at all interested in it.

From this starting point, Dorsey arrives at judgment subjectivism in two steps. The first step is to argue that, in order to accommodate our intuitions about how a person’s good cannot be alien to her—that is, in order to accommodate the alienation constraint—theories of well-being must tie a person’s good to the pro-attitudes that constitute her *values* and not just to any pro-attitude or other. Dorsey claims that a theory that ties a person’s good to some pro-attitude that is not a valuing attitude risks alienating a person from her good.<sup>7</sup> The argument for this claim appeals to the case of a recovering addict who desires,

5 In a canonical expression of the resonance constraint, Railton writes: “It does seem to me to capture an important feature of the concept of intrinsic value to say that what is intrinsically valuable for a person must have a connection with what he would find in some degree compelling or attractive, at least if he were rational and aware. It would be an intolerably alienated conception of someone’s good to imagine that it might fail in any such way to engage him” (“Facts and Values,” 9). For arguments in favor of the resonance constraint, see Rosati, “Internalism and the Good for a Person”; Dorsey, “Why Should Welfare ‘Fit’?” For criticisms of Rosati’s arguments, see Dorsey, “Why Should Welfare ‘Fit’?”; Sarch, “Internalism about a Person’s Good.” Sarch also discusses an argument against Rosati’s preferred formulation of the constraint (“Internalism about a Person’s Good”).

6 For the purposes of this paper, I will follow Dorsey in characterizing evaluative beliefs as pro-attitudes (“Subjectivism without Desire”).

7 A valuing attitude is an attitude such that if a person takes up that attitude toward an object, then she values it.

but does not value, taking an addictive drug. It would be to adopt an intolerably alienating conception of her good, Dorsey claims, to say that taking the addictive drug is good for her when doing so conflicts with her values.<sup>8</sup>

The second step is to give a theory of valuing.<sup>9</sup> A judgment-based theory of valuing identifies valuing with belief or judgment (I will use the two interchangeably). The theory says that *S* values *x* if and only if *S* believes, under the proper conditions, that *x* is good for *S*. There are some troubling cases for the theory. I will mention two here.

Suppose that some of my beliefs about what is good for me are in tension with some of my other beliefs about what is good for me. For example, suppose that I believe that being a philosopher is good for me, but I do not believe that the activities that are constitutive of being a philosopher are good for me. Plausibly, if one does not value the activities constitutive of being a philosopher, one does not value being a philosopher. Thus, the judgment-based theory of valuing seems to imply, implausibly, that I both value and do not value being a philosopher.<sup>10</sup>

Another problem case is this: suppose that I believe that being a philosopher is good for me, but I have a mistaken view of what being a philosopher is like. Suppose further that if I knew what being a philosopher is really like, I would not believe that being a philosopher is good for me. Perhaps, for example, I believe that being a philosopher is good for me on the basis of the prospects of the fortune and fame I associate with being a philosopher, and that I would not believe that being a philosopher is good for me if it were not for this mistaken view of what being a philosopher is like. The judgment-based theory of valuing seems to imply, implausibly, that I value being a philosopher when I do not value what it is really like to be a philosopher (philosophy, perhaps regrettably, is not a reliable path to fortune and fame).

We can specify the theory in a way that avoids these objections. The theory says that *S*'s beliefs determine, *under the proper conditions*, what *S* values. Dorsey suggests that the proper conditions include a coherence condition.<sup>11</sup> In the case where I believe that being a philosopher is good for me, and I also believe that

8 See Dorsey, "Idealization and the Heart of Subjectivism," 200–1.

9 More specifically, Dorsey takes himself to be giving a theory of *prudential* valuing. According to Dorsey, prudential valuing is the kind of valuing that is *self-interested* and thereby most plausibly related to well-being. For example, Dorsey distinguishes between the way that he might value a stranger's broken leg being healed and the way he values being a philosopher. He says that he values the former in a *non-prudential* way and that he values the latter in a different, *prudential* way. See Dorsey, "Subjectivism without Desire," 419–22.

10 Dorsey, "Subjectivism without Desire," 415.

11 Dorsey, "Subjectivism without Desire," 415–16.

doing the activities that are constitutive of being a philosopher is not good for me, my beliefs about what is good for me are incoherent. Once my beliefs about what is good for me are rendered coherent, I will either believe both that being a philosopher and that the activities constitutive of being a philosopher are good for me or I will not believe that being a philosopher is good for me at all.

What of the case where I believe that being a philosopher is good for me but on the basis of a misunderstanding of what being a philosopher is like? To accommodate this kind of case, Dorsey specifies the theory's proper-conditions clause to include a condition of full consideration.<sup>12</sup> Provided that I would not maintain my belief that being a philosopher is good for me if I had fully considered the relevant ways that being a philosopher is like, then the judgment-based theory of valuing that includes a condition of full consideration would not imply that I value being a philosopher.

With these details, we can now state Dorsey's preferred formulation of judgment subjectivism:

*Dorsey-Style Judgment Subjectivism:*  $x$  is good for  $S$  if and only if  $S$  would believe, if  $S$ 's beliefs about what is good for  $S$  were rendered coherent and if  $S$  had fully considered all the (relevant) ways that  $x$  might be, that  $x$  is good for  $S$ .

The core of judgment subjectivism is a commitment to subjectivism and a judgment-based theory of valuing. Dorsey-style judgment subjectivism is one way to specify the theory's proper-conditions clause in light of the two problem cases just discussed. Dorsey's formulation of the theory is an *idealized* theory. It does not give the person's *actual* beliefs evaluative authority. Instead, whether  $x$  is good for  $S$  is determined by the beliefs that  $S$  *would* have if her beliefs were rendered coherent and if she had fully considered all the (relevant) ways that  $x$  might be. Other judgment subjectivists may wish to avoid idealization.<sup>13</sup> The

12 Dorsey, "Idealization and the Heart of Subjectivism," 209.

13 Dorsey distinguishes between two ways that idealization might be incorporated into subjectivism. On Dorsey's understanding of subjectivism, the subjectivist says that something is good for a person if and only if she values it. The first way that idealization could enter the subjectivist picture would be for the subjectivist to say that it is not the person's *actual* values that determine what is good for her; instead, it is the values that she *would* have if she were, say, fully informed and fully rational. Now suppose that the subjectivist does not choose to idealize in this way. There is still a second way that idealization could enter the picture: the subjectivist might say that what it is for a person to value something is for her to have certain pro-attitudes under certain idealized conditions. Dorsey chooses to idealize in the second but not the first way; on his view, it is a person's *actual* values that determine what is good for her, but her actual values are revealed through what she *would* believe is

welfare-nihilist arguments against judgment subjectivism, however, apply not just to Dorsey's particular formulation of the theory; they apply to any plausible version of the theory.

## 2. THE WELFARE-NIHILIST ARGUMENTS

Welfare nihilism is the view that there are no welfare properties or at least that none are instantiated. Judgment subjectivism has some implausible implications about the welfare of welfare nihilists. I will discuss three: that welfare nihilists cannot be benefited, that welfare nihilists cannot be harmed, and that for any two welfare nihilists, *A* and *B*, the segment of *A*'s life after *A* becomes a welfare nihilist is no better or worse for *A* than the corresponding segment of *B*'s life is for *B*, *no matter what these life segments are like*.

### 2.1. *The First Argument*

Suppose that Felicity is a senior philosophy professor. In graduate school, she took a seminar in the metaphysics of value. She became convinced by various arguments that nothing is good or bad for anyone. After becoming a welfare nihilist, Felicity nonetheless experienced numerous pleasures and the satisfaction of her most enduring desires. She married a lovely and kind person with whom she is exceptionally happy. She loves her children, and they love her. She has published widely in philosophy. She has developed her musical talent as an expert pianist. She donates money to the poor, and she has a wide range of hobbies in which she often finds occasion to indulge. She is well respected, and she has many genuine friendships. At the age of eighty-five, Felicity dies just as she had always hoped that she would: painlessly and surrounded by her loved ones.

It is plain that Felicity led a good life. Furthermore, it is not that the goodness of Felicity's life is wholly explained by what occurred in her life before she became a welfare nihilist. The goodness of Felicity's life is explained, at least in part, by states of affairs that obtained after she became a welfare nihilist.<sup>14</sup> Note that we need not agree on which states of affairs are good for Felicity after she became a welfare nihilist, and we need not agree on exactly why they were of benefit to her. I take it that virtually everyone, irrespective of their preferred the-

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good for herself under idealized conditions. See Dorsey, "Idealization and the Heart of Subjectivism."

