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SYMPOSIUM ON UNSETTLING THE SOVEREIGN "RIGHT TO EXCLUDE"

IS LEGITIMATE EXCLUSION INCOMPATIBLE WITH THE SOVEREIGN RIGHT TO EXCLUDE?

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Scholars of international law have been increasingly troubled by states' vast powers and practices of migrant exclusion. There is no doubt that much of this uneasiness is catalyzed by a keen sense of the demands of a basic liberalism at the international legal order's core. Indeed, the increased construction of border walls,[1] the continuously widespread use of deportation as a migration control tool,[2] and new digital bordering technologies[3] have all come under scrutiny precisely because of the challenges they pose to the notion of supposedly universal entitlements, both substantive and procedural, that often appear disabled or overridden when it comes to the treatment of different sorts of migrants. My goal in this contribution is not to add to such legal critiques, but rather to provide the contours of a broader normative argument to rebuke—or at least complicate—what is often called the state's "right to exclude" all or most would-be immigrants. This right is not just standardly assumed in legal and political practice—indeed, standardly viewed as the linchpin of sovereignty—but has also enjoyed sophisticated defense by liberal political theorists.[4] The main goal of my argument is to suggest that anyone with basic liberal inclinations—including political theorists, lawyers, and practitioners of politics—should be able to agree that, under current circumstances, granting states a potent "right to exclude" entails deep tensions with basic moral standards of legitimate authority. This is because the deeply entrenched characteristics and historical background conditions of immigration control today tend *structurally* to push states to violate the appropriate moral conditions of their legitimate authority to enforce immigration restrictions.[5] While moving above and beyond legal argumentation, my hope is that the argument may underscore and give further analytical expression to some of the animating concerns of contemporary legal contestations of states' exclusive powers and practices.

My argument will proceed in three steps to establish three main points. First, I clarify that any exercise of "the right to exclude" requires states to assert authority over would-be immigrants, which in turn requires legitimations that respect the *equal moral worth* of those who are to be excluded. Second, focusing on migrants' basic human rights, I argue that many of the states exercising immigration control authority do undermine the equal moral

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[1] Moria Paz, *The Law of Walls*, 28 Eur. J. Int'l L. 601 (2017).

[2] Vincent Chetail, *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 29 Leiden J. Int'l L. 917 (2016); Asha Kaushal, *From the Inside Out: The Coercive Power of Deportation and the Erosion of the Liberal Democratic State*, 43 Oxford J. Leg. Stud. 350 (2023).

[3] E. Tendayi Achiume, *Digital Racial Borders*, 115 AJIL 333 (2021).

[4] *Cf.*, Sarah Song, Immigration and Democracy (2019); Anna Stilz, Territorial Sovereignty: A Philosophical Exploration (2019); Luara Ferracioli, Liberal Self-Determination in a World of Migration (2021).

[5] My focus will be on the immigration control systems of Global North states, and most clearly on those states with histories of colonial and imperial expansion.

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worth of many would-be immigrants, a phenomenon whose full appreciation requires the recognition of historically entrenched, structural features of states' self-governance prerogatives. Finally, I suggest that legitimate exclusion may well be incompatible with conceiving exclusion as a right inherent to sovereignty.

The Authority and Legitimacy to Exclude

If there are deeper reasons for the principle that political communities should have the right to refuse entry to aliens, public international law remains agnostic about them. In the legal imagination, this right appears as a key domestic *power* of states. Regardless of deeper moral or political considerations that could make sense of this power, what matters here is simply the positive fact of sovereign jurisdiction.[6] The legal power to exclude, moreover, is not somehow incidental to sovereign jurisdiction, but taken to be generated in its virtue. This means that it is not the case that exclusionary state governments merely enforce the natural or pre-political rights their citizen subjects hold against the encroachment of foreigners. Instead, such rights are *generated* by the (hypothetical) process of their incorporation into sovereign statehood. In other words, territorial exclusion is part of the bundle of powers uniquely appropriate to sovereign states.

It is important to be cognizant that any usage of the power to exclude requires the assertion of a kind of authority claim over aliens. When the state claims exclusion power, it essentially communicates to aliens that their movement, whether intended or actualized, threatens to subvert its sovereign right, which is why aliens will be forced to comply with rejection should the state deem it appropriate. Manifestations of such authority are often resisted by migrants, and not just when there are doubts about their legality. Legality does not settle the question of legitimacy, which is what resisting migrants and their allies often primarily contest.[7] How are such claims to be evaluated?

