

THE MORAL COMPLEXITY OF THE BORDER: A CRITICAL EXAMINATION OF THE NORMATIVE FOUNDATIONS OF  
ADMISSION AND EXCLUSION

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## **Abstract**

It is common in popular and policy discussions to assume that states possess the near-unilateral right to set and enforce their own immigration policies without examining or articulating the underlying normative justifications. In recent years, various liberal theorists have examined the normative foundations of border admission and exclusion. While these approaches are unified in criticising particular border policies, they are highly polarised between those who view nearly all immigration restrictions as unjust and those who broadly support state discretionary control of immigration. This thesis examines the constraints that justice claims place on Western liberal democratic states' immigration policies and argues that we cannot take for granted the claim that states possess a 'right to exclude. It then argues that this broader debate in normative political theory suffers from two problems: (1) it uses a partial and idealised conception of the border, and (2) it offers an overly narrow response to the questions of *whose freedom* and *what constitutes freedom*. Finally, I argue that immigration policy must be constituted with reference to the freedom of both citizens and non-citizens based on their situationally defined claims.

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Finally, I submit this on the day that I found out that my friend and fellow PhD candidate Paula Schwevers has sadly passed away. This has naturally given me mixed emotions about completing this project. Paula was a fantastic researcher but more importantly a fantastic person and friend. Thank you for the memories.

Any mistakes within this thesis are of course my own.

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## Introduction

On 22<sup>nd</sup> May 2023, Wilmer, a farmer from Venezuela, exhausted and drenched in sweat, arrived in Bajo Chiquito, Panama, on a narrow wooden boat after completing a daunting five-day journey across the Darien jungle. Surrounding him were similar boats, each filled beyond safe capacity with men, women and children, which ferried them along the Turquesa river, the final leg of the Darien gap, one of the most dangerous migration routes in the world. To complete this journey, Wilmer, and those that travelled with him, had to stretch to the limits of their endurance to complete a 66-mile journey by navigating through a 10,000 square mile stretch of jungle, swamps, rivers and mountains that spans the border of Colombia and Panama. During this journey, Wilmer and those who travelled alongside him had to contend with a lack of food, unclean water and heatstroke as well as biting and stinging insects, wild animal attacks and multiple forms of violence including exploitation, armed robbery and sexual abuse (Cortes 2023). Whether motivated by the dream of a better life, the chance to send remittances to relatives left at home, or fleeing poverty, violence or persecution, 148,000 migrants made a similar journey through the Darien in the first quarter of 2023, according to the International Organisation for Migration (IOM) (Cortes 2023). The authorities do not know how many people have died whilst attempting this journey, however, the Missing Migrants project has estimated that at least 137 migrants either died or disappeared whilst making the trek in 2022 (IOM 2023). For Wilmer, and many of those arriving in Bajo Chiquito, this is just one step in a long journey. Migrants of over forty different nationalities have made this journey across the Darien, and for many, the journey ahead is likely to be equally long and arduous, as most move onwards on the next leg of the long road to the United States' border with Mexico (Cortes 2023; Fernandez 2022).

Stories like this are not unique; many migrants face similar challenges. Whilst the setting may change, similar stories could be told by people who have attempted to cross the English Channel in small boats, used their life savings in the hope of crossing the Mediterranean or Aegean to Europe, swam the Rio Grande or rushed border fences in their attempt to enter Ceuta or Melilla. Indeed, they are only the tip of the iceberg. By the end of 2022, the number of people who had been forcibly displaced by conflict, political persecution or instability, or other human rights failures had grown by 21 percent to an estimated 108.4 million (UNHCR 2023, p.7)<sup>1</sup>. Not all migration looks like this of course. Many use 'authorised' routes of migration by applying for visas and travelling over formal border crossings such as seaports, airports and formal border crossings. However, over the past half-decade, the estimated numbers of migrants have increased to a record 281 million people, representing 3.6% of the world's population living outside their countries of origin (IOM 2022).

This number includes a wide range of people who bring a variety of claims to the borders of states. Indeed, the term "migrant" has been used so often and in such different contexts that it is both difficult to define and has

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<sup>1</sup> This figure captures a variety of different groups including refugees, asylum seekers, internally displaced people amongst other people in need of protection (UNHCR 2023, p.4), with the term "those in need of protection" being first introduced by the UNHCR in 2022 to refer to people who "are outside their country or territory of origin, typically because they have been forcibly displaced across international borders, who have not been reported under other categories (asylum-seekers, refugees, people in refugee-like situations) but who likely need international protection, including protection against forced return, as well as access to basic services on a temporary or longer-term basis" (UNHCR 2022, p.3).

become ideologically charged<sup>2</sup>. At one end of the spectrum, migration, as experienced by most residents of economically developed states, is a banal experience. Visas are applied for either in advance of travel or at arrival, or are simply not required<sup>3</sup>, and the experience of crossing borders is a formality. For those in this privileged position, those who move choose to do so “not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons” (IOM 2021, p.132). At the other, are those for whom, like Wilmer, the claims and experience of migration and state borders are anything but banal. Instead, movement through borders can be a matter of life and death, with the full array of a state’s capacity to coercively regulate their movement brought to bear. The power of the state to either approve or deny immigration status leaves migrants subject to the whim of the receiving state, and for many the stakes involved in this decision are high (Innes 2021). For those who fall into the legally recognised categories of “refugees” and “asylum seekers”, the stakes are high because the determination of whether they may cross a border affects whether or not they are able to escape the harms that caused their displacement. For others, this lack of banality may be due to the often harmful and dehumanising bordering practices of states, or the harms associated with unauthorised routes of entry which they are forced to use by virtue of being deemed “undesirable”<sup>4</sup>.

Whilst these experiences of the border may vary wildly, those who interact with the border are unified in two senses. Firstly, in that they make similar claims to receiving states. Refugees, and migrants more generally<sup>5</sup>, make a claim to access territory and participate in certain institutions<sup>6</sup> (and oftentimes make a claim to formal membership), and make these against a particular institutional backdrop, states<sup>7</sup>. Secondly, these claims are made to states that claim to possess a “right to exclude” or the right to determine unilaterally, who, if anyone, they allow to access their territory and institutions. As part of this, states also claim the right to use coercive force against those who seek admission without legal authorisation. At present, states are only legally obliged to grant entry to migrants in a very limited set of circumstances set out in, for example, the Universal Declaration of Human Rights and the 1951 Refugee Convention (UN 1948; UN 1951, p.14). These circumstances are limited to when the receiving state believes that a migrant has suffered political persecution and not the wider set of harms that cause displacement such as war, poverty and, increasingly, environmental collapse. Instead, the right to exclude is viewed as an inherent part of state sovereignty. This position has been consistently reasserted in

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<sup>2</sup> To some the label of ‘migrant’ ceases after an individual has settled in another state, and in others, ‘migrant’ is a label that may be inherited by the descendants of those who have changed their state of residence (Bloom 2019, p.484).

<sup>3</sup> As in, for instance, the principle of freedom of movement in the European Union.

<sup>4</sup> Whether due to lack of “desirable” skills, language ability, level of education or ethnic or cultural background.

<sup>5</sup> Whilst this separation is consistently maintained in international law, the normative underpinnings (if not the legal) of this separation leaves blurs the lines between “refugees” and “migrants”. Many seek to move for reasons other than persecution or armed conflict that are just as pressing. Indeed, in August 2015 Al Jazeera announced that it would cease using the term “migrant” in relation to those seeking to cross the Mediterranean and instead use the term refugee, arguing that the term migrant has evolved from dictionary definitions “into a tool that dehumanises and distances” (Malone 2015). When we bandy around terms such as “economic migrant”, or “refugee” we must be careful not to obscure the normative underpinnings of what is being claimed and for what reasons.

<sup>6</sup> Which refers to access and the ability to participate in certain institutions such as access to the workforce and other joint schemes of co-operation, such as pension schemes or social security.

<sup>7</sup> Or, in other words, migration occurs when an individual changes their state of residence from one to another (Wellman and Cole 2011, p.1).

international agreements related to migration, including in the recently adopted Global Compact on Migration and Global Compact on Refugees, both of which place state sovereignty at their centres (UN 2018a; UN 2018b).

Whilst, for citizens of affluent, western liberal democratic states, this is often hidden from view, at few places are individual freedoms coercively limited so significantly without considerable scrutiny and justification as at international borders. Coercive border controls restrict freedom in a number of meaningful ways. Perhaps most noticeably, they restrict freedom of movement and the ability of individuals to choose *where* to live their lives, thereby confining people's movement to a set of designated boundaries (Kuthakas 2014, p.379). However, border controls restrict freedom in other ways. Border controls may interfere with individuals' abilities to form and maintain relationships<sup>8</sup>, to access social, political and economic opportunities, or to enter into contracts, and may limit property rights, or generate precarity through ill-defined or vulnerable legal statuses<sup>9</sup> (Hidalgo 2014a, p.214). To members of liberal democratic and multicultural states, this question should raise an uncomfortable tension. Liberal democracies are committed to at least a tacit recognition and emphasis on moral equality and freedom, and, going at least as far back as the thought of John Locke and J.S. Mill, it has been a hallmark of liberal political thought that any limitations on individual freedoms caused by human agency<sup>10</sup> demand justification<sup>11</sup> (Freiman and Hidalgo 2011, p.2). Liberals have generally assumed that state limitations of freedom require justification and yet this does not seem to apply at states' borders. Instead, the burden of proof rests on those who wish to exercise individual freedom of movement and association by crossing borders, with migrants having to make the case that they possess a certain set of skills, have a certain kind of pre-existing relationship with citizens (such as when people seek to cross borders through family reunification schemes), or are at risk of a particular set of harms. The problematic nature of this coercive limitation of freedom may be brought into sharper focus when considering that individuals such as Wilmer are ordinary, peaceful people, who are simply seeking opportunities or escaping harm or threats. How we can not only turn a blind eye to the suffering that these people are exposed to, but also justify employing force against them on the basis of a historically contingent territorial distinction<sup>12</sup>?

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<sup>8</sup> Immigration restrictions hamper people's ability to associate with others freely by restricting who an individual may form attachments with by limiting physical access to those residing on another state's territory. Anyone in a long-distance romantic relationship knows that whilst modern technology can overcome some hurdles of distance, that they is no substitute for being to interact with other people in person. To highlight how important these barriers can be, it is worth noting that this interference with associative rights may interfere with non-trivial relationships, placing barriers between families, romantic partners and close friends and may interfere with and impact the ability to care for children or care for ill family members

<sup>9</sup> Even if this precarity is not immediately apparent and is "revealed" later down the line as with the "Windrush Generation" in the UK. Due to UK immigration policy at the time (1948-1971), those born in British colonies had the right to move to, settle and work in the UK, however as a result of these arrivals not requiring documents to live and work in the UK and the Home Office not keeping records of their arrival, many were later threatened with deportation as the UK adopted increasingly securitised internalised border practices.

<sup>10</sup> As opposed to those caused by the constraints of the physical world. To say that I cannot jump to the moon as much as I may want to experience the view is not really a restriction of my freedom as such, rather that the physical world the sets constraints on what is possible.

<sup>11</sup> An example of this would be restrictions of being able to walk down a motorway. My freedom to walk as I please may be restricted in this case as my walking on a motorway would imperil the safety of fellow users of the road.

<sup>12</sup> The criminalisation of movement may cause harm especially when considering particularly egregious policies adopted by states to control movement through their borders such as "family separation", offshore and long-term detention, push-back tactics or the suspension of search and rescue activities that leave migrants to drown in rough seas.

This tension is doubly problematic when considering that securitised borders and states' discretionary control of migration are relatively new phenomena. Throughout the nineteenth century, migration was left largely unregulated and in many cases was actively encouraged (see for instance Reimers 1992). It was only when the number of those migrating became sufficiently large, or when those migrating were deemed to be "undesirable" (whether on economic or racial grounds), that states began to implement restrictive and discriminatory immigration controls. In the United States, the first major federal immigration restrictions were introduced in the racially discriminatory *1882 Chinese Exclusion Act* that was introduced in response to concerns that Chinese labourers were competing with American citizens for work. Stemming from this, the claim that the state's right to control immigration was an inherent component of sovereignty developed out of a series of cases put before the U.S. Supreme Court (Lee 2002; Song 2018)<sup>13</sup>. This historical trajectory was mirrored in the UK. Throughout the nineteenth century – and earlier – the UK maintained an "open door" approach to immigration (Lloyd 2007). Whilst the *Aliens Act 1905* introduced limited restrictions on mobility, this "open" borders approach was formalised in the *British Nationality Act 1948*, which granted citizenship, and the right to migrate, to all those born within British Colonies. It was only with the end of empire and the introduction of the *Commonwealth Immigrants Act 1962* that this "open borders" approach was altered and the right of citizens of Commonwealth countries to migrate to the UK was curtailed, and with the *Immigration Act 1971* and *British Nationality Act 1981* that border controls were internalised to operate within the territory of the UK in addition to at the periphery of its territory (Hansen 2010; Consterdine 2017; Zotti 2021).

It is against this backdrop of increasing control and securitisation of human mobility that the conceptual distinctness of migration may be understood. At its simplest, perhaps, migration can be understood as when an individual changes their state of residence from State A to State B<sup>14</sup>. However, a closer examination reveals that this obscures a lot of complexity related to what type of *movement* is involved in migration. Rather, migration relates to legal status, institutional backdrop, and the types of claims of access being made. As to the first of these, a keyway that is commonly used to identify migrants is through birth and the acquisition of citizenship, with migration assumed to involve physical movement. However, an examination of stateless people who have been arbitrarily denied citizenship in the state in which they were born (such as in Myanmar and Kenya and the Dominican Republic<sup>15</sup>), reveals that migration relates to "legal identity" (Bloom 2019). Similarly, and stemming from this, when discussing *movement* in relation to migration, we are really talking about a particular kind of mobility. Migration is distinct from other forms of movement<sup>16</sup> because of the spatial and temporal claims that *are made to states*. A person moving from Leeds to London will have moved between a number of jurisdictional

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<sup>13</sup> See for instance *Chae Chan Ping v. the United States* (1889), *Nishimura Ekiu v. United States* (1892) and *Fong Yue Ting v. United States* (1893).

<sup>14</sup> This understanding informs a lot of policy-making and is broadly used when conducting statistical analysis of migration (Scheel and Tazzioli 2022, p.2). The UN, for instance, follows this definition by defining a migration as "a person who moves to a country other than his or her usual residence for a period of at least a year" (UN 2002, p.11) and the UNHCR as one who "choose[s] to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons (UNHCR 2016)."

<sup>15</sup> See, for instance Amnesty International (2020) and UNHCR (2018).

<sup>16</sup> Such as is prehistoric movement where early modern humans moved from Africa and settled in every continent other than Antarctica, the Migration Period in Europe, European colonisation, the Māori colonisation of what would come to be known as New Zealand between 1320 and 1350, or people moving between town or city.

authorities such as local governments or councils but would not typically be called a migrant. The reason for this is that their movement is not set against the backdrop of institutions that claim sovereignty over a particular territorial area, even if the claims being made by those who move between different types of jurisdictional authority are similar<sup>17</sup>. Finally, migration involves claims to access and participate in the institutions<sup>18</sup> of a receiving state on an indefinite basis<sup>19</sup>. However, whilst many do not “migrate” with the intention of seeking membership in their new state of residence, in order to avoid a class of long-term resident noncitizens who participate on unequal (and more precarious) terms with citizens, states must “leave the path to citizenship open, and this in turn constrains the way that incoming groups, even those admitted formally on short-term schemes, must be treated” (Miller 2008, p.378). Because of this, migration is (ultimately) concerned with membership<sup>20</sup> or citizenship<sup>21</sup>. Further complexity can (and later will) be added to this picture by examining the empirical realities of contemporary migration<sup>22</sup>. However, for now we can proceed with a working definition that says *migration occurs when an individual seeks to change their state of residence with the label ceasing to apply once a “migrant” has received citizenship in a receiving state*<sup>23</sup>. We return to the complexities surrounding migration and border crossing in Chapter Four.

If members of liberal democratic and multicultural states are to be consistent with their self-professed commitments to freedom and moral equality, then responding to this tension depends not just on an honest assessment of the empirical implications of immigration policies, but also an honest look at our own underlying moral commitments. When making judgements or debating elements of public policy, we need to not just know the empirical implications of potential policies, but also the extent to which they align with our own underlying normative commitments. While engaging with political debate on issues such as how we should design social security and welfare, healthcare, and immigration policy, we seek to highlight not just the efficacy of our respective positions when advocating for them but also “appeal to principles underlying our side of the argument and examine the principles of our opponent’s position and consider the consequences of both” (Song 2018, p.4). It is here that we can see the intuitive connection between normative theory and public policy. Put another way, we assign relative value and evaluate policies in relation to these normative commitments independently from their outcome (Rawls 2005b, p.1; Goodin 1982, p.7; Song 2018, p.4). Questions such as “if someone wishes to

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<sup>17</sup> Although even this claim is controversial and may be labelled, relatively fairly, as being simplistic. Migration may also be made against the backdrop of supranational institutions (such as the EU), further complicating this institutional backdrop.

<sup>18</sup> Such as the workforce, access to property markets, healthcare, social security or any other of the institutions that a resident ordinarily has access to when living within a state.

<sup>19</sup> In drawing attention to these we may distinguish between a “migrant” and a “tourist” on the one hand, and a “migrant” and “those who visit for work” on the other. A tourist applying for a visa is making a claim for territorial access, but this access is temporary, and does not extend to access to a variety of a receiving state’s institutions. One who visits another state to attend a meeting or a conference, may receive access to territory and (a limited) access to state institutions, but these are short-term forms of access.

<sup>20</sup> I will use these terms interchangeably within this thesis.

<sup>21</sup> It should be noted that the distinct categories of refugee and migrant fall under this definition and this is deliberate. Whilst the claims of those seeking to migrate may vary in strength this definition does not distinguish between the types of harm that motivate movement

<sup>22</sup> After all, the empirical realities of contemporary migration are complex and often involving transit states, people smuggles or and non-state actors that are delegated to process claims and police borders.

<sup>23</sup> In doing so, I follow theorists such as Wellman and Cole who define migration in similar terms (Wellman and Cole 2011, p.1)

migrate, why should we interfere with that individual's choice?", "what, if anything, justifies states' right to control movement through their borders?", "if states may control movement through their borders does this also justify the use of force and coercion against non-members?", "if states have discretion over who they should admit and exclude, who should they admit?" and others are normative questions and our underlying normative commitments inform the answers that may be given to them if we are to be consistent with our own values (Carens 2013, p.2). If we accept the value of these sorts of questions, and by extension the view that moral judgements have a role in public debate and policy formulation, then it follows that an examination of the moral judgements that are made in relation to the above questions are central to any politics of immigration. Or, in other words, anyone interested in the politics of immigration has good reasons for understanding the moral judgements that motivate our responses to these questions.

In this thesis, I explore border exclusion through the lens of liberal normative political theory to answer the question of whether and to what extent (liberal, democratic, welfare and multicultural) states may morally permissibly exclude non-members. By virtue of being an exercise in political theory, this is a project of a particular sort. Firstly, if a normative theory of migration is to be relevant to public debate, it must be sensitive to and engage with the actual dynamics of migration and border enforcement. That is, it must be "realistically utopian" by "offering interpretations of values and principles to which we should aspire, but it is also realistic in taking account of real-world institutions and constraints" (Song 2018, pp.4-5). Or in other words, whilst an examination of normative considerations may lead us to be aspirational, this examination must be grounded in complexity and constraints of real-world practices, as well as the extent to which aspirational values may expose people to enormous obligatory burdens and sacrifice what they may consider to be their own basic interests (Fishkin 1982; Carens 1996). Secondly, the "clarity" that may be offered in such an exercise is clarity of a different sort. The role of political theory is not to produce clear policy proposals, legislate how we should live, or provide some algorithm capable of telling us how to act in any given situation. Rather, by its nature, political theory furthers our moral understanding and facilitates a conversation, with the guidance that it provides necessarily being general and requiring application. This will be a somewhat controversial statement, even to many political theorists. However, it is an assertion that stems from the idea of "reasonable disagreement" and "the burdens of judgement" (Rawls 2005a). Sometimes, adequately informed and sincere people will disagree, whether due to the complexity of evidence, the weight we assign to relevant considerations, or the vagueness of the concepts at play<sup>24</sup> (Rawls 2005a, pp.36-37, 55-57). As such, whilst we may gain "clarity" through an examination of relevant normative considerations, by its nature we cannot necessarily determine prescriptive policy proposals that offer a firm blueprint for a "just" immigration policy. Rather than rules, we may offer guidelines.

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<sup>24</sup> Rawls' list of the burdens of judgement contains six features related to psychology and the nature of *reason* and institutions, namely that: "(1) evidence is often complex and conflicting; (2) we may reasonably disagree about the relative weight of different considerations; (3) concepts are often vague and subject to hard cases; (4) the way we weigh values may be shaped by our total life experience; (5) different normative considerations may pull in different directions and make an overall assessment difficult; and (6) the number of values any social institution can incorporate, defend and further is limited (Rawls 2005a, pp.55-57).

With these caveats in mind, the central claim of this thesis is that whilst liberal democratic states may possess a right to exclude, the situations in which this right may be exercised are limited and dependent upon the situational claims of members and non-members. Or, in other words, I will advocate for the — admittedly not very catchy — position of *open borders that may be closed*. Borders, I argue, restrict and protect freedom simultaneously and the determination of “whose freedom”<sup>25</sup> should take priority rests on (an oftentimes) painful trade-off between the freedom of members and non-members. This trade-off, I argue, is affected by the situational claims of members and non-members, the recognition that the structure and location of borders may affect the freedom of non-members to varying degrees, and the capacity of states to meet new and existing obligations. The claims of non-members, I will argue, are grounded in the concept of freedom and are linked to the capacity for autonomy, including: a lack of access to basic liberties whether through poverty, persecution or any number of other harms that individuals may be exposed to from which they have little recourse within their own state, but also to particularity claims and claims of restorative justice. Countervailing this, whilst border admission may restrict the freedom of members, the freedom of members is not affected equally by admission and, unlike the freedom-related concerns of non-members, the extent to which the freedom of members is affected is determined by empirical factors. Whilst this may not result in normative guidance that may enable us to clearly identify how “open” or “closed” borders should be, trying to do so would most likely result in an account that is so threadbare that it has little to say that may be action-guiding. Grappling with the moral complexity of borders enables us to capture the ambivalent relationship between borders and freedom.

This thesis will be broadly split into three parts. In the first part, I will critically engage with the existing literature on this topic. This literature, which may broadly be dubbed “the ethics of immigration control”, can be divided into two camps. On one side are those who call for open borders<sup>26</sup> (see for instance Fine 2013, Kuthakas 2005, Oberman 2016). For the most part, these thinkers conclude that border controls either ought not to exist or have only a very limited function (e.g. Carens 1987; Abizadeh 2008). These theorists problematise borders and border exclusion by: (a) pointing to the morally arbitrary role that one’s citizenship plays in determining one’s life prospects (see for instance Carens 1987), (b) pointing to the way in which liberal assumptions regarding the presumption of freedom appear to be flipped at state borders (see for instance Cole 2000; Blake 2001; Abizadeh 2008; Freiman and Hidalgo 2011), (c) pointing to the externalised effects of border coercion (Abizadeh 2008), (d) seeking to establish freedom of movement as a human right (see for instance Cole 2011, Carens 2013, Freiman and Hidalgo 2016, Oberman 2016), or (e) pointing to the problematic implications of arguments employed to support a right to exclude (see for instance Brezger and Cassee 2016a; Freiman and Hidalgo 2016). On the other side are those theorists who justify strict border controls on the basis that states have competing obligations to maintain democratic legitimacy, cultural homogeneity, and the economic and social conditions required for the exercising of freedom (Walzer 1983, Miller 2016, Wellman and Cole 2011). These theorists are unified in holding that borders and exclusion may protect and further individual freedom for those who already enjoy membership

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<sup>25</sup> Whilst this may be framed in terms of members and non-members, on closer inspection this may often involve a trade-off of the freedom of members and members.

<sup>26</sup> Whilst these theorists argue — in principle — that borders should be open, they accept that there may be some circumstances where they may be permissibly closed (see for instance Carens 1987; Abizadeh 2008).

within those polities, whether in terms of ensuring collective self-determination, supporting redistributive justice and democracy, or securing the environment necessary for the exercising of liberal freedoms. These theorists seek to ground a right to exclude in: (a) freedom of association (Wellman 2008), (b) the value of culture and cultural membership (Walzer 1987; Miller 2007, 2016), (c) the preconditions for collective self-determination (Song 2018), and (d) Lockean notions of property (Pevnick 2011).

In the second part of this thesis, I argue that this existing debate suffers from two problems. The first of these, I argue, is a reliance on an oversimplified conception of the way in which state borders function. Both camps within the literature overtly or indirectly tie state borders to the territorial and jurisdictional limits of states. Whilst the dynamics of borders and bordering practices have been examined by critical international relations scholars, sociologists and political geographers<sup>27</sup>, little time has been spent examining these practices by normative political theorists working on the “ethics of migration”. This is problematic as it misrepresents how borders function, creating a disconnect between theory and practice. Borders do not operate as static “lines in the sand”; rather, to adequately conceptualise the border, it is necessary to grapple with the ways in which borders permeate our social and political lives (Agnew 1994). Borders may be found “wherever selective controls are to be found” (Balibar 2011, p.84), with border controls pushing and pulling the border beyond and within the territorial and jurisdictional limits of states. This results in at least two normative implications of the border being missed. First, the degree to which the border interferes with the freedom of non-members may vary depending upon the location of non-members in relation to the state’s border control; at times this may be greater and at times lesser than that portrayed within the existing literature. Second, the “form” that border controls take may raise questions of remedial responsibility for receiving states, which may create obligations to grant entry.

The second problem with the existing literature relates to the way that the concept of freedom is utilised. Whilst a shared concern for freedom motivates the positions of “open” and “closed” borders, these positions differ on the questions of *whose* freedom matters and what *constitutes* freedom. In doing this, I argue that both sides of the debate take an overly narrow view of freedom, with the result that the legitimate freedom-related concerns of members and non-members are overlooked, respectively. If, as we should be, we are concerned with the freedom of members and non-members alike, then state borders simultaneously are problematic as they restrict the freedom of non-members and yet may be necessary to meaningfully secure freedom for members. Borders restrict and protect freedom simultaneously, with the securing of freedom in one location meaning the limiting of it elsewhere.

Finally, in the third part of thesis, I seek to resolve these problems within the existing debate and articulate a “middle way” that seeks to address these two problems within the literature. To do this, I will examine the broad array (and varying strength) of claims that may be brought to state borders through the lens of the concept of autonomy, highlighting the link between empirical conditions and members’ capacity for autonomy and

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<sup>27</sup> See for instance Agnew (1994, 2008, 2009), Guild (2001), Paasi (2003, 2012a, 2012b), (Longo (2010, 2016, 2018), Vaughan-Williams (2010) Balibar (2011), Johnson et al (2018) and Parker and Vaughan-Williams (2013, 2018) amongst others.

collective self-determination. I then draw upon the concept of *capacity*, the idea that moral obligations are limited by the ability of an agent to meet these obligations (see for instance Singer 1979; Fishkin 1982; Scheffler 1986; Nickel 1993; Goodin 2009; Lichtenburg 2010; Arneson 2012 amongst others). Ultimately, I argue that whilst states may possess a right to exclude, the situations in which they may permissibly exercise that right are limited and its use requires articulable justification being offered to those excluded. This is not a simple task; however, it may elucidate considerations that can serve as guides and reveal four broad implications for policymaking to allow exclusion to be morally permissible. Firstly, exclusion may only be permissible following dialogue with and reference to the claims of non-members. Migrants must be able to bring their claims for states and have the capacity to make these claims. Secondly, states must be able to articulate and demonstrate how the freedom of members is limited by the admission of non-members. Thirdly, the justifications for internalisations and externalisations of the border must be sought independently of the justification for a right to exclude, and, when securitising the border, states must be conscious of and limit border policies that target particular individuals or routes of entry, that build precarity or that limit freedom in ways not strictly necessary to regulate movement through borders. Finally, whilst states may, due to lack of capacity, exclude those who bring claims to their borders, this does not absolve them of the responsibility to increase their capacity to meet their obligations towards non-members in the future. Or, in other words, the “middle-way” that I articulate may be expressed in three parts. Firstly, states possess moral obligations to accept migrants in circumstances where they have the capacity to do so. Secondly, any immigration restrictions that arise from state incapacity must be removed once these capacity issues are no longer present. And thirdly, the application of immigration restrictions must meet certain standards of procedural justice. Namely, that immigration rules must be transparent and applied without discrimination and that a clear rationale must be offered for restricting access that is linked to the freedom of members.

This thesis therefore makes three important contributions to this ongoing debate over the ethics of immigration control. First, I draw attention to the normative significance of ‘the border’ to questions of admission and exclusion. Borders and bordering practices are complex and have wide reaching normative implications for the moral efficacy of admission and exclusion and only in moving beyond a partial and overly idealised conception of the border can we grapple with these. The second contribution of this thesis resides in the somewhat Rawlsian project of seeking to highlight areas of consensus and overlap from which we may build either shared political judgements or establish a foundation upon which we may have discourse and reasonable disagreement over questions of immigration control. Freedom is a shared concern amongst those arguing for positions of “open” and “closed” borders and recognising this may aid in taking some of the heat out of this debate through the recognition that there is space for reasonable disagreement. Finally, and stemming from these two contributions, I articulate this “middle way” to offer a solution to the question of whether and when states may morally permissibly exclude non-members<sup>28</sup>.