<sup>14</sup> For simplicity, I am writing as if states of affairs are the bearers of prudential value, but I want to remain neutral on this controversial issue. Everything I say here could be restated in terms of whichever metaphysical entity one thinks is the bearer of welfare value.

ory of well-being, would agree that Felicity was benefited by at least something after she became a welfare nihilist.

Dorsey-style judgment subjectivism, however, cannot accommodate this fact. The theory implies that  $x$  is good for  $S$  only if  $S$  would believe, if her beliefs were rendered coherent and if she had fully considered all the (relevant) ways that  $x$  might be, that  $x$  is good for  $S$ . Felicity's beliefs about what is good for herself are consistent because she does not believe that anything is good for herself. There is also no difficulty in imagining that the full-consideration condition has been met. We can imagine that Felicity remained steadfast in her welfare nihilism even after fully considering every possible state of affairs that might be of benefit to her. Thus, Dorsey-style judgment subjectivism implies, implausibly, that Felicity was not benefited after she became a welfare nihilist.

This first welfare-nihilist argument, like the other two to follow, are not just a problem for Dorsey-style judgment subjectivism. Dorsey's formulation of the theory is a result of his preferred way of specifying the theory's proper-conditions clause. I will argue in section 4 that Felicity would not believe that anything is good for herself after she became a welfare nihilist under any plausible specification of the theory's proper-conditions clause. My argument there relies on the claim that some natural and plausible ways the judgment subjectivist might try to specify the proper-conditions clause to avoid my objection are inadequate for that task. This fact suggests (but, of course, does not entail) that there is no plausible way at all for the judgment subjectivist to specify the proper-conditions clause in order to avoid my objection.

One initial objection to this first argument is that I have begged the question against the judgment subjectivist. Only someone who is not a judgment subjectivist, the objector claims, would grant that Felicity is benefited after she became a welfare nihilist. I suspect, however, that if the judgment subjectivist puts aside his philosophical commitments and reflects on the case as anyone else would, he would agree that Felicity is benefited after becoming a welfare nihilist. Furthermore, the judgment subjectivist should be concerned with accommodating commonsense intuitions about welfare and not just the idiosyncratic intuitions of judgment subjectivists.

Even if the judgment subjectivist digs in his heels and insists that Felicity is never benefited after becoming a welfare nihilist, I do not think that my argument begs the question (or if it does, it is not an illicit instance of begging the question). I doubt, for example, that anyone would seriously think that Gettier begs the question (or that his begging the question is illicit) against the justified-true-belief theory of knowledge just because he assumes as a premise something that someone who digs in his heels and insists that the theory is true would

reject (e.g., that Smith does not know that the man who will get the job has ten coins in his pocket).<sup>15</sup> The issue of when an argument begs the question (illicitly) is beyond the scope of this paper, but we can at least say this: an expansive view according to which the welfare-nihilist arguments should be rejected on this basis is one that would condemn as fallacious virtually every philosophical argument that attempts to make problems for a theory by identifying its implausible implications.<sup>16</sup>

## 2.2. *The Second Argument*

Judgment subjectivism is a theory of well-being. Theories of well-being are theories about what is good for a person as well as what is bad for a person. For example, the hedonist claims that pleasurable experiences benefit a person whereas painful experiences harm. Similarly, we would expect a full statement of judgment subjectivism to say something about what is bad for a person. Dorsey does not discuss this element of the theory, so we must fill in some of the details for ourselves. The most natural suggestion is for the judgment subjectivist to say that  $x$  is bad for  $S$  if and only if  $S$  would believe, under the proper conditions, that  $x$  is bad for  $S$ .

This additional feature of judgment subjectivism suggests a different but related argument against the theory. Suppose that Mallory is a prisoner at a top-secret government compound. She is tortured daily. She has numerous painful experiences and her life is full of the frustration of her most enduring desires. Before her imprisonment, Mallory took a seminar in the metaphysics of value in graduate school. She became convinced by various arguments that nothing is good or bad for anyone. Mallory had many friends that have since lost all respect and affection for her after learning of her imprisonment for suspected terrorist activity. Upon her capture, Mallory's lovely and kind partner—with whom she was previously exceptionally happy—divorced her. Her children despise her, and she has no opportunity to pursue the various projects that are important to her. She has no hobbies and no genuine friendships. Mallory never again sees the light of day and dies at the hands of her captors.

It seems plain that Mallory is harmed after she became a welfare nihilist. After all, it is not as if a person could avoid the harm of being tortured simply by convincing themselves of welfare nihilism. Even if we cannot agree as to exactly what is bad for her after she became a welfare nihilist or exactly why it is bad for her, surely we can all agree, irrespective of our preferred theory of well-being, that Mallory was harmed after she became a welfare nihilist.

15 Gettier, "Is Justified True Belief Knowledge?"

16 I thank an anonymous referee for pressing me on this point.

Dorsey-style judgment subjectivism cannot accommodate this fact. Mallory's beliefs about what is bad for herself are coherent because she does not believe that anything is bad for herself, and we can simply imagine that the full-consideration condition has been met as well. Furthermore, Mallory would not, under any plausible specification of the proper-conditions clause, believe that anything is bad for herself, so this second welfare-nihilist argument, like the others, is a problem for any version of the theory.<sup>17</sup>

### 2.3. *The Third Argument*

I want to highlight one additional implausible implication of judgment subjectivism. To put the argument roughly: when I reflect on Felicity's life after she became a welfare nihilist, I find myself thinking that this period of Felicity's life is going *by far* better for her than the corresponding period of Mallory's life is going for her. The problem for judgment subjectivism is that it seems unable to accommodate this intuitive thought. As I will explain, the theory implies that Felicity's life after she became a welfare nihilist is of equal welfare value for her as Mallory's life after she became a welfare nihilist is for her.

For the discussion that follows, it will be helpful to introduce some terminology for ease of reference. Let us call the period of Felicity's life after she became a welfare nihilist *Felicitous* and the corresponding period of Mallory's life *Maladious*. It seems clear to me that *Felicitous* is better for Felicity than *Maladious* is for Mallory. In fact, I have a strong intuition that *Felicitous* is *significantly* better for Felicity than *Maladious* is for Mallory. Perhaps you share this intuition. But the claim we need for the third welfare-nihilist argument is weaker; all we have to say is that *Felicitous* is *at least somewhat* better for Felicity than *Maladious* is for Mallory. Everyone, irrespective of their preferred theory of well-being, should accept this weaker claim. Imagine that you are Felicity in the moment immediately after she became a welfare nihilist. Now suppose that you could choose, only taking into account considerations of your own welfare, either *Felicitous* or *Maladious* as your future. Surely you should not be indifferent between these two options; *Felicitous* is preferable precisely because it is the future that would be better for you.

Judgment subjectivism cannot accommodate this simple fact. There are two different versions of judgment subjectivism that we have to consider, each corre-

17 In section 4.2, I argue that Felicity would not, under any plausible specification of the proper-conditions clause, believe that anything is good for herself. I trust that the reader can take what I say there, make the appropriate changes, and reason in the same fashion to the conclusion that Mallory also would not, under any plausible specification of the proper-conditions clause, believe that anything is bad for herself.



sponding to a difference with respect to what the theory might say about how we should evaluate the welfare value of one of *S*'s life segments for *S*. The judgment subjectivist might say that a life segment is good for a person just in case she believes at some specified time and under the proper conditions that it is good for herself. On a different approach, the theory would imply that a life segment is good for a person just in case there is a favorable balance of welfare goods to welfare bads accrued during that period of time.

Consider the first approach. Put aside the proper-conditions clause for the moment, because the strategy I employ in section 4.2 can be used to establish that Felicity would not, under any plausible specification of the proper-conditions clause, believe that Felicitous is good for herself and that Mallory would not, under any plausible specification of the proper-conditions clause, believe that Maladious is good for herself. What is of interest to us now is the fact that a fully specified version of the theory on this first approach would have to say when exactly *S* must believe (under whatever proper conditions the theory specifies) that one of *S*'s life segments is good for *S*. The main options are to require that *S* believe that the life segment is good for herself before the life segment occurs, during the life segment, or after the life segment ends (or some combination of these). Irrespective of the details, on this approach the theory implies that the welfare value of Felicitous for Felicity is 0 provided that we stipulate that Felicity does not, *at any time whatsoever*, believe that Felicitous is good for herself. *Mutatis mutandis* with respect to what this version of the theory implies about the welfare value of Maladious for Mallory. Thus, on this first approach, Felicitous is no better for Felicity than Maladious is for Mallory.