This is a complex question to which I cannot give a full and comprehensive answer here. At any rate, I think we can at least formulate a *minimal* precondition for legitimately authoritative exclusion that all liberally minded people should be able to accept. This is the condition that immigration authorities—just like other authorities—cannot treat those whose conduct they regulate in ways that deny their equal moral worth as persons; if they do so, they cannot legitimately expect their authority to be accepted. Note that this does not mean that the authorities must treat such persons in substantively all the same ways, so that immigration authorities would have to treat would-be immigrants just as they would treat citizens. It just means that they cannot treat would-be immigrants in ways that deny their basic humanity, the basic humanity they share with all other persons.

This emphasis on the requirement for authorities to respect the equal moral worth of persons has a long history in liberal political thought, emphasized in enlightenment thought specifically but consistently present in normative examinations of today's societies as well. Importantly, the exigency of this moral equality is accepted and even stressed also by those contemporary political theorists who have provided elaborate legitimations of the state's right to exclude.[8] Even further, the most prominent type of argument in favor of the right to exclude requires a steadfast commitment to universal moral equality in order to maintain its coherence. This type of argument essentially stresses the self-determination or self-governance rights of political communities. Anna Stilz, for example, argues that the legitimate authority to exclude follows from a right to collective self-determination that is itself

[6] *E.g.*, Abdulaziz, Cabales and Balkandali v. United Kingdom, App. No. 9474/81, Judgment (Eur. Ct. H.R. 1985); JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 608 (8th ed. 2012).

[7] *See* Robin Celikates, *Remaking the Demos "from Below"? Critical Theory, Migrant Struggles, and Epistemic Resistance*, *in* CRISIS UNDER CRITIQUE: HOW PEOPLE ASSES, TRANSFORM, AND RESPOND TO CRITICAL SITUATIONS 97 (2022).

[8] *See, e.g.*, RYAN PEVNICK, IMMIGRATION AND THE CONSTRAINTS OF JUSTICE: BETWEEN OPEN BORDERS AND ABSOLUTE SOVEREIGNTY 19–52 (2011); STILZ, *supra* note 4, at 89–118; MICHAEL BLAKE, JUSTICE, MIGRATION, AND MERCY 94–142 (2020).

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grounded in citizens' interests to preserve their autonomy by co-authoring their common political project.[9] Similarly, Sarah Song insists that the right to exclude is necessary to protect a people's self-determined decision making, since without such a right peoples could not set their own boundaries, a process constitutive of peoplehood.[10] Relatedly, Luara Ferracioli argues that the right to exclude is best understood as a permission for associated citizens to control and manage the effects immigration may have on the nature of their common political project.[11]

These arguments are highly intuitive. However, their cogency depends on our capacity to read them as at least partially grounded in a fundamental commitment to the equal moral worth of all persons. Ferracioli, for her part, is explicit about this: as it is precisely a commitment to preserving and enhancing people's basic freedom and equality that gives value to the self-determination of political communities, it would be incoherent to think that a right to exclude could legitimately be asserted in ways that *deny* the moral equality of those whose movement is being regulated or prevented.[12] Arguments such as Stilz's and Song's must be read to contain similar commitments. For if political communities *everywhere* possess legitimate authority to exclude outsiders because of collective self-determination prerogatives in turn grounded in fundamental individual interests, there must be a *universal* moral quality of human persons that lies at the basis of collective self-rule; a quality collective self-rule everywhere is meant to defend and protect. This is what the notion of moral equality captures.

Respect for the moral equality of persons, then, aptly constrains the legitimate exercise of authority over would-be immigrants. Asserting the "right to exclude" in a fashion that undermines this equality is ultimately a self-defeating act.

Immigration Control Tends Systematically to Jeopardize Moral Equality

The very point of restrictive immigration rules and their enforcement is to treat people unequally: to subject some persons (would-be immigrants) to constraints that do not exist for others (citizens and some non-citizen residents). This inequality, however, is not in and of itself a violation of *moral* equality, as long as we can point to compelling reasons why these distinctions serve morally important functions and are not implemented in ways that deny people's equal humanity.