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<sup>28</sup> However, whilst I believe that the approach to this problem developed throughout this thesis is best able to respond to the complexity of the border and navigate between these competing concerns, each of these contributions are, I believe, valuable independently. That is, whilst these contributions support one another, they have merit and contribute to the

This thesis will proceed as follows. In Chapter 1, I examine the case for “open” borders and the liberal egalitarian case for freedom of movement. By drawing on the liberal egalitarian case for open borders, I highlight that it is the restriction of movement through borders that stands in need of justification. This chapter will focus on the liberal egalitarian case for “open” borders both for reasons of space and due to these being the strongest arguments refuting the assertion that migration policy is not a question related to justice. In Chapter 2, I will examine the case for states’ control of movement through their borders by examining the relationship between exclusion and freedom, whether through cultural identity, freedom of association, Lockean notions of property or collective self-determination. In Chapter 3, I highlight the need for greater engagement with the actual practices that constitute the border today in these debates and explore the normative implications of a morally complex border. In Chapter 4, I lay the groundwork for the reconciliation of the positions of open and closed borders by re-examining how they engage with the concept of freedom. In Chapter 5, I articulate this “middle way” and discuss the policy implications of this position, before offering a brief conclusion.

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ongoing debate in and of themselves. If readers are not, say, convinced with the way that I propose as a way to balance the competing claims of members and non-members, readers may still find value elsewhere within this thesis whether in terms of the need to incorporate a more nuanced understanding of the border in normative questions about migration or through this thesis’ examination of how the existing debate engages with the concept of freedom.

## Chapter 1: The Case for Open Borders

According to (most) popular and legal understandings of migration (hereafter referred to as the state sovereignty view), entry policy is the sole purview of states. States may (and do) exercise unilateral control over their borders and border policies. As part of this, any justification for their bordering practices is seen as being owed to existing members and not to migrants. Contained within this claim to unilaterally control movement through their borders, states claim (and exercise) the right to use coercive force against those seeking admission absent authorisation<sup>29</sup>. At few places other than state borders are individual freedoms coercively limited without significant justification. Liberals accord “liberty” primacy as a political value and demand that state restrictions on freedom be justified (Feinberg 1984, p.9; Rawls 2001, pp. 42, 112). This assumption of limitations of freedom requiring justification, however, does not seem to apply at states’ borders. This, to those who profess to be liberal egalitarians, is somewhat strange. Instead, the burden of proof rests on those who wish to exercise individual freedom of movement by crossing borders, with migrants having to prove that they meet certain entry criteria set by states.

In response to this tension, many liberal and democratic theorists have argued that the anti-migrant position adopted by states is deeply problematic, pointing to liberal commitments to freedom, moral equality and democratic legitimacy (see for instance Carens 1987, 2013, 2015; Chang 1997; Cole 2000; Blake 2001; Abizadeh 2008, 2010). These theorists have challenged and problematised the state sovereignty position by arguing that it (a) does not take human rights seriously (Kukathas 2003, Carens 2013, Oberman 2016), (b) is based on an arbitrary ethical asymmetry between domestic and international movement that is inconsistent with liberal principles (Cole 2000; Wellman and Cole 2016; Blake 2001), or (c) is inconsistent with democratic understandings of popular sovereignty (Abizadeh 2008, 2010). From this, these theorists have argued that states do not possess the right to prevent people moving across state borders and settling within a receiving state’s territory “subject only to the sort of constraints that bind current citizens in their new country” (Carens 1987, p.251). Which may, and will be referred to, as a position of “open borders” for the remainder of this thesis.

In this chapter, I will seek to lay out these arguments for open borders in their strongest form. By critically engaging with these theorists, I hope to do two things which will serve as the foundations for the remainder of this thesis. Firstly, I aim to establish that migration policy is a question of justice. Secondly, I will seek to highlight that it is the restriction of movement through borders that stands in need of justification. This is not to say that justice will require borders to be open at all times and in all circumstances, only that when discussing the ethics of movement and membership, the burden of proof needs to be shifted to those who seek to exclude non-members. If readers are convinced that the concerns that these theorists raise are valid (even if they are not ultimately convinced by the open borders position for which they advocate), then questions of admission and exclusion should be reframed as ones of freedom, justice and democratic legitimacy. If liberal democratic states

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<sup>29</sup> Although as we saw in the introduction of this thesis, this is a relatively new phenomenon. Historically a concern with the control of borders was related to military incursions and land grabs as opposed to the movement of people (see for instance Longo 2018, especially chapters one and two).

wish to be consistent with the values that they profess to hold, any control over the movement of non-members through borders should be justified from this position and in terms of non-members' rights to freedom<sup>30</sup>.

This chapter will be split into three sections that correlate to the liberal and democratic arguments put forward by advocates of the position of open borders. Section One will discuss the case grounded in freedom. In this section, I will firstly explore what has alternatively been dubbed the "libertarian"<sup>31</sup>, "freedom"<sup>32</sup>, or "negative case"<sup>33</sup> for open borders. In doing so, I will examine how theorists such as Carens (1987), Hidalgo (2014a) and Brezger and Cassee (2016a) have argued that liberals should view immigration controls with suspicion due to the role of freedom in liberal political thought and the way that borders interfere with liberal freedoms, as well as how arguments used to support the state sovereignty view have problematic implications when applied internally. Following this, I will explore the positive case for open borders grounded in freedom by examining why freedom of movement should be considered to be a human right (Carens 2013; Oberman 2016). In Section Two, I will examine the democratic case for open borders (Cole 2000; Blake 2001; Abizadeh 2008, 2010). In Section Three I will examine the cosmopolitan egalitarian case for open borders that is based in the idea of global justice which draws upon the liberal intuitions of equal moral worth and equality of opportunity (Carens 1987; Pogge 2005; Wellman and Cole 2011). Finally, I will offer a brief conclusion in which I evaluate the relative strengths and weaknesses of these arguments.

### **Section 1: Freedom and Border Controls**

In response to the state sovereignty view, theorists such as Hidalgo (2014a), Freiman and Hidalgo (2016), Carens (1987, 2013), Cole (2000; with Wellman 2011), Brezger and Cassee (2016a) and Oberman (2016) have critiqued states' unilateral control of movement through their borders by appealing to liberal commitments to freedom. These arguments, whilst mutually supporting, can be split between a "negative" approach in which border controls are problematic because of the way that they restrict freedom, and a "positive" case which seeks to show to show that there is a right to freedom of movement.

#### *1.1 Border Controls and the Restriction of Freedom*

Whilst the route taken by those making the case for open borders by relying on a negative argument for freedom may vary, these theorists are unified in: (a) highlighting the role of freedom in liberal political thought, (b) pointing to the ways that border controls restrict the freedom of non-members, (c) pointing to the flip of the standard liberal justificatory requirement for the restriction of freedom (Cole 2000; Wellman and Cole 2011; Carens 2013), and (d) has been developed by Freiman and Hidalgo (2016) and Brezger and Cassee (2016a) by highlighting the problematic implications of the rational utilised by states to justify their immigration policies to importantly held liberal freedoms.

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<sup>30</sup> As opposed to sovereignty, economic utility etc.

<sup>31</sup> This terminology is used by theorists such as Wellman (with Cole 2011) and Carens (1987) and Freiman and Hidalgo (2022).

<sup>32</sup> This terminology is used by theorists such as Hidalgo (2014a).

<sup>33</sup> This terminology is occasionally used by Hidalgo (2014b) and Cole (with Wellman 2011).

### *1.1.1 How Borders Restrict Freedom*

The concept of freedom has long been held by liberals to be central to liberal political philosophy (Blake 2001, p.266). The “capacity to be free, to decide freely the course of their own lives, is what makes a person” (Raz 1988, p.190) and stands at the heart of liberal commitments to individual freedom, rights, and state neutrality. Philosophers and theorists such as Jonathon Wolff, Thomas Scanlon, Joseph Raz and John Rawls have utilised the concept to ground and explore principles and issues related to justice, the legitimate basis of political authority, the nature of the liberal state, the justification of democracy and freedom of speech (Rawls 1971; Scanlon 1983; Raz 1988; Dworkin 2012).

Against this backdrop and within liberal political theory, a key role of the state is indexed to its capacity to facilitate the development of individual freedom (Nagel 1991; Anderson 1999; Rawls 2005b). Liberals argue that states may legitimately interfere with the choices available to, and autonomy of, individuals only to provide an equal capacity for liberty and to further the ability to exercise autonomy. States, in making law, coerce those individuals subject to those laws. However, when ideally constituted, this is not objectionable as it creates a framework that maximises meaningful options available to individuals and maximises their capacity for autonomy. The object of ideally constituted state coercion is to provide a framework which can aid in enabling those subject to coercion to pursue their life projects (Pevnick 2008, p.401; Wellman and Cole 2011, p.16). As Locke puts it, the aim of the law “is not to abolish or restrain, but to preserve and enlarge freedom”<sup>34</sup> (Locke 1988, p.57). Coercive border controls, however, pose a distinct challenge to the freedom of non-members. By setting the criteria by which non-members may pass through their borders, and by enforcing these criteria to ensure that those who do not have authorisation are not able to pass through their borders, states subject those who interact with their borders to a coercive threat backed up by the use of force, including state surveillance, involuntary deportation, indeterminate detention, and organized abandonment. Unlike instances of ordinary and ideally constituted coercion, border coercion restricts the freedom of those subject to coercion but does so without reference to the freedom of those that are coerced (Cole 2000; Carens 2013).

In asserting a right to exclude and backing this up with coercive border controls that regulate movement through borders, states deprive people of freedom through coercion. Theorists such as Carens (1987, 2003), Hidalgo (2014a) and Cole (2000) highlight how immigration restrictions interfere with what Isaiah Berlin calls the negative sense of freedom. This negative conception of freedom is centred around the extent to which an individual can act without being obstructed by others (Berlin 1958, pp.2-3). If I were to be prevented from doing what I would otherwise wish to do by deliberate interference by other people I would be being deprived of freedom (Berlin 1958, p.3). Being free in this sense is largely determined by the extent to which I can act without people interfering with my actions, with the wider area of non-interference resulting in being ‘more free’ (Berlin 1958, p.3). The introduction of coercive border controls limits the choices and actions of non-members in a number of visible ways.

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<sup>34</sup> A practical example of this would be that those who use the road network are coerced into driving on a certain side of the road and at certain speeds because doing so will make all those who use the road network safer and result in an expanded set of options available to those subject to this coercion as a result of this safety.

The first, and perhaps most obvious, way that these theorists point to borders restricting freedom is that borders restrict freedom of movement (Carens 1987; Cole 2000; Hidalgo 2014a; Kukathas 2014). Individuals may have many reasons for or interests in wishing to move to another state, such as identifying with other cultures or wishing to access educational, social or economic opportunities found in another state. In other words, “free international movement respects the pluralism of human desires, interests, projects, and values” (Hidalgo 2014a, p.214). However, states’ exercising of exclusionary practices at their borders prevents people from moving into territory whose governments do not wish them to enter, thereby confining people’s movement to a set of designated boundaries (Kuthakas 2014, p.379). As part of this, Carens (1987) and Hidalgo (2014a) point to how borders prevent individuals from different states from accessing economic opportunities within a territory and prevent landowners from inviting who they may wish to their property (Carens 1987; Hidalgo 2014a, especially p.214)<sup>35</sup>.

This is not the only way in which state borders limit the choices and actions of non-members. In addition to restricting movement, Hidalgo highlights how immigration restrictions hamper peoples’ ability to associate with others freely, due to the added difficulty involved in forming and maintaining attachments with people who are separated by a border (Hidalgo 2014a; Freiman and Hidalgo 2016). By being restricted from a particular territory, a person is restricted from the possibility of forming associations with people living on that territory due to their inability to access them. Border restrictions interfere with pre-existing relationships when people are separated by state borders. Any person who has lived through strict Covid restrictions or has attempted to maintain a long-distance romantic relationship knows that whilst modern technology can overcome some hurdles of distance, they are no substitute for being able to interact with other people in person. To highlight how important these barriers can be, it is worth noting that this interference with association rights may interfere with non-trivial relationships, placing barriers between families, romantic partners and close friends, and may interfere with important personal duties such as caring for ill family members or children.

It is also important to recognise that these restrictions cut both ways. Border restrictions can impact members’ and non-members’ freedom to associate, for instance, in much the same way. A barrier is placed between family members, friends, colleagues and romantic partners. Much as with non-members, a member’s ability to maintain pre-existing relationships is impacted when their state sets the terms under which (if at all) non-members may visit their state’s territory to see them. This is doubly cutting, as, in a world in which all states claim the right to near unilaterally control their own borders, members would have to cross a similar barrier to visit their friends and family in other states. Border controls therefore impose broad restrictions and limitations on individual freedom.

### *1.1.2 Why Liberals Should Be Suspicious of Border Controls: Freedom, Asymmetry and Problematic Implications*

From a liberal egalitarian perspective, then, borders constrain individuals’ negative freedom, and this restriction of freedom is problematic in at least three ways.

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<sup>35</sup> Although as we shall see in Chapters Three and Four, borders interfere with freedom in broader ways than simple interference.

In the first instance, theorists such as Carens (1987; 2013 especially p.227), Hidalgo (2013, 2014a) Freiman and Hidalgo (2016) and Brezger and Cassee (2016a) argue that border controls appear to flip the usual liberal approach to justifying freedom-limiting interventions. It is a hallmark of liberal political thought that it is *restrictions of freedom that require justification*. JS Mill's harm principle, for instance, states that every individual has the right to act as they like, so long as their actions do not harm others. As Mill puts it, "the burden of proof is supposed to be with those who are against liberty, who contend for any restriction or prohibition... The a priori assumption is in favour of freedom" (Mill 1963, p.262). Formulations similar to this are common within liberal political thought, where liberty is held to be the norm and coercion always demands some kind of special justification. The burden falls on "the shoulders of the advocate of coercion who must, in particular instances, show that the standing case for liberty can be overridden by even weightier reasons on the other side of the scales" (Feinburg 1987, p.9). Likewise, Samuel Scheffler remarks that "[c]oercion always requires justification, and this requirement is particularly urgent with respect to the coercive political power of the state" (Scheffler, 2010, p.154).

Carens highlights that this liberal assumption of limitations on freedom requiring justification does not seem to apply at states' borders (Carens 2013, p.227). Instead, in popular and policy debates, it is too quickly assumed that states possess an adequate justification bound up in state sovereignty, economic welfare and security. This, to those who profess to be liberal egalitarians, should be somewhat strange as the burden of proof is shifted from those restricting freedom to those seeking to exercise it by crossing state borders (Carens 2013, p.227). It is a feature of many Western states' immigration policies that migrants must prove that they meet a certain set of criteria to be able to exercise an individual freedom to migrate, by demonstrating that they possess a certain set of skills, expertise or qualifications desired by the receiving state<sup>36</sup>. Or failing this, they must prove, often in the face of a hostile bureaucratic apparatus, that they are at risk of a particular set of harms that qualify them as a refugee. This application to exercise freedom, whether freedom of movement or association, seems to be unique, especially given how unchallenged the right to exclude is in popular discourse on migration.

Secondly, in addition to what seems to be a flip in the justification that occurs at state borders, borders are unusual because of what Cole calls their "asymmetry" (Wellman and Cole 2011, pp.173-174). Underpinning discussions of border admission and exclusion is the idea that freedom of movement within a state is viewed as a question of human rights, and freedom of movement between states is viewed as a question of state sovereignty (Weiner 1997, p.171). For instance, the Universal Declaration of Human Rights (UNDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention all establish freedom of movement within your home state and a right of exit as human rights but are all silent on movement as a right beyond this. For instance, Article 13 of the UNDHR states that whilst everybody has a right to leave any state, the right to enter a country is restricted to those who possess citizenship. The ICCPR reaffirms this, stating that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence" as well as that "[e]veryone shall be free to leave any country

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<sup>36</sup> Such as with the UK's immigration system, shared languages, as with the weighted system in Canada that prioritises migrants that speak English or French, or family ties as with the US immigration system post 1952.

including his own” (UN 1966). Despite this consensus on the value of domestic movement (and the right to leave one’s state), this defence of movement is not found when discussing a right to enter another state. This asymmetry is reflected in popular discussion as well. Where many would condemn the inability to move between Guildford and London, such condemnation is not reflected when discussing international movement. Instead, it is common to hear a question similar to “why should someone from Italy be able to move to the United States?”. On closer inspection though, this might strike us as unusual. Why is it that movement internally and rights to exit and return should be so important as to be viewed as a human right, but the obstruction of movement between states either does not require justification or the justification is so intuitive that it does not require articulation when discussing migration?

By holding that freedom of movement internally is a human right, yet seemingly arbitrarily limiting it to exclude movement between states, liberal egalitarians are left with an uncomfortable asymmetry. Liberal egalitarians value ethical symmetry based upon the moral intuition that people should treat similar cases similarly (Wellman and Cole 2011, p.173). To act otherwise is to act arbitrarily, which seems to cut against liberals’ deepest moral intuitions. Anyone who has experienced racism or sexism or other forms of arbitrary treatment will have felt the indignation of being treated differently (Wellman and Cole 2011; Carens 2013). In order to justify unequal treatment without raising problems of moral asymmetry, it is necessary to find a morally relevant difference that is sufficient to justify treating the cases differently<sup>37</sup>.

Thirdly, and linked to the previous two points, theorists such as Freiman and Hidalgo (2016, 2022) and Brezger and Cassee (2016a) have developed the negative account for open borders by pointing to the problematic implications of arguments used to support discretionary state control of migration<sup>38</sup>. Many contemporary states, such as the UK, Australia and Canada in operate “points-based” immigration systems (see for instance UKVI 2022; Government of Canada 2024). In doing so, these states either directly or indirectly cite economic welfare or concern for cultural preservation as reasons for determining desirable and undesirable migrants (see for instance Taylor 2018). Whilst, in popular and policy debates, these arguments are often (although not universally) accepted when discussing the restriction of movement *at the border*, when applied internally these concerns appear to equally justify the limitation of core liberal freedoms such as freedom of speech or reproductive freedoms (Hidalgo 2016, 2022; Freiman and Hidalgo 2016; Brezger and Cassee 2016a). The exercising of speech or reproductive freedoms may likewise affect the culture of a state over time. Higher or lower birth rates amongst different cultural groups may alter the extent to which this culture or that is more or less prevalent (Freiman and Hidalgo 2016, pp.8-9). Likewise, members may change their political, social, or economic outlook due to exposure to other viewpoints and doing so is a reflection of their rights to freedom of

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<sup>37</sup> An example of this would be that is permissible for a convicted criminal to be deprived of their liberty due to the fact that they have committed a crime and been found guilty and sentenced through the judicial system, whereas it would be impermissible for someone who has not committed a crime to be incarcerated. It is the fact that the prisoner has committed a crime and been found guilty of doing it that is morally relevant in treating these two cases differently (Wellman and Cole 2011, pp. 173, 191).

<sup>38</sup> It should be noted that whilst these theorists primarily apply to normative arguments used to support closed borders (including those discussed within Chapter Two), they apply equally to arguments commonly used to support the state sovereignty position (Freiman and Hidalgo 2016, 2020; Brezger and Cassee 2016a).

expression, choice and speech (Freiman and Hidalgo 2016, pp.8-9). Freiman and Hidalgo (Hidalgo 2016, 2022; Freiman and Hidalgo 2016) and Brezger and Cassee (2016a) ask that if these arguments are sufficient to justify the exclusion of migrants, then are they not also sufficient to justify the freedom of citizens? If proponents of the state sovereignty view wish to avoid the unpalatable implications of this, further argumentation is needed to show why the justification offered is sufficient to limit importantly held liberal freedoms for one group but not another.

The negative case for open borders that appeals to liberal intuitions about freedom provides strong reasons to view the state sovereignty view with scepticism and is sufficient to demonstrate why deference to existing international law is a poor foundation on which to rest normative enquiry. In the following subsection of this chapter, I will present the “positive” case for open borders that draws upon freedom. In following sections, I will explore two further positive arguments that support a position of open borders — those that appeal to democratic legitimacy and those that draw upon justice.

## *1.2 Freedom of Movement as a Human Right*

### *1.2.1 Freedom of Movement as a Human Right and a Cantilever Argument*

The positive case for open borders, developed by theorists such as Oberman (2016) and Carens (1987, 2006)<sup>39</sup>, claims that freedom of movement should be counted as a human right<sup>40</sup>, in much the same way as other liberal freedoms such as expression or religious choice. These theorists point to at least three sources of value for considering freedom of movement to be a human right: constitutively, instrumentally, and intrinsically (Freiman and Hidalgo 2011, 2016; Carens 2013; Oberman 2016). That is, freedom of movement may be valuable in and of itself, be valuable because it increases access to some other valuable good<sup>41</sup>, or because it is a constitutive component of other rights<sup>42</sup>. Each of these, to liberal egalitarians at least, are not particularly controversial in moral, if not legal, terms due to the value that is placed by most people on freedom of movement and the acceptance of the importance of freedom of movement domestically within the “closed border” literature (see for instance Miller 2005, 2007, 2016b; Pevnick 2011). However, each of these are worth exploring in turn to

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<sup>39</sup> Carens is unclear on whether or not he views freedom of movement as a human right in and of itself, or as an instrumentive (or procedural) right existing to protect other rights at times arguing for the former and at others the latter.

<sup>40</sup> The subject of ‘what is a human right’ has been discussed at great length, not just in the context of migration, but across political theory more broadly. As such, a brief summary of one position cannot hope to do justice to the rich discussion on the subject. However, I will begin with some simple and less contested points. When discussing human rights, what is being discussed is a moral rather than a legal right, with moral rights being those that set out what individuals are morally entitled to (Oberman 2016, pp.33-34). Further, human rights are not simply aspirational, rather, to hold a human right is a “high priority prescription of a freedom or benefit that generates definitive obligations for parties other than the right holder” (Nickel 1983, p.32). Interest-based accounts of human rights link rights to fundamental human interests and not to the contingent benefits of any policy (Carens 2013, p.240). When discussing a right to immigrate in terms of an interest-based account of rights Oberman, following a similar line to Miller, argues that these moral rights must be grounded in universally held interests that are significant enough to generate weighty moral obligations on people who may only be loosely connected to the right holder (Oberman 2016, p.35; Miller 2012, pp.409-410). As such, freedom of movement would need to be shown as linked to a generalisable basic human interest that is capable of holding others to weighty obligations.

<sup>41</sup> For example, freedom of movement may enable individuals to discover and access new opportunities, whether in terms of employment (and other economic opportunities) or in terms of personal projects (religious belief, family life etc.).

<sup>42</sup> For example, freedom of movement is necessary to exercise democratic rights such as democratic participation, freedom of association, and it exists as a procedural right that protects and guards against human rights failures.

emphasise the strength of these arguments, especially when considering that these three directions for locating the value of movement are mutually supporting.

The first (and perhaps easiest) of the three sources of value of freedom, utilised by Freiman and Hidalgo (2016) and Oberman (2016), argues that freedom of movement has value constitutively. These theorists point to the value of freedom stemming both from its role as a procedural right as well as it being a component part of other rights (Freiman and Hidalgo 2016; Oberman 2016). Let us start with it as a procedural right. This is one area in which freedom of movement, at least in certain contexts, is recognised as a human right within international law. The Universal Declaration of Human Rights sets out a “right to leave any country, including his own, and to return to his country” (UN 1948, Article 13). This operates in concert with the 1951 Refugee Convention with its 1967 supplement, the Protocol Relating to the Status of Refugees, setting a limited right to enter another state when the receiving state acknowledges that a migrant has suffered persecution (UN 1948; UN 1951, p.14; UN 1961). Taken together, freedom of movement, even in this limited format, can be understood as a constituent part of a right to freedom from oppression. Movement in this sense can be understood as a procedural right<sup>43</sup> existing to support another right (Oberman 2016; Miller 2016b, pp.21-22). Without the ability to leave a state to escape persecution (and to enter another), a right to freedom from oppression is meaningless. In much the same way, movement may have constitutive value to other rights such as bodily integrity or subsistence rights.

In addition to this, Oberman highlights that freedom of movement has instrumental value as it is necessary to access a variety of other freedoms and the greater latitude one has with their movement, the more opportunities they have access to (Oberman 2016). If your home state bans you from entering a certain city, town or province, then not just is your movement restricted but all the associations, experiences, jobs, and social and educational opportunities that that town, city or province has to offer are likewise restricted. If one’s home state is devoid of hills or mountains and that person wants to experience what it is like to trek through mountains, they must move to where there are hills or mountains. Likewise, one may wish to study a degree that is only available at specific universities or move closer to family that are in need of care or support. The greater scope one has to move, the greater range of opportunities and experiences one has. Movement across state borders is necessary so that people are not restricted when making important decisions (Oberman 2016, p.36).

The final source of value of freedom of movement, and drawn upon by Carens (2013, p.249), is intrinsic. This is perhaps the most difficult to show as many of the benefits of movement manifest in terms of other rights and freedoms as highlighted in the preceding paragraphs. However, it would be a mistake to simply identify movement as valuable only because it is a constituent part of other rights. To ask the question of why someone would want to move from Manchester to London (leaving aside the vast improvement in weather) when their rights and vital interests are being met in Manchester misses the mark. The vital interest at stake is freedom itself (Carens 2013, p.249). Being “free” in a meaningful sense involves being free to be able to go where you want to do what you want to do without being subject to the will of another, provided that you do not violate

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<sup>43</sup> A procedural right is a right that exists to protect other rights (see for instance (Miller 2016b, pp.21-22).

someone else's rights (Carens 2013, p.249). When states restrict movement<sup>44</sup> they are imposing their will on another.

“From this perspective, it matters a lot that no political authority gets to decide whether or not it is important for you to [move]... Perhaps it will be a difficult journey and when you get there you will find that the people have strange customs to which you will have to adapt. Perhaps you will regret the move. But it is your choice whether to go or not. It is not up to the government to decide what options are valuable and why. If that freedom were taken away or severely restricted, it would be an important loss” (Carens 2013, p.249).

This is at the core of the notion of self-determination, which is defined as “being the author of one's own life” (Wellman and Cole 2011, pp.30-31). This has led theorists such as Alicia Ely Yamin to argue that human rights should be understood as “tools that allow people to live lives of dignity, to be free and equal citizens, to exercise meaningful choices, and to pursue their life plans” (Yamin 2008, p.46).

Understood this way, human rights constitute a framework supporting the conditions for people to obtain and exercise agency over their own lives. Unless rights are examined in concert with one another, the result is an overly narrow definition of any given right which may not provide adequate protection or an adequate minimal standard for humans as agents. Oberman follows a similar line to Carens when exploring a right to migrate, arguing that people have a vital interest in conscience, which “is a value which involves more than simply acting in accordance with one's ethical beliefs but also searching for answers to ‘ultimate questions’... [b]ecause people have this interest they also have an interest in the conditions of freedom that make conscience possible” (Oberman 2016, p.42). The case for holding to freedom of movement to be a right is strengthened when viewing movement in terms of its role in supporting agency. If freedom and agency are held as important values, then “the prima facie case for open borders is a strong one, since very substantial considerations will have to be adduced to warrant ignoring or repudiating them” (Kuthakas 2014, p.379).

To conclude, there are strong constitutive, instrumental and intrinsic reasons for valuing freedom of movement. Moreover, these are strong intrinsic, instrumental and constitutive reasons that seem to be just as applicable for international movement in the same way that they support (recognised) rights to domestic freedom of movement. One may wish to move across borders for the same reasons as one would, to return to the earlier example, want to move from Manchester to London. An individual may prefer a hot climate over a cold climate, wish to experience a culture not found or little practiced in one's home state, or wish to join family or fall in love with someone from another country (Carens 2013, p.239). All of these give a strong indication that the *interests* that people have in moving translate seamlessly from domestic to international movement.

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<sup>44</sup> Or demand movement as in asylum seeker housing policies that may abruptly demand that asylum seekers move to other (and often distant) localities at little notice (Home Office 2024).

### 1.2.2 And a Cantilever Argument...

It is because the reasons that one may have in moving (appear to) translate between domestic and international movement that Carens (1992; 2013) has reacted to this (apparent) asymmetry by employing what David Miller has dubbed a cantilever argument (Miller 2016). Much like a cantilever in engineering, the basic structure of this type of argument is that if something is taken to be a right in one location, then one attempts to demonstrate that the commitments that ground that right are applicable to a contested issue, thereby extending it outwards (Carens 2013, p.239). An example of this type of argument would be to take as the accepted basis the moral objectionability of racial discrimination and then, by claiming that the case is suitably similar, that discrimination based on sexual orientation or gender identity is also morally objectionable. Given the similarity between these two types of movement, those who seek to restrict movement across borders “have to offer a rationale for the human right they do accept (i.e. the right of free movement within the state), and then explain why that rationale does not apply to movement across borders” (Carens 2003, p. 239). The case for a cantilever argument when discussing freedom of movement is a powerful one. As highlighted earlier, freedom of movement within a state is widely recognised as a human right. Moreover, freedom of movement seems to be as instrumentally valuable as domestic movement given that the reasons that someone may wish to move within a state also apply to international movement.