Now consider the second approach. On this version of the theory, a life segment is good for a person just in case there is a favorable balance of welfare goods to welfare bads accrued during that period of time. On this way of evaluating the welfare value of a life segment, a life segment could be good for a person even if she does not believe that it is good for herself. As long as the life segment contains the right balance of welfare goods over welfare bads, then the life segment is good for her. Of course, according to judgment subjectivism, whether a life segment contains items that are welfare goods for *S* will depend on *S*'s beliefs about whether those items are good for herself, but on the version of the theory currently under consideration, whether *the life segment itself* is good for *S* does not depend on whether *S* believes that it is good for *S*.

This version of the theory implies that the welfare value of Felicitous for Felicity is 0 because Felicity does not, and would not under any plausible specification of the proper-conditions clause, believe that anything is good for herself during that period of time. According to the theory, Felicitous contains no wel-

fare goods at all for Felicity. *Mutatis mutandis* with respect to what this version of the theory implies about the welfare value of Maladious for Mallory. Thus, irrespective of whether we take the first or second approach in explaining the welfare value of one of *S*'s life segments for *S*, the theory has the implausible implication that Felicitous is no better for Felicity than Maladious is for Mallory.<sup>18</sup>

These three implausible implications of the theory—that Felicity is not benefited after becoming a welfare nihilist, that Mallory is not harmed after becoming a welfare nihilist, and that Felicitous is no better for Felicity than Maladious is for Mallory—are devastating. Note that the leading theories of well-being do not have these problems. Hedonism, the desire theory, and objective-list theories can each account, for example, for the fact that Felicity was benefited after she became a welfare nihilist. The hedonist will appeal to the pleasure that Felicity experienced, the desire theorist will appeal to the satisfaction of her desires, and the objective-list theorist will appeal to the relevant objective welfare goods that Felicity had in her life (e.g., her friendships, the development of her talents, and her achievements).

I have been assuming that we should reject the theory because it has the implausible implications that I have indicated. But why should that be? Every extant theory of well-being has some implausible implications. Theory choice is a complicated matter; we need to carefully weigh the virtues and vices of a theory against each other before rejecting it. The worry is that since I have not assessed all of judgment subjectivism's virtues and vices, I am not entitled to say that the theory should be rejected on the basis of the welfare-nihilist arguments.

These are sensible remarks. We certainly should not commit the mistake of prematurely rejecting a theory on the basis of just three implausible implications. But I do not think that rejecting judgment subjectivism on the basis of the welfare-nihilist arguments is premature. The implausible implications that I attribute to judgment subjectivism are *very* implausible implications about *basic* issues that *any* theory of well-being should get right. Felicity leads a paradigmatically good life, and Mallory leads a paradigmatically bad one. If a theory cannot deliver the correct verdicts in these kinds of cases, then we should jettison that theory for one that can. Nearly every extant theory of well-being can account for our intuitive judgments about Felicity's and Mallory's welfare after they became

18 This third welfare-nihilist argument may be thought to enjoy a certain advantage over the previous two. The previous arguments depend on absolute welfare claims (e.g., that Felicity was benefited after she became a welfare nihilist), whereas this argument does not. Instead, it depends on a purely comparative welfare claim. So even if someone is skeptical about absolute welfare claims, they can still believe that this third argument is sound.

welfare nihilists except for judgment subjectivism. That is an embarrassment for the theory.

### 3. LIN'S OBJECTION

Eden Lin has recently posed an interesting and formidable challenge to judgment subjectivism that is related to the welfare-nihilist arguments.<sup>19</sup> His objection is related because it identifies a class of individuals who do not have beliefs about what is good or bad for themselves but who can nonetheless be benefited and harmed. Whereas Lin's objection is about newborn babies, mine is about welfare nihilists. In this section, I will explain Lin's objection and Dorsey's reply. Then I will show that my objection is superior to Lin's in an important respect: whatever purchase Dorsey's reply has with respect to Lin's objection, a similar reply is a nonstarter as a reply to the welfare-nihilist arguments.

Lin argues against a theory he calls "Same World Judgment Subjectivism," which he describes as the view that " $x$  is basically good for you at  $W$  if and only if at  $W$ , you believe that  $x$  is basically good for you."<sup>20</sup> Lin's challenge comes in two steps. First, note that newborn babies do not have any beliefs about what is good for themselves. As Lin points out, "they like some things and are averse to others, and perhaps they have beliefs. But they surely do not have beliefs to the effect that  $x$  is good for them."<sup>21</sup> Second, note that newborn babies can clearly be harmed and benefited. As Lin writes, the fact that "a newborn can have a *positive* level of welfare . . . implies that some things can be basically *good* for it." Thus, the judgment subjectivist is apparently wrong that in order for something to benefit a subject, she must believe that it is good for herself.

A natural response would be to say that judgment subjectivism applies to normal human adults but that some other theory applies to newborn babies. However, Lin argues that "if the view is restricted in this way, we should reject it [because] if the view is true of normal adults even though it is false of newborns, then adult welfare diverges from neonatal welfare in a way that cannot plausibly

19 See Lin, "Against Welfare Subjectivism."

20 Lin, "Against Welfare Subjectivism," 357. We have seen that the judgment subjectivist need not accept this claim because he might instead prefer an idealized version of the theory. Lin has an objection against idealized versions of the theory too. See Lin, "Against Welfare Subjectivism," 365–68.

21 Lin, "Against Welfare Subjectivism," 357. Lin points out that even if this is not true of newborns at this world, it is certainly true of some newborns at some possible worlds. That the theory cannot accommodate our intuitions about the welfare of these merely possible beings is still a problem for the theory.

be explained.”<sup>22</sup> Lin asks us to consider a newborn baby who has a high level of welfare. Suppose that hedonism is the correct theory of neonatal welfare. Suppose further that the newborn baby matures over time and develops the capacity to believe that some things are good for herself but that she does not believe that anything is good for herself. Lin describes the problem as follows:

If Same World Judgment Subjectivism becomes true of her at this point, then her welfare drops to zero (or lower) at that time—even though she continues to have exactly the same balance of pleasure over pain in virtue of which she was previously high in welfare. This is implausible. If those favorable hedonic conditions were formerly sufficient for a *high* level of welfare, they are surely still sufficient for a *slightly positive* level of welfare. For what could explain why they are suddenly of no benefit at all?<sup>23</sup>

The judgment subjectivist is thus forced to accept either that newborn babies cannot be harmed or benefited or that there is a mysterious divergence between neonatal and normal human adult welfare. Both options seem untenable.

In a recent paper, Dorsey replies by digging in his heels and arguing that the divergence is not so mysterious after all.<sup>24</sup> He begins with the commonsense thought that when something is *good for* a welfare subject, it bears a positively valenced relation to that subject. He calls this the *kinship relation*. On his view, the kinship relation is different for different kinds of subjects. For example, the kinship relation that obtains between a dog and the things that are good for it may be a different kind of kinship relation than the kinship relation that obtains between a normal human adult and the things that are good for her. Dorsey argues that *for valuers*, the kinship relation is constructed by the subject’s valuing attitudes; his view is that  $x$  bears the kinship relation to a valuer,  $S$ , just in case  $S$  values  $x$ . And, of course, he believes that a judgment-based theory of valuing is true. Thus, on Dorsey’s view, the divergence between the welfare of newborn babies and that of normal human adults is explained by the fact that when the former develops the capacity to believe that something is good or bad for itself, the kinship relation that must obtain between that being and the things that are good for it is fundamentally altered.

I mention this dispute between Lin and Dorsey not to evaluate Dorsey’s response to Lin. Instead, I mention it to illustrate the strength of the welfare-nihilist arguments. In reply to Lin’s objection, Dorsey argues that one theory of well-being applies to normal human adults and that another applies to newborn

22 Lin, “Against Welfare Subjectivism,” 358.

23 Lin, “Against Welfare Subjectivism,” 360.

24 See Dorsey, “Why Should Welfare ‘Fit’?”

babies on the grounds that when a newborn baby develops the capacity to form beliefs about what is good or bad for itself, it becomes a fundamentally different kind of being. Assign to this reply whatever degree of plausibility you believe it deserves.

It is plain that a similar reply to the welfare-nihilist arguments is less plausible. It cannot be argued that the explanation as to why one theory of well-being applies to otherwise normal human adults who are welfare nihilists and another applies to normal human adults who are not welfare nihilists is because the latter have the capacity to form beliefs about what is good or bad for themselves whereas the former do not. Welfare nihilists have the capacity to form beliefs about what is good or bad for themselves.<sup>25</sup> Having the capacity to form such beliefs is just a matter of having the capacity to come down, as it were, one way or the other, as to whether something is good or bad for themselves. Welfare nihilists like Felicity and Mallory clearly have this capacity; it is just that when they exercise it, they come to believe that nothing is good or bad for themselves. For this reason, whatever purchase Dorsey's reply has with respect to Lin's objection, it is a nonstarter as a reply to the welfare-nihilist arguments.