The trouble is that they often do just that. Consider as a paradigmatic example President Trump's "Muslim Ban." This policy factually (if not strictly legally) excluded would-be immigrants simply on the basis of their religious beliefs. It expresses that a large number of people are not worthy of consideration just by virtue of their sincerely held religious creed. Policies such as the "Muslim Ban" can, however, be ephemeral rather than deeply engrained. President Biden revoked this particular policy with a simple executive act. I want to suggest that we should instead focus more energy on unearthing how immigration enforcement tends *structurally* to violate the moral equality of would-be immigrants, that is, in ways that must be traced to the more deeply entrenched mechanics and historical background conditions of many immigration control systems. A key structural phenomenon of this sort is the excruciating fragility of unwanted migrants' basic human rights. There is an astonishing number of legal cases and news stories concerning the killing, torturing, endangering and abandoning of migrants by enforcement agents or their proxies, be it at border checkpoints and fortifications, on the high seas, or in deserts.[13] Basic human rights, such as to life and against torture or degrading treatment, are key legal and political expressions of

[9] *See* STILZ, *supra* note 4, at 89–154.

[10] *See* SONG, *supra* note 4, at 57–66.

[11] *See* FERRACIOLI, *supra* note 4, at 57–60.

[12] *Id.*

[13] For an overview, see REECE JONES, VIOLENT BORDERS: REFUGEES AND THE RIGHT TO MOVE (2017).

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universal moral equality; they stress and protect the key physical and psychological vulnerabilities shared by all persons. Consequently, the more immigration control regimes trample on them, the less reason there is to think them legitimate.

It is, however, not generally possible to establish a causal link between any particular public policy (or set of public policies) and a country's complicity with or perpetuation of grave human rights violations. In liberal democracies at least, there are no "licenses to kill," and, as Jürgen Bast and Janna Wessels show in this symposium, migration policy is ever more subject to legal "humanrightization."[14] Instead, to understand the persistent fragility of migrants' basic human rights, one needs to dissect the underlying dynamics that make authoritative immigration control so imperative for Global North states today. Elsewhere I have argued at some length that it is the narrow and static nature of dominant conceptions of self-rule that renders visible demonstrations of sovereign border control such a high priority for state governments that basic human rights must necessarily remain an afterthought.[15] To properly diagnose and understand the dominance of such conceptions, one must grapple in earnest with the historical conjunctures through which they were first popularized and then institutionalized, as, for instance, Radhika Mongia's piece in this symposium so convincingly does.[16] In other words, normative political theorists and others interested in the legitimacy of migration control had better attend to the sociohistorical conditions that have shaped the very structures determining the features and characteristics of the phenomenon at issue. We cannot appreciate structurally ingrained tendencies without engaging in such analysis, and without appreciation of such tendencies, we are bound to obscure rather than illuminate.

This task is even more urgent as there is good reason to believe that structural violations of would-be immigrants' moral equality are not limited to the phenomenon of human rights fragility. Perhaps the most obvious and oft-discussed additional violation is the tendency of immigration control systems to operate according to racist logics and reproduce racial discrimination, an arbitrary devaluing of persons clearly inconsistent with moral equality. Empirical investigations have time and again shown that the Global North's immigrant selection and exclusion systems still tend systematically to disadvantage people construed to belong to certain racial groups, even if such discrimination is no longer formally codified.[17] Scholars have also noticed that this tendency tends to fuel racist attitudes at home, subjecting even included immigrants and non-immigrants to exacerbated discrimination.[18] We cannot understand precisely what is going on here and just *how* severe and normatively relevant this problem is without attempting to grasp "racial borders" as a product of historically situated constellations of needs, interests, and assumptions.[19]

Structures of Illegitimacy and the Sovereign Right to Exclude

Extant attempts in normative political theory to defend on the level of principle the state's right to exclude (and, by extension, its legitimate exclusion authority) have not yet sufficiently grappled with the possibility that many

[14] Jürgen Bast, *The Rise of Human Rights Limits to Migration Control – A European Perspective*, 118 AJIL UNBOUND 208 (2024); Janna Wessels, *Reverse Strategic Litigation by Governments? Negotiating Sovereignty and Migration Control Before the European Court of Human Rights*, 118 AJIL UNBOUND 214 (2024).

[15] Lukas Schmid, *Saving Migrants' Basic Human Rights from Sovereign Rule*, 116 AM. POL. SCI. REV. 954 (2022).