For those seeking to refute this argument, at least two avenues are open. Firstly, they could either argue that despite outward appearances, the cases of domestic and international movement are not sufficiently similar to employ a cantilever argument. In doing so, arguing that what appears to asymmetry are in fact two distinct cases. That is, liberal egalitarians advocating for border controls must demonstrate that state borders are morally relevant (Ibister 2000, p.630), or alternatively that there are costs associated with movement across borders which are not present for domestic movement (Carens 2013, p.239). For the time being, this will be left aside and picked up in Chapter 2, where I examine the case for “closed borders”. The reason for doing this is that the central thrust of such arguments is that there are morally relevant features of state borders and the control of the contours of movement that mean that there is in fact a disanalogy between domestic and international movement which undermine the applicability of a cantilever argument.

Alternatively, some theorists have argued that what is important when discussing important freedoms such as freedom of movement is that individuals possess an *adequate range of options* (see for instance Miller 2007, pp.205-208, 2016a; Pevnick 2011, pp.84-85). Provided that individuals have access to a minimal standard, that they have reached a threshold of adequacy, then others are not placed under any sort of moral obligation to ensure that individuals have access beyond this minimum threshold. When applied to migration, proponents of this argument argue that as long as individuals pass this minimum threshold of adequacy within their own state, then that individual has no vital interest in being able to cross over state borders (for proponents of this view, see for instance Miller 2007, p.207; Pevnick 2011, pp.83-85). In what remains of this section and the next, by

drawing on Oberman (2016) and Song (2018), I will seek to establish that the *adequate range* options is problematic and ultimately unsuccessful<sup>45</sup>.

Whilst existing in slightly different formats, the core of the adequate range argument is as follows. States are morally obliged to ensure that people living outside of the state have a sufficient range of options to satisfy basic needs and live a minimally decent life. Beyond this however, states are under no obligation to ensure that those living outside of the state have access to a full range or maximal set of options or freedoms. Because of this, immigration restrictions are permissible to those who have reached this adequacy threshold (Hidalgo 2014a, pp.215-216). Miller articulates this by stating that:

“[I]f we are going to show that migration is a human right, a line must be drawn between basic freedoms that people should have as a matter of right and what we might call bare freedoms that do not warrant that kind of protection. It would be good from my point of view if I were free to purchase an Aston Martin tomorrow, but that is not going to count as a morally significant freedom—my desire is not one that imposes any kind of obligation on others to meet it. In order to argue against immigration restrictions, therefore, liberal philosophers must do more than show that there is some value to people in being able to migrate, or, as their behaviour shows, that they have a strong desire to migrate” (Miller 2007, p.204).

As opposed to a full range of options, Miller argues that, instead, what a person can “legitimately demand access to is an adequate range of options to choose between – a reasonable choice of occupation, religion, cultural activities, marriage partners, and so forth” (Miller 2005, p.196). Whilst individuals may possess an interest in crossing state borders, these interests are at odds with rights that states possess to control access to their territory and institutions (Hidalgo (2014a, p.216). Pevnick follows a similar line when he argues that there is no reason to suspect that freedom of movement extends indefinitely. Pointing to existing, permissible limitations on freedom of movement such as the ability to climb all over the Lincoln memorial or even to drive too quickly on a motorway, Pevnick follows Miller in distinguishing between having a sufficient set of options necessary for a decent *autonomous* life, and a full range of options (Pevnick 2011, p.84).

There are, however, reasons to be suspicious of this, both in individual cases and more broadly (Carens 2013; Song 2018). On an individual case level, the distinction between universal and specific interests is, in part, unsuccessful. Miller, when discussing this, uses two examples, romantic partners and religion, arguing that these should be seen as too generic in character to support a human right (Miller 2013, p. 8). However, on closer inspection the example of religion is problematic. Say for instance the state that I lived in did not allow the practice of Catholicism but did allow Buddhism and Hinduism. Whilst they are in some ways replacements (they all contain philosophical and theological beliefs), they are not interchangeable as someone with faith in a religion likely believes strongly that their faith is the correct one, with the others being incorrect. For adherents of a

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<sup>45</sup> I will explore arguments to argue that there are morally relevant features of state borders that disrupt the employment of a cantilever argument in chapter five of this thesis. The reasons for this is that these arguments are powerful and nuanced and the exploration of these warrants a chapter in its own right. As such, exploring them fully here would not give them adequate merit and would disrupt from the narrative of this chapter. The critique I offer here is more limited as it is centred on the “freedom” and interests of those seeking to migrate, which, I argue, do translate seamlessly between domestic and international movement.

religion, other religious options cannot easily function as a replacement for a religion should one not have access to one's own religion (Song 2018). A similar problem emerges when turning to Miller's other example, romantic partners. Miller misunderstands the importance of particular romantic partners and why having a life with a *particular* partner can be seen as a universal interest, even if this is not the case all of the time. To highlight this, it is worth making the distinction between absolute and relative loss. Whilst, if I have no pre-existing relationship with an individual in another country, the fact that I am unable to cross a border to establish a relationship with this individual is a relative loss as my universal basic interest in having an intimate relationship could still be met in my home country – there are, to put it crudely, still an adequate range of options. But can the same thing be said if one is in a pre-existing intimate relationship? This cannot be sustained and would represent an absolute loss given that I cannot simply substitute a romantic partner with another person with similar characteristics. The distinction between universal and specific interests is not clear cut in these cases.

The adequate range argument, then, faces problems in contexts in which there are no immediately interchangeable options, but what about cases where this is not the case? Perhaps Miller and others would concede the point around religious choice or romantic partners but maintain that other options such as employment, culture or lifestyle choices such as sun seeking resist this criticism. If one has access to, say, an adequate range of sunny beaches necessary for an autonomous life, why should an individual's preference to access additional options on top of their adequate range of options overcome the rights that states claim to control access to their territory?

There are at least two responses to this, both of which give compelling reasons to at least be suspicious of this argument. Firstly, the use of an adequate range argument may have unpalatable implications as it may equally provide a normative justification for restricting freedom of movement domestically (Carens 2013, p.242; Oberman 2016, pp.39-40). If the standard for moral obligation is only to ensure that people have access to a range of options, it is not clear why, in sufficiently large states that movement could not be restricted. Many large states have counties, provinces and cities that have a larger population, as well as access to a wider array of cultural, social and economic opportunities, than many small states. If sufficiency is all that matters, would it be morally permissible to restrict movement beyond that, city, county or province? If the vital interests, or adequate range of options, can be met within those subunits, then by the adequate range argument's own internal logic it would be permissible to restrict movement to those subunits and not the state in which an individual resides (Carens 2013, p.244). However, this does not reflect the current formulation of human rights to freedom of movement, which establishes freedom of movement over the entirety of one's state, not subunits of it<sup>46</sup>. As such, the adequate range challenge fails to offer a successful counter to the cantilever argument, which

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<sup>46</sup> Instead of using the adequate range argument, one could instead attempt to counter the cantilever argument by instead pointing to the relevant moral difference that justifies this asymmetry being between different jurisdictional authorities in a similar way as done by Blake (2001). Perhaps this could be more successful, however it too runs into difficulty. Whilst it is common to think of borders and boundaries in terms of those that exist around and between states, many, if not most, borders are not like this at all. In the contemporary world, individuals are surrounded by a multitude of boundaries that demarcate territory and membership, even if they are open (Wellman and Cole 2011, p.302). To utilise the example highlighted by Phillip Cole, the UK is comprised of "the national regions of England, Scotland, Wales, and Northern Ireland, which themselves consist of counties, and there are local authorities below that level. All have political authority determined

demands justification of the asymmetry between internal freedom of movement and the movement between states (Carens 2013, p.244).

Secondly, and related to this first point, we again run into the problem that this cuts against liberal intuitions regarding the presumption of freedom. Whilst Pevnick is right to claim that “freedom” may not extend indefinitely, it would be a mistake to view the extent of “freedom” as based upon some threshold of adequacy, at least not without further argumentation. To highlight this, let us return to Pevnick’s examples of standing on the Lincoln memorial or driving too quickly on the motorway (Pevnick 2011, p.84). These arguments are successful because they either support a greater scope for the exercising freedom despite these representing restrictions of freedom or because they overly burden others with obligations to support an individual accessing these options. Take for instance, a right to free speech. Assuming that this right does not overly burden others with obligations to support access to others’ freedom of speech, there is no reason to suppose that this right extends indefinitely. Any interference with another’s speech would be rightly condemned. However, this is not the case. There are certain costs associated with speech, whether it is the monetary cost of tech companies hosting servers so that people can post and share opinions on social media platforms, or the potential societal cost of hate speech or the deliberate misinformation on the efficacy and safety of vaccines during a public health emergency. I do not want to say that prohibiting hate speech, spreading disinformation about vaccines, or even shouting fire in a crowded theatre is not controversial, only that the justification for restriction of this is lighter than say a blanket ban on speech regarding political subjects. Where weighty obligations are placed on others, it is necessary to ask whether what these obligations secure is worth the cost that is imposed upon obligation holders.

Does this apply to freedom of movement in this way? It may do but notice here that arguments based in some threshold of *adequacy* are most successful when pointing to limitations raised when “individual freedom” competes with others’ exercising of freedom, or through the placing of overly burdensome obligations on others. Because of this, is the focus really on adequacy? Instead, it seems as though the main thrust of these arguments really relies upon the way in which rights conflict and may generate burdensome obligations on others when these rights are already being adequately supported in one location. Or, in other words, the concern related to adequacy around a right to subsistence is really a concern related to the obligations that this places on others. The result of this is that a right to subsistence supports access to adequate foodstuffs and not that others provide an individual with an unlimited amount of choice related to foodstuffs because the burden that this would place on others would be too great. As a result of this, assuming a position of closed borders is difficult to sustain. Rather, the value placed upon freedom of movement and liberal intuitions regarding freedom instead appear to point to holding a position of open borders as being the starting point to any discussion related to how “open” or “closed” borders should be with restrictions justified from this position. This does not mean that there is symmetry between domestic and international movement, only that the burden of proof is shifted. Here, if a

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by democratic voting, and have tax-raising and other powers, and so depend on a political membership with duties and obligations, and all have a territorial boundary. But none of them has the right of exclusion” (Wellman and Cole 2011, p.302). From this, it appears less than clear how an argument based upon different jurisdictional authorities would ground a departure from the cantilever argument.

right to exclude can be grounded, it must exist in either costs being incurred that do not exist at the domestic level, or because of competing moral obligations<sup>47</sup>.

In short then, unless there is in fact a morally relevant feature of state borders<sup>48</sup>, it seems that the same constitutive, instrumental and intrinsic reasons support a right to freedom of movement and that objections based upon an adequate range of options is unsuccessful. Given this, liberals are left with strong freedom-based reasons to consider international freedom of movement to be a human right.

## **Section 2: Democracy and Open Borders: Coercive Border Controls and Democratic Theory**

Having explored the case for open borders grounded in freedom, we may now turn to a second positive case for open borders, the “democratic case” that has been developed by Abizadeh (2008, 2010). *Democratic* arguments seem to pull in both directions and have been used to support both a “right to migrate” and a “right to exclude” (see for instance Abizadeh 2008, 2010; Cole 2000; Song 2018a). On the one side, the view that there exists a tension between liberalism and democratic theory is widespread enough that Cole, usually a defender of open borders, argues that democratic theory cuts against the liberal case for open borders: “[liberal egalitarians] believe that the moral equality of persons... [sets] limits to self-determination; some matters can rightly be held to lie beyond the scope of the democratic powers of any body of people” (Cole 2000, p.184). This tension is captured by Cohen, who argues that liberalism on the one hand is “universalising and inclusive but apolitical and individualistic”, whereas democracy is “political, internally egalitarian and uniform but externally exclusive and particularising” (Cohen 1999, pp.245-268). On the other side, democratic arguments for open borders may be found in responses to what Frederick Whelan (1988) has dubbed the *boundary problem in democratic theory* – the problem of how the boundaries of a democratic community should be set.

Democracy is widely understood as rule by the people. However, Abizadeh argues that the question of who should constitute the “demos” and by extension to whom democratic justification is owed, gives strong reasons for favouring a position of open borders (Abizadeh 2008). Looking beyond the equivalency between the demos and the state, political theorists have turned to democratic theory to for answers to the boundary problem. One principle that has been advanced has been the *all-affected interests* principle, the idea that anyone whose interests are affected should have a say in making that decision (see for instance Shapiro 1999; Young 2000; Gould 2004; Goodin 2007)<sup>49</sup>. Another, which has been directly applied to the question of border policy, has been the coercion principle; the idea that those who are subject to the coercive power of the state should be included in the decision-making process about how that state power is wielded (Lopez-Guerra 2005, Abizadeh 2008, 2010). Both principles are grounded in the liberal emphasis on individual autonomy. Coercion is normatively significant as it may undermine autonomy; “whenever coercion takes place, one will is subordinated to the other. The coerced is no longer a completely independent agent” (Dworkin 1970, p.267). As coercion represents

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<sup>47</sup> What this may be will be explored in detail within chapter two, where I examine the case for “closed” borders directly.

<sup>48</sup> Again, what this may be will be the focus of Chapter Two.

<sup>49</sup> This however runs quickly into what Goodin (2007) calls a problem of coherence. Those affected by a decision depends on what decision is made, and the decision that is made is determined by who is constituted within the demos (Goodin 2007, especially p.52). Although it should be noted that the all-affected principle has been defended by theorists such as Owen (2012).

an invasion of autonomy, it stands in need of *democratic* justification for democratic theorists (Lopez-Guerra 2005, Abizadeh 2008). As border controls are, at least at first sight, coercive, Abizadeh argues that democratic justification for these controls is owed to both members and non-members (Abizadeh 2008). As Abizadeh puts it, “democratic theory either rejects the unilateral right to close borders or would permit such a right only derivatively and only if it has already been successfully and democratically justified to foreigners” (Abizadeh 2008, p.39). For Abizadeh, border coercion is problematic, as options available to non-members, such as the ability to live and work where they please, are coercively limited and, crucially, they have no chance to take part in the political process that would legislate or justify those controls (Abizadeh 2007, 2008, 2010).

How effective is this argument? A number of objections have been raised to the boundary problem implying a position of open or joint control over borders. The first of these, which features in prominent debates between Miller (2010) and Abizadeh (2010) is whether border controls are *actually* coercive. Miller seeks to avoid the externalised effects of border coercion by arguing instead that border restrictions are not coercive at all. Instead, he makes a distinction between *prevention* and *coercion* (Miller 2010). For Miller, coercion involves “forcing a person *to do* some relatively specific thing”, and prevention involves “forcing a person not to do some relatively specific thing while leaving other options open” (Miller 2010, p.114). For Miller, border controls do not trigger the justificatory demand that need to justify coercion as a threat to individual autonomy, as they only limit certain options but do not coerce. Does Miller’s argument hold up?

Coercion has received sustained attention within political theory from at least the late 1960s with the work of Robert Nozick (1969) and Gerald Dworkin (1970). For Dworkin, coercion is normatively significant due to the involuntary nature of actions performed under the influence of coercion (Dworkin 1970, p.267). Nozick however, developed what has been dubbed the ‘pressure-based’ account of coercion in which coercion takes place when one agent makes another perform an action against their will by putting pressure on them by means of threats (Nozick 1969, p.441-455). For Nozick, for coercion to occur, there needs to be a coercer and a coercee. The coercer threatens a particular action if the coercee does, or refrains from doing, a particular activity. In this instance, the coercer makes the threat with the purpose of getting the coercee to do, or refrain from doing, a particular action, and the coercee knows that failure to act in line with the coercer’s threat will result in a situation that is less desirable than compliance with the coercer’s threat by acting, or refraining from acting, in a certain way. As a result of this, the coercee does not do<sup>50</sup> the activity highlighted by the coercer due to the desire to avoid or lessen the sanctions threatened that the coercer would bring about (Nozick 1969, pp.441-455). The key aspect of this pressure-based account of coercion is that it operates on an agents ‘will’, not through violence, through the utilisation of a threat of sanction which may include the threat of violence (O’Neill 2000, p.82). By employing propositional threats, a coercer seeks to alter the behaviour of others.

On closer inspection, Miller’s assertion that border controls are not coercive is flimsy. Prevention forms an integral part of coercion and indeed is the principal mode that defines coercion, as the act of preventing a person from acting on possible alternatives shapes what is “practically necessary for the coercee”, as “inducement to

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<sup>50</sup> Or does do.

perform specific acts typically follows on the ability to prevent many or even all other acts” (Anderson 2010, p.9). Preventing a person from relevant alternatives “entails the power to shape and define the institutional context of the coercee and can be imagined [as] a path where all branch-offs are blocked” (Bloom and Risse 2014, p.68)<sup>51</sup>.

In this discussion, however, we see the beginnings of the second criticism which has been levelled at the democratic case for open borders: whether border coercion may be seen as functionally similar to the coercive relationship that exists between the state and the citizen and whether it requires the same level of justification (Song 2018). Rather than argue that some forms of coercion can be imposed unilaterally and without reference to the welfare of those being subjected to it<sup>52</sup>, Song argues that a better way of capturing the distinction between state coercion and border coercion is to view coercion as a problem of degree, with different degrees of coercion requiring greater or lesser justifications (Song 2018, p.71). Song argues that as a member of a state is subject to the entire coercive legal apparatus of that state, with internal state coercion affecting all aspects of a member’s choices, the justification owed must be correspondingly weightier than the more limited outwards directed coercive interference directed towards non-members that limits access to particular institutions and territory only (Song 2018, p.72). From this, Song goes on to argue that non-members are owed ‘some’ justification, but that that justification need not be as weighty given that it is less pervasive, affects less options, and because of this has a lesser effect on autonomy (Song 2017, p.41; Song 2018, p.72).

Does this weaken the democratic case for open borders? Whilst at first sight at least border coercion is often far less extensive than ordinary state coercion<sup>53</sup>, in Chapter Three of this thesis we shall see that this is not always the case. An examination of internalised border coercion and particular border policies that externalise the

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<sup>51</sup> To highlight this, it is worth turning to several examples. Firstly, let’s return to the classic example of the highwayman who makes the threat ‘your money or your life’, but make some small modifications. Let’s say that the highwayman looks worse for wear and before the threat is made, the traveller decides to give the highwayman the money that they are carrying so that the highwayman can get a warm meal and a room for the night, however before they are able to do so the highwayman makes the threat. Let us also say that this traveller is of a more benevolent spirit than most, perhaps recognising that the highwayman is making this coercive threat out of desperation and gives her money to the highwayman in line with her initial intentions. Is the traveller subject to coercion by the highwayman? How about the person who doesn’t share a political opinion in public because they don’t hold that opinion and have no intention of voicing it in a political community that bans certain political opinions in public, or, what about the person who pays their taxes because it is socially responsible rather than the threat of fines or imprisonment? Or what about the happy slave who is content in their bondage, is not mistreated by their owner and is given an adequate range of options but is nonetheless under the threat of punishment if he seeks to escape? Are they subject to coercion? In each of these examples, the answer, surely, is yes. In all of these cases, whether the threat was justified or not, being subject to coercive threats always invades an agent’s autonomy in three ways corresponding to Raz’s three conditions of autonomy, ‘appropriate mental abilities, an adequate range of options, and independence’ (Raz 1988, p.372). Firstly, being subject to coercive threats has the potential to destroy, or hinder the development of the requisite mental capacity (Abizadeh 2008, p.40). Secondly, and in each of these examples, being subject to coercive threats reduces options that would otherwise be available. Whilst it is true that the reduction of available options does not necessarily impact autonomy provided that individuals are left with an adequate range of valuable options (Raz 1988, pp.373-377), interference with an individual’s life options stands in need of justification. And thirdly, coercive threats always interfere with autonomy by interfering with an individual’s independence as it subjects that person to the will of another (Raz 1988, pp.377-388; Abizadeh 2008, p.40). In all of these examples then, the issuing of a coercive threat is sufficient to count as coercion irrespective of the dispositions of those subjected to them as it both interferes with a person’s freedom in the negative sense by reducing the options available to them, but also by treating them as less than an autonomous agent.

<sup>52</sup> Or, alternatively following Miller in arguing that follow Miller in arguing that border coercion is not an example of coercion but is preventative (Miller 2010).

<sup>53</sup> Abizadeh himself acknowledges this (Abizadeh 2008, p.54)

border reveal that border coercion may at times be far more pervasive than ordinary state coercion (see for instance Aas 2014). However, this is the result of particular bordering practices of states and not as a result of holding to an idealised conception of border exclusion. Absent competing concerns then, the democratic case for open borders provides us with strong reasons for requiring border policy to be justifiable to non-members.

### **Section 3: Justice and Open Borders: Moral Equality and Equality of Opportunity**

The third direction employed by liberal theorists such as Carens (1987)<sup>54</sup> is connected to, but conceptually distinct from, the previous two arguments, and is based in the concept of justice. As part of this, Carens connects liberal concerns for moral equality and equality of opportunity to freedom of movement (Carens 1987, 2013). Concern for moral equality and equality of opportunity are pivotal to any discussion on migration because of their central role in egalitarian liberal political theory. It is a recurring theme within liberal theories of social justice that it is inequitable if people are treated differently because of morally arbitrary factors beyond their control (Wellman and Cole 2011, p.180). Within Western, democratic states, liberals recognise that, at least in principle, social and economic status should not be determined on the basis of morally arbitrary factors such as one's gender, sex or ethnicity. This concern for equality of opportunity is intimately tied to the idea of moral equality due to the recognition that there are no natural social hierarchies that would entitle particular social groups to occupy advantageous positions (Carens 2015).

Why may exclusionary border controls be problematic to liberal commitments to moral equality and equality of opportunity? In short, because of the social, economic and political opportunities afforded by the possession of citizenship. This is perhaps best captured by an analogy first made by Carens in 1987, but developed in latter works in the analogy with "feudal privilege". Given the force of this analogy, it is worth laying out Carens' analogy (almost) in full.

"In many ways, citizenship in Western democracies is the modern equivalent of feudal class privilege – an inherited status that greatly enhances one's life chances. To be born a citizen of a rich state in Europe or North America is like being born into the nobility (even though many of us belong to the lesser nobility). To be born into a citizen of a poor country in Asia or Africa is like being born into the peasantry of the Middle Ages (even if there are a few rich peasants and some peasants manage to gain entry to the nobility). Like feudal birthright privileges, contemporary social arrangements not only grant great advantages on the basis of birth but also entrench these advantages by legally restricting mobility, making it extremely difficult for those born into socially disadvantaged positions no matter how talented they are or how hard they work... Reformers in the Middle Ages objected to the way feudalism restricted freedom, including the freedom of individuals to move from one place to another in search of a better life... Modern practices of state control over borders tie people to the land of their birth almost as effectively. Limiting entry to rich democratic states is a crucial mechanism for protecting birthright

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<sup>54</sup> Also the third "positive" argument presented for open borders.

privilege. If the feudal practices protecting birthright privileges were wrong, what justifies the modern ones?" (Carens 2013, p.226).

This analogy is particularly forceful given that borders seem to contradict liberal commitments to moral equality and equality of opportunity in at least two different ways. Firstly, as we have seen above and emphasised by Carens, within democratic states, we recognise that access to social and economic opportunities should not be determined by one's morally arbitrary birth-related characteristics such as class, race, sex, gender, or other characteristic that has no impact in one's ability to perform equally well in that position (Carens 2013, p.227). This is intimately tied to the idea that each individual is of equal moral worth – that there are no natural hierarchies of birth<sup>55</sup>. For people to access economic and social opportunities, individuals have to be able to move to where these opportunities are<sup>56</sup> (Carens 2013, pp.227-228; Carens 2015). This is part of what grounded Oberman's (2016) case for counting freedom of movement to be a human right, as many of the opportunities that one may wish to pursue are located outside of the country of one's birth. Freedom of movement, then, has instrumental value to moral equality and equality of opportunity. Coercive border controls seem to cut across liberal commitments to moral equality by restricting the opportunities and membership entitlements that are available to people. However, it is the way that these choices and options are limited that makes border exclusion doubly problematic, as one's acquisition of citizenship through birth determines which opportunities are available to an individual.

Secondly, as is also emphasised by Carens, a commitment to moral equality entails some commitment to economic, political and social opportunity (Carens 2013, p.228). Given the extent of global economic inequality, political stability and social and political opportunities, and the role of coercive border controls in reinforcing these<sup>57</sup>, it appears that coercive border controls contradict this commitment. This is made doubly problematic when considering that economically developed states' continued economic prosperity (or at least cheap consumer goods) is often made on the back of taking advantage of cheap labour abroad. Because of this, theorists such as Beitz (1999), Pogge (1989), Richards (1982), Barry (1973, 1989), Brock (2009) and Carens (2013) have employed a modified version of Rawls' Original Position<sup>58</sup> to apply globally rather than within the confines of a political community<sup>59</sup>.

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<sup>55</sup> These commitments directly oppose (and were historically utilised) to criticise positions – such as feudalism – that held that birth entitled one to certain entitlements or benefits.

<sup>56</sup> Although it may be argued – somewhat successfully – that with the emergence of “digital nomads” this requirement to move to be able to access opportunities has been lessened with the emergence of new technologies which enables remote working and studying.

<sup>57</sup> See chapter 6 for an exploration of how coercive border controls reinforce restrictions of freedom.

<sup>58</sup> The Original Position is designed to be a fair and impartial way of considering the principles of justice. In it, individuals sit behind the “veil of ignorance” (they know nothing of their own personal characteristics, capacities, social and historical contingencies or their conception of the good but know about their fundamental interests) and are asked to choose principles of justice (Rawls 2005b). Rawls argues that individuals in this sitting of the Original Position will choose two principles of justice. The first of these is that every individual should have equal basic rights and liberties needed for individuals to form and pursue their own conception of the good. The second of these is that any social or economic inequality must be arranged so as to benefit the least well-advantaged in society (Rawls 200b).

<sup>59</sup> Rawls does this for a number of reasons. First, the theory of domestic justice focuses on the basic structure of society, so when formulating justice between societies it is reasonable to presume the existence of societies and the principles of justice

Many of the reasons that make the Original Position useful when talking about domestic justice are useful when thinking about global justice (Pogge 1989; Beitz 1999). In our interconnected world, people from far flung places interact through migration, trade and conflict, raising many of the same questions of whether the background conditions of these interactions are fair (Beitz 1999). Given the vast extent of global economic inequality, why shouldn't an individual's location of birth not also be included in this list of morally arbitrary factors? After all, borders are morally arbitrary in two senses, where they fall geographically and on which side of a border people happen to find themselves (Wellman and Cole 2011, p.180). The modern US borders are the result of wars of conquest, whether against Mexico or native Americans, and agreements with other colonial powers; the UK's and France's the result of conquest, defeats in war and the vagaries of feudal dynastic practices, and those in the Middle East and Africa the result of agreements between colonial powers. Modern state borders rarely neatly align with national groups and where one is born in relation to them is an accident of fate. As John Rawls states, "[w]hat the theory of justice must regulate is the inequalities of life-prospects between citizens that arise from social starting positions, natural advantages and historical contingencies" (Rawls 2005b, p.56). At first sight, it seems clear that the side of a border on which one is born is one such of these contingencies (Pogge 1989, p.246). Being born on one side or the other of the US-Mexico border plays a large role in determining one's life prospects, given that being born on the US side of the border gives a GDP per capita income of \$63,413, and on the Mexican side \$8,329 (World Bank 2022). Coercive border controls, then, appear to cut against liberal commitments to moral equality by aiding in the entrenchment of absolute (and relative) inequality. At the core of this argument is that the accident of one's nationality does nothing to alter one's moral status and what one deserves as a human, even if states may be the most suitable way of organising and supporting rights (Bloom 2009, p.232). To resist the presumption of freedom of movement given the moral arbitrariness of borders in determining life prospects, one must demonstrate that borders are, despite appearances, morally relevant in some sense.

Taken together, if we are to be consistent with liberalism's deeply held commitments to moral equality and equality of opportunity, then coercive border controls are deeply problematic against the backdrop of relative and absolute inequality. If we are to be consistent with liberal commitments to moral equality and moral opportunity, then social, political and economic institutions of opportunity that perpetuate relative and absolute inequality, as appears to be the case with coercive border controls that are targeted towards the least well-advantaged, must be rejected, or, at the very least, the onus for justifying these must rest with those seeking to implement exclusionary border practices.

#### **Section 4: Conclusion**

The case for open borders is a strong one. These three arguments are powerful in their own right, are mutually supporting and, at the very least, are sufficient to shift the burden of justification to those who wish to restrict

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adopted in the sitting of the original position as a starting point (Rawls 2005a). As such, discussing international justice is a discussion of justice between "peoples" (Rawls 2005a). Secondly, Rawls does this to resist the implication that the foreign policy of liberal peoples should be a step-by-step approach to liberalise non-liberal peoples to respect plurality and to resist the claim that only a liberal democratic society is acceptable (Rawls 2005a; Chen 2023).

movement through borders. In other words, they are strong enough to show that if liberal democratic states are to be consistent with their self-professed commitments to freedom, democracy, moral equality and equality of opportunity, enforcing coercive border controls on the basis of an appeal to sovereignty is insufficient. Border restrictions restrict multiple freedoms of both non-members and members alike; however, these restrictions are not made in reference to increasing the overall liberty of those that are affected. We have compelling constitutive, instrumental, and intrinsic reasons to hold freedom of movement to be a human right and that the reasons for supporting this as a human right in a domestic setting translate to movement between states. Democratic understandings of popular sovereignty demand that democratic justification is owed to those who are subject to coercive laws. Further, the role that one's citizenship plays in determining one's life prospects appears to be as morally arbitrary as other morally arbitrary factors such as one's race, sex or sexual orientation. Each of these arguments builds upon and supports the others.

Whilst none of these arguments are "weak", there are however places that they are weaker. Whilst the democratic case for open borders may provide compelling reasons to believe that justification is owed to non-members, it is unclear why this should fundamentally alter the shape and scope of the demos considering that (at least ideal) border coercion is lesser than state coercion. Given this, it is unclear why all non-members subject to border coercion should be included within the demos as their inclusion would involve their input in the creation of laws to which they are not subject. For Habermas, democracy rests on the concept of self-legislation which "requires that those subject to law as its addressees can at the same time understand themselves as authors of law" (Habermas 1996, p.120), but non-members, at least at first sight, are not subject to full state coercion; that is, they are not subject to the full range of coercive law that regulates the lives of members. If this is the case, whilst non-members would appear to be owed justification for the formulation of border policy, it is less clear that this would require inclusion in the demos (Song 2018a). At best, it seems that democratic arguments for open borders give us reason to justify border restrictions to non-members but not, without further development, inclusion within the demos. As we shall see in Chapter Three, however, a closer examination of the way that borders function will reveal that this is not always be the case. If borders, in certain circumstances, pose a greater degree of coercion, then the justification needed to support them will be greater, and if their coercive interference is lesser, the justification needed to support them will be correspondingly lesser.

A second area that has been alluded to throughout these discussions is that whilst these arguments give us strong reasons to believe that a position of open borders better reflects liberal and democratic intuitions, each of these arguments rests upon the assumption that borders are not morally relevant or that the morally relevant features of state borders are not sufficiently weighty to justify the restriction of movement through borders. Whilst theorists are right to draw attention to the value of freedom of movement, the cantilever strategy employed to extend this from domestic to international movement rests upon the assumption that there is moral equivalency between domestic and international movement. Likewise, if there are morally relevant features of borders that generate special obligations with compatriots, whilst still being compatible with the principle of moral equality, then it is a mistake to include the location of one's birth amongst that list of morally

arbitrary factors, even if we should remain concerned with relative and absolute inequality across borders<sup>60</sup>. There may be obligations involved in securing international freedom of movement that are not present when discussing domestic freedom of movement. Borders may protect the freedom of members, secure democratic rights or aid in securing the conditions for justice within a given territory. If this is the case, then the cantilever argument that is contained within the case for open borders, based in freedom and justice, may be less successful than implied by those theorists who utilise it. What these “morally relevant” features of state borders may be and the control of the contours of membership will be the focus of the next chapter of this thesis.

Whilst some readers may be sceptical of the conclusion of open borders that these writers advocate, I have sought to highlight the strength of these arguments in this chapter. A position of open borders rather than closed borders better reflects liberal intuitions about individual freedom. Because of this, border exclusion stands in need of justification. It is a mistake to view borders as some moral watershed, beyond which the demands of justice are silent.

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<sup>60</sup> In Chapter Four of this thesis, I will argue that this is a problem with the arguments presented in favour of open borders that leads these theorists to provide an overly narrow response to the questions of “what constitutes freedom” and “whose freedom” (or at least that no sufficient argument is given as to why the freedom of members or non-members should matter more) which leads them to overstate the case for open borders.

## Chapter 2: The Case for Closed Borders

In popular debates surrounding migration, it is common for people to assume that states possess the right to exclude immigrants as an inseparable component of state sovereignty (Bosniak 1991, p.737; Weiner 1996; Blake 2013; Song 2018a). Debate instead focuses on how closed borders should be. Such an assumption is not hard to make given that contemporary states create and enforce their own border policies according to their own whims, with the only small concession in international law being that those deemed to be fleeing persecution should be granted admission. The arguments examined in the previous chapter of this thesis have shown why the state sovereignty view is, however, is problematic when it comes to justifying selective border regimes. If we are to take liberal and democratic commitments to individual freedom, moral equality and equality opportunity, and democratic legitimation seriously, an appeal to state sovereignty is insufficient to ground a “right to exclude”. Concerns for the asymmetry between domestic and international movement, the impact that morally arbitrary<sup>61</sup> borders have in determining one’s life prospects, and democratic legitimacy all provided compelling reasons to adopt a position of open borders. Given this, should we then abandon the notion that states have a right to exclude? Is the liberal egalitarian case for open borders sufficient to show that many peoples’ intuition that states should possess control over who is admitted and who is excluded is mistaken? Whilst the case for open borders may be sufficient, to accept this position without exploring how borders may be morally relevant would be too quick. State borders may protect freedom and generate special obligations between states and their members.

The purpose of this chapter is to lay out the countervailing liberal case for closed borders. A theme that arose throughout the first chapter of thesis was moral symmetry – the idea that morally similar cases demand morally similar treatment. The liberal case for closed borders rests upon the claim that there are morally relevant features of states borders that mean that there is in fact asymmetry between domestic and international movement. Rather than simply appealing to the concept of sovereignty, these theorists have highlighted how the democratic control of the boundaries of membership supports the freedom of members, whether in terms of individual or collective self-determination (Walzer 1983, Miller 2016, Wellman 2008, Pevnick 2011). This is not a small concern. After all a commitment to a right of collective self-determination is widely held to be an inseparable and integral part of liberal political philosophy in which the consent of the governed is generally presumed to largely determine the legitimacy of state power. In examining these arguments, I seek to bring into sharper focus the role that control of movement through borders plays in supporting members’ individual and collective freedom in ways that can compete with the freedom-related claims of non-members. After all, to sustain a position of open borders, it is necessary to demonstrate that competing concerns are insufficient to override a concern for the freedom-limiting aspects of border regimes (Sager 2020, p.60).

To do this, this chapter will be split into four parts, which correspond to the three most prominent arguments put forward for states’ right to exclude: associative ownership, freedom of association, and continued access to

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<sup>61</sup> And by arbitrary here, I mean only that the location that an individual is born in relation to borders and the way in which individuals acquire membership at birth, whether *ius soli* or *ius sanguinis*, or some other way, is morally arbitrary. Not that there are no morally relevant features of state borders.

a shared culture – each of which draws upon concepts of individual and collective self-determination. In section one, I will explore the case for exclusion based upon Lockean notions of property. In section two, I will examine the case based upon freedom of association, and in doing so, highlight that whilst it is perhaps intuitively appealing, a right to exclude based upon freedom of association alone is a shaky footing on which to ground a right to exclude due to conflicts between individual and collective associative rights. In section three, I will explore the demand for shared culture as the basis of a right to exclude. Finally, in section four, I will bring these arguments together, arguing that whilst claims based on associative ownership are ultimately unsuccessful, a right to exclude may be grounded on a direct appeal to collective self-determination and on an appeal to a “thin” conception of national or societal culture.

### **Section 1: Ownership and Exclusion**

Theorists such as Cara Nine (2008) and Ryan Pevnick (2011) have appealed to Lockean property arguments to defend territorial rights (Nine 2008) and establish why collective associations possess a right to collective self-determination. They contend such a right extends to decisions on whether to admit new members (Pevnick 2011). Both theorists utilise a collectivist account of property. Whilst traditional Lockean accounts of territorial rights have been understood in terms of individual property, Nine extends this by arguing that states acquire property rights analogously to the way that individuals acquire property rights (Nine 2008). According to Nine, states acquire a right to territory when they are “capable of changing the land, thereby creating a relationship with it”, and the relationship that is created is “morally valuable – established by the Lockean principles of liberty, desert, and efficiency” (Nine 2008, p.155). Nine emphasises that “morally valuable” can be understood in two senses. First, in the creation and enforcement of property rights, which in turn shape how land is developed. And second, in the support and maintenance of markets that assign value to that land and any goods that are produced from it. These arguments rest on the claim that state territorial rights are most effective for protecting and promoting individual liberty and property rights (Nine 2008, pp.157-161).

In a similar vein, Pevnick utilises a collectivist Lockean account but directly applies this to focus on the moral efficacy of exclusion. As part of this, Pevnick argues that by virtue of their individual contributions, members have property rights over their “collective accomplishments”, specifically the public institutions of the state of which they are members (Pevnick 2011, pp.33-36). Drawing on an analogy of a family farm, Pevnick argues that members of a state can be understood to be “joint owners” of the institutions that comprise their state:

“Like the family farm, the construction of state institutions is a historical project that extends across generations and into which individuals are born. Just as the value of a farm very largely comes from the improvements made on it, so too the value of membership in a state is very largely a result of the labour and investment of the community” (Pevnick 2011, p. 38).

It is through these claims of ownership that members have a right to decide which direction these institutions should be orientated towards, including who will be making these decisions in the future (Pevnick 2011, pp.37-38). For Pevnick, much as with the family farm, members raise taxes and invest these in a range of valuable public goods, from infrastructure through to the institutions necessary for the establishment and protecting of

a functioning market, and providing education, with these only existing and continuing as the result of the collective efforts of the members of that community (Pevnick 2011, p.38). It is this type of contribution, Pevnick argues, that distinguishes the relationship between members of a state and non-members. Members of a state should be understood as being part of an “ongoing system of fair co-operation across generations” (Pevnick 2011, p.11), whereas non-members cannot. As joint owners of their state’s public institutions, members are “in a position to legitimately deny membership to some outsiders” (Pevnick 2011, p.53) as their joint ownership enables them to decide the future course of these institutions and who may benefit from those institutions (Pevnick 2011, p. 44).

At play here are two distinct but concurrent claims. Firstly, that associative<sup>62</sup> ownership generates *territorial and jurisdictional rights* for states. And secondly, that associative ownership of state institutions gives a *right of collective self-determination* over them<sup>63</sup>. The first of these is on shaky ground. However, even if this argument is unsuccessful in generating territorial and jurisdictional rights, a right to exclude may still be supported based upon collective self-determination over associatively owned state institutions. To do this, I will discuss issues related to establishing a relationship between property<sup>64</sup> and jurisdictional rights<sup>65</sup>. I will then discuss how these issues are insufficient to undermine the case for a right to exclude based on property by more closely examining what border admission entails. I will then explore how this more limited right of exclusion that can be grounded in an appeal to ownership is resilient to criticisms that have attempted to show that this approach contains an internal and external boundary problem (see for instance Hidalgo 2014).

Let us start with the claim that associative ownership may generate jurisdictional rights. Theorists such as Song (2017, 2018a, 2018b) are sceptical of this claim, arguing that collective ownership accounts such as Nine’s and Pevnick’s blur together property rights and jurisdictional rights. Pevnick, when discussing jurisdictional rights defines “jurisdiction” as a type of claim about ownership (Pevnick 2011, pp.43-44). Following Waldron, Pevnick argues that calling someone an owner of a resource does not convey exact information about the rights that the owner has over that resource but is the starting point of a discussion of the sort of rights that an individual has over it (Pevnick 2011, p.43; Waldron 2004). Whilst Pevnick concedes that jurisdiction cannot be understood as a form of private property, Pevnick holds that jurisdiction can be understood as a type of *collective* property, with jurisdiction being a more expansive form of property right (Pevnick 2011, p.44). Collective ownership affords some discretion on the usage of that property and, given that, the bundle of rights afforded by ownership comes in a variety of shapes; “the state’s right to self-determination is justified by an ownership claim that takes a different shape than the ownership claims that underlie “ordinary” claims of private property” (Pevnick 2011, p.44).

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<sup>62</sup>Perhaps better articulated as “collective” ownership.

<sup>63</sup> Although it should be briefly noted that even if this argument is successful in establishing a right to collective self-determination, further argumentation is needed to show why this would extend to a right to exclude certain individuals.

<sup>64</sup> Property rights are generally thought to contain at least three elements. Firstly, property rights can be said to contain rights of exclusive use, secondly the right to benefit from the resource, and thirdly the right to transfer, rent or exchange a good.

<sup>65</sup> That is rights related to the usage of property and the right to make and enforce rules within a particular area (Buchanan 2003, p.233).

This, to theorists such as Song (2017, 2018b), is a problematic view of jurisdiction as it fails to capture the distinct principles that govern the usage of property and those which govern the control of territory (Song 2017, p.28; Song 2018b, p.42). Collective ownership may provide a bundle of rights over the way that that property is used, but it is less clear that this stretches as far as establishing jurisdiction:

“As the owner of this plot of land, I can use and benefit from it; I can also exclude people from entering it. But my ownership claim does not determine who has the right to make the rules governing my backyard and the backyards of my fellow citizens” (Song 2018b, pp.42)

Much as when users of allotments or homeowners in housing associations come together to agree upon rules governing the use of their property or allotments, this does not give them jurisdiction over their allotments or property. Rather, any agreed upon rules are subject to and superseded by the rules governing the usage of property by the state in which the housing association or allotments are located.

Pevnick would likely respond to this criticism by reiterating that his own account appeals to collective property, not an amalgamation of a group of individual’s property rights. But holding jurisdictional rights as a type of property right may still be seen as problematic, as it is not clear how “morally transforming the land” is sufficient to ground jurisdiction.

Consider the following. State X suffers widespread poverty, due in large part to a large amount of barren land that is unsuitable for agriculture or widespread habitation. State Y invests heavily in State X, and in doing so transforms the previously barren land into arable land that enables communities to live in the area and improve the economic situation of X. Would this grant State Y jurisdiction over that part of State X that it has improved<sup>66</sup>? If a contract had been signed between State X and State Y, it may be reasonable for State Y to acquire some property rights but not jurisdiction. The generation of jurisdictional rights is no less problematic when considering the ‘transformation’ by individuals or groups other than states. Throughout the twentieth century, Song points out that many Korean immigrants moved to the US without speaking English or possessing an ‘American’ culture, but built many businesses, monuments and community centres in Los Angeles, and in doing so transformed the city. Did these immigrants acquire jurisdictional rights over the parts of Los Angeles that were transformed by their culturally expressive labour (Song 2019, p.37)? Whilst this may ground property rights, Pevnick’s claim that jurisdictional rights arise from collective property then runs into difficulties<sup>67</sup>.

Whilst this may be a problematic element of Pevnick’s account, this criticism does not necessarily undermine the case for a right to exclude based upon property rights. Whilst jurisdictional rights and rights of self-determination generated by ownership are certainly linked in Pevnick’s mind, the link between self-determination and ownership is not dependent upon such ownership granting jurisdictional rights. Instead, a

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<sup>66</sup> If so, then it would appear that Pevnick’s account would also justify a form of neo-colonialism in which those who invest take jurisdictional rights (over their newly acquired property) from states in which they have invested.

<sup>67</sup> It should also be noted at this point that Lockean notions of the acquisition of property rights through cultivation have also been used to justify settler occupation and colonisation which may open this account open to normatively troubling implications by offering a justification for these practices.

compelling case for exclusion can be found within the appeal to associative ownership, provided that a slightly different view of what it is to exclude is adopted.

A state's right to exclude, as it is commonly understood, incorporates three conceptually different rights (Coleman and Harding 2010; Wellman and Cole 2011; Kukathas 2011; Fine 2013). Firstly, a right to control access to territory, regulating who has access to the physical space of a state's territory or who may cross into a state's jurisdiction. Secondly, a right to determine who may settle in a state's territory, including who may participate in things such as the labour market. And thirdly, a right to regulate access to membership in a political community on equal terms with existing members (Coleman and Harding 2010, p.20; Wellman and Cole 2011, p.169; Kukathas 2011, pp.327-340; Fine 2013, p.255). This basic list has been broken up in various ways. Coleman and Harding, for instance, break this down further by instead focusing on the types of goods to which states regulate access, such as employment, emergency services, socioeconomic resources, and permanent membership (Coleman and Harding 2010). However, as many of these are often viewed as falling under the umbrella of access to territory, participation and membership, it is perhaps more helpful to see these three rights as containing a bundle of different forms of access.

Access to territory is primarily centred around the freedom to move around public space in the receiving state. However, there is more to it than this. By gaining access to territory, even on a temporary basis, the receiving state also becomes the primary legal guarantor of that person's human rights for the time that they are present in that state's territory. Similarly, being granted access to settle within a territory removes time limits on territorial access<sup>68</sup> as well as granting rights to access that state's labour market and to draw on commonly held socioeconomic resources. And finally, the right to membership may also be seen as containing a bundle of different forms of political access. Whilst membership rights are primarily centred around being granted a say in collective decisions on the same terms as existing members, they also involve the removal of precarity. Going hand in hand with formal citizenship comes the recognition that access is, at least in theory, permanent and that upon the granting of membership comes a legal protection against deportation<sup>69</sup> and other forms of precarity which can result from uncertain status such as access to employment<sup>70</sup>.

On a more limited reading, where associative ownership is centred around access to, setting the direction of and receiving the benefits of jointly owned institutions, the associative ownership account may be more resilient than its critics claim. The case for a right to exclude based upon associative ownership is at its strongest when

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<sup>68</sup> At least in principle, if not always in practice given that many have time-limited rights to remain based upon employment,  
<sup>69</sup> It is, however, perhaps worth tentatively adding another to this list, that appears implicitly claimed by states but is poorly articulated - the right to determine who may make claims of entry to the receiving state. This will perhaps need a little bit of unpacking. This will be more thoroughly explored within Chapter Three, however a variety of contemporary bordering practices (such as Operation Sovereign Borders, offshore detention facilities and the UK's Rwanda policy) are all designed to prevent migrants from either reaching their territorial borders or closing off 'permissible' routes of entry. Whilst assigning definitive motives across a variety of cases is an inherently problematic endeavour, especially given that in each of these cases there are likely to be multiple motives used for justifying individual policies, it is plausibly possible to tentatively assign the common motive of seeking to limit a states' obligations towards non-members. In creating policies that create "desirable" and "undesirable" migrants that are unable to effectively bring their claims to state borders.

<sup>70</sup> Or unscrupulous employers that utilise a territorially present migrant's uncertain status to impose exploitative working conditions.

discussing certain forms of exclusion, namely membership. If members are joint owners of state institutions, then even if this ownership may not clearly confer jurisdictional and territorial rights, members may still possess a bundle of rights over the institutions of which they are collective owners, including a right to collectively determine who the benefits of these institutions are shared with. In this sense, then, the appeal to ownership should be understood in terms of private property. Just as you may legitimately deny me access to your pension, salary or residence, or decide how *your* goods will be used, so too may associative owners decide how collective goods are used. Likewise, the shareholders of Microsoft may deny me dividends from Microsoft's profits or deny me a say on the future the direction of the company. For the same reasons, members of a state deny a non-member access to their social security, healthcare programmes or input into how the public purse will be used.

From this starting point, a more recognisable right to exclude may be established by examining the costs and obligations that are generated when other forms of admission are granted. As the preceding discussion has sought to show, access to territory and participation may generate costs and obligations for existing members<sup>71</sup> (Blake 2014). Access to territory even for a limited period requires the receiving state to take on certain legal obligations and responsibilities for the duration of the time that migrants are territorially present. These obligations may be considerably broader when considering those that settle in their territory and may require members to use the "benefits of their labour" to meet these new obligations<sup>72</sup> (Blake 2014). A right to exclude may be extended from membership to deny access to those who seek "to gain access to a set of goods to which they are not entitled" (Pevnick, 2011, p.60), but not "those who seek territorial access just for the sake of territorial access" (Pevnick 2016, p.60).

Before accepting that associative ownership may generate a right to exclude, it is worth considering one final problem: that it contains an internal and external boundary problem (Hidalgo 2014). Theorists such as Hidalgo have sought to highlight that the way that owners acquire ownership may include or exclude many who would either be considered to be members or non-members (Hidalgo 2014). Let us consider the external boundary problem first.

If it is by virtue of the economic contribution to state institutions that generates associative ownership, there is a powerful *prima facie* case that many non-members should also be viewed as associative owners. If so, this would reshape a right to exclude in a way that would not extend to non-members who economically contribute. To highlight this, consider the following case set put forward by Hidalgo: A Turkish businesswoman owns a company that exports goods to Germany, and, having family members in Germany, she regularly visits and sends them money. To do this, this business owner pays tax in the form of import duties to the German government, and when visiting her family, she obeys German law whilst within Germany's jurisdiction (Hidalgo 2014, pp.267-268). As this business owner contributes resources in the form of taxes and obeys the law, it would appear that the business owner should also be considered a joint owner in the same way as German citizens. Because of

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<sup>71</sup> Although these costs and obligations may be offset by migration aiding states meet existing obligations or by the economic benefits of migration.

<sup>72</sup> Again, it is worth emphasising here that whilst admission may generate obligations, it would be overly simplistic to view these as a burden given the contributions that new members make to receiving societies.

this, it would seem that the German government violates the business owner's rights as a joint owner if they prevent her from relocating to Germany and participating in decisions relating to the future direction of Germany's public institutions (Hidalgo 2014, p.268).

A similar problem appears to exist when looking inwards. Children, at least children who are not old enough to work, not only do not contribute in the way that Pevnick argues would confer joint ownership but, at least until they start to contribute themselves, are a drain upon the public institutions<sup>73</sup>. Perhaps this case could be addressed by viewing the resources spent in education as an investment spent on the future maintenance of institutions. However, at best this seems to be only partially successful as it fails to adequately distinguish between the non-contributing children of members and non-members who either wish to contribute or are already doing so in a similar way to the Turkish businesswoman.

Indeed, this may actually be more problematic on closer inspection, as not all members have the capacity to contribute in a way that would confer associative ownership, whether due to disability or illness. Would it be permissible to deny membership to these individuals? Pevnick himself anticipates this internal boundary problem and goes some way to addressing this problem by placing limits on the claims of ownership. Pointing to an example of a "disliked minority", Pevnick argues that denying membership rights to the children of a "disliked minority" fails to respect that the 'disliked' group are already joint owners, which is sufficient to outweigh ownership claims (Pevnick 2011, p.64). However, in referring to the interests of the "disliked group" who would be excluded, Pevnick argues that "the claims of ownership are dwarfed in importance by the interest these children have in being accepted as full members of the political community" (Pevnick 2011, p.65). By addressing the internal boundary problem in this way, Pevnick highlights that claims of self-determination come with important limits, or put another way "[t]o say that citizens have claims of ownership over state institutions is not to say that such claims are absolute or that they cannot be outweighed by the claims of outsiders" (Pevnick 2011, p.66).

However, these boundary problems are less problematic than they first appear when considering the types of contribution that may generate associative ownership. Pevnick himself is a little vague about what type of contribution may generate ownership, but points to two distinct (but not mutually exclusive) types of contribution that may ground associative ownership. The first of these, and the focus of this internal boundary critique, is a focus on economic contribution (Pevnick 2011, p.33). That is, that it is by virtue of one's economic contributions through labour and the paying of taxes that grants an individual associative ownership. However, this is not the only type of contribution that Pevnick points to, and the other, which is far more resilient to this critique, is contributions qua citizen (Pevnick 2011, p.53). Whilst Pevnick clearly leans more towards the first of these two types of contribution, he also points to adherence to the law as an alternate means of contribution that may ground associative ownership (Pevnick 2011, p.33). Directly drawing on Rawls, Pevnick argues that contribution should also be understood in terms of "the shared contributions of citizens to a framework of publicly provided goods gives each a legitimate stake in the success of their compatriots" (Pevnick 2011, p.53).

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<sup>73</sup> Such as through the requirement for public funding in order for them to be educated.

Whilst the cases of the Turkish businesswoman and those that have disabilities are problematic in terms of economic contribution as the basis of associative ownership, it is less clear that these cases raise boundary problems when contribution is based (at least partly) in terms of cooperation qua citizen. In the case of the former because the non-member does not contribute qua citizen and in the latter because they do. Whilst the Turkish businesswoman may adhere to aspects of German law, by ensuring that their goods and services meet German import regulations and paying import taxes, they do not have to obey the full range of German law<sup>74</sup>. However, whilst this may go some way to resolving the external boundary problem, it contributes to the internal boundary problem. The vast majority of tourists and other visitors to a state also obey the law in the places that they travel. Should they be included as associate owners? Neither viewing ownership as stemming from economic contributions or qua citizen are capable of resolving this boundary problem.

In summary, appealing to associative ownership may ground a right to exclude centred on membership but it is plagued with problems that ultimately make it difficult to generate a *recognisable* right to exclude on this basis.

## **Section 2: Freedom of Association and Collective Self-Determination**

### *2.1.1 Freedom of Association*

A second argument that seeks to justify a right to exclude is premised upon freedom of association (Wellman 2008, 2011; Altman and Wellman 2009; White 1997). This argument is perhaps most clearly articulated by Christopher Heath Wellman who draws attention to the relationship between collective self-determination, freedom of association and exclusion (see for instance Wellman 2008, 2011 and with Cole 2011). Starting from the premise that legitimate states possess a right to self-determination, Wellman argues that an integral aspect of self-determination is the right to associate (or not associate) based upon the “the widespread conviction that each of us enjoys a privileged position of moral dominion over our self-regarding affairs, a position which entitles us to freedom of association” (Wellman 2008; Wellman and Cole 2011, p.31). Drawing upon Stuart White’s discussion of freedom of association, Wellman argues that a component part of a right to freedom of association is a right not to associate with others, stating that:

“[w]ith the freedom to associate, however, there comes the freedom to refuse association. When a group of people gets together to form an association of some kind (e.g., a religious association, a trade union, a sports club), they will frequently wish to exclude some people from joining their association. What makes it their association, serving their purposes, is that they can exercise this ‘right to exclude’” (Wellman and Cole 2011, pp.31-32, quoted from White 1997, p.373).

Just as an individual may permissibly choose whether they will marry or enter a relationship, Wellman argues by way of analogies of associative groups<sup>75</sup>, that states are likewise free to decide which (if any) non-members they associate with (Wellman and Cole 2011, pp.34-35).

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<sup>74</sup> Although this is, at best, only a partial avoidance of the external boundary problem.

<sup>75</sup> Specifically, golf clubs (see, for instance, Wellman 2008, p.112, 2015, p.84).

This leap is somewhat controversial given that these analogies encompass different types of association that serve different purposes, so it is worth unpacking this a little more fully. Whilst Wellman accepts that freedom of association is more important in intimate relationships, freedom of association, Wellman argues, is also important in impersonal relationships like those between citizens. To highlight this, Wellman asks us to consider a golf club and the reasons for which their members may be concerned about the admission of new members – even if they may never meet or be compelled to play with them (Wellman 2016, p.84). Wellman offers two reasons. Firstly, that the admission of new members affects the character of that association and the way that existing members experience that association<sup>76</sup> (Wellman 2016, p.84). And secondly, because existing members have an interest in determining the rules for adding new members, as, once added, new members will also have a say in setting the future direction of the club (Wellman 2016, p.84)<sup>77</sup>. At play here are two concurrent and intertwined arguments related to self-determination, an appeal to the *control of the collective self*, and the *control of destiny*. As to the first of these, members have an interest in maintaining control over the boundaries of membership because doing so is integral to controlling the “self” that exercises this collective self-determination. As to the second of these, Wellman appeals to the value of collective self-determination by pointing to members’ interest in determining the future direction of their association, including how and for whom collective resources are used.

As members of relatively inconsequential associations have reasons to control the admission of new members, Wellman argues that citizens of states, a far more consequential association, have the same reasons to be concerned about the rules governing admission (Wellman 2008, 2011, with Cole 2011). The admission of new members may affect the “character” of a state by affecting things such as population density, cultural makeup and the way that the economy and state institution’s function<sup>78</sup>. And, in the case of controlling the self:

“[the] connection between a group’s membership and its future direction underscores why freedom of association is such an integral component of self-determination. No collective can be fully self-determining without enjoying freedom of association because, when the members of a group can change, an essential part of group self-determination is exercising control over what the “self” is” (Wellman 2016, p.85).

Freedom of association in groups is therefore an integral component of collective self-determination, as it plays an inseparable role in determining the shape and direction of the group that is self-determining. Or, put another way, a precondition of collective self-determination is a defined collective that can do the self-determining.

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<sup>76</sup> Including things such as whether there will be more or less wear and tear on the course, higher or lower green fees, or more or less difficulty in getting tee times (Wellman 2008, p.114).

<sup>77</sup> Wellman moderates this argument to a degree when considering discriminatory practices, such as when “society as a whole discriminates against women or privileges theism and heterosexuality over atheism and homosexuality” (Wellman 2008, p.111; see also Wellman and Cole 2011, pp.34-35). But highlights this does override the presumptive case for group freedom of association simply that it places it (much as with individual freedom of association) as subject to the demands of justice, by identifying where the case in favour of group self-determination may be overridden.

<sup>78</sup> Wellman makes it clear that he is not assuming that these changes will be for the worse, only that they will be changes (Wellman 2016, p.84).

For those seeking to refute this argument, two main avenues of criticism are open. Firstly, one may draw attention to a potential conflict existing between the associative rights of members and the associative rights of states. Alternatively, one could argue that the analogies used to move from individual freedom of association to states' freedom of association are sufficiently disanalogous to extend this right to states (see for instance Fine 2010; Song 2017).

Let us examine the first of these two problems, that the associative rights of members and states may exist in tension. As we saw in the previous chapter of this thesis, immigration restrictions interfere with the ability of individuals to freely associate with others. By restricting access to territory, barriers are placed between members and non-members and these barriers affect non-members *and* members. Border controls make it harder for non-members to form new attachments with members, and, correspondingly, these same barriers make it harder for members to meet, interact and form attachments with non-members. However, it is not just *potential associations* that border restrictions may interfere with. These same restrictions may interfere with pre-existing relationships, including non-trivial ones. Border controls place barriers between families, romantic partners, and close friends, and may interfere with the ability for people to care for ill family members or raise children. This begs the question, why should a group right to freedom of association take priority over an individual's rights to freedom of association<sup>79</sup>? This is particularly problematic given that Wellman concedes that freedom of association is more important in intimate relationships (Wellman 2016, p.83). So perhaps this criticism should be reframed. Why should a presumptive collective right to freedom of association in a non-intimate association take priority over an individual right to freedom of association in intimate associations?

Perhaps this reframed charge is unfair and would fall under that category of things, much like discriminatory practices, where collective self-determination would be overridden without undermining the presumptive case for freedom of association. We can, for instance, hold that a group has a right to collective self-determination, but that this does not extend to the ability to legitimately pursue policies that do not treat their members as moral equals, such as those that discriminate based on sexual orientation, gender, sex, or race. Conceding this would not undermine the case for a right to exclude based upon freedom of association. One would simply recognise that in cases such as family reunification or in the cases of spouses that this type of intimate relationship takes priority as is the case in many contemporary states' immigration policies<sup>80</sup>. However, this may only partly resolve this problem, as the broader problem of why a group right should take priority over an individual right remains unaddressed and is particularly problematic when considering the severe problems that prospective migrants may suffer compared to those inconveniences that might be suffered by those who admit them.

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<sup>79</sup> Or to put this another way: there are multiple associations (nations, family, friendship groups, work organisations) and these generation association claims that can compete and conflict. When this is the case, as between national and, say, family claims or work claims, then a further argument is needed that explains why one should prevail over the other.

<sup>80</sup> Conceding this does have implications for the extent of a right to exclude. Rather than the near unlimited right to exclude, this concession places limits on the circumstances in which states may permissibly exclude. Here, states would be unable to permissibly exclude when exclusion would interfere with pre-existing "significant" relationships.

Moving on to the second criticism, theorists such as Song (2017), and Fine (2010) have argued that the move from an individual's right to freedom of association to states' right to freedom of association rests on a series of disanalogies. Specifically these theorists point to: (1) states being sufficiently large that they are *imagined communities* as opposed to small-scale associations where members know and interact with one another regularly (Song 2017), (2) that the purpose of these associations is different (Fine 2010; Song 2017) or, (3) that they failure to capture the involuntary nature of state membership and the importance of moral equality and state neutrality.

Let's examine the first of these. A member of a state is unlikely to ever meet many of their compatriots, let alone need to have regular or intimate contact with them (Song 2017, p.21). This is quite unlike small voluntary associations such as book clubs or sporting clubs. However, whilst members may not ever meet one another, the charge of being an *imagined community* misses an important normative factor. There are plenty of large associations where the interest in freedom of association is as apparent as in small ones. Consider the World Wildlife Fund (WWF) or the National Trust. Both have large enough membership rolls that most members will likely not meet one another, but that does not mean that they still do not have an interest in determining who they associate with. Members of the WWF would hardly be at fault for excluding lobbyists seeking to deforest the Amazon or reinstitute commercial whaling, much as the National Trust would not be for denying admission to those seeking to turn Britain's national parks and heritage sites into affordable housing. Associating with these lobbyists as fellow members would undermine the very purpose of these organisations. Even if new members were not sufficiently numerous to change the policies of the National Trust or WWF, the inclusion of new members with views that oppose the purpose of the association would likely change the way in which existing members experience either association (Wellman 2016, p.84).

This, at least, partially rescues this argument by highlighting the value of maintaining the terms of an association (and because of this grounding a right to exclude those who would seek to change the way an association functions), it does little to rescue it in the case of those who (for want of a better phrase) seek to fit into the association harmoniously. Added to this, this analogy is imperfect because states do not have specific purposes in the way that club or other private associations do. Or at least liberal states do not. The aims of liberal states are limited to ensuring stability and fairness. If this is true, then it is much harder to say that the interests of migrants conflict with the aims of the potential host state.

This analogy, however, is potentially problematic in another sense. Fine (2010, p.342) and Song (2017, p.22) highlight that membership in a state is involuntary and because of the stakes involved in possessing *a* membership – and because of the relative and absolute inequality between states, in possessing *a particular* membership. Most of us acquire citizenship through *ius soli* or *ius sanguinis* at birth and live and die in the states in which we were born<sup>81</sup>. This, in conjunction with the role that states play in supporting the human rights of those within its jurisdiction, significantly raises the stakes of membership. Exclusion from a state, either through the denial of admission or statelessness raises issues that are simply not at play within private clubs. Membership

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<sup>81</sup> Only one in thirty of us are migrants (IOM 2022).

in a state has significant implications related to the capacity of individuals to lead a recognisably decent life, a point most noticeable for those lacking membership in any state<sup>82</sup>. If I am refused membership in a golf club, then (whilst recognising the cost may be prohibitively large) I may seek to form another. However, this is not the case for states. If I am refused admission, I cannot simply form another to address this lack of membership (Song 2017, p.22). All areas of the planet that are habitable for human life have already been carved up and claimed by states.

It is here that these analogies prove themselves to confuse as much as they clarify. The use of these analogies results in a simultaneous overvaluation and undervaluation of the value of freedom of association in states. Freedom of association in the context of states is overvalued, as it places it on par with freedom of association in personal and intimate relationships. These relationships reflect core components of individual agency and self-determination. Within the personal sphere, freedom of association matters, in part, because of the way that personal relationships shape our lives. When we think of intimate relationships we tend to think of love and intimacy as freely given to those that we choose. Whereas, in the context of states, we speak in terms of respect and equality as things that we may demand and are entitled to. Conflating the value of personal and collective freedom of association is problematic given that individuals may choose not to associate with any particular member, even if they are bound by a shared coercive framework and take part in certain shared activities. Put another way, sharing a workplace with a certain disliked colleague is of much less importance to individual agency than being forced to marry that disliked colleague.

On the flip side of this, however, these analogies undervalue the importance of freedom of association in the context of states by failing to capture what is distinct about a member's relationship with their state. Through the enacting and enforcing of coercive laws, states regulate the lives of their members. Input into the formulation and exercise of this coercive power plays an important role in relation to freedom of a particular kind. At play is the idea that autonomous people cannot simply be acted upon, that due to the role of the liberal state in coercively structuring its members' lives, individuals must have the ability to have input in shaping their political space (Philpott 1995, p.357). It is within the context of the state, at least states with democratic input from their citizens, that citizens have agency in collective decisions and may input and shape the coercive structure that regulates their lives. "If we are excluded from that authority, then we lack the autonomy in an important dimension of our lives" (Gutmann 1993, p.142). To remove all agency in group decisions that structure our lives both limits the scope of moral autonomy and deprives individuals of the dignity and respect as self-governing agents who are the part-authors of their own lives (Raz 1988, p.156; Gutmann 1993, p.143)<sup>83</sup>. Because of this, when new members gain access without authorisation, they may alter the extent to which existing members have agency in group decisions.

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<sup>82</sup> For a much more thorough exploration of the precarity generated by statelessness, see for instance Bloom, T., and Tonkiss, K. (2017) *Understanding Statelessness* (Routledge: London)

<sup>83</sup> It is here that we may find the beginnings of a democratic case for exclusion. This democratic case, however, seems to pull us in contradictory directions. On the one side, this appears to ground a right to collectively control the boundaries of membership. On the other, and as we saw when examining the democratic case for open borders, the all-affected and coercion principles give reasons for non-members to be included within the collective self.

It seems then that whilst this appeal to collective self-determination by way of freedom of association is intuitively appealing and may ground a right to exclude, it is also hampered by a conflict between states' right to freedom of association and members' and non-members' right to freedom of association as well as by a series of disanalogies.

### 2.1.2 *Collective Self-Determination*

Because of this, it is perhaps worth bypassing freedom of association, and returning to the initial concerns that motivated Wellman (2008; with Cole 2011) and Walzer (1983)<sup>84</sup> by appealing directly to the concept of collective self-determination and defending a right to exclude in democratic terms (see for instance Song 2018a). Let us return briefly to this. In an oft cited passage, Walzer states that:

“the right to choose an admissions policy is more basic than any of these [other policies], for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them there could not be communities of character” (Walzer, 1983, pp.61–62).

And, as we have seen, Wellman follows this almost verbatim, writing that “an essential part of group self-determination is exercising control over what the “self” is” (Wellman 2016, p.85). When new members are admitted to a group, the nature of the group itself changes. When people are admitted to a group they may, as Wellman claims, introduce new habits, norms, or customs, or they may make existing norms habits or customs more widely pronounced (Wellman 2008, 2011, 2016). The admission of new migrants, then, may lead to both a group making decisions than it may not have done had these new members not been introduced, but also may change the way that individual members may experience being a member of the group (Song 2018a, p.66). Walzer's and Wellman's concern is that without immigration control, a group loses the ability to control who the “self” is that is “self-determining” as self-determination is defined not just by the decisions taken by the individual or group, but in the determination of the self by the self (Van der Vossen 2015, p.278).

To highlight this, consider the following. Imagine that there are two neighbouring legitimate states, State A and State B. Both provide the space and capacity for individuals to determine and pursue the lives that they wish for themselves and provide the space for their members to participate in collective decisions. In addition to this, imagine that these two states have torn down the barriers regulating access to territory and membership with members of each state able to move freely between the two states, even though the two remain jurisdictionally distinct as two separate entities. Further, imagine that these two states are different in character. Whilst they both protect the freedoms of their members, they have different institutions, different understandings of these institutions and different priorities and challenges. State A, for instance, may have a struggling agricultural sector but a booming services industry and may wish to prioritise funding for wildlife protection and natural conservation whereas state B may have a booming agricultural and manufacturing industry, and may wish to

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<sup>84</sup> That control over the contours of membership is necessary for the *control of the collective self*, and the *control of collective destiny*.

prioritise funding for the arts. Now imagine that members of State A move to State B, to make the institutional make up better reflect their own preferences and vice versa. The citizens of State A may not like the polluting effects of their agricultural and manufacturing industries, and so may wish to influence State B's policies to be more environmentally friendly. Or citizens of State B may wish to move to State A because they may not agree with the policies of State A. Whilst this is perhaps not an issue if State A and State B as individual agents exercising collective self-determination both agree with and had voluntarily signed up to the free movement between the two states, immigration without consent in this case is problematic as it reduces the capacity for each state to exercise collective self-determination. When members of State A move to State B and vice versa, they change the *character* of that collective self (Walzer 1983, pp.61–62; Wellman 2016, p.85).

What matters here is not so much that the character of the group changes but the source of this change. Whilst the distinct epistemological character of a *collective self* will mean that the “self” itself constantly fluctuates whether through births and deaths or through the exercising of liberal freedoms,<sup>85</sup> the source of these changes matter<sup>86</sup>. Changes to the *self* are problematic when imposed from without as opposed to reflecting the freely chosen preferences and decisions. Consider the following<sup>87</sup>. Clive, a political theorist, enjoys his research but also finds considerable pleasure in hiking. When not reading and writing about political theory, he spends his time either planning or going on long walks. Clive's friend and colleague Alice, however, is a single-minded political theorist, who enjoys nothing more than reading, thinking, and writing about political theory. Further suppose that both Clive and Alice are both autonomous and are content in their chosen ways of spending their time. Now consider two permutations of this. Firstly, Clive, after spending time with Alice, becomes convinced that hiking is a distraction, and after some introspection, likewise becomes convinced that spending his time wholly reading, thinking, and writing about political theory is the best way of spending his time. Secondly, suppose that Tom (Alice and Clive's line manager), who is concerned about the department's REF score and thinking that Clive could be publishing more were it not for his love of hiking, coerces and cajoles Clive into being more like Alice, and after some time, Clive internalises this, gives up hiking, spends all of his time reading, thinking, and writing about political theory, and now endorses this way of life. Whereas the former is not problematic for Clive's autonomy as the acceptance of new values, and the modification of his conception of the self, was internally driven. However, the same cannot be said in the latter case. Whilst Clive now accepts and is content with his new values, these were imposed upon him against his wishes.

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<sup>85</sup> Such as through the exercising of freedom of speech and the result this may have in swaying the opinions of fellow members.

<sup>86</sup> As for deaths, these are – at least until the possible invention of some future technology – are an inescapable and unalterable part of the human existence so are outside of the scope of normative judgements. However, births are worth exploring a little further. In one sense, births may be seen in a similar light to the swaying of public opinion through the exercise of liberal freedoms, that is that they represent changes to the self that originate internally – choice to have children is an important life decision and linked to the exercising of the autonomy of individual members. However, births are normatively dissimilar to changes of the group through unauthorised migration in at least two further ways. Firstly, in that the acquisition of citizenship is, at least in theory, acquired through processes that are democratically endorsed, or through tacit agreement. That is that the rules of citizenship acquisition whether through *ius soli*, *ius sanguinis* or naturalisation are decided by and may be revised by the group. In the second instance, births and the acquisition or membership or citizenship raises issues of equality, where withholding citizenship to a “disliked minority” disrespects current members of the group and undermines their equal status (this argument is fleshed out more comprehensively by Pevnick 2011, pp.63-66).

<sup>87</sup> The following example is a modified version of one originally presented by Bas Van der Vossen (2015, p.280).

Separating these two permutations of this example highlights the importance of the source of these changes for autonomy. In the case of the first, this reconstruction of the self is unproblematic as it reflects Clive's autonomy and reflects the exercising of his liberal freedoms, and in the second the choice is not autonomous as it is the result of unjustified manipulation. Notice here, however, the emphasis of *unjustified* manipulation. Whilst manipulation may also be *wrong* to some extent, countervailing moral factors may justify manipulation in some cases. One candidate for this is the *consequence* of this manipulation - Tom's manipulation of Clive may save lives<sup>88</sup> or have some other beneficial consequences. Another candidate may be that this manipulation enhances Clive's autonomy. In being manipulated into being more focused on academic outputs, Clive may have access to new opportunities and improve his capacity for rational self-reflection that enhance his capacity for autonomy<sup>89</sup>. As such, whilst manipulation is a problem for autonomy, not all instances of manipulation are *necessarily* problematic.

Turning back to the case of migration, provided that there are no countervailing concerns that may legitimate changes to the self<sup>90</sup>, when "would-be immigrants enter or remain in a country without authorization, they sidestep the political process by which members of the political community can define who the collective self is. This contravenes the right of collective self-determination itself" (Song 2018a, p.67). If, as liberals commonly hold, an important aspect of freedom is to have a say in the coercive framework of laws that regulate our collective lives, it is necessary to be able to control the contours of membership for collective decisions to reflect the collective self that is exercising self-determination.

### **Section 3: Culture and Exclusion**

The final approach within the literature that appeals to collective self-determination to ground a right of exclusion focuses on the value of protecting a distinctive culture. Theorists who utilise culture to ground a right to exclude point towards the value of a distinctive culture as an expression of members' preferences and identity. These theorists draw upon the instrumental value of culture in one of two mutually supporting ways: (1) culture as a necessary prerequisite for collective self-determination, and (2) access to a shared culture being a necessary prerequisite for individual autonomy (Walzer 1983, 2003; Miller 1995; 2007; 2014; 2015; 2016).

For theorists such as Walzer and Miller, members of a state are not simply joint participants in a scheme of co-operation or the co-subjects of a scheme of coercion, they "also relate to one another as fellow nationals, people who share a broadly similar set of cultural values and a sense of belonging to a particular place" (Miller 2016, p. 26). Members of a political community have an interest in their shared culture as it provides a "background against which more individual choices about how to live can be made" (Miller 1995, pp.85-86). Moreover, the maintenance of a distinct culture flows directly from a right of collective self-determination as members of political communities "want to be able to shape the way that their nation develops, including the values that

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<sup>88</sup> Although in this particular case this is an unlikely prospect.

<sup>89</sup> Although this itself raises issues related to paternalism (see for instance Arneson 2015).

<sup>90</sup> Such as perhaps in the case of refugees or those whose admission may contribute to the more effective functioning of a collective self.

are contained in the public culture” and that this interest grounds a right to control immigration (Miller 2005, p.200). For Walzer, states’ right to exclude flows from the value of a distinct culture as:

“[t]he distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. If this distinctiveness is a value, as most people . . . seem to believe, then closure must be permitted somewhere” (Walzer 1983, p.39).

Contained within this argument is an empirical claim that distinctive cultures depend upon closure and that successful forms of collective self-determination are only possible if citizens operate with a shared culture. Running alongside this are normative claims related to the value of culture (Walzer 1983, p.39; Song 2017, p.14), both of which are worth exploring in a little more detail <sup>91</sup>.

Whilst recognising that a ‘national culture’ may be one amongst several sources that comprise an individual’s identity, national culture can give those who hold it a sense of belonging and provides a “a background against which more individual choices about how to live can be made” (Miller 1995, p.86). This “culture” provides context that assigns value to the options available to individuals which contributes to making choice meaningful (Kymlicka 1995, p.84; Carens 2000, p.55). A common ‘national’ or ‘societal’ culture can be said to be a constitutive part of individuals’ identity. If this shared culture becomes inaccessible or changes so quickly as to be unrecognisable by those who associate with it, Miller argues that those who shared that common culture are left “in a cultural vacuum or else have to undergo a difficult process of cultural adaptation, which is usually painful and disorienting while it is happening, and rarely wholly successful in its outcome” (Miller 1995, p.86). Because of this, members of a political community who share a common culture have an interest in the preservation and pace of change of that common culture. In his earlier work, Miller argues that immigration may not necessarily pose a problem to the preservation or pace of change of a common culture, provided that migrants already share this common culture or assimilate and “come to share in a common national identity, to which they may contribute their own distinctive ingredients” (Miller 1995, p. 26). However, immigration may be problematic when the “rate of immigration is so high that there is no time for a process of mutual adjustment to occur” or “where a large number of immigrants have arrived in a relatively short space of time” (Miller 1995, p.128). Because of the interest members have in continued access to their shared culture, states require a right to exclude in order to control the pace of change to their common culture (Song 2018b, p.392).

The second direction where culture is seen as valuable and works to support a right to exclude is its role in supporting the ability of groups to be self-determining. This has two parts. Firstly, the introduction of new members can place new demands on existing members by limiting the scope of free choice if liberal demands for respect of minority interests and equal respect are to be met. And secondly, the watering down of public culture may affect the capacity for self-determination (Miller 2016, pp.64-65). Pointing to studies that suggest

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<sup>91</sup> Although a third could be added here centred on the link between culture and territory. Whilst Walzer does tentatively link territory and culture (Walzer 2003, p.204), Miller does this explicitly, arguing that culture is defined by and is dependent upon territory (Miller 2007, pp.217-218). With a distinctly Lockean flavour, Miller argues that there is a cyclical relationship between territory and the culture of those who reside on it, with people adapting their culture to the land that they reside. The physical characteristics of a territory, whether it is hot or cold, mountainous or steppe, landlocked or surrounded by the sea will encourage or discourage the development of certain customs (Miller 2007, p.218).

that the cultural diversity that may be generated by immigration may reduce both interpersonal trust and trust in social and political institutions, Miller goes on to argue that lower levels of trust make it harder to support policies that involve economic redistribution and makes it harder for democratic institutions to function deliberatively (Miller 2016, p.64)<sup>92</sup>. Or put another way, maintaining a national culture is a prerequisite both for democracy and for the sorts of redistribution necessary for justice to be realised<sup>93</sup>.

At play here are at least two distinct, but often muddled together, claims about the value of culture. The first of these, primarily featuring within David Miller's later works, points to the value of culture as existing in what it achieves, with culture's value resting in its role in supporting collective self-determination and the conditions for supporting equal liberty. The second approach points to the value of culture in its creating and supporting of the capacity for individual autonomy (Pevnick 2011, p.134). Both point towards the instrumental value of culture.

### *3.1 Democratic Functioning and The Capacity for Equal Liberty and Culture.*

Let us start with the claim that culture is instrumentally valuable as it supports deliberative decision making. Miller argues that cultural homogeneity is necessary for social trust and solidarity, which in turn is necessary for deliberative self-determination or democratic functioning. In a similar vein, Gibney states that:

“[L]iberal egalitarian principles can only be realised in communities where relations among citizens are characterised by solidarity and trust, relations that are often sustained by a shared culture and can be jeopardized by large, short-term changes in membership” (Gibney 1999, p.174).

According to these theorists, nations ordered around cultural groups are required to solve the dual problems of integration and motivation, particularly in the context of large democratic communities (Miller 2016; Abizadeh 2002, p.498). On the one side, this is because culture is a site of attachment necessary for individuals to sacrifice on behalf of others. On the other, because cultural attachments are large enough to make democratic self-rule and distributive justice meaningful (Miller 2016; Miller 1989, p.245). In short, Miller is making an empirical claim that democracy presupposes a shared cultural identity. Because of this, this claim is at least somewhat dependent upon empirical realities<sup>94</sup>. In addition to this dependence, it is also necessary to examine the concept of culture more closely, as what is meant by culture has broad implications for the success and extent of a right to exclude grounded in it.

There are at least two (broad) understandings of culture that may be used; a “thick” conception and a “thin” conception<sup>95</sup>. A “thick” conception can be understood as “well-integrated, well bounded, and largely self-generated entities, defined by a set of key attributes, including a shared language, history and values” (Song 2009, p.18). A “thin” conception of culture, on the other hand, is more akin to what John Rawls defined as *public*

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<sup>92</sup> It should also be noted here that whilst Miller does not talk in this way and rejects this, that similar arguments have been used to support highly problematic and racist objections to migration.

<sup>93</sup> The implication of this is that multicultural societies are less likely to collectively define the terms of mutual respect and be less willing to redistribute goods fairly.

<sup>94</sup> The validity of these empirical claims will be discussed in Chapter Five of this thesis.

<sup>95</sup> Although this distinction is perhaps better understood as a sliding scale rather than a binary choice.

*political culture*. Rather than a historically rooted set of overlapping norms, values or a shared ethnic background and language, culture instead can be said to comprise “the political institutions of a constitutional regime and the public traditions of their interpretation...” (Rawls 2005, pp.13-14)<sup>96</sup>. In the context of liberal democratic states, this relates to a shared adherence to principles such as equality of opportunity and equality before the law. It is worth starting with a thin conception of culture to see the extent to which a right to exclude based upon culture can be extended outwards, as this is perhaps the least controversial, may stand on its own merits, and is contained within an account that appeals to a ‘thicker’ conception of culture.

In *Political Liberalism*, Rawls aims to demonstrate that citizens of a particular society may hold divergent beliefs and yet converge upon a conception of justice that can be used as a basis of public agreement and as a regulative ideal (Rawls 2005a). Given the plurality of views held by members of a society, this conception of justice must look towards “gain[ing] the support of an overlapping consensus of reasonable religious, philosophical, and moral doctrines in a society regulated by it” (Rawls 2005a, p.10) which are to be found in the ideas and principles that underpin a community’s public sphere. The principles that constitute this overlapping consensus constitute a society’s public political culture. As Rawls explains, we look “to the public culture itself as the shared fund of implicitly recognised basic ideas and principles” (Rawls 2005a, p.8) in the hope of connecting these principles in a way that “all citizens, whatever their religious view, can endorse” (Rawls 2005a, p.10). Political culture, in this thin sense, is important as it serves as a reference point and fund of ideas that may be referred and may provide a mutually agreeable basis from which to construct a shared conception of justice that is reasonable to citizens who hold a plurality of different beliefs and values.

Using a thin conception of culture in this sense to ground a right to exclude is at its strongest and least controversial, but also at its thinnest. If culture is linked to social trust, when considering whether to admit or exclude, what matters is not whether a potential immigrant shares a history or a set of norms, beliefs, values, and habits, only that the beliefs and values are compatible with this shared political culture of a receiving state<sup>97</sup>. In the context of a liberal democratic state, this may be as thin as a commitment to democratic process as a means of making collective decisions and the idea of reasonableness, entailing some commitment to viewing one’s fellow citizens as free and equal persons (see for instance Rawls 2005b). Needless to say, this is a very broad and inclusive conception of culture that may only ground a right to exclude in cases of individuals who fundamentally disagree with this shared political culture and perhaps not even this, considering that Rawls allows for the presence of unreasonable persons (Rawls 2005b). To return to the earlier examples of the WWF and the National Trust, what matters is not whether potential new members think that these organisations should use their resources in one way or another, pursue this policy over that, or even that these potential new members share a similar language to existing members or an understanding of these organisations’ histories, only that the values that these potential members are not fundamentally incompatible to the underlying purposes of the organisations. However, whilst this may provide a strong case for a right to exclude, it is a very

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<sup>96</sup> Of course there will be interim conceptions of culture sitting in between a “thick” and “thin” culture.

<sup>97</sup> Although a lack of shared values does not justify categorical exclusion but is one factor that must be considered in specific cases. This point will be expanded in Chapter Five.

narrow right to exclude. A plurality of values and beliefs, customs and habits are compatible with a thin *public political culture*. Where individuals hold a fundamentally incompatible conception of justice, then even on a sceptical reading, the instrumental value of culture in democratic functioning is sufficient to justify a right to exclude. In this way, controlling the pace of change of a 'national culture' may be expressed in terms of Joseph Carens' list of five situational exceptions to a position of open borders<sup>98</sup> (Carens 1987, pp.260-261; Carens 1992, pp.28-31). An appeal to a thin conception of culture perhaps falls most clearly under Carens' second and third exceptions, those situations where immigrants holding illiberal values may threaten democratic institutions or when sheer numbers may overwhelm the institutions of the receiving state (Carens 1987, pp.260-261). A thin conception of culture is a stable footing on which to base a right to exclude, but any right to exclude that is generated is correspondingly narrow.

However, is this similarly sustainable when using a thicker conception of culture? Miller and Walzer certainly think so and utilise much thicker conceptions of culture. In a 1995 article, Miller defines culture as "a set of overlapping cultural characteristics— beliefs, practices, sensibilities— which different members exhibit in different combinations and to different degrees" (Miller 1995, p.86). Whilst Miller also holds that a "public culture" will contain shared beliefs in principles such as the rule of law or democracy, the conception of culture that Miller employs goes much further than this. It:

"extends to social norms such as honesty in filling in your tax return or queueing as a way of deciding who gets on to the bus first. It may also embrace certain cultural ideals, for instance religious beliefs or a commitment to preserve the purity of the national language" (Miller 1995, p.26).

Miller leaves space for private cultures. However, a national culture is sufficiently broad in his work that the distinction between a 'public' and a 'private' culture is hazy and ill defined (Miller 1995, p.26). Likewise, Walzer, in a similar vein to Kymlicka (1996) and Miller (1995; 2016), views culture as a context for choice, stating that we should understand communities as "communities of character" and that "the political community is probably the closest that we come to a world of common meanings" (Walzer 1983, p.28). The vehicle for this is the coming together of language, history, and culture to produce "a collective consciousness" (Walzer 1983, p.28). Using a thicker conception of culture in this way correspondingly raises the bar for the level of homogeneity required for the degree of social trust needed for democratic functioning and redistributive justice.

This thicker conception has been seen as particularly problematic. Theorists such as Abizadeh (2002) and Song (2017; 2018) have each highlighted that the use of this thicker conception of culture runs into problems when considering empirical examples of multicultural states such as Belgium or Switzerland that are characterised by linguistic and 'cultural' differences yet maintain levels of social trust. These cases pose an empirical challenge as it appears that multiple 'thick' cultures may exist alongside one another without undermining social trust<sup>99</sup>, and

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<sup>98</sup> These are centred on public health and security. These include: (1) those wishing to enter are criminals, invaders or subversives, (2) when illiberal immigrant (with weak or absent liberal and democratic values) threaten liberal and democratic institutions, (3) where the volume of immigration may overwhelm a receiving state's institutions, (4) where immigration restrictions benefit the worst off in society and support the conditions for equal liberty, and, (5) where immigration hinders the development of liberal institutions (Carens 1987, pp.260-261, 1992, pp.28-31, 1988, pp. 220, 227).

<sup>99</sup> Or at least that "thick" cultures are not as homogenous or as neatly bounded as Miller implies.

as with the use of a thicker conception of culture more generally, open the door to a boundary<sup>100</sup> problem that may change the shape of what a right to exclude may look like.

To resolve this empirical challenge, a couple of options are available. Firstly, one may revert to the thinner conception of culture centred around a shared conception of justice that avoids this problem. Or alternatively, one may take a closer look at a 'national culture' to see whether multicultural states pose as much of a challenge as appears at first sight.

In response to the empirical examples of Canada and Switzerland, Miller argues that social trust is not undermined, because despite containing multiple cultures, they have cultivated an overarching common national identity and have developed and jointly support institutions (such as a federal or decentralised structure) to ensure that interests of various 'communities' are balanced (Miller 1995, p.96). However, in doing this, Miller reveals that when referring to culture, he is referring to and trading on two slightly different (although not mutually exclusive), conceptions of what it is to share a national identity. The first of these is the sharing of features commonly held by those sharing a common culture such as a shared language, habits, history, and frames of reference. The second of these is a common identity or a shared sense of attachment and sense of belonging (Abizadeh 2002, p.498). Drawing heavily on John Stuart Mill, Miller argues that free institutions are difficult to realise in states made up of different nationalities, but also that this does not imply complete national homogeneity. Instead, citing Mill, Miller states that "Mill was well aware that a common sentiment of nationality could co-exist with linguistic and other cultural differences, and indeed used the Swiss and the Belgians as examples to make the point" (Miller 1995, p.98). By broadly subscribing to Mill's thesis that nationality is the basis of solidarity that enables deliberative democracy, Miller reveals that, to a certain extent, this second type of meaning of national identity (or culture) takes priority, with a shared culture supporting a sense of broader national identity.

What matters is not so much 'cultural' uniformity in the sense of language and habits but that citizens share an overarching "public culture" that facilitates transparent communication, comprehension, and fair treatment. A "thick" culture, then, is valuable in that it supports and enables a "public culture". In the case of multicultural states, a "public culture" capable of maintaining trust is created when component cultural groups understand and recognise the value of each cultural group and simultaneously hold a national identity that transcends their cultural identity. For Miller, a "public culture" is functionally similar to cultural uniformity in multicultural states by fostering the trust required for democratic functioning and redistributive justice. Put in other words, it matters less that Belgium is predominantly comprised of a French speaking Flemish community and a Dutch

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<sup>100</sup> This will be discussed in more detail whilst examining the role of culture in supporting self-actualisation as this is a common 'problem' for both arguments. However, for the time being it is worth highlighting that appealing to culture does not clearly ground a right to exclude to non-members who share a similar culture. Miller himself highlights this and does not find it to be problematic, but it is worth noting as it changes the shape of what a right to exclude looks like. Put another way, Greece would not be able to appeal to the preservation of a national culture to exclude non-members who share a minority or majority culture with existing Greek citizens.

speaking Walloon community, but that an overarching Belgian “public culture” has been created that encapsulates both cultural identities.

Refocusing on Miller’s conception of a “public culture,” that is created by mutual recognition and a shared commitment to common terms that are the basis of a shared public life, reveals a normative difference between cultural identities that comprise a common public culture and those that do not. In the case of the former, this mutual recognition exists, and in the latter it does not. In trading on this ambiguity around culture, Miller pulls a slight of hand by referring to the former and by doing so reveals the role of a thick conception of culture to be more complex than first appears. In reality, when arguing that a shared culture is required for social trust, which in turn supports deliberative democracy and redistributive justice, Miller is primarily focused on a much thinner conception of ‘culture’. What really matters here, to Miller, is a common identity built around shared understanding, common meanings, and common terms that members of a political community can agree upon. A ‘thick’ conception of culture may go a long way in providing this, but its role is facilitatory, not a prerequisite. As a result of this, by appealing to public culture to address the problems of multicultural states, Miller reveals that the conception of culture that he uses to support a right to exclude is much thinner than first appears and because of this any right to exclude would be much narrower than Miller suggests<sup>101</sup>.

### *3.2 Culture and Autonomy*

Having briefly examined the instrumental role of culture in supporting deliberative democracy and the capacity for equal liberty, it is worth turning to the second way in which culture may be valuable: that it supports and enables individual autonomy. The key claim here is that cultural membership gives meaning to the choices that are available, or in other words that “[w]e become full human agents, capable of understanding ourselves, and hence of defining an identity, through our acquisition of rich human languages of expression” (Taylor 1992, p.33), with language covering a broad range of modes of expression.

This link between culture and the capacity for autonomy has a long pedigree within political theory. Margalit and Raz, for instance, argue that possessing membership in a culture is important for individual wellbeing (Margalit and Raz 1990, p.449). Culture shapes an individual’s tastes and opportunities, provides an anchor for one’s self-identity and sense of belonging and defines one’s relationships and goals (Margalit and Raz, p.454). In a similar vein, Will Kymlicka argues “[f]reedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us” (Kymlicka 1995, p.84). In this sense, access to a societal or national culture can be seen to be a fundamental interest of the sort that Rawls calls a primary good (Carens 2000, p.55). These theorists argue then that culture is a lens that individuals can use to interpret, understand, and meaningfully engage with the options available to them.

If the possession of a culture is a precondition for individual autonomy and contributes to individual well-being, it would seem to follow that individuals possess a reason to exclude those whose inclusion would undermine or

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<sup>101</sup> There are two additional problems with using a thick conception of culture a boundary problem and a conflict between cultural freedom and liberal freedom. Both problems are shared with the use of culture to support individual autonomy (the next section of this chapter). To avoid duplication these will not be discussed here but are applicable in the same way.

threaten the continued existence of the 'culture' of a national community. After all, if an individual's culture is destabilised or rapidly altered so as to be unrecognisable to that individual, they are likely to be disorientated, or harmed, by losing the lens which gives the options in their life meaning. This is much the line taken by Walzer and Kymlicka, with Kymlicka arguing that "[l]imits on immigration can be justified if we recognize that liberal states exist, not only to protect standard rights and opportunities of individuals, but also to protect people's cultural membership" (Kymlicka 1995, p.126). The central claim and implications of this are that (a) members' interest in maintaining and living within recognisable cultural groups justifies excluding those whose cultural views may undermine their shared culture, (b) that they are also justified in favouring culturally similar migrants when considering whether or not to exclude, but also (c) as with the previous account linking culture to democratic functioning, that members may not exclude those that are culturally similar (Pevnick 2011, p.143).

From here however, at least two avenues are available, again related to the 'thickness' of culture, which have broad implications for the success and extent of a right to exclude. One may argue that a thick conception of culture is required for individual autonomy (Taylor 1992, 1994; Miller 1995, 2016; Walzer 1983), or take some intermediate positions as does Kymlicka (1995), Pevnick (2011), Margalit and Raz (1990), Philpott (1995), Coleman and Harding (1995) and at times Carens (1992, 2013, p.53), centred on a much thinner conception of culture.

The most prominent and fully developed account of a thick conception of culture and its relation to individual authenticity<sup>102</sup> has been put forward by Charles Taylor<sup>103</sup>. Following Herder, Taylor argues that a "Volk should be true to itself" and should not seek to emulate and inevitably be a second-rate derivative of other cultures (Taylor 1994, p.34). Taylor views being true to itself through a broader conception of language. Language includes "not only the words we speak but also other modes of expression whereby we define ourselves, including the "languages" of art, of gesture, of love, and the like" (Taylor 1992, p.33). It is this broader understanding of language that shapes individuals' world experience, gives meaning, and enables individuals to understand and become who they are (Taylor 1992, pp.33-40). Whilst cultures are internally diverse, with members holding a set of overlapping characteristics that may change over time, they are nevertheless taken to be discrete wholes that are distinguishable from other cultures (Song 2009, p.17). Culture can be understood as belonging to a class of goods that is irreducibly social (Taylor 1995, p.138). This, for Taylor, is because cultures create valued ways of life, incorporate common understandings of these valued ways of life and can only be supplied in the context of a group of individuals who share these understandings (Taylor 1995, pp.138-139).

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<sup>102</sup> This will be discussed in greater detail in Chapter Four of this thesis, although for the time being authenticity can be understood as an expression of our true inner self (see for instance Beehler 1990).

<sup>103</sup> As such, I will primarily focus on his account of culture, although when analysing this conception of culture's relationship with border exclusion it is worth bearing in mind that this does not preclude differing interpretations. of thick culture which may be substituted in either in their whole or in part provided that they bear similarities to the locus of value, shape of and nature of culture.

Once individuals have access to a culture, its value can be assessed by how it affects the lives of those who engage with it (Pevnick 2011, p.142)<sup>104</sup>. For Taylor, nations, much like individuals, are entitled to define and articulate their own authentic identity, and maintain this into the future (Taylor 1994, pp.58-59). The reason for this is to ensure that “there is a community of people here in the future that will want to avail itself of the opportunity” to be members of a culture by choosing policies that “actively seek to create members of the community” that future generations can identify with and recognise (Taylor 1994, p.58). In short, there is value in the continued survival of a culture because of its value both in and of itself and because of the creation of meaning, recognition, and identity to those who share in it. A right to exclude can be drawn from the interests of individuals in having a stable cultural context from which to ground an autonomous life as well as the interest in controlling the inevitable change that will happen to this cultural context over time (Miller 2005, p.201).

It is here that a right to exclude may be at its broadest. As with using a thicker conception of culture when discussing the role of culture in supporting democratic functioning, if a ‘thick’ culture is a prerequisite for individual freedom, groups are entitled to refuse to admit those who do not share in this culture as it may water down, destabilise, or destroy this lens which contributes to the understanding of ourselves and of the options available to us. However, whilst perhaps at its broadest, using a thicker conception of culture may come with implications that many liberals may find unpalatable, at least in the cases of multicultural states that are composed of a variety of groups with different norms, ethnic backgrounds, and religious views. If a ‘thick’ conception of culture is a component of the precondition for autonomy, and the protection of this is used as a suitable justification for exclusion, then a right to exclude would exist around the boundaries of distinct “thick” cultures. This poses a boundary problem in two directions.

Outwardly and less problematically, (and similarly to monocultural states) a boundary problem is created when considering groups of non-members that share either a majority or minority culture that already exists within a state<sup>105</sup>. This provides a justification to both favour migrants who share constituent cultures, but also fails to justify a right to exclude those who are culturally similar. Put another way, Türkiye would not be able to appeal to the preservation of a national culture to exclude non-members who share a minority or majority culture with existing Turkish citizens and would be justified in favouring prospective immigrants who are Turkic, Kurdish or Armenian. As with the previous argument appealing to culture’s role in supporting deliberative democracy, this does not undermine the argument, however it does limit the extent of a right to exclude<sup>106</sup>.

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<sup>104</sup> To highlight this, consider Pevnick’s example of where the value in sport can be found. Take cricket, for instance. Although it may be considered a social good that is farcical absent understanding its history and significance to particular communities, it is hard to conceive that this doesn’t also have value to individuals because of its effect on those individuals (Pevnick 2011, pp.142-143).

<sup>105</sup> As in the case of the Hungarian government’s granting of citizenship rights to ethnic Hungarians in Slovakia (see for instance BBC 2012).

<sup>106</sup> However, it may not even do this if one is willing to stretch what is meant by culture as Miller does. This apparent failure to justify a right to exclude may be overcome. ‘National cultures’ are often defined by the balance of different groups within a state. Canada is made up primarily of anglophone, francophone and Indigenous cultures, but it is in part the balance between these three that makes Canadian culture recognisably Canadian. A huge influx of migrants sharing say a cultural background with anglophone Canada that reduced the other two groups to negligible influences on an overarching Canadian

The more problematic implication of this is evident when looking internally at multicultural states. If a thick conception of culture is used, then boundaries are drawn surrounding national groups<sup>107</sup> rather than territorial states. To highlight this, consider the following examples. Within his 1992 article *Democracy and Respect for Difference, The Case of Fiji*, Carens considers whether it is morally permissible to deviate from liberal impartiality in order to protect the culture of native Fijians in a society where there are multiple established cultural groups. After an in-depth historical account of native Fijians and Indian Fijians, Carens argues that “[f]ormal inequalities may actually contribute to the goal of treating people as moral equals or giving their interests equal moral weight” (Carens 1992, p.596). Given the relative fragility of native Fijian culture, Carens advocates for separate administrative institutions for native Fijians, and because of their cultural attachment to the land, policies designed to prohibit the selling of land held by native Fijians (Carens 1992, pp.594, 595). Carens ultimately reconciles this deviation from liberal impartiality, as these deviations differ from apartheid or other instances of racial segregation because they *do not harm* Fijian Indians and instead were designed to protect native Fijians from domination (Carens 1992, p.594). In doing this, Carens follows a very similar line taken by Taylor when discussing whether or not it is permissible for Quebec to deviate from impartiality to enact policies to protect a distinct Quebecois society (Taylor 1994, p.60)<sup>108</sup>. Taylor allows for a state to enact policies aimed at ensuring the survival and flourishing of a particular culture if they respect the basic rights of citizens who do not share in this culture. How far can these policies to protect distinct cultures be pushed? Would the Quebecois be entitled to restrict the movement of Anglophone Canadians to preserve this distinct identity? Rather than establish a right to exclude for states, with exclusion separating members and non-members, this would imply a right to exclude that surrounds the boundaries of national groups which may or may not correspond to the boundaries of states. In cases of multicultural states, this would seem to imply and legitimise the creation of a series of gated communities bounded within a state<sup>109</sup>.

As a result of this, we are left with a few (uncomfortable) implications. Firstly, liberals must either tolerate a series of differentiated communities bounded within a state, which at its weakest involves deviation from liberal impartiality in order to protect these communities, and at its strongest may justify limited movement at the boundaries of different cultural groups within a state. The second of these uncomfortable implications is that it may demand that cultural groups possess a right to succession so that each constituent culture who feels that their culture is threatened is able to have a state to protect their distinct culture. And thirdly, and following

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culture would correspondingly change what it means to be Canadian as being Canadian is at least in part defined by the influences of groups that share being Canadian. Instead of negating a right to exclude in cases of migrants sharing a cultural background with members, this boundary problem perhaps only changes the shape of a right to exclude to one that protects the balance of minority and majority cultures in order to maintain the shape of a national culture.

<sup>107</sup> Or indeed sub-national cultural groups.

<sup>108</sup> Although it should be noted here that despite their similarities, these cases are very different. In the case of Fiji, native Fijian culture – in Carens’ mind – is very fragile both due to its reliance on access to certain goods and due to its low number of adherents. In the case of the latter, Quebecois culture is in a far more stable position due to its number of adherents. As such, culture may be far more resilient than Taylor would imply out of – quite rare – cases.

<sup>109</sup> Taylor is more than happy to restrict liberal freedoms to this end including fairly strong prescriptions on the use of language in public, the schooling of children, employment practices (Taylor 1994). This has uncomfortable implications as different conceptions of freedom run into one another. This will be explored in more detail in Chapter Four of this thesis (Taylor 1994).

Walzer, liberals must recognise that states may need to yield territory to other cultural groups to maintain cultural homogeneity (Walzer 1983, pp.46-47).

All of this is not to say that appealing to a thick conception of culture is problematic even with these implications. Whilst I will not wade into a defence of cultural groups' right of succession, both due to concerns of space and of maintaining the focus of this chapter, allowing a deviation from liberal impartiality may be permissible provided that the rights and liberal freedom of citizens who do not share these commitments are protected. Taylor's exploration of the Quebec government's adopting of policies to protecting a distinct Quebecois culture highlights this well. When governments take an interest in the survival of their majority cultural group, this is partly practical<sup>110</sup>, but does not undermine their liberal commitments when they show partiality to certain languages, literature, history or customs and norms of their majority culture. Rather, they vindicate their liberalism by respecting the cultural differences of their *citizens* through the granting of equal rights and respect and facilitating the reproduction of diverse ways of life within civil society (Walzer 1994, pp.99-100). Put another way, partiality is not problematic provided that this partiality does not include the restriction of liberal freedoms of those who do not share in the majority culture<sup>111</sup>. But it is here that a "thick" conception of culture runs into difficulties in generating a right to exclude. From one direction this, as we have seen, does little to justify excluding those who share in this "thick" conception of culture. From another, and more problematically, partiality for a majority culture involves the restriction on liberal freedoms at the border. Using a thick conception of culture leads to cultural and liberal freedoms existing in tension and it is unclear why freedom resting in culture should always take priority.

Utilising a 'thick' conception of culture may have problematic implications, but it is not the only way that 'culture' may ground a right to exclude. A 'thinner' conception of culture, centred around a shared language, a commitment to democratic institutions and procedures and contextual understanding of these institutions, may bypass many of these issues whilst being sufficiently weighty to generate a right to exclude (Kymlicka 1989; Pevnick 2011, p.144). It is this thinner sense that Kymlicka advocates when articulating the role of culture in supporting autonomy. For Kymlicka, culture is centred on a "common language and social institutions, rather than common religious beliefs, family customs, or personal lifestyles" (Kymlicka 2001, p.25). Kymlicka goes on to explain that:

"societal cultures within a modern liberal democracy are inevitably pluralistic, containing Christians as well as Muslims, Jews, and atheists; heterosexuals as well as gays; urban professionals as well as rural farmers; conservatives as well as socialists. Such diversity is the inevitable result of the rights and freedoms guaranteed to liberal citizens, particularly when combined with an ethnically diverse population. This diversity, however, is balanced and constrained by linguistic and institutional cohesion" (Kymlicka 2001, p.25).

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<sup>110</sup> After all, public processes such as the education of children or the functioning of government have to be conducted using a language, and the using of multiple languages (where these are not already used) serves only to raise the costs of these public processes and making these less accessible to members who may not speak these languages.

<sup>111</sup> It has also been used to open racist and racialised thinking about group belonging.

To say that all Americans share a common culture based in the speaking of the English language is stretching reality, but there is an element of truth to this. The United States has integrated vast numbers of people from a variety of thick cultural backgrounds into something that can be said to be a common culture (Kymlicka 1996b, p.78). Most Americans can be said to be participating in a “joint culture” that integrates a broad array of groups (Kymlicka 1996b, p.78). Whilst this shared culture is broad enough to encompass this wide range of thick cultural backgrounds, it provides its members with a shared vocabulary, mutual recognition, and self-identification (Kymlicka 1996b, p.84; Margalit and Raz 1990, pp.451-455). On a thinner conception, culture still plays an instrumental role in supporting the capacity for autonomy for those who share in it, albeit a thinner one.

Much as with the thick account of culture, culture has value due to its role in giving choices meaning<sup>112</sup>. The survival of a culture is by no means guaranteed. Indeed, Dworkin goes on to say “[w]e inherited a cultural structure, and we have some duty, out of simple justice, to leave that structure at least as rich as we found it” (Dworkin 1985, pp.232-233). Even if one is sceptical of the non-instrumental value of culture, or with the implications of using a thicker conception of culture, a thinner societal culture still plays an instrumental role in facilitating autonomy and is sufficient to generate a right to exclude, albeit one that is less extensive than when using a ‘thicker’ conception of culture. Whilst a ‘thick’ conception of culture may draw a right to exclude around the broad contours of a ‘national culture,’ a thin conception of culture may only ground a right to exclude around shared commitments and understandings of institutions. This is a far weaker and less extensive right to exclude, but it is also one that avoids many of the problems faced by utilising a ‘thick’ conception of culture. It does this in two ways. Firstly, it does not face the same internal boundary problem<sup>113</sup>. And secondly, it goes some way to resolve the tension between “liberal” freedom and supporting the conditions for autonomy<sup>114</sup>.

#### **Section 4: Conclusion**

In this chapter, I have explored the liberal and democratic case for a right to exclude and have sought to lay this out in its strongest terms. This case should be understood as existing in dialogue with the previous chapter of this thesis. The arguments put forward by theorists advocating for a right to exclude have, to varying degrees of success, drawn attention to the moral relevance of state borders and the control of membership.

The first, and ultimately unsuccessful attempt at doing this, was based in *Lockean notions of property* (Nine 2008; Pevnick 2011). Whilst this account may have provided a (relatively) sound footing from which to assert a right of collective self-determination over certain collective goods (including membership), this route is also mired in a boundary problem, the conflation between jurisdictional rights and property rights and disanalogies which ultimately undermine this position. As to the first of these, whilst this proved partially resolvable, accounts that seek to tie ownership and exclusion are wracked with a boundary problem that stems from where ownership comes from (Hidalgo 2014). If one seeks to ground collective ownership in economic contributions (as Pevnick does in places; 2011, p.33), then an internal boundary problem is created when considering those who are

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<sup>112</sup> Although a thinner conception of culture will also likely involve a much lesser contribution to the lens that gives meaningful choices meaning so will have correspondingly lesser value in supporting individual autonomy.

<sup>113</sup> Or at least it does not face this boundary problem provided that a state is not comprised of liberal and illiberal peoples.

<sup>114</sup> This tension will be explored in greater detail in the next chapter of this thesis.

unable to contribute and an external boundary problem is created when considering those who contribute from abroad (Hidalgo 2014, pp.267-268). Whereas if one seeks to ground collective ownership through contributions qua citizen, we are left with a similar problem when considering that many also obey the law but would not be considered associative owners. As to the second of these, and if we accept that contributions (in either form) generate collective ownership, we are still left with the difficulty of establishing jurisdictional as opposed to property rights (Song 2018b, 2019). In short, whilst appealing to collective self-determination proved to be a promising direction from which to ground a right to exclude, collective property is an unconvincing way of getting there.

The second route explored within this chapter was likewise grounded in a concern for collective self-determination but was grounded in an appeal to *freedom of association* (Wellman 2008; Wellman and Cole 2011). Much like attempts to ground a right to exclude in property, the underlying concern that motivates this approach is collective self-determination. Much like attempts to ground a right to exclude, this account also ran into problems. Whilst theorists such as Walzer (1983) and Wellman (2008) are right to highlight the value of freedom of association to individual autonomy, their accounts began to unravel as they sought to extend this to states by way of private associations. In doing so, however, this route to establishing the moral relevance of borders foundered due the use of serious disanalogies. States are not like personal relationships or like clubs. However, whilst the analogies proved problematic, their underlying concerns were not. An essential part of collective autonomy is that the decisions that are made emanate from within the group as opposed to being enforced from without (Altman and Wellman 2009; Wellman 2015; Song 2018b). If (as most members of liberal democratic states hold) democratic self-rule is an important aspect of freedom<sup>115</sup>, then control of the contours of membership is important as it is required for a collective self to be autonomous. As such, in bypassing freedom of association and appealing directly to collective self-determination and making a democratic case for the moral relevance of borders we may find a firm footing for democratic state's right to exclude under certain conditions.

The third, and final approach explored within this chapter was centred on the instrumental role of culture in supporting individual autonomy and the equal capacity for liberty. On the one hand, culture may have instrumental value in supporting the bonds of social trust and solidarity required to support democratic decision meeting and in providing the conditions for the equal exercising of liberty (Miller 1995; 2007; 2014; 2015; 2016). On the other, culture may support autonomy by functioning as a lens that gives options meaning (Kymlicka 1995, p.84; Carens 2000, p.55). Both provide strong reasons for supporting a state's right to exclude. However, as we have seen, this is largely dependent upon whether a "thick" or "thin" conception of culture is used. Whilst the utilisation of a thick conception of culture may ground a much broader right to exclude, it raises a (potentially problematic) tension between liberal freedoms<sup>116</sup>. A thin conception of culture may skirt many of these problematic issues but generates a correspondingly thinner right to exclude that in practice may only be exercisable in limited circumstances.

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<sup>115</sup> This connection will be explored more fully in Chapter Four of this thesis.

<sup>116</sup> By justifying the restriction of liberal freedoms of members to support access to culture.

Taken together, there *are* morally relevant features of borders that can protect important aspects of members' freedom (whether in terms of individual or collective autonomy). Because of this, whilst there is a powerful liberal and democratic case for open borders, there is a powerful case for closed borders. Or, in other words, rather than a clear presumptive case for admission or exclusion, concern for the freedom of members and non-members pulls us in different directions. This turns these questions into how to balance the freedom of members and non-members. Subsequent chapters of this thesis will take up this challenge. Over the next two chapters, I will seek to lay the groundwork for doing this by examining two overarching problems with this debate. In the first of these, I will engage with the concept of the border, in doing so seeking to highlight that both camps within the literature utilise a partial and overly idealised conception of the border and discuss the implications of this for this debate. And, in the second, I will more closely examine how the arguments for open and closed borders relate to the concept of freedom. In doing so, I will argue that borders should be understood as restricting and protecting freedom simultaneously with the securing of freedom in one sense or location meaning the limiting of it in another sense elsewhere.

### Chapter 3: The Moral Complexity of Borders

To talk about borders is evocative. When asked to conjure an image of ‘the border’, many people picture fences or checkpoints, passports and visas, border guards and guns, seaports and airports, queues, and luggage — or migrants in leaky boats, deserts, or frozen forests playing a high-stakes game of cat and mouse with a state’s border regime. In the context of debates on migration and the moral permissibility of border exclusion, discussing the border seems to involve at least two aspects. Firstly, it is a legal dividing line that separates those who belong from those who do not, members from non-members. Secondly, by controlling who is authorised to cross a border, it is a coercive exercise of state power.

In the previous two chapters of this thesis, I examined how liberal theorists have explored the normative foundations and moral permissibility of border admission and exclusion. While these arguments are stronger in some areas than others, I contend that both sides of this debate suffer from two analytical problems. The first of these<sup>117</sup> and the focus of this chapter, is the failure to adequately engage with the sociological complexity of the border, the implication of which has broad normative implications for liberals. Despite the border’s centrality to questions of admission and exclusion, it is surprising how little time is spent by normative political theorists examining how bordering practices may shape the rights of admission and exclusion that they seek to establish. Rather, both the border and the practices that occur there are treated as a monolith whose normative implications beyond their very existence are all too often overlooked. In the rush to establish the basis of a ‘right to migrate’ or a ‘right to exclude,’ the border is viewed simply as the location at which decisions about admission and exclusion are made, and this is assumed to exist at the territorial and jurisdictional limits of the state. However, by failing to incorporate a more sociologically informed conception of the border that reflects many Western states’ bordering and “co-bordering” practices<sup>118</sup>, liberal theorists underexplore the normative significance of the border.

In this chapter, I will argue that the moral complexity of the border stems from developments in states’ bordering practices throughout the twentieth century. State borders no longer exist solely at the territorial limits of states, but have increasingly become regulatory regimes that are internalised and externalised through the implementation of coercive border controls (Bosniak 2008, Agnew 2008, Kukathas 2011 Balibar 2011; Longo 2018). This has at least three (broad) normative implications for those discussing the ethics of immigration. Firstly, the *extent* to which borders coercively restrict freedom may vary considerably based upon the location of non-members in relation to state borders, and, by extension, the specific nature of their relationship with those borders. Contemporary bordering practices of states blur the line between inside and outside and between member and non-member. As a result, the coercive interference with the freedom of non-members may sometimes be lesser (and correspondingly less problematic) and at other times much more pervasive (and thus in need of weightier justification) than portrayed within the existing normative literature. Secondly,

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<sup>117</sup> The second of these, which will be the focus of the next chapter of this thesis stems from the use of an overly narrow concept of freedom and an overly narrow response to the question of “whose freedom?”.

<sup>118</sup> See for instance Longo (2018) and Campos-Delgado (2017) for a discussion of jointly managed borders and the creation of extraterritorial border zones through international agreements.

because of practices of differentiated admission and the stretching of borders, the freedom of non-members may be affected in ways not easily captured when utilising a partial and overly idealised conception of state borders. Finally, because some bordering practices immorally target those people who are deemed to be “undesirable”<sup>119</sup>, bordering practices may raise issues of restorative justice.

To do this, this chapter will be split into four parts. First, I will lay out how borders are discussed within the existing normative literature on migration, arguing that whilst borders are problematised both in terms of the degree to which they are either morally arbitrary or morally relevant and in terms of the way in which they interact with freedom, the existing literature either tacitly or overtly ties borders to the peripheries of states<sup>120</sup>. In the second section, I will seek to highlight the empirical shortcomings of this abstract and idealised conception of the border utilised within the existing normative literature on migration by drawing on both the critical border studies and critical international relations literatures. In the third section, I will explore how this more complex account of bordering practices impacts the freedom of non-members. Finally, in section four, I will discuss the implications and limitations of this situation for normative debates on migration.

## **Section 1: The Border in the Normative Literature on Migration**

### *1.1 The Border in the Existing Normative Literature*

To talk about migration is to talk about movement over state borders from one state to another. Of course, migration can be more complicated than this, often involving transit states and different bundles of claims. However, the core of this view is that migration involves movement between two different types of jurisdictional authority, i.e., states<sup>121</sup>. Migration differs from other forms of movement as it takes place against the backdrop of boundaries that demarcate territorially bound jurisdictional authorities in order to “gain stable, which in practice means legal, residence and often membership in a state” (Laegard 2010, p.248)<sup>122</sup>. However, whilst these statements hint at the complexity of the activity that occurs when individuals migrate, they are also sweeping and do not neatly capture the diverse experiences of individuals who interact with state borders. For some, interaction with state borders is a matter of life and death; for others, it is a banal experience. For many, it falls somewhere in between these extremes. This range of experiences can all occur at the same border, which is why Etienne Balibar describes borders as both *polysemic* and *vacillating* (Balibar 2002). Borders are *polysemic* because individuals from diverse backgrounds may experience the same border in a way that is unrecognisable to others (Balibar 2002). They are *vacillating* because “they are no longer *at the border*, an institutional site that can be materialised on the ground and inscribed on the map, where one sovereignty ends and another begins” (Balibar 2002, p.89). Contemporary states increasingly use a complex series of controls to regulate movement through their borders. These controls are often no longer limited to traditional border zones, and they often, by

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<sup>119</sup> Whether on economic, social, racial, or some other grounds.

<sup>120</sup> For examples of this see, for instance Carens (1987, 2000, 2013) Bertram (2018), Bader (1995, 2005) Buchanan (2003) Weiner (1999) White (1997) Walzer (1983) Ibister (1996) Pevnick (2016).

<sup>121</sup> Although in addition to this, migration may also take place across the backdrop of transnational institutions such as the EU.

<sup>122</sup> For a more in-depth discussion of what constitutes migration see the introduction of this thesis.

design, target individuals from particular social and economic groups (see for instance Vaughan-Williams 2010; Aas 2014).

For a concept so central to questions of admission and exclusion, it is surprising that the existing normative literature is oddly silent in discussing the activity that occurs at state borders. Rather, standard approaches to the ethics of immigration either more or less ignore the concept of the border or (directly or indirectly) utilise a crude conception of the border which does not capture the border's sociological complexity (Laegard 2010, p.248). Theorists such as Walzer (1983), Wellman and Cole (2016), Miller (2016), Bader (1995; 2005), Bertram (2018), Pevnick (2011) and Fine and Ypi (2016) all fail to identify a working definition of the border and their discussion of the activity that occurs there is limited. This is not to say that the border is not discussed at all; as we have seen across Chapters One and Two, the ways in which borders may protect and restrict freedom have been problematised and explored at length. However, it is rare to find a direct discussion of the border and its normative significance within debates on the moral efficacy of admission and exclusion. When the border is addressed, it is a feature of the existing literature to portray an overly simplified view of the border that does not capture how individuals interact with the border, the location at which this interaction occurs, how people 'move' through state borders, and the specific strategies employed by states to regulate movement through their borders, each of which may have widely felt normative implications when discussing the normative foundations of rights of exclusion and rights of migration.

The way that the existing literature uses and examines the concept of the border falls into two broad camps. In the first camp are those theorists who do not spend time unpacking how borders function, instead falling back on the ill-defined terms "open" and "closed" borders when discussing migration (Walzer 1983; Carens 1987, 2000, 2013; Bader 1995, 2005; Ibister 1996; White 1997; Weiner 1999; Buchanan 2003; Pevnick 2011, 2016; Bertram 2018). Joseph Carens, for instance, in his famous 1987 essay *Aliens and Citizens: The Case for Open Borders*, asserted that a defence of closed borders by economically advanced states is tantamount to a defence of feudal privilege and instead advocated for a position of open borders (Carens 1987). However, Carens, like many other theorists writing on this topic, does not address exactly what exactly is meant by border admission and "open border(s)". Because of this, readers are forced to rely on context, which could lead them to assume that Carens adopts a position somewhat similar to Walzer or Miller's 'hard on the outside, soft on the inside' approach (albeit in the modified format of soft on the outside, soft on the inside), in which once a migrant is granted border access, they have the same standing as an existing member, with all that entails (Walzer 1983; Miller 2016; Bosniak 2017, p.94). This lack of clarity is mirrored across much of the literature. In a similar vein, Veit Bader advocates for a position of "fairly open" borders but does not at any point define or locate the border (Bader 1995, 2005). Likewise, Sarah Song discusses a person's location in regard to a border in terms of 'at' and 'within' but doesn't discuss in any detail what is meant by this beyond defining the border as something that is territorial (Song 2016). As these theorists are silent on the nature, location and functioning of borders, readers are forced, from passing references and context, to conclude that these thinkers view the border, much like Kuthakas, as "geographic boundaries demarcating or defining political entities or legal jurisdictions" (Kuthakas

2011, p.325) or revert to the popular understanding of state borders as existing purely at the “boundaries” of states.

The second camp is more explicit in defining borders and how they function. These theorists spend time unpacking both what states are claiming when they assert the right to control their borders, as well as breaking down the concept of border admission (Coleman and Harding 2010; Miller 2015; Wellman and Cole 2011, p.169; Fine 2013). However, these theorists either neglect to explore how migrants interact with the border or overly limit the space in which the border operates by tying it to the territorial and jurisdictional limits of states. As to the first of these, theorists such as Sarah Fine spend time unpacking what states are claiming as part of a right to exclude, highlighting that the right to exclude can be distinguished into a right to exclude from territory, a right to exclude migrants from *settling* within a state’s territory and the right to exclude a migrant from membership (Fine 2013, p.255)<sup>123</sup>. Whilst these theorists highlight this legal complexity, they do not adequately incorporate this complexity into discussions of the normative foundations of admission and exclusion<sup>124</sup>. As part of this, the coercive and oftentimes violent bordering practices are not adequately incorporated into their discussions. Rather, in failing to examine the normative implications of territorial admission, participatory admission and membership being granted at various times and in different locations, admission is treated as a one-time event (see for instance Carens 1987, 2013; Bader 1995). As to the second of these, the use of vague terms such as “within” and “without” and “at the border” (see for instance Song 2016) perpetuates an inaccurate inside-outside dichotomy that locates the border at the territorial and jurisdictional limits of states. In doing this, a partial view of the border is presented in which borders function as geographic boundaries that delineate states (Kukathas 2011, p.325).

The way that the concept of the border is used within these two camps is problematic in one, or more, of three separate ways. Firstly, the concept is all but ignored in its entirety with no adequate definition of the border being given (Song 2016; Bader 1995; 2005; Bertram 2018). The result of this is that the border is left as an ill-defined monolith that does not capture the space in which migrants interact with the border or the extent to which migrants are subjected to coercion by states’ bordering practices. Secondly, the concept of the border is discussed, but either indirectly in a roundabout way or through a limited examination of its aspects or implications. In cases such as these, this lack of direct engagement with current border regimes of population control forces readers to use their own understanding, potentially creating a barrier in understanding between reader and author<sup>125</sup>. And thirdly (and most problematically) whether an account falls within the first or second of these camps, many theorists today conceptualise the border in highly idealised and partial terms. Or, in other words, failing to engage with the border’s sociological complexity implies that these theorists fail to grasp the empirical realities and complexities of contemporary states’ bordering practices. As I argue, this reliance on an

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<sup>123</sup> This is mirrored elsewhere. Theorists such as Coleman and Harding, Fine and Wellman differentiate between access to territory, access to the right to remain on the territory and participate in things such as the labour market, and access to full membership or citizenship (Coleman and Harding 2010, p.20; Fine 2013, p.255; Wellman and Cole 2011, p.169).

<sup>124</sup> At times, this is due to a normative commitment, with some theorists resisting the split between membership and territorial admission due to concerns of a hierarchies of membership (see for instance Miller 2016; Walzer 1983).

<sup>125</sup> For instance, the way in which I have characterised this second camp is to an extent quite subjective as it is a composite of often fleeting references and reliance on contextual discussions.

idealised and partial conception of the border, in turn, misrepresents the breadth and depth of coercion to which migrants may be subjected.

## **Section 2: A Complex Border?**

In this section, I will seek to demonstrate that state borders are more complex than portrayed in the existing literature in normative political theory. This oversimplification works from three directions. Firstly, I will seek to highlight that through a variety of bordering practices, state borders are pushed and pulled within and without the territorial and jurisdictional limits of states. Secondly, the structure of borders and the controls that regulate movement through them may disproportionately affect some migrants to a greater degree than others. And thirdly, and as a result of differentiated admission, many non-members today experience a process of authorisation and reauthorisation which places them in states of precarity and vulnerability to domination within the admitting state.

### *2.1 The Location of State Borders*

Firstly, where are borders located? Whilst it is partly true that borders mark the edges of a state's territory, this is only a partial picture. Instead of viewing the border as a boundary demarcating the jurisdiction of different political institutions, the border should be viewed as "not just a geographic place at territory's geographic edges; it is a regulatory regime which operates on territorial inside as well" (Bosniak 2008, p.4). This is reflected in the UK Government's *2025 Border Strategy Consultation*, which states that "[o]ur border is more than a line on a map. It is a combination of organisations, policies, processes, and systems that control, monitor and protect physical crossings of people and goods into and out of the UK's territory" (Cabinet Office 2020, p.11). As such, it is necessary to view the border not so much as a fixed line, but as an "evolving construction" (Agnew 2008, p.175), as "a complex system of machinery" (Kuthakas 2011, p.327), as a regulatory regime where decisions of admission and exclusion are made and enforced. As a state introduces or repeals border policies, the border is defined and redefined. When a migrant interacts with border controls (whether operated by state or delegated non-state actors) they "activate" the border and in doing so locate it (Guild 2001, p.67). Borders should be viewed as "the tripwire of sovereignty" (Guild 2001, p.67), with the border being located at the point where migrants interact with border controls.

Viewing borders as a regulatory regime retains the core of the definition that is used by the existing literature. It is still the space in which decisions of admission and exclusion are made and functions as a dividing line between members and non-members. However, viewing the border in this way better reflects the somewhat messy empirical realities of the strategies and technologies that states use to control access to their borders and better captures the disjointed spatiality of the border. When a migrant encounters border controls that coercively restrict their territorial, participatory or membership admission access, they encounter the receiving state's sovereign power. Where this differs from the popular understanding of borders is that it inextricably ties the border to the controls that regulate movement over them and successful settlement within them. Border controls push and pull the location of borders internally and externally to a given state, causing borders to often exist at multiple locations simultaneously.

To highlight this, let us start with an examination of how borders may be internalised. This is aided by there being no shortage of contemporary examples of states internalising their borders in order to regulate access to territory and the labour market. In the UK, for instance, a series of checks are imposed on non-members (and members) in order to prove that a migrant individual possesses a certain kind of access (checks which are often delegated to non-state officials). If one wishes to rent property, work, study, or open a bank account in the UK, checks are imposed which serve to delineate those who are deemed to be authorised to have access, and those that are not (Hansen 2010; Consterdine 2017; Zotti 2021). Whilst many who gain territorial access to the UK experience the border at the limits of the UK's territory, whether at ports or airports, this is not where most migrants' interactions with the border stops. Rather, non-members in the UK — whether territorially present with authorisation or without — continue to experience the border through these checks. Here, internalised borders repeatedly check and recheck the territorially present<sup>126</sup>, with those who are deemed to not have been granted or no longer possess authorised access subject to detention and deportation at the discretion of the state, as well as other sanctions such as the denial of housing, access to education, formal employment, access to pensions, bank accounts and other capacities that are required to live a minimally decent life in western states. The UK is not alone in this regard; similar examples may be found elsewhere. The Schengen Borders Code (SBC) allows EU member states to temporarily reintroduce border controls between and within EU member states, a provision which was activated thirteen times between November 2023 and March 2024 (European Commission n.d.). In the US, Immigrations and Customs Enforcement (ICE) operate workplace immigration raids and other forms of checks and immigration enforcement tactics within the territory of the US. Whilst the location at which these migrants experience the border changes, the border, because of the varied ways in which non-members experience it, can be said to exist in multiple spaces simultaneously.

A similar picture exists when examining externalised border controls. Take, for instance, the well-publicised case of Behrouz Boochani, a Kurdish-Iranian journalist who fled Iran in 2013 after many of his colleagues were arrested by Iranian authorities for publishing dissident material. On Behrouz' second attempt to travel from Indonesia to Australia on a boat with 60 other asylum seekers, the boat that he was on was intercepted by the Royal Australian Navy, after which he was detained for a month on Christmas Island, an Australian external territory, before being transferred to the Manus Island detention facility in Papua New Guinea for four years as part of Australia's 'Operation Sovereign Borders'. After his case was raised in the Australian parliament, he was released from the detention facility but was unable to leave Papua New Guinea until 2019 as he lacked travel documents (Hollingsworth 2020). Much like those refused admission at the territorial limits of the state, Behrouz was denied entry to access to Australia's territory, as well as participatory and membership access. However, instead of this occurring at the edge of Australia's territory, Australian policy extended its border regime into the Pacific Ocean as well as into a third-party state, Papua New Guinea, with decisions regarding admission and the enforcement of this exclusion being made externally to Australia's territory.

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<sup>126</sup> With these checks mostly being conducted by actors who have been delegated this authority by states as opposed to state officials. For a further examination of this see Bloom and Risse's (2014) examination of hidden coercion and carrier sanctions.

This, and examples like it such as the UK's Rwanda deportation policy<sup>127</sup>, are part of a growing phenomenon of what has been dubbed as "co-bordering", in which borders are jointly managed between states through bilateral agreements (Longo 2018). Whether it is recent agreements between the UK and France to prevent unauthorised Channel crossings, or the US' recent *Beyond the Border Agreement with Canada* (2011) and the *21<sup>st</sup> century Border Management Accord with Mexico* (2010), states have increasingly widened the border in the name of border security (Longo 2016, 2018). However, whilst the stated aim of many of these policies is deterrence<sup>128</sup> or building capacity to regulate the movement through borders, an either direct or indirect consequence of this is the stretching of the border to spaces beyond the territory of receiving states.

From this, it seems that borders can be pushed externally by states attempting to prevent migrants from reaching their territory (Longo 2010) and pulled internally by states attempting to distinguish between those who have authorisation to be territorially present and participate and those who do not. Taken together, borders today operate in multiple spaces and operate in these spaces simultaneously (Johnson et al 2011). Rather than conceiving borders as static and territorially defined "lines in the sand," if we are to adequately conceptualise the border, we must recognise and grapple with the way in which borders permeate our social lives and interact with and restrict the freedom of non-members (Agnew 1994). It is because of this that international relations scholars such as Parker and Vaughan-Williams have called for a new "border epistemology" that situates state borders in everyday life and in which it is more accurate to talk of bordering practices than in terms of borders (Parker and Vaughan-Williams 2013). Contemporary states, through a variety of bordering practices, *thicken* their borders, and as part of this, borders are increasingly projected overseas and across state territory, often in the name of border security (Longo 2016, 2018; Vaughan-Williams 2010). It is for these reasons that theorists such as Etienne Balibar have rejected the notion of borders as a physical zone existing at the boundaries of territory and instead argues they are to be found "wherever selective controls are to be found" (Balibar 2011, p.84).

## 2.2 Bordering Practices and "Polysemic Borders"

Whilst border controls may push and pull borders within and without the territorial and jurisdictional limits of states, borders may also be constituted and reconstituted in ways that mean that they are experienced and defined differently for individuals in different contexts (Balibar 2011, p.81). In addition to the spaces in which borders operate, we may also look to the way that specific bordering practices are constituted. In this subsection, I will seek to (broadly) distinguish between two types of border control — those that are unidirectional, and are not targeted at particular groups, individuals or routes of entry, and those which are selective and directed towards individuals of different social, economic and ethnic backgrounds or particular routes of entry. Exploring these (broad and blurred) types of border controls can go some way to explaining

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<sup>127</sup> Although this and its normative implications will be discussed in greater detail later in this chapter, for the time and for clarity, this policy entails deporting migrants who have used unauthorised routes of migration through third party states (that have been deemed safe) to Rwanda where their asylum claims are heard. This is, however, more expansive than the off-shoring involved as part of operation sovereign borders as, under this agreement, asylum claims are processed in Rwanda with successful claimants gaining asylum in Rwanda instead of the UK.

<sup>128</sup> The UK Prime Minister Rishi Sunak has repeatedly described the Rwanda policy as being an effective deterrent against unauthorised migration (see for instance Sky News 2024)

what Balibar calls the *polysemic* nature of borders, where borders “never exist in the same way for individuals in different social groups” (Balibar 2011, p.79).

Firstly, let us consider some of the ways in which the border may be internalised and externalised in an undirected way – those instances where border controls are not intended to target any particular group. Perhaps the best example of this latter kind can be found in Abizadeh’s (2008) examination of border coercion. Abizadeh, by examining border coercion, highlights how the independence and choices available to non-members are limited irrespective of their location or whether an individual ever plans to “cross” a particular border (Abizadeh 2008). For example, by asserting the right to exclude, the US border limits all those who have not received authorisation from being able to access its territory and institutions, including all of the opportunities that such access affords, under threat of being detained and deported by US border officials<sup>129</sup>. Whilst these controls represent a restriction of the freedom of non-members and may affect different individuals to different degrees depending on their context, they are not intended to target any individual or group<sup>130</sup>.

Not all border controls are like this, however. Bordering practices may be designed to target particular groups. Internally, states actively draw borders by introducing controls such as right-to-work checks and right-to-study checks, demanding that some categories of migrants from certain states register with the police, having the police check certain victims’ immigration status when reporting certain crimes and requiring proof of right-to-residency to rent or purchase property. Often these controls are conducted by delegated, private-sector, or non-state actors, with the result that a buffer is created between a state and a migrant by “constructing the ways in which the individual may come into contact with the State, or even whether they may do so” (Bloom 2015, p.892). Externally, states actively externalise their borders by pushing decisions about whether a potential migrant should be granted admission beyond the territorial limits of a state or by seeking to prevent certain migrants from reaching a state’s territory. This may be done directly by states, via international agreements or by some combination of these. Policies such as the (now former) policy of relocating those who entered the UK without proper documentation to Rwanda with the stated aim of disincentivising irregular entry to the UK’s territory (BBC 2020) are an example of this former kind. Bordering practices such as these are intended to target particular groups of migrants for seeking to use particular routes of bringing their claims “to the border”.

Similar “targeted” border controls may be found within international agreements through what Campos-Delgado calls “Transit Control Regimes” (Campos Delgado 2017). A Transit Control Regime is an agreement between two or more states in which the transit state detains and expels third country migrants travelling

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<sup>129</sup> At this point, a reader may object by saying that this is not coercive and instead is perhaps choice limiting or merely the threat of coercion. Whilst I will discuss this in greater detail coercion should be understood as the threat of or use of force in order to elicit a certain behaviour from the coerced. For example, a mugger that says “give me your wallet or I will stab” you is coercing a victim whether or not he actually stabs the victim in order to get his wallet. What is important is not whether the mugger actually had to employ force, but that the threat of a sanction, being stabbed, elicited the desired behaviour, the handing over the wallet. In the case of the US border example, the border can be said to be coercive because there exists a threat of sanction, being detained by ICE and then deported, to elicit a potential migrant to not attempt to gain unauthorised access (Abizadeh 2008, p.57). Both the actual application of force and the threat of force are coercive as they both interfere with an individual’s autonomy.

<sup>130</sup> Although the empirical realities of this are, of course, more complex given that the US operates a green card system with quotas for migrants from specific nationalities (see for instance Economic Times 2023).

irregularly to a destination state (Campos-Delgado 2017, p.17). Backed by security agreements, a transit state's territory becomes a border-zone for migrants travelling to destination states (Campos-Delgado 2017, p.17). Using the example of Mexico, Campos-Delgado highlights how Mexico, through international agreements, acts as a delegated authority responsible for preventing migrants seeking to enter the United States irregularly, and in doing so, operates as an extension of the US' border (Campos-Delgado 2017). In doing this, the US border is thickened, but it is only thickened for those whose only way of bringing their claims to the US border is by transiting. Moreover, it does this in a way that avoids the responsibility that interacting with a border places on receiving states within international law<sup>131</sup>.

The "form" that border controls take and the location(s) in which borders operate contribute to the concept of the border being messy and experienced differently by migrants depending upon their broader context. Recognising the interaction between a migrant's context and the structure of bordering practices goes some way to capturing how migrants experience the border in diverse ways.

### *2.3 Differentiated Admission and Movement Through Borders*

The final dimension contributing to the complexity of borders is *differentiated admission*, which refers to when different forms of access are granted (or denied) at different times and in different locations. Whilst extending the space in which the border operates better reflects where migrants may interact with the border, further clarity can be gained by examining the implications of differentiated admission put forward by theorists such as Coleman and Harding (2010), Kuthakas (2011) and Wellman (Wellman and Cole 2011). As highlighted within the discussion of how the existing normative literature engages with the concept of the border, this is one aspect of the border that is explored, even if the normative implications of this are not fully grappled with<sup>132</sup>. Instead, within the existing normative literature, the question of whether a migrant should be granted territorial and participatory access is treated to be one of admission, and the question of being granted full membership is treated to be one of integration.

This distinction is useful, as there is an integrational dimension to the temporally delineated practice of granted citizenship after a prolonged period of residence. However, this distinction also obscures the fact that territorially present non-members may be subject to some, if not all, aspects of the border. Rather than thinking in terms of crossing borders, it is perhaps better to think in terms of moving through them. A person who has been granted partial admission will not have 'passed through' the border until they have the benefits of full membership. After this, any border controls that they are subject to are on the same terms as existing members. Highlighting this distinction has normative significance as it has the potential to affect: (1) the way that non-

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<sup>131</sup> Such as the responsibility to hear and assess asylum claims.

<sup>132</sup> Instead, theorists resist the splitting of participatory or membership access due to concerns about individuals being subjected to coercion absent democratic legitimation (Walzer 1983; Miller 2016), purely discussing the question of participatory admission, assuming that territorial access is a separate question (related to non-migrants, such as tourists or people visiting briefly for business), and that membership must be granted 'at some point down the line' (Pevnick 2016; Oberman 2017, p.92).

members interact with a border, (2) the extent to which the freedom of non-members is affected by the border, and (3) the obligations that receiving states have towards territorially present non-members.

To highlight this, let us explore two different examples. Firstly, consider a migrant who arrives at a border checkpoint at the traditionally located border. That migrant's presence at the border seems to shape the obligations that that state has towards that migrant. David Miller articulates this by stating that:

“[s]o does being at the border make any difference at all? I think that it imposes on the receiving state an immediate duty of care. This becomes most apparent if we think of someone arriving by sea on a hostile shore. If state officials are not willing to admit such a person to the territory, they must ensure that he is escorted to a place of physical safety: they cannot simply turn his boat around if it is likely to sink. The duties that apply at land borders and airports follow the same logic. (Miller 2015, p.394)”.

The fact of one's presence “at a border” is important as that state has assumed the role of being the migrant's primary human rights protector, at least for the duration that they are “at the border”. In some instances, this concern takes on greater moral force when the denial of admission may represent a human rights failure if denying admission would put the migrant at risk of harm. Pushing leaky boats containing desperate migrants back towards French or Turkish shores is morally reprehensible, because their presence within a receiving state's jurisdiction demands that the state take their human rights seriously.

Moving on to examine a second example, consider those who are territorially present but have not passed fully through a border by becoming full members. Take for instance, the example of the Dreamers in the United States, those migrants who arrived in the United States before the age of sixteen as undocumented immigrants. Whilst provided some protections under DACA<sup>133</sup>, Dreamers have been granted these protections in a way that builds precarity. They have a temporary right to live, study and work within the United States on a rolling two-year basis, but no path to permanent residency or citizenship. Those in this program have been granted territorial and participatory access (albeit on a temporary basis) but are still subject to border controls. They must reapply every two years, making their position precarious, and they do not have the benefits of membership such as voting rights, the ability to stand as an elected representative, or access to affordable tuition at universities and they remain vulnerable to deportation for even minor crimes. Examining differentiated admission reveals normatively significant differences. Those that are territorially present, but are not members, are potentially subject to broader and deeper forms of state and private coercion. One's precarious status may leave one vulnerable to coercion or manipulation from unscrupulous employers or abusive romantic partners given the sanctions that one may face for even minor immigration violations. Moreover, because people that live in a political community form connections and attachments over time, border coercion may build precarity. Denial of admission *at the border* may limit the choice of where one will build a life, but denial of participation rights and long-term security whilst territorially present can make one's

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<sup>133</sup> Deferred Action for Childhood Arrivals.

life precarious given that the ability to continue living in the place that an individual has made their home is contingent upon the (often unequal, discriminatory, or incorrectly applied) immigration rules.

#### *2.4 A Complex Border*

A quick examination of contemporary bordering practices reveals that the border is far more complex than portrayed in the normative literature. In this section, I have sought to argue that this complexity comes from (at least) three directions.

Borders no longer, if they ever did, function as clearly defined geographic spaces that neatly parcel states off from one another, delineate the exercising of state sovereignty and coercive power and clearly separate members from non-members. Rather, as states have increasingly sought to regulate access to their territory and institutions, borders have moved from being an observable geographic space to be a regulatory regime that operates not just at the edges of a state's territory but within and without its territory as well (Longo 2018; Guild 2001). This regulatory regime is an "evolving construction" as states formulate and reformulate their border policies either unilaterally, or bilaterally or multilaterally through international agreements (Agnew 2001; Kukathas 2011; Longo 2018). Co-bordering agreements may result in the sharing of sovereignty as states jointly manage borders (Campos-Delgado 2017; 2018), and border management may be delegated to non-state actors (Bloom and Risse 2014). This shifts the space(s) in which borders operate. In one direction, borders are externalised through the enactment of border policies that are designed to detect, deter, and prevent migrants from reaching their territorial limits, thereby reworking where the border is located (Casas-Cortes 2015). In the other, borders are internalised to "new locations, into the city, and its streets and even into private homes as well as into discursive and digital spaces" (Fauser 2023, p.4).

From this, we may broadly redefine a border as *a coercive exercise of state power that operates as a regulatory regime that represents, creates, and enforces a dividing line between insiders and outsiders, members and non-members, citizens and non-citizens* (Fauser 2023, p.2). However, because bordering practices are often aimed to affect some more than others, and individuals move through borders and are authorised and reauthorised, borders create various categories of non-citizen (Bloom 2017; Fauser 2023). Borders, then, are complex, and it is only in engaging with this complexity that we begin to capture the ways in which borders interact with and restrict the freedom of non-members.

#### **Section 3: A Morally Complex Border?**

Up until this point in this chapter, I have examined how the border is portrayed within the normative literature. By engaging with the critical international relations and critical geography literatures as well as contemporary examples of bordering practices, I have sought to highlight the empirical deficiencies of the partial and idealised conception of the border used within the existing normative literature that examines migration. In this section, I will examine the implications of a complex border through an examination of border coercion operating across internalised, externalised, and territorially defined borders.

As we have seen in the first chapter of this thesis, border coercion interferes with the "freedom" of non-members. Non-members of a state are subject to an implicit, and often explicit, threat. Seek to cross our borders

absent permission and you will be detained, deported or be subject to some other sanction designed to negatively affect a prospective migrant. This threat, however, does not affect non-members equally, and unlike ideal state coercion<sup>134</sup>, border coercion is imposed without reference to the freedom of non-members. As we saw in Chapter Two, border coercion can be justified in some cases because of its role in supporting the freedom of members (Wellman 2008; Miller 2016; Pevnick 2016).

In response to this, bordering-as-coercion, and the extent to which it restricts the freedom of non-members, has been taken up in the normative literature — most notably in debates between Aresh Abizadeh (2008, 2010) and David Miller (2010). This debate reflects a divide within the existing literature between those who view border coercion as functionally similar to state coercion, thereby demanding that coercion be legitimate only when it maximises the options and capacity for autonomy (see for instance Carens 1987, 2013; Cole 2013; Schotel 2012; Abizadeh 2008, 2010; Pevnick 2016), or those who view coercion *at the border* as functionally different<sup>135</sup> (such as Miller 2010; Wellman and Cole 2011; Song 2016) and argue that coercive restrictions on individual freedom do not need justifying in the same terms. Despite this divide in viewpoint, and as a result of using a partial and idealised conception of the border, it is a feature of the existing normative literature on both sides of this divide, with a few notable exceptions<sup>136</sup>, to lump together all coercive interference without recognising that the intensity and extent of the coercive interference to which migrants are subject is dependent upon their location and relationship to a state's bordering practices. By not fully exploring how the context of a migrant's interaction with 'the border' may result in greater or lesser degrees of coercive interference, the degree to which border coercion interferes with the choices available to, and capacity for the exercising of autonomy of, non-members is not adequately explored. This leaves the rationale required to adequately justify this coercive interference unclear.

In this section then, I will argue that the coercive interference with non-members' "freedom" is at times more pervasive and more problematic than explored within the open borders literature, and at times less pervasive and less problematic. In order to do this, I will draw upon Sarah Song's insight that the justification needed to legitimise coercion is dependent upon the degree of coercion (Song 2018).

### 3.1 Freedom and Border Coercion "at the Border"

To begin with, how do borders limit the options available to and autonomy of non-members coercively at the border? This is perhaps the best place to start in an examination of border coercion as it is here that the literature views the coercive limitation of non-members' life options as occurring<sup>137</sup>. David Miller, for instance, whilst

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<sup>134</sup> See chapter 1, although to briefly recap, the ideal state coerces its citizens in order to create a framework that maximises individual freedom and does this equally so as to maximise the capacity for autonomy and life of options for all subject to the power of that state. As Locke puts it, the aim of the law 'is not to abolish or restrain, but to preserve and enlarge freedom' (Locke 1988, p.57). The object of ideally constituted state coercion is to provide a framework which can aid in enabling those subject to coercion to pursue their life projects (Pevnick 2008, p.401).

<sup>135</sup> Or at the extreme end, whether border coercion should be viewed as coercion at all (Miller 2010).

<sup>136</sup> See for instance Bloom and Risse's examination of carrier sanctions and hidden coercion (Bloom and Risse 2014)

<sup>137</sup> However, this is not always the case. Sarah Song, for instance, ties together border coercion and externalised border coercion, drawing the distinction between territorial insiders and outsiders, and Bloom and Risse separate between border coercion as occurring *at the border* and coercion by one state over person living in other state<sup>137</sup> (Bloom and Risse 2014, p.69).

rejecting that border coercion should be counted as coercion<sup>138</sup>, locates this preventative act as occurring at the territorial and jurisdictional limits of a state (Miller 2013, p.4). As such, this is a good starting point from which to explore the coercive interference of border controls, in part to establish a benchmark against which to explore the differences in the breadth and depth of border coercion in other locations.

When states regulate movement through their borders, and back that with the use of force or threat of legal sanction, states coercively interfere with the autonomy and available life options of non-members (Abizadeh 2008, pp.58-60). It is the threat of legal sanctions and state violence that underpins border coercion irrespective of location, however, presence *at a border* introduces elements that are not necessarily present in other locations.

This comes from at least two directions. In the first instance, a migrant reaching the territorial and jurisdictional limits of a state, in the words of David Miller, occupies an unusual position,

“On the one hand, the immigrant is not a distant stranger, because she is directly subject to the state's power in the way that the foreigner is not; what the state decides to do may have an immediate and profound impact on her life” (Miller 2013, p.4).

That is, a migrant's presence at the border pushes that migrant under the umbrella of a receiving state's jurisdiction. In the second instance, being held at the border is problematic in at least two senses that are not apparent to non-members who are not present at the border. Firstly, being subject to coercive interference at the border may limit the options available to non-members to such a degree that for the duration of time that they are held at the border they cannot be said to be autonomous. To highlight this, it is worth considering the treatment of refugees and asylum seekers in Greece, in particular those who have arrived primarily from the Middle East, as well as North and East Africa, having moved primarily from Türkiye to arrive at Greek borders. Since 2016, some six thousand refugees have remained stuck on the Greek islands of Lesbos, Chios, Samos and Leros, many in overcrowded and dangerous conditions whilst waiting for months to have their asylum cases heard. Before it burned down in September 2020, those living in the Moria refugee camp, built to house around 3000 people, but at its height holding closer to 13,000, had to wait at times for more than a year for the wheels of Greek bureaucracy to turn, process and review their asylum applications and send them to the mainland for a decision (Donadio 2019). During the wait, and in addition to the overcrowded conditions, many of the 13,000 had to live outside of the boundaries of the camp, without running water or electricity and where NGOs picked up the slack to cover the lack of basic services offered by the Greek government (Donadio 2019; UNHCR 2020). Compounding this has been the comparison by many observers to many of these facilities to prisons, with freedom of movement and ability to integrate into Greek society being severely curtailed for residents of these facilities (Smith 2021; Oxfam 2022).

Whilst at first sight, these camps may not appear to be directly coercive, on closer inspection, this is hard to sustain given the drastic reduction of options available to those within these camps and the conditions of these

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<sup>138</sup> For a discussion of this in more detail see Chapter 1, Section 2.

camps, a fact compounded by the length of time that many stay within them. The detention facility-like nature of these camps, along with sanctions designed to disincentivise movement (such as pushback tactics (see for instance UNHCR 2020)) surely meets the criteria for coercion. In addition to coercive interference, being ‘held’ at the border is problematic in another sense. Whilst the migrants held in facilities such as those in Greece have not been formally granted admission, they are living in the jurisdiction of the state even if they are held at the border. Being held in this position, for anything more than a very brief time, involves not just a coercive interference in the lives of migrants held at the border, but also a failure of the receiving state to fulfil its role in supporting the capacity for equal liberty to those within its jurisdiction. Whilst refugee children living in multiple sites across mainland Greece have access to education alongside their Greek peers, formal education is not available for many within refugee facilities on the islands, leaving NGOs and the UNHCR to again pick up the slack (UNHCR 2019b, p.4).

Coercive interference at the border, much like coercion more generally, stands in need of justification. However, migrants *at the borders* of states stand in an unusual position, being both subject to border coercion and the jurisdiction of the receiving state, but not under the full umbrella of a state’s internal coercive regime of law or its suite of civil protections and rights.

However, particular bordering practices may broaden and deepen the degree of coercive interference beyond this. Targeted border controls that are designed to disincentivise particular routes of entry or categories of migrant from seeking admission may have a much broader impact on the freedom of certain non-members – whether by design or by unforeseen impacts. To examine this, we can consider the UK’s policy introduced in 2022<sup>139</sup> of sending certain categories of asylum seekers to Rwanda, alongside the 2021 *New Plan for Immigration*. These policies, amongst other things, introduced sanctions to those seeking to use particular routes of entry that prevented migrants from having their claims heard by the UK, with the route used to enter precluding any chance of authorised admission, no matter how weighty a claim a migrant brings. Those that were deemed to have entered illegally received:

“a new temporary protection status rather than an automatic right to settle, will be regularly reassessed for removal from the UK, will have limited family reunion rights and will have no recourse to public funds except in cases of destitution” (Home Office 2021c, p.4).

This was introduced along with an increase in maximum sentence for “illegally entering the UK” (Home Office 2021c).

This introduces an additional coercive layer that only affects certain categories of migrant that can be expressed as something along the lines of “do not seek access in a certain way or you will be subject to long term detention, your claims will not be heard at all, and you will be removed to a state that you have no ties to”. This is problematic as it raises issues related to equality through the distinction between desirable and undesirable non-members. Cases such as these are hardly unique. Many states are overt in setting out point based systems

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<sup>139</sup> As of the time of writing this in 2024, the UK Government has yet to actually send any migrants to Rwanda.

to highlight desirable characteristics. But, whereas in failing to meet these states' criteria would result simply in the denial of admission, policies such as those entailed within the *New Plan for Immigration* and the policy of sending certain asylum seekers to Rwanda are more problematic because they deny *certain* migrants from having their claims heard by a receiving state.

To summarise then, border coercion operating *at the border* is broadly captured by its portrayal in the existing normative literature when discussing non-targeted border coercion. This, however, does not necessarily hold when discussing particular coercive practices that are targeted at particular groups of individuals, which, in addition to involving the subjection of migrants to another layer of coercion, often involves holding certain categories of migrants at the border in an ill-defined limbo, within the jurisdiction of the state but held at the border.

### 3.2 Externalised Borders, Coercion and Freedom

Having examined border coercion at the traditionally located border, let us turn to the border's effect on freedom when operating externally to a state, those coercive measures designed to prevent migrants from reaching the borders of a state<sup>140</sup>.

At first sight, externalised border coercion appears to function similarly to border coercion operating *at the border*. In both cases, the basic structure of coercion that underpins state's regulation of border admission *at the border* appears to be in place. For instance, a potential migrant considering seeking admission to the United States is subject to the same coercive threat. If a potential migrant attempts to gain access to the territory of, participate in, and receive the benefits of American civil and political institutions absent authorisation, then that migrant will be detained and deported by US border officials. At first sight, this appears similar to coercion operating at the territorial and jurisdictional limits at the state, in both instances the non-member is subject to the border regime of a receiving state, but not the full breadth of normal state coercion<sup>141</sup>. However, the shape of this space appears to change when moving to externalisations whose impact affects particular groups of non-members in much greater ways than others, whether intentionally or not.

State borders, when movement over them is regulated, however slightly, interfere with the freedom of all non-members irrespective of their location, and they do so coercively (Abizadeh 2008). As we saw from the discussion in Chapter 1 of this thesis, coercive threats always limit options and always interfere with an agent's independence, even if that act of coercion does not change the behaviour or preferences of the coerced. So, to return to the example of the US border in the preceding paragraph, the US' assertion of a right to exclude and exercising this through coercive border controls limits all non-US citizens from being able to access the territory of, participate in, and receive the benefits of American civil and political institutions<sup>142</sup>. Even in cases of "fairly open" borders, in which criteria for entry are low, this still represents a flip in the standard liberal formulation

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<sup>140</sup> Either by dissuading people from moving at all or detaining and turning away migrants before they reach the borders of the receiving state.

<sup>141</sup> That is that they are not subject to all the coercive laws of a state that regulate the lives of the territorially present.

<sup>142</sup> Including limiting all of the opportunities that access to these holds.

that restrictions of freedom require justification<sup>143</sup>. However, whilst this does represent a coercive interference in non-members' individual freedom, for most of us at most times this interference is slight when compared to the coercive relationship existing between members and their state.

The existence of borders and (at least some) controls over movement through them coercively limits life options available to non-members. It may disincentivise some people from moving to a location that they otherwise may have done if not for the threat of sanctions; however, it is far less wide ranging than ordinary state coercion. This, whilst somewhat different to border coercion *at the border*, as potential migrants are not subject to the jurisdiction of the potentially receiving state, is broadly captured by the existing normative literature<sup>144</sup>. However, it is a mistake to view externalised border coercion as *always* having a lesser effect on the freedom of non-members. Instead, depending on the context, and on particular state policies, non-members' capacity for freedom may be undermined in a way that it is greater than ordinary ideal state coercion.

To help illustrate this, let us turn to a couple of examples. Firstly, let's return to the example used in section two of this chapter of Australia's use of offshore and long-term detention (such as on Manus Island), interception of migrants *en route* to Australia in international waters, and when Manus detention facility was shut down, leaving previously detained individuals stranded in these states without travel documents. There are multiple complexities to this case, so for the sake of clarity it is worth picking these apart. The first part of this is the use of the Royal Australian Navy to prevent migrants from using maritime routes to Australia, primarily from Southeast Asia, with any migrants reaching Australian territorial waters being removed as part of Operation Sovereign Borders. Secondly, there is the use of facilities in third party states for mandatory detention of migrants using maritime routes to Australia. And thirdly, after the closing of the facility in 2017, in October 2021 the Australian government cut off support for the remaining 124 individuals who had been detained in the facility. This had the result that those left in Papua New Guinea were unable to leave Papua New Guinea (the state that Australia had transferred and detained them in) due to a lack of documents (Hollingsworth 2020).

Whilst this is a particularly egregious example, the UNHCR described this policy as not "extinguish[ing] the legal responsibility of the transferring State (Australia) for the protection of asylum-seekers affected by the transfer arrangements" (UNHCR 2014, p.3). This policy represents a series of targeted border externalisations and the pulling of migrants who are not in Australia's territory into Australia's jurisdiction whilst simultaneously introducing serious limitations on these migrants' freedom. This represents a high degree of inequality in the way that Australia treated people within its jurisdiction; members that are subject to state coercion, some non-

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<sup>143</sup> Albeit with notable exceptions such as freedom of movement, residence and participation in labour markets within the European Union

<sup>144</sup> Pevnick, for instance, views border coercion in this sense to be problematic in much the same way as non-coercive externalities such as agricultural subsidies. Agricultural subsidies, such as the United States' subsidisation of cotton production "limit the options of cotton farmers in the developing world by damaging their ability to earn a living", and "because the effects are of considerable magnitude, easily predictable and pursued within a framework of rules constructed without the input of those affected (and could be reasonably rejected by them), the policy displays a tremendous degree of disrespect/disregard for those individuals" (Pevnick 2008, p.407).

members subject to non-targeted border coercion<sup>145</sup>, and *those using maritime routes* being subject to broader and targeted border coercion.

The use of transit control regimes, the placing of border guards in neighbouring states or the utilisation of another state's border guards and officials in "buffer states" should be viewed as requiring a special justification that must be sought independently from a right to exclude. To highlight this, take, for instance, the idea of a right to decide who enters your home. For most liberals, the idea that you are able to restrict the ability of others to enter your home absent permission is relatively unproblematic, even though it places limits on everyone else's freedom of movement. There are of course limits to this right. Your right to control access to your property would not extend to denying access to someone who would otherwise be at a severe risk of harm. However, generally, on a doorstep, admission is viewed as being at the discretion of the homeowner, who may coerce and use force to prevent or expel those who have gained entry without authorisation. A resident may threaten to or call the police or use force to expel a burglar or other unwanted intruder. This right to use such force, however, does not extend beyond the boundaries of a property. One cannot (morally permissibly) set up roadblocks at either end of the street<sup>146</sup> to prevent others from gaining unauthorised access to one's property even if it does make it more difficult for others to gain unauthorised access to one's home. To do so would place limits on the ability to access public property to which the homeowner has no special claim. Policies that involve the interception, redirection, and detention of migrants in international waters (such as Australia's Operation Sovereign Borders), are painfully reminiscent of this as international waters are in theory open to all (UNCLOS 1982)<sup>147</sup>. Whilst there may be some circumstances in which it would be justifiable to prevent others from reaching the boundaries of your property (or territorial waters), for instance if they were approaching with a drum of kerosene and a lit torch, the justification for this rests not on a right to access property but on an appeal to some other right such as personal security or the protection of property.

To take this back specifically to the issue of migration, appeals to control access to territory and institutions through targeted externalised coercion is problematic<sup>148</sup> for several reasons. Extraterritorial border coercion may further limit the range of movement of non-members<sup>149</sup>, it may be applied in a more unequal way than ordinary border coercion due to the targeting of particular groups, and it may often be less accountable and open to contestation from non-members. Moreover, policies of this sort are often inhumane and dehumanising, and their implementation assigns responsibility to the states that implement them for harms suffered as a result of these targeted externalisations<sup>150</sup>.

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<sup>145</sup> In this case those subjected to non-targeted border coercion including those using approved, or at least non-maritime routes.

<sup>146</sup> At least without an independent justification for doing so.

<sup>147</sup> At least all who have access to a boat.

<sup>148</sup> Minus some individual cases, such as those captured in Carens' list of reasons where immigration may be restricted. Carens lists four (Carens 1987, pp.260–61), later five, instances where the restriction of movement may be permissible centred on security and the protection and development of liberal institutions (Carens 1988, pp.220, 227; Carens 1992, pp.28-31).

<sup>149</sup> Such as with the use of Transit Control Regimes.

<sup>150</sup> This will be explored in more detail in Section 3.4 of this chapter and within Chapter 5.

In short then, whilst the same coercive threat for externalised borders is at play as *at the border*, the space in which this threat operates, as well as how it is applied, may significantly alter the extent of the coercive impact of non-members' freedom, from almost negligible (although still needing justification) to incredibly extensive.

### *3.3 Internalised Borders, Coercion and Freedom*

Having examined externalised border coercion, I will now turn to examine internalised border coercion. When, in 1987, Joseph Carens famously opened his classic paper *Aliens and Citizens: The Case for Open Borders*, Carens observed that "borders have guards and guards have guns" (Carens 1987, p.251), but what was neglected in this statement was that those guards with guns are located not just *at the border*, but also internally to the state with those guns facing inwards as often as outwards (Kukathas 2017, p.717).

As explored in the previous section of this chapter, contemporary states employ a variety of controls to regulate access that operate internally to the state. Internalised border controls pose a unique problem for the freedom and equality of those that are territorially present but lacking legal authorisation to settle or participate in political decision-making. Whilst citizens of a state are often subjected to these checks alongside territorially present migrants, the target of these controls are non-citizens, and those who cannot produce the "right" legal documentation are punished. The result of these controls is the implementation of two different regimes of coercion: normal state coercion, which applies to all individuals that are territorially present in a state's jurisdiction, and a regime of coercion centred around constructing belonging and the categorisation of people as members and non-members. This latter regime of surveillance, discipline, and control enforces this distinction by preventing people who have not been granted admission from accessing the state's core social, economic, and political institutions or by threatening to remove them from its territory.

These two systems of coercion taken together have the potential to result in territorially present migrants being subjected to a greater overall level of coercion than citizens residing in their own state, those at the border or those interacting with an externalised border<sup>151</sup>. This should be problematic to liberals, and to those who use coercion as a lens to examine the permissibility of border exclusion. If the justification for coercion is indexed against the degree of coercion (see for instance Song 2017; Wellman 2016), then the justification required for internalised border coercion appears to be weightier than ordinary state coercion given the greater array of coercive interference to which territorially present migrants are subjected. This produces two issues. Firstly, whilst a territorially present migrant may be subject to a greater overall level of coercion than a citizen, it is the fact that these two types of coercion often operate in tandem that makes internal border coercion particularly problematic due to the generation of precarity. And secondly, in surveying and policing migrants living within its borders, the receiving state actively fails to create the conditions for the equal capacity for liberty for those residing in its territory.

Take, for instance, the case of the United Kingdom. Starting from around 2007, and extended in December 2020, the UK's immigration rules have been shaped so that those who were seeking indefinite leave to remain in the

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<sup>151</sup> With the possible exception of those held in detention facilities.

UK or to become a naturalised British citizen would have their criminal history — including fines, cautions and disqualifications for driving through to custodial sentences — taken into account, which could be used to justify the refusal of visa renewal or a denial of indefinite leave to remain (Home Office 2021). In the first instance, this created differentiated sanctions for criminal behaviour in the UK. Full members of a particular community are subject to the specified threat laid out in a particular law (Aas 2014, 2017). If one were to jump on a train without a ticket, one would be liable for a fine. However, in the case of territorially present non-members in the UK, there is a secondary sanction attached to this coercive threat that does not apply to members. Travelling without paying the relevant fare may have an impact on the territorially present migrant's ability to continue residing in the UK in either the short or long term. In the case of serious criminal behaviour, this can even make a migrant vulnerable to deportation. But perhaps more concerning is the example of the minor fine or traffic violation preventing a resident from being able to remain in the UK, where they might have established meaningful relationships and pursued meaningful professional and developmental outcomes.

Internalised border coercion therefore creates what Katjo Franko Aas (2014; 2017) has called a form of abnormal justice which “differentiates between the offences committed by citizens and non-citizens, creating two parallel penal systems” (Aas 2014). This system of dual criminality leaves territorially present migrants in a precarious position, which leaves those subject to it vulnerable to domination and raises serious issues of equality between members and non-members. By threatening the route to citizenship, and by linking the ability to remain in the location that migrants have made their home to minor offences, freedom is undercut in a way that it is not for members as it becomes harder to confidently act or plan for the future. Many decisions (or mistakes) that would have minimal consequences for members are in effect closed off to territorially present migrants, as the consequences for them are anything but minimal. Instead, even coming close to breaking rules must be given a wide berth as misunderstandings with officials, train guards, shop workers or neighbours may lead to a chain of events which may, at best, cause anxiety, and, at worst, undermine their ability to remain in their home (see for instance Taylor 2018; Gentleman 2023b; Sedacca 2024).

Whilst this overlap between coercive interference surrounding control over the movement of borders and the criminal justice system may not exist universally, this precariousness stemming from the existence of internalised border controls is hardly unique to the UK. Instead, precarity for territorial present migrants because of internalised border controls appears to be common due to instances of lack of formalised status, or lack of routes to citizenship. We saw this earlier when discussing DACA in the US (see for instance Barbero 2017; Coutin et al 2017). In order to receive the protections of DACA, Dreamers have to apply, including registering their address. However, these protections only extend on a rolling two-year basis (and there is no guarantee that they will be renewed if political winds change) and offer no route to permanent residency or citizenship. Because of this, those enrolled in the programme are kept in a position of enforced precarity that will extend until the US introduces a new scheme that offers a route to citizenship.

Other examples of enforced precariousness existing due to internalised borders are not difficult to find and may serve to create inequalities between territorially present migrants, especially when policies are targeted at particular groups or types of migrant. Then Prime Minister of the UK, David Cameron, when discussing illegal

migration through Calais, highlighted the need to strengthen the internal borders of the UK by making it harder for non-members to open bank accounts, rent property and other measures designed to make it harder for unauthorised migrants to remain in the UK. In practice, this meant the extension of regulation and surveillance in the UK. It meant that universities must keep records on foreign staff and students and make reports on these to the Home Office, inspections of employees and the now infamous billboard campaign implemented by then Home Secretary Theresa May telling undocumented immigrants to go home or face arrest (Griffiths and Yeo 2021; Jones 2021). In short, the UK's hostile environment regime introduced and operated through a tranche of measures aimed at separating members and non-members. However, many of these policies are targeted at particular groups of territorially present migrants or are more felt by certain groups than others. For instance, in its 2013 pilot scheme, the Home Office publicised the same messages about going home or facing arrest in the UK in newspapers and other publications known to be read by particular immigrant communities such as 'Nigeria Watch', 'Asian Voice' and 'Punjab Telegraph Weekly', leading to voluntary departures from individuals of primarily Indian origin (Home Office 2013, pp.9, 13). In a similar vein, foreign students studying in the UK were up until 2022 similarly subjected to more or less vigorous border controls, depending on their country of origin or whether they are stateless, with some required to register their address and personal information with the police and others not<sup>152</sup>. Whether or not it was the intention for internalised border coercion to disproportionately affect some more than others, scholars such as Pamar (2020) have found that the perception of who belongs in an established community serves to marginalise migrants that do not fit this cultural mould leading immigration officials to focus their work in areas that target particular "types" of migrant (Pamar 2020, p.183). Internalised border coercion raises issues related to equality, as particular cultural and ethnic groups are more likely to endure the most of these punitive border controls than others (Kukathas 2017, p.716).

This point is perhaps at its clearest when discussing the Windrush Scandal in the UK which involved the wrongful detention, denial of legal rights, including access to housing and healthcare, threatening of and, in at least 83 cases, the wrongful deportation of those with the right to remain in the UK (Williams 2020; Owen 2020; Hewitt 2020; Goring et al 2020). The majority of those affected had been born in British colonies and had arrived in the UK before 1973, and who, because of immigration law at the time, had the right to settle in the UK and did not need documentation to prove this<sup>153</sup>. This was compounded by many travelling on their parents' passports (as they did not need independent travel documents) and the Home Office's destruction of the database of landing cards in 2010 which would have made it easier for many to have proved their legal states (Gentleman 2018). However, because the UK government made no efforts to provide sufficient documentation, did not transfer the protections of the Immigration and Asylum Act (1999) and increasingly internalised border controls, many of those who had been considered (and considered themselves to be) British were revealed to be in a state of precarity due to the reconstruction of British border policy<sup>154</sup> (Williams 2020; Hewitt 2020).

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<sup>152</sup> This list included forty-two states such as Afghanistan, China, Palestine, Israel, Egypt, Russia and Saudi Arabia amongst others.

<sup>153</sup> It was only with the *Immigration Act (1971)* and *British Nationality Act (1981)* that border controls were increasingly internalised away from the traditionally located border and began to operate within the territory of the UK.

<sup>154</sup> The majority of whom were of Afro-Caribbean origin although many were of Indian, Pakistani and African origin.

Whilst the coercive threat that underpins border controls is functionally similar to that operating *at the border* or externally to the territorial and jurisdictional limits of a state, in operating internally, its impact on the freedom of non-members is broader and deeper in scope and impact. Those subject to internalised border controls are affected significantly more than those denied any sort of border admission due to the broader context in which this coercive interference takes place, but also due to these policies' role in generating inequality and precarity. Individuals that live in a political community form connections and attachments over time, and as such, their ability to have a recognisably decent life is defined at least in part by this spatiality. For territorially present migrants, however, this space is all too often defined in such a way that leaves them on an unequal footing with existing members. Internalised border controls' impact on freedom, therefore, is often greater than forms of ordinary state coercion and thus requires a weightier justification.

### *3.4 Border Controls and Moral Responsibility*

In the previous three sub-sections I have sought to highlight that the freedom of non-members is affected by the location in which they stand in relation to territorial, internalised and externalised borders. In this sub-section, I will turn to examine how bordering practices may raise questions of restorative justice and, in doing so, may generate a case for admission even where a state may otherwise have permissibly excluded.

Contemporary liberal theories of justice emphasise the idea of individual responsibility where, if an individual or group can be shown to be responsible for their actions, choices and outcomes, and that these wrongfully imposes costs on another, an obligation of remedial responsibility is generated to compensate the person for those costs (Miller 2004, p.240). So, if for instance, I was to carelessly light a fire that damages a neighbour's garden shed, then justice would demand that I pay for my neighbour's loss (Miller 2004, p.240). However, not all externalised costs caused to others may generate additional responsibility towards those harmed. What may and may not generate remedial responsibility has been the subject of a wide body of literature<sup>155</sup>, but for the purposes of discussing the impact of border controls on individual autonomy and life options, I will turn to a simplified account centred on *causation*, i.e. whether a state is causally responsible for causing harm or limiting the options of non-members, and thus on *moral responsibility*, i.e. whether that state is responsible for a negative outcome in such a way that can be said to make them liable to blame (Miller 2001; Honoré 1999). For instance, if Laurel dropped a banana skin, and Hardy came along, slipped, and broke his arm, we may say that Laurel is causally responsible for Hardy's broken arm. However, when examining whether Laurel is morally responsible, it is necessary to examine further factors such as intent, foreseeability or perhaps some reasonable standard of decent conduct or care (Miller 2001, p.456). So, we would be able to hold Laurel both causally responsible and morally responsible if, when dropping the banana skin, it was Laurel's intent that Hardy slip, if it was reasonably foreseeable that dropping the banana skin where it was dropped would cause Hardy to fall and the fall caused Hardy harm.

When applying this to examining border controls, states may have moral responsibility (and because of this have obligations related to restorative justice) in circumstances where border policies cause harm and it was the

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<sup>155</sup> See for instance Miller (2001) and Honoré (1999).

either the intent that they cause harm, or it was foreseeable that they would cause harm (or indeed both). Policies that fit this mould have been discussed (indirectly) throughout this chapter, including push-back tactics or long-term offshore detention. Naturally, the extent to which border policies may cause harm is also dependent upon the individual circumstances of non-members. However, there is clearly a significant normative difference between passport checks designed to simply track who is entering and leaving a state's territory and the creation of offshore detention facilities such as the one operated by the Australian government on Manus Island.

Settling on terminology that captures this distinction is difficult. To quote Javier Hidalgo, "[t]he politics of immigration tend to create a war of words" (Hidalgo 2019, p.7). This is hardly a problem unique to the discussion of the ethics of immigration but is characteristic across political theory. The terminology used by theorists may have wide-reaching normative implications and may, if not properly chosen, cloud as much as it can clarify. The first way of thinking about this was by making a distinction between policies that are "active" and "passive." Or, to put it in other words, "active" policies may refer to bordering practices that include a positive action, and "passive" to those that are the result of inaction. However, on closer inspection, this distinction does not quite work. In the case of active policies, this is too broad and lacks analytical clarity. That is, it does little to provide a framework that may explain why pushing back boats is more morally problematic than having a border control officer undertake a quick check of a passport as someone goes through an airport, and it does not adequately capture how controls may affect individuals differently. Additionally, whilst the distinction between action and inaction may appear to be a useful way of assigning responsibility and culpability, inaction maybe just as problematic either through negligence or by representing a failure of an individual's moral obligations.

Because of this, it is better to look elsewhere. Perhaps a distinction between whether a policy is targeted or non-targeted would work better. On this separation, targeted border policies are those that intentionally or reasonably foreseeably "target" a category of migrant and non-targeted policies are those that affect all non-members indiscriminately. Targeted policies, then, are those that are directly 'targeted' at particular groups of people or routes of entry and that are designed to make access more difficult, disincentivise access, dissuade those groups from seeking entry in the first place or prevent their claims of entry from being heard at all. In contrast, non-targeted border controls are those that are not aimed at specific groups of people and affect all non-members indiscriminately. This distinction avoids the failings of the active/passive distinction as it avoids the sticky entanglement raised in identifying actions as problematic and inaction as non-problematic. In addition to avoiding this, this distinction seems to go some way towards identifying problematic elements regarding particular policies, namely problems related to equality. To take a quick example, Britain's (now former) policy of sending asylum seekers to Rwanda involves the levying of coercive measures and denial of the ability to bring claims (that are heard in the UK) designed to close off a route of entry that is used by a particular group of people that has been deemed "undesirable"<sup>156</sup>.

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<sup>156</sup> It should be noted that targeted border controls are not necessarily problematic. However, in order for them to be unproblematic there must be a normatively relevant justification that may justify different treatment.

Further analytical clarity may be gained when introducing *intent* and *impact* when discussing targeted and non-targeted border policies. By *intent*, I mean the aim or aims of a particular policy<sup>157</sup> and by *impact* I mean how a particular policy affects different people differently. For instance, whilst policies may be judged based upon their impact, we may judge an actor based upon their intent with this generating of additional responsibilities for restitution.

In order to examine the normative significance of how bordering practices are constructed, let's begin with an examination of bordering practices where it is the intention to cause harm<sup>158</sup>. Examples of practices that fall into this category are unfortunately not hard to find. In announcing a tranche of policies designed to force undocumented migrants to leave the UK in what has been dubbed the Hostile Environment, then Home Secretary Theresa May stated that "[t]he aim is to create, here in Britain, a really hostile environment for illegal immigrants" (quoted from Hill 2017). In addition to fanning the flames of xenophobia, this led to negative impacts in terms of health, employment status, the provision of welfare, and policing, as well as mental health for undocumented migrants, those in marginalised communities and those with precarious legal status (Qureshi et al 2020). Whilst many of the harms caused by this policy were likely unintended consequences, with policymakers expressing remorse for these (see for instance Gentleman 2023a; May 2023), it was designed to make life so difficult for certain migrants that they chose to voluntarily leave (Gentleman 2023a). Whilst unequal treatment is not necessarily problematic (provided that an adequate justification is offered for it), where no such argument is present (as would appear to be the case here considering that many of those affected possessed legitimate claims or status to be in the UK), we may assign causal and moral responsibility for the harms caused by these policies.

This is distinct from those policies that harm migrants, but it was not the intention of states to do so. To highlight this, consider the Windrush scandal in the UK. As discussed earlier, the origins of the scandal can be traced through successive rounds of legislation that was introduced from the 1960s onwards. When the UK introduced the *1971 Immigration Act*, it confirmed that the Windrush generation had the right of abode in the UK, but they were never given any documents to prove their status and no efforts were made to regularise the status of these British Nationals<sup>159</sup>. Over time