#### 4. OBJECTIONS AND REPLIES

Each of the previous arguments relies on the general thought that some ways that a welfare nihilist's life can go can be better or worse for her than others. Judgment subjectivism is implausible because it implies otherwise. One might wonder, however, whether it is really possible to be a welfare nihilist and whether there are ways to specify the theory that do not have the implausible impli-

25 A very natural way to think of the welfare nihilist is as someone who thinks that the concept of welfare is incoherent. If we think of welfare nihilism according to this model, then we might doubt that the welfare nihilist has the capacity to form beliefs about what is good or bad for themselves. Do I, as someone who believes that the concept of a four-sided triangle is incoherent, have the capacity to form beliefs about whether something is a four-sided triangle? I am inclined to think the answer is yes, but some readers may have a different reaction. For these readers, I submit that we need not understand welfare nihilism according to this model. Instead, we can think of the welfare nihilist as someone who thinks that there are no welfare properties instantiated in this world but that there are some possible worlds where they are. Compare: I am a nihilist about unicorns. I do not think the concept of being a unicorn is incoherent; I simply deny that there are any unicorns. It can hardly be said that I have not exercised my capacity to form beliefs about unicorns simply because I do not believe that anything is a unicorn. I have indeed exercised the capacity to form beliefs about whether this or that thing is a unicorn. It is just that, in each case, I come down on the question in a particular way. For discussion of these issues as they arise in the context of morality, see Brown, "The Possibility of Morality"; and Kalf, "Are Moral Properties Impossible?" I thank an anonymous referee for raising this concern.

cations I attribute to it. To make the discussion that follows less onerous, I will formulate each objection in terms of the case of Felicity.

#### 4.1. *The First Objection*

*You claim that Felicity believes that nothing is good for herself, but I find that difficult to imagine. After all, Felicity pursues various projects and engages in loving relationships, so she must believe that these activities are good for herself. Thus, Felicity cannot be a sincere and consistent welfare nihilist in the way that you suggest. Even if she sincerely believes that welfare nihilism is true, she clearly is not consistent because she makes ordinary, everyday judgments about what is good for herself.*

I agree with the objector that one possible explanation for Felicity's behavior is that she is not a sincere and consistent welfare nihilist. That would be one coherent way to fill in the details of the case. If Felicity really did believe, for example, that being married to her husband is good for herself, that fact could explain why she got married. But this is not the only possible explanation. There is another coherent way to fill in the details of the case that does not require us to say that Felicity believes that something is good for herself.

The explanation I have in mind appeals to Felicity's *intrinsic desires*. An intrinsic desire is a desire for something for its own sake. Contrast intrinsic desires with mere instrumental desires. My desire for money is a mere instrumental desire; I want money because having money can get me other things that I desire. I do not desire to have green slips of paper in my pocket for its own sake. My desire for pleasure, however, is an intrinsic desire; I want pleasure for its own sake. Sometimes an intrinsic desire can also be an instrumental desire. I may want pleasure because it can get me something else that I desire, but my desire for pleasure is still an intrinsic desire as long as I also want it at least partly for its own sake. Also, intrinsic desires do not depend on beliefs about value; you can have an intrinsic desire for pleasure even if you do not believe that pleasure is good for you.<sup>26</sup>

Now suppose that Felicity pursues her various projects and engages in loving relationships because she has an intrinsic desire for pleasure and she believes that pursuing her various projects and engaging in loving relationships will result in her experiencing pleasure. Because she is a sincere and consistent welfare nihilist, Felicity does not believe that experiencing pleasure is good for herself, but she wants to experience pleasure nonetheless. When Felicity gets married, for example, we can suppose that she believes that doing so will result in her

<sup>26</sup> Even the judgment subjectivist would accept that you can have a desire for something without believing that it is good for yourself. Otherwise, a judgment-based theory of valuing would not be much of an alternative to a desiderative theory of valuing.

experiencing pleasure. Using this strategy, we can appeal to Felicity's intrinsic desire for pleasure (coupled with the belief that her behavior will result in her experiencing pleasure) to explain her behavior.

The objector might insist that though I have provided a *possible* explanation of Felicity's behavior that does not require us to say that Felicity believes that something is good for herself, I have not provided a *plausible* explanation of her behavior. Only an explanation that says that Felicity believes that something is good for herself can fit that bill. Or so the objector claims.

I do not know what is supposed to be so implausible about explaining a person's behavior by appealing to her intrinsic desire to experience pleasure. But in order to respond to the current objection, I do not need to argue that the explanation I offered is plausible; it only needs to cohere with the other details of the case. The fact that Felicity can coherently be described as acting on an intrinsic desire to experience pleasure (coupled with the belief that her behavior will result in her experiencing pleasure) is enough to undermine the objection. After all, Felicity is just a fictional character in a thought experiment. As long as the story is coherent, we can fill in the details as we wish. Thus, by appealing to Felicity's intrinsic desire to experience pleasure, we need not accuse Felicity of being an insincere or inconsistent welfare nihilist in order to make sense of why she pursues her various projects and engages in loving relationships.<sup>27</sup>

Furthermore, we can be relatively confident that welfare nihilists like Felicity have benefited after becoming welfare nihilists. On one interpretation, G. E. Moore was a welfare nihilist.<sup>28</sup> Thomas Hurka has on occasion expressed skepti-

27 Some hold that *S*'s desire that *p* is just the state of its seeming to *S* that *p* is good; see Oddie, *Value, Reality, and Desire*. It might be thought that such a view is in tension with my strategy here; if it turns out that Felicity's intrinsic desire to experience pleasure just is her belief that experiencing pleasure is good for herself, then it could not be argued that appealing to Felicity's intrinsic desire for pleasure helps us explain various facts of her life without appealing to her beliefs about what is good for herself. I do not think this view is in tension with what I say here for two reasons. First, the view is that intrinsic desires are seemings, not that intrinsic desires are beliefs. It might seem to *S* that *p* even if *S* does not believe that *p*. Second, the view is that intrinsic desires are seemings about value *simpliciter*, not welfare value. It might seem to *S* that *p* is of value *simpliciter* even if it does not seem to *S* that *p* is good for *S*. Thus, even if we think that Felicity's intrinsic desire to experience pleasure just is the state of it seeming to her that experiencing pleasure is good, that falls short of identifying Felicity's intrinsic desire to experience pleasure with a *belief* that experiencing pleasure is *good for herself*.

28 This is the view that Crisp ("Well-Being," sec. 2) and Lin ("Against Welfare Subjectivism," 359) attribute to Moore. On a competing interpretation, Moore is instead a reductionist about welfare value. On that interpretation, Moore's view is that what it is for *x* to be good for *S* is just for *x* to be of value *simpliciter* and for *S* to stand in the right kind of relation to



cism about well-being.<sup>29</sup> Bart Streumer argues that all normative judgments are false.<sup>30</sup> Readers who find the case of Felicity difficult to imagine need only reflect on these real-world cases of welfare nihilists.

#### 4.2. *The Second Objection*

*Judgment subjectivism is the view that something is good for a person if and only if she would believe, under the proper conditions, that it is good for herself. You claimed earlier, without argument, that Felicity would not, under any plausible specification of the theory's proper-conditions clause, believe that anything is good for herself. But I can think of some plausible ways of specifying the proper-conditions clause such that the resulting theory will not have the implication that you attribute to it. And if I can supply at least one such specification, I will have limited the force of your argument in an important way: your argument, if successful, gives us reason to reject some but not all versions of judgment subjectivism.*

I did indeed claim earlier that Felicity would not, under any plausible specification of the theory's proper-conditions clause, believe that anything is good for herself. I now need to make good on that claim. My strategy is to establish a presumptive case for it by showing how some candidate specifications of the proper-conditions clause fail to make the theory immune to the welfare-nihilist arguments.

##### 4.2.1. *"If she were fully informed and fully rational ..."*

One natural and plausible-sounding strategy is to specify the proper conditions as those of full information and full rationality. The version of judgment subjectivism that would result is as follows:

*x is good for S if and only if S would believe, if she were fully informed and fully rational, that x is good for S.*<sup>31</sup>

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*x.* This is the view that Fletcher attributes to Moore (Fletcher, "The Locative Analysis of *Good for Formulated and Defended*," 2–3).

29 In explaining why his perfectionism is not a theory of well-being, Hurka writes: "I do not see that 'developing human nature constitutes well-being and is therefore good' says anything over and above 'developing human nature is good,' and prefer to confine perfectionism to the second, simpler claim" (*Perfectionism*, 194). Hurka has also claimed that "good for" is "multiply ambiguous" and "fundamentally confused, and should be banished from moral philosophy" ("'Good' and 'Good For,'" 72).

30 See Streumer, *Unbelievable Errors*.

31 There are some reasons to reject specifying the proper-conditions clause as conditions of full information and full rationality. There is a worry that such idealized conditions are objectionably *ad hoc*. For a statement of this criticism, see Enoch, "Why Idealize?" For a reply, see Sobel, "Subjectivism and Idealization." There are also concerns that no person could be

To assess this formulation of the theory, we have to say something about what “full information” means here. Would information about what is good for Felicity be included among the information we add to her belief set when we make her fully informed?

Suppose that when we add information to Felicity’s belief set to make her fully informed, we add information about what is good for her. Then the theory presupposes facts about a person’s good independent of her beliefs about what is good for herself. The judgment subjectivist tells us that the fact that something is good for a person consists in her believing, under the proper conditions, that it is good for herself. But then we are told that these proper conditions include knowledge of the fact that it is good for herself. It would seem that we have an instance of a problematic kind of circularity that the judgment subjectivist should not be willing to accept.

Suppose instead that when we add information to Felicity’s belief set to make her “fully” informed, we do not add information about what is good for her. In that case, there is no guarantee that Felicity will believe that something is good for herself under these conditions. Perhaps this is where the condition of being fully rational comes into play. The hope would be that it would in some sense be irrational for Felicity to be “fully” informed and still fail to believe that anything is good for herself.

Suppose that Felicity is “fully” informed and fully rational and that she does not believe that anything is good for herself. Now the version of judgment subjectivism currently under consideration would imply that Felicity is thereby irrational. But why is Felicity irrational for not believing that anything is good for herself? The judgment subjectivist must surely allow that some things are not good for a person. On any version of the theory, it must be rational for a person to believe of some arbitrarily chosen  $x$  that it is not good for herself. But if a person can believe this of *some arbitrarily chosen*  $x$  and remain rational, she should surely be able to believe it of *every*  $x$  and remain rational.

But suppose that I am wrong about this and that it is really true that Felicity, if “fully” informed, is irrational for believing that nothing is good for herself.

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fully informed and that even if a person could be fully informed, the idealized perspective may lack evaluative authority. For a statement of this criticism, see Rosati, “Persons, Perspectives, and Full Information Accounts of the Good.” More generally, there is a worry that if a theory of well-being bestows evaluative authority to a person’s counterfactual pro-attitudes, then that theory risks violating the resonance constraint. Such a theory might imply, for example, that my fully informed and fully rational self’s desire to listen to Muzak makes listening to Muzak good for me, even if I strongly dislike listening to Muzak and do not believe that listening to it is any good for me. For a discussion of a similar alienation worry as it relates to some forms of moral rationalism, see Joyce, *The Myth of Morality*.

Consider a variation of the case. This time, suppose that Felicity has no opinion about welfare (e.g., she is not a principled welfare nihilist as in the original version of the case) and that she is “fully” informed. Suppose further that by introspection she comes to hold the true belief that she does not believe that anything is good for herself. She studies the well-being literature and becomes convinced of judgment subjectivism. She then combines these two beliefs—her belief that she does not believe that anything is good for herself and her belief that judgment subjectivism is true—and deduces that nothing is good for herself. The judgment subjectivist cannot say that in this version of the case Felicity is irrational since each step of her reasoning is unassailable by the judgment subjectivist’s own lights. We now have before us a different version of the case in which Felicity is both “fully” informed and fully rational, yet she still does not believe that anything is good for herself. The upshot is that specifying the proper conditions as those of “full” information and full rationality does not make the theory immune to the welfare-nihilist arguments.

We can get different versions of judgment subjectivism by tinkering with the theory’s proper-conditions clause. But I have shown that the theory is undermined by the welfare-nihilist arguments if we specify those conditions to include a coherence condition, a condition of full consideration, a condition of full information, and a condition of full rationality. There may be other ways to specify the proper-conditions clause in an effort to make the theory immune to the welfare-nihilist arguments, but we at least have a presumptive case that the arguments are effective against any plausible formulation of the theory.

## 5. CONCLUSION

In this paper, I have given three related arguments against judgment subjectivism. Each argument is about how the theory implies something implausible about the welfare of welfare nihilists. The problematic feature of the theory is that it implies that something is good (bad) for a person only if she believes that it is good (bad) for herself. The welfare-nihilist arguments would be devastating against any theory with this implication. For example, Wayne Sumner’s happiness theory of well-being is also subject to the welfare-nihilist arguments. On his theory, welfare consists in *authentic happiness*, which involves a cognitive component (in addition to an affective one). Sumner describes this cognitive component as “a judgment that, on balance and taking everything into account, your life is going well for you.”<sup>32</sup> Welfare nihilists, of course, make no such judgments, so Sumner’s theory also has the implausible implications that I attribute

32 See Sumner, *Welfare, Happiness, and Ethics*, 145.

to the judgment subjectivist. One upshot of this paper is that we should assess theories of well-being, at least in part, in terms of whether they deliver the intuitively correct verdicts about the welfare of welfare nihilists.<sup>33</sup>

Coe College  
akelley@coe.edu

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## AN OCCASIONALIST RESPONSE TO KORMAN AND LOCKE

David Killoren

DAN KORMAN AND DUSTIN LOCKE argue that nonnaturalists are rationally committed to withhold moral belief.<sup>1</sup> A main principle in their argument, which they call EC\*, can be read in either of two ways, which I call EC\*-narrow and EC\*-wide. I show that EC\*-narrow faces serious problems. Then I show that, if Korman and Locke rely on EC\*-wide to critique nonnaturalism, the critique fails. I explain how the availability of a view that I like to call *moral occasionalism* can be used to respond on the nonnaturalist's behalf to the EC\*-wide version of the argument. Moral occasionalism is what is called a "third-factor account" (an explanation of the correlation between moral facts and moral beliefs in terms of some third factor). I show how moral occasionalism is more useful for responding to Korman and Locke than the most widely discussed third-factor account, namely David Enoch's preestablished harmony view.

### 1. A DILEMMA FOR KORMAN AND LOCKE'S CRITIQUE OF NONNATURALISM

To argue that nonnaturalists are rationally committed to withhold moral belief, Korman and Locke rely on a general principle concerning explanation. Before they unveil their principle, they first consider and reject the following "flat-footed" principle:

EC: If S believes that her belief that *p* neither explains nor is explained

- 1 Korman and Locke, "Against Minimalist Responses to Moral Debunking Arguments." Korman and Locke's paper won the 2018 Marc Sanders Prize in metaethics. Their argument, more precisely, is that *minimalists*, who allow that moral facts neither explain nor are explained by moral beliefs, end up being committed to withhold moral belief. There is some question about whether nonnaturalists can reject minimalism (see Shafer-Landau, *Moral Realism*, ch. 4). But I believe that all nonnaturalists *must* endorse minimalism, for reasons I explain in Killoren, "Robust Moral Realism," 225–27. So, I will proceed here with the assumption that Korman and Locke's challenge is a challenge for nonnaturalism broadly.

by the fact that  $p$ , then  $S$  is thereby rationally committed to withholding belief that  $p$ .

Korman and Locke reject EC because of its bad implications. Concerning a standard example, they write: “You observe the fire in the fireplace and are justified in believing that there is smoke coming out the chimney. Of course, the fact that smoke is coming out of the chimney does not explain (causally or otherwise) the belief that it is. But [contrary to what EC implies] this realization surely does not undermine the belief.”<sup>2</sup> So, Korman and Locke switch away from EC to

EC\*: If  $p$  is about domain  $D$ , and  $S$  believes that her belief that  $p$  is neither explained by nor explains some  $D$ -facts, then  $S$  is thereby rationally committed to withholding belief that  $p$ . (To say that a given fact that  $p$  is “about” a given domain  $D$  is just to say that the fact that  $p$  belongs to  $D$ .)

Korman and Locke want to endorse EC\*. They argue—not implausibly—that if EC\* were true, that would be bad news for nonnaturalists. Here is why. Any given moral belief is about the moral domain. But nonnaturalism implies that moral beliefs are neither explained by nor explain any moral facts (see note 1). So, if EC\* were true, then it would straightforwardly imply that nonnaturalists are rationally committed to withholding all moral beliefs.

But there is an immediate problem for interpreting EC\*, which they recognize (but do not try to solve).<sup>3</sup> The problem stems from Korman and Locke’s notion of a domain. Korman and Locke do not explain what a domain is, but presumably it is a type of classificatory structure for facts. The moral domain is one domain; another is the chemical domain (i.e., that domain that contains all and only facts that belong to the science of chemistry); the physical domain is another, and so on.

If we think of domains as classificatory structures for facts, we should expect that there will be overlap between some domains and others, and that some domains will be proper subsets of others. So, any given fact may belong to multiple domains. This highlights an ambiguity in EC\*. Consider two versions of EC\*. First, a narrow version:

EC\*-narrow: If [there is some domain  $D$  such that  $p$  is about that domain, and  $S$  believes that her belief that  $p$  neither is explained by nor explains any  $D$ -facts] then  $S$  is thereby rationally committed to withholding belief that  $p$ .

2 Korman and Locke, “Against Minimalist Responses to Moral Debunking Arguments,” 324.

3 See Korman and Locke, “Against Minimalist Responses to Moral Debunking Arguments,” 324n25 and discussion on 325.



Second, a wide version:

*EC\**-wide: If [for any domain *D* such that *p* is about that domain, *S* believes that her belief that *p* neither is explained by nor explains any *D*-facts] then *S* is thereby rationally committed to withholding belief that *p*.

It appears that Korman and Locke intend *EC\** to be equivalent to something close to *EC\**-narrow. This is suggested by their discussion of a case in which a belief is about multiple domains:

Take the belief that the sun will set in the west. If *sunsets* and *the west* are the only domains that this belief is about, then—since this belief is explained by facts about previously observed sunsets in the west—*EC\** does not prescribe withholding belief (and rightly so). But if *the future* also counts as a domain that the belief is about, then *EC\** does have the unwanted implication that we should withhold belief about whether the sun will set in the west. So the proponent of *EC\** must supply some account of which domains are relevant to assessing whether a belief satisfies *EC\**, one which excludes *the future*.<sup>4</sup>

In this paragraph, Korman and Locke gesture at a problem for *EC\** that arises from beliefs about the future. Later in this paper, I will develop this problem and will show that this problem is quite serious. But set this aside for now. At the moment, I am interested in this paragraph just because it is useful for interpreting Korman and Locke.

If *EC\** were equivalent to *EC\**-wide, then the case described above would *not* produce a problem for *EC\** (regardless of whether *the future* counts as a domain that the belief is about). By contrast, if *EC\** were equivalent to *EC\**-narrow, then the case above *would* produce a problem for *EC\** (unless *the future* is excluded from being a domain that the belief is about). So, given that Korman and Locke in the above paragraph suggest that the case in question produces a problem for *EC\** (unless *the future* is excluded from being a domain that the belief is about), the above paragraph strongly suggests that Korman and Locke think of *EC\** as being equivalent to *EC\**-narrow.

However, I am going to argue (in section 2) that *EC\**-narrow faces serious problems. This will mean that Korman and Locke should consider alternatives, such as *EC\**-wide. But (in sections 3 and 4) I will argue that even if *EC\**-wide is true, it is no help to Korman and Locke in their effort to produce a problem for nonnaturalism. That is where moral occasionalism is going to come in.

My thesis is that Korman and Locke face a dilemma. Their critique of non-

4 Korman and Locke, "Against Minimalist Responses to Moral Debunking Arguments," 325.

naturalism can be founded on either EC\*-wide or EC\*-narrow. But EC\*-narrow is difficult to defend (section 2), and EC\*-wide does not provide for a good critique of nonnaturalism (sections 3 and 4). Therefore, Korman and Locke's EC\*-based critique of nonnaturalism fails. This does not rule out the possibility that some alternative critique of nonnaturalism in the neighborhood of Korman and Locke's might work, though I will discuss some challenges for developing such an alternative critique in the conclusion.

## 2. WHY EC\*-NARROW IS IMPLAUSIBLE

If we believe that

1. there are infinitely many different facts, and
2. for any given set of facts, there is a domain that contains all and only the facts in that set,

then we should believe that there are infinitely many domains. In this way of thinking, the largest domain will, of course, be the domain that contains all the facts of all sorts. And the smallest domain that contains any given fact that  $p$  will be the domain that contains only the fact that  $p$ .

If we accept 1 and 2, the problem that Korman and Locke already see for EC (see section 1) will resurface for EC\*-narrow. For we should say (given 2) that the fact that there is smoke coming out of the chimney ( $p_s$ ) is contained in a domain ( $D_s$ ) that contains only  $p_s$ . This—together with the reasonable assumption that the fact that  $p_s$  neither explains nor is explained by the belief that  $p_s$ —means that EC\*-narrow forbids believing that smoke is coming out of the chimney.

So, if they were to endorse EC\*-narrow, Korman and Locke would need to avoid 2. In order to avoid 2, they would need a way of carving and sorting the world of facts into domains such that not just any set of facts counts as a domain. Korman and Locke provide no guidance on that score. There are many possibilities.

According to one idea, domains correspond to disciplines (i.e., forms of inquiry). For example, there are certain sorts of facts that fall within the purview of the discipline of chemistry (e.g., the atomic weight of gold, the structures and properties of carbon compounds) and other facts that fall outside of its purview (e.g., the price of a cup of coffee, the distance between Los Angeles and New York). We might then say that the set of facts in chemistry's purview are *chemical facts*, and this set constitutes a genuine domain precisely because it constitutes the purview of a genuine discipline. Call this the *disciplinary conception* of domains.

An advantage of the disciplinary conception is that it explains why certain sets of facts that intuitively seem like genuine domains, such as the set of all physical facts and the set of all psychological facts, are in fact genuine and separate domains (for those sets of facts are purviews of separate disciplines). Another advantage is that this conception can explain why there are no domains containing only one fact (for there are no disciplines with only one fact in their purview). This conception also has the advantage of excluding certain hodgepodes of facts (e.g., the set of facts that has been explicitly affirmed in sentences written in the French language between 1951 and 1964) from being genuine domains. Because not every set of facts is a genuine domain according to the disciplinary conception, this conception allows us to reject 2 and thus blocks the objection to EC\*-narrow discussed above.

But the disciplinary conception does not save EC\*-narrow. To see why, consider futurology. Futurology seems to be a genuine discipline; at any rate, it has the trappings of a genuine discipline. (Futurologists hold conferences, publish their findings in books and articles, self-identify as members of a profession, etc.) The facts that fall within futurology's purview are facts about the distant future. So, according to the disciplinary conception, facts about the distant future form a genuine domain—call it the *futurological domain*.<sup>5</sup>

One of the facts that belongs to the futurological domain is the fact that the sun will burn out five billion years from now. Scientists' belief that the sun will burn out five billion years from now neither explains nor is explained by any futurological facts. So, given the disciplinary conception of domains, EC\*-narrow implies that we are rationally committed to withholding belief that the sun will burn out five billion years from now. But we have no such rational commitment. So, given the disciplinary conception, EC\*-narrow is false.

To respond to this, the defender of EC\*-narrow can reject the disciplinary conception. Indeed, Korman and Locke do not seem to accept the disciplinary conception. For, as we saw earlier, they seem to allow that “*sunsets*” and “*the west*”

5 One might say that the futurological domain is not a genuine domain because it is defined by reference to a particular time, namely the time that we happen to occupy. In this way the futurological domain resembles the set of facts about grue things. (A thing is grue if it is observed to be green before *t* or observed to be blue after *t*; this famous idea is due to Nelson Goodman.) Here it is worth observing that other domains that fall out of the disciplinary conception also involve time in this way. History, for example, is a discipline—and the set of facts in its purview is determined by the point in time that we happen to occupy. (Barack Obama's 2008 election to the presidency is a historical fact today but was not one in 1964.) If one wants to say that a set of facts cannot count as a genuine domain if its membership criteria include reference to a particular time, then one must supply a conception of domains to explain why this restriction holds. It is up to my opponents to supply the needed conception. Thanks to an anonymous referee for pushing me on this point.

count as genuine domains, but there are no disciplines that focus on those subjects. (There is no *Journal of Sunset Studies*—alas.)

But if the disciplinary conception is rejected, then a different conception has to be offered in its place. And then a difficult challenge for the critic of nonnaturalism arises. On the one hand, in order to avoid the problems we have already discussed, it is necessary to offer a conception of domains that is restrictive enough to prevent certain sets of facts—e.g., the set of facts about the distant future; the set containing only the fact that smoke is coming out of the chimney—from being genuine domains. On the other hand, if  $EC^*$ -narrow is going to be used in a Korman and Locke-style critique of nonnaturalism, then it is necessary to offer a conception of domains that is permissive enough to allow the set of moral facts to count as a genuine domain (for the simple reason that the critique relies on the assumption that moral facts belong to the moral domain). It is unclear whether any principled conception of domains can be both restrictive and permissive in the needed ways. Until such a conception of domains is provided,  $EC^*$ -narrow cannot be used in a persuasive attack on nonnaturalism.

Let us now consider what happens when a critique of nonnaturalism is built on the basis of  $EC^*$ -wide rather than  $EC^*$ -narrow.

### 3. MORAL OCCASIONALISM TO THE RESCUE

I will repeat  $EC^*$ -wide for ease of reference:

*EC<sup>\*</sup>-wide:* If [for any domain  $D$  such that  $p$  is about that domain,  $S$  believes that her belief that  $p$  neither is explained by nor explains any  $D$ -facts] then  $S$  is thereby rationally committed to withholding belief that  $p$ .

A main advantage of  $EC^*$ -wide is that, even if the futurological domain is a genuine domain,  $EC^*$ -wide still does not require us to withhold our belief that the sun will burn out five billion years from now. That is because the fact that the sun will burn out five billion years from now is not only part of the futurological domain. It is also part of various larger domains, such as the physical domain (which contains all and only physical facts), and our belief that the sun will burn out five billion years from now is explained by various physical facts.

If Korman and Locke were to use  $EC^*$ -wide to show that nonnaturalists are rationally committed to withhold moral belief, they would need it to be the case that nonnaturalism implies the following thesis:

Moral facts are radically disconnected from moral beliefs: For any do-

main  $D$  such that moral facts belong to  $D$ , moral beliefs are neither explained by nor explain any  $D$ -facts.

If nonnaturalists believe that moral facts are radically disconnected from beliefs, and if  $EC^*$ -wide is true, then nonnaturalists are rationally committed to withholding moral beliefs.

To solve this problem, nonnaturalists need to claim that there is some domain that contains moral facts and that *also* contains facts that explain or are explained by moral beliefs. Then they can deny that moral facts are radically disconnected from moral beliefs. And in that case, nonnaturalists can simply grant  $EC^*$ -wide and go about their business without further concerning themselves with Korman and Locke's critique.

This is where moral occasionalism comes in. Moral occasionalism allows the nonnaturalist to coherently and plausibly deny that moral facts are radically disconnected from moral beliefs.

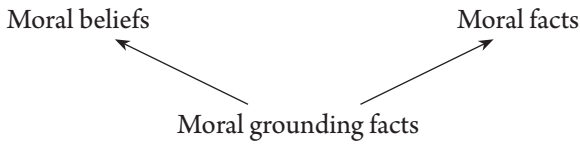
Before I can explain why, I need to first explain what moral occasionalism is. According to moral occasionalism, moral grounding facts play a dual explanatory role. First, moral grounding facts (i.e., natural facts that ground moral facts) explain why we hold certain moral beliefs. Second, moral grounding facts make it the case that certain moral facts obtain. Happily, according to the hypothesis of moral occasionalism, the resultant beliefs *usually* (not always) match the resultant facts. So, our moral beliefs are usually correct—even though moral beliefs neither explain nor are explained by moral facts.<sup>6</sup>

6 There may be a question about whether this picture is compatible with nonnaturalism. Consider:

*Natural Grounding:* Any fact grounded in a natural fact is itself a natural fact.

If Natural Grounding is true, then moral occasionalism implies that moral facts are natural facts and is thus incompatible with nonnaturalism. So, if moral occasionalism is going to be at all helpful to nonnaturalists, Natural Grounding has to be denied. Here there are many ways that nonnaturalist occasionalists can proceed. First, one could develop a moral occasionalism according to which moral facts are merely *normatively* grounded in natural facts, not *metaphysically* grounded in natural facts (cf. Rosen, "Ground by Law"; Bader, "The Grounding Argument against Non-reductive Naturalism"), and then argue that a fact can be merely normatively grounded in a natural fact without being a natural fact. Or one could argue that moral facts are only partially grounded in natural facts, and then argue that a fact can be grounded in a natural fact without being a natural fact as long as it is not *fully* grounded in natural facts. There are other possibilities. The core point here is that the occasionalist picture requires the thesis that moral facts can be explained by natural facts without being natural facts; different occasionalists can defend and explicate that thesis in different ways. It is beyond the scope of this brief paper to develop this point in detail; for the present purpose it is enough, I hope, to indicate some of the ways in which it could be developed. Thanks to an anonymous referee for pushing me to acknowledge this.

Here is a handy diagram to illustrate the simple idea:



(The arrows in the diagram represent explanatory connections.) To illustrate the moral occasionalist's view, we can use Harman's cat-burning case. A hoodlum sets fire to a cat. An observer sees this. Here is a fact:

G: Setting fire to the cat causes pain to the cat.

In the moral occasionalist's picture, G makes it the case that

M: Setting fire to the cat is morally wrong.

Also, in the moral occasionalist's picture, G makes it the case that

B: The observer forms the belief that setting fire to the cat is morally wrong.

In this picture, there is no direct explanatory connection between M and B. Rather, M and B are explanatory siblings: they are both explained by the same grounding fact, namely G. I am calling this picture *moral occasionalism* because it has the same structure as the picture given by the classical occasionalists.<sup>7</sup>

Moral occasionalism is fully consistent with nonnaturalism. And, as I will now explain, moral occasionalism allows the nonnaturalist to deny that moral facts are radically disconnected from moral beliefs.

There is a set containing all and only moral facts. That is the moral domain. There is another set containing all and only facts that are either moral facts or are moral grounding facts. Call this the moral+ domain.

According to moral occasionalism, a given moral belief that *p* can be ex-

7 The occasionalists, such as Arnauld and Malebranche, held that there is no causal interaction between our minds and the world. God causes everything that happens in our minds and causes everything that happens in the world. But God is good and so he ensures that what is in our minds mostly matches the way the world is. So, God in classical occasionalism plays the role that moral grounding facts play in moral occasionalism. For an accessible overview of the historical oddity that is classical occasionalism, see Nadler, *Occasionalism* (especially the introduction). Classical occasionalism, of course, is no longer defended by anyone; but moral occasionalism (of the godless sort described in this paper) avoids many of the vices of classical occasionalism, though I do not have the space to show this here. I will note that when views like moral occasionalism are mentioned, they are often given short shrift. For instance, Matthew Bedke is dismissive of a view in the neighborhood ("Intuitive Non-Naturalism Meets Cosmic Coincidence," 197).

plained by facts in the moral+ domain (in particular, a given moral belief can be explained by those moral grounding facts that give rise to the fact(s) that the belief in question is about). So, if nonnaturalists endorse moral occasionalism, they can deny that moral facts are radically disconnected from beliefs.

To rebut this occasionalist strategy, my opponents might contend that the moral+ domain is not a genuine domain. But that position is difficult to sustain.

First of all, if we were to accept the disciplinary conception of domains, then the moral+ domain looks to be a genuine domain. For there is a discipline—namely, the discipline of ethics—that has the moral+ domain as its purview.<sup>8</sup>

Now, as we have seen, Korman and Locke do not have to accept the disciplinary conception and indeed they seem not to accept it. However, rejecting the disciplinary conception is not sufficient to explain why the moral+ domain does not get to count as a genuine domain. Some principled reason why the moral+ domain is not a genuine domain needs to be given.

Here one might claim that hodgepodes of facts are not genuine domains and that because the moral+ domain is defined disjunctively (it contains facts that are *either* moral facts or moral grounding facts) it is a mere hodgepodge of facts. But the moral+ domain is not a mere hodgepodge of facts. The moral-grounding relation itself is the feature that unifies the moral+ domain: the moral+ domain contains all and only those facts that participate, one way or another, in the moral-grounding relation. Because the moral+ domain is unified in this way, it is not a mere hodgepodge of facts.

Of course, for all that, there may be a conception of domains that explains

- 8 Ethics as a discipline is not only concerned with moral facts, such as the fact that child neglect is wrong. Ethics is also concerned with the *grounds* of moral facts. For example, ethicists are interested in facts about the vulnerability of children, the psychological effects of child neglect, and other nonmoral facts in virtue of which child neglect is wrong. (Imagine an ethicist who is asked to explain why child neglect is wrong and declines to answer, saying, “I’m an expert on what’s wrong and what isn’t, but explaining *why* this or that is wrong is not my job.”) In other words, ethics is not only about moral reality; it is also a study of those parts of the natural world in which moral reality is grounded and of the relationship between moral reality and the natural world. This means that the moral+ domain is squarely within the purview of the discipline of ethics. Here it might be replied that ethics is only concerned with *the grounding relationship* between morality and the natural world and is not actually concerned with the natural world itself. If this were the case, then moral grounding facts would be excluded from the purview of ethics. But this is not the case. Granted, it seems to be true that the branch of ethics known as normative ethics is unconcerned with any natural facts and is only concerned with principles that connect natural facts with moral facts; but applied ethics is a branch of the discipline as well, and applied ethicists are directly concerned with facts about the natural world (e.g., parts of applied ethics that deal with our obligations to animals are concerned with whether nonhuman animals have the capacity to suffer).



why the moral+ domain does not get to count as a genuine domain. But until such a conception is provided and tested, the moral occasionalist can reasonably rely on the moral+ domain to respond to a critique of nonnaturalism founded in EC\*-wide.<sup>9</sup>

Given this, and given that nonnaturalists can consistently endorse moral occasionalism, EC\*-wide does not imply that nonnaturalists are committed to withholding any moral beliefs. Therefore, a Korman and Locke-style critique of nonnaturalism that relies on EC\*-wide cannot succeed (unless it is aimed at nonnaturalists who deny moral occasionalism).

#### 4. MORAL OCCASIONALISM IS AN ATTRACTIVE OPTION FOR NONNATURALISTS

Let moral optimism be the view that our moral beliefs are correlated with the moral facts, i.e., our moral beliefs are mostly true. Third-factor accounts explain moral optimism in terms of some third factor. David Enoch's pre-established harmony view is the most widely discussed third-factor account.<sup>10</sup> Moral occasionalism, too, is a third-factor account.

Enoch's pre-established harmony view says that (1) evolution's aim (survival or reproduction or whatever it may be) is good; (2) our moral beliefs are (indirectly) influenced by evolution; and (3) moral optimism is explained by 1 and 2. A main difference between moral occasionalism and Enoch's pre-established harmony view is that the former focuses on *proximate* causes of moral beliefs whereas the latter focuses on *distal* causes of moral beliefs. Compare with two ways of explaining the reliability of vision: one could explain this in terms of the evolutionary adaptivity of reliable vision (a distal-cause account) or in terms of the physiological structures and functions of the eye (a proximate-cause account).

These two styles of explanation need not be incompatible, of course.<sup>11</sup> What

9 A debunker who wants to rely on EC\*-wide to critique nonnaturalist occasionalism needs to provide a conception of domains such that (1) the moral+ domain is not a genuine domain, and (2) the provided conception of domains does not inadvertently commit EC\*-wide to implausible consequences elsewhere (e.g., it is important that EC\*-wide not imply that we have to withhold beliefs that are generally thought to be well-founded, such as beliefs about the distant future).

10 Enoch, *Taking Morality Seriously*, ch. 7.

11 This means that moral occasionalists can allow that some Enoch-style evolutionary explanations of moral beliefs are in fact true and do not compete with the explanations that moral occasionalists offer. For the moral occasionalist can allow that moral grounding facts do not *fully* explain moral beliefs. Other sorts of facts (including facts about the evolutionary forces that have made us into the sorts of beings who are disposed to form correct moral beliefs

I want to emphasize here is that, for the purpose of responding to a Korman and Locke–style critique based in EC\*-wide, Enoch’s view has a deficiency that moral occasionalism does not.

Recall the idea that mere hodgepodes of facts do not count as genuine domains. I argued that the moral+ domain is not a mere hodgepodge because it is unified by the moral-grounding relation. Therefore, I argued, even if mere hodgepodes do not count as genuine domains, EC\*-wide still does not overturn nonnaturalism when moral occasionalism is in the nonnaturalist’s quiver.

Now imagine a version of nonnaturalism that rejects moral occasionalism and accepts Enoch’s pre-established harmony view. As we have seen, in order for nonnaturalism to respond to an objection from EC\*-wide, it is necessary to identify a domain that contains moral facts and that also contains facts that explain or are explained by moral beliefs. Enoch’s view is of no help in identifying such a domain if mere hodgepodes do not count as genuine domains. True, Enoch’s view implies that facts about our evolutionary history explain moral beliefs. But a set of facts that combines facts about our evolutionary history with moral facts *does* seem to be a mere hodgepodge.<sup>12</sup> So, if mere hodgepodes are not domains, then it seems that Enoch’s view offers no resources for constructing a genuine domain that contains both moral facts and facts that explain moral beliefs, which in turn means that Enoch’s view is not useful for responding to a critique of nonnaturalism founded on EC\*-wide. Moral occasionalism, by contrast, is more effective in responding to such a critique, as we have seen.

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in response to moral grounding facts) also enter the explanation of our moral beliefs. Here the analogy with vision is useful. We can rightly claim that facts about our macroscopic surroundings explain our visual experiences while also allowing that other sorts of facts (including facts about the evolutionary forces in virtue of which we have reliable vision) also explain our visual experiences.

- 12 Granted, there are some views that can give this set of facts some degree of unity. For example, if you believe that morality is *grounded* in evolution (such that an action is wrong *because* that action is maladaptive, or was maladaptive in the environment of our ancestors) then a set containing both evolutionary facts and moral facts would not be a mere hodgepodge. Rather, such a set would be unified by the moral-grounding relation, which I have already granted (in my discussion of the moral+ domain above) is sufficient to avoid the hodgepodge objection. But the idea that morality is grounded in evolution in the needed way is, I believe, highly implausible: it implies, for example, that if we were to make shocking new discoveries about our evolutionary history (e.g., if it were to turn out that child neglect was somehow adaptive for our ancestors) or if we were to learn that we have no evolutionary history at all (e.g., imagine a case where our ancestors emerged whole from a swamp, a la Davidson’s Swampman) then we would have to revise our moral beliefs in disturbing ways. And at any rate this evolutionary view of ethics is highly controversial, and it is reasonable to hope that nonnaturalism can be defended without depending on such highly controversial views.

## 5. CONCLUSION

I have argued that Korman and Locke's critique of nonnaturalism fails, or at least requires substantial elaboration, because moral occasionalism is available to nonnaturalists. I have further argued that moral occasionalism is more useful than Enoch's pre-established harmony view in responding to Korman and Locke. The fact that moral occasionalism is useful to nonnaturalists in this way ought to motivate nonnaturalists to investigate whether moral occasionalism is defensible, and whether it can be incorporated into nonnaturalist views.

But I cannot claim to have shown that nonnaturalists ought to accept occasionalism, because occasionalism faces many challenges that I have not addressed. For one thing, I have not discussed whether moral occasionalism itself might be vulnerable to a debunking argument. At most, I have only shown that if moral occasionalism is true, then Korman and Locke have failed to show that nonnaturalists are rationally committed to withholding *moral* belief. But it might be that a different Korman and Locke-style debunking argument could show that nonnaturalists are rationally committed to withholding *metaethical* beliefs, such as the belief that moral occasionalism is true. That challenge is beyond the scope of this paper.

More broadly, if we want to be moral occasionalists, it is not enough to show that moral occasionalism avoids this or that debunking argument. Some positive reason to believe that moral occasionalism is true is also needed. In this paper, I have not tried to offer reasons to believe that moral occasionalism is true; I have only argued that moral occasionalism's availability to nonnaturalism undermines one important critique of nonnaturalism. A positive case for moral occasionalism is a task for another day.

Additionally, I have not shown that Korman and Locke's argument cannot be further refined to deal with the points I have made here. And it is a yet further question whether moral occasionalism can be useful in responding to other critiques of nonnaturalism, including other explanationist critiques that have nothing whatsoever to do with domains.<sup>13</sup> These issues have to be left for future work on moral occasionalism.

*david.j.killoren@gmail.com*

13 Moral occasionalism needs to be tested not only against the variations on Korman and Locke's EC\* discussed in this paper, but also through engagement with alternative constraints such as those developed in Locke, "Darwinian Normative Skepticism"; McCain, *Evidentialism and Epistemic Justification*; Schechter, "Explanatory Challenges in Metaethics"; Korman, "Debunking Arguments in Metaethics and Metaphysics"; and Lutz, "The Reli-

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ability Challenge in Moral Epistemology"; among others. I believe that future facts create a problem for some but not all of these types of constraints, but I cannot show this to be the case in this brief response paper.