[16] Radhika Mongia, *Colonialism and the "Right to Exclude,"* 118 AJIL UNBOUND 198 (2024).

[17] Cecilia Menjívar, Andrea Gómez Cervantes & Daniel Alvord, *The Expansion of "Crimmigration," Mass Detention, and Deportation*, 12 SOCIOLOGY COMPASS e12573 (2018); ANDREW S. ROSENBERG, UNDESIRABLE IMMIGRANTS: WHY RACISM PERSISTS IN INTERNATIONAL MIGRATION (2022).

[18] AMY REED-SANDOVAL, SOCIALLY UNDOCUMENTED: IDENTITY AND IMMIGRATION JUSTICE (2020).

[19] E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445 (2021).

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immigration control systems may habitually violate the moral equality of would-be immigrants. To be sure, theorists are clear that racist exclusion or wanton human rights violations are not things in which states can legitimately engage.[20] Nonetheless, there is a lack of interest in the possibility that such violations may have deeper structural causes, and they are thus standardly treated as moral aberrations rather than systemic byproducts of immigration control regimes with particular historical geneses and functions. The result is a picture according to which there is a generally valid right to exclude that simply cannot be asserted in particularly vicious ways. We should take more seriously the possibility that this gets it the wrong way around. Exclusion involves authority over would-be immigrants, authority that stands in need of legitimation. The evidence suggests that such legitimation attempts rather standardly fail the basic condition of respect for the moral equality of all persons.

In keeping with this symposium's theme, I want to end by stressing that we should investigate more thoroughly whether the prevailing notion and practice of a sovereign right to exclude is inextricably tied up with the ongoing dearth of actually legitimate exclusion. This notion has for some time now dominated our thinking on the possibilities of self-governing political organization. Yet, as the contributions by Ayelet Shachar, Moria Paz, Radhika Mongia, and Vincent Chetail gathered in this symposium make clear, the central place exclusion rights have taken in our conceptions of sovereignty has been highly contingent on particular sociohistorical circumstances.[21] At the same time, these and other contributions clearly imply that there is reason to believe that the right to exclude has emerged largely as a tool for Global North states to avoid the drawbacks of colonial and imperial domination but continue to reap their fruits.[22] Continuing the impetus of its genesis, it may serve today to satisfy a conception of self-rule so fundamentally dependent on the idea of boundary policing that basic moral constraints are standardly relegated to secondary status. Political theorists should develop a more critical body of work to provide systematic investigations of how moral permissions to exclude relate to and may depend on the real characters of the institutions to which such permissions ostensibly attach.

In general, I do not think there is reason to doubt that self-determining political communities will sometimes have weighty interests in excluding outsiders. Political theorists and others are right on this basic point. But by putting this interest on a pedestal so elevated that it often trumps all other concerns of moral significance, by casting the specters of porous boundaries and unwanted newcomers as existential threats, ideas and practices of sovereignty built on a supposed "right to exclude" appear continuously to reproduce conditions that undermine the very legitimacy of exclusion itself. Where the right to exclude remains a prerogative so integral to our conceptions of self-rule, it is at best unclear that we can sufficiently reform the institutions of immigration control to robustly respect the moral equality of outsiders. Slicing the Gordian knot of sovereignty and migration control may thus not only benefit migrants, but also be the only way for states to develop durably legitimate methods of boundary management.

[20] *See, e.g.*, David Miller, *Border Regimes and Human Rights*, 7 L. & Ethics Hum. Rts. 1 (2013); Song, *supra* note 4, at 151–72; Guy Aitchison, *Border-Crossing: Immigration Law, Racism and Justified Resistance*, 71 Pol. Stud. 597 (2021).

[21] Vincent Chetail, *Demystifying Sovereignty: Totem and Taboo of Migrant Control in International Law*, 118 AJIL Unbound 193 (2024); Mongia, *supra* note 16; Moria Paz, *The Illusion of Progress: Rethinking Human Rights and the Legal Regulation of Mobility*, 118 AJIL Unbound 203 (2024); Ayelet Shachar, *Severing the Gordian Knot of Sovereignty and Migration Control*, 118 AJIL Unbound 188 (2024).

[22] *See, e.g.*, Nadine El-Enany, (B)Ordering Britain: Law, Race and Empire (2020); Dieter Gosewinkel, Struggles for Belonging: Citizenship in Europe, 1900–2020 (2021).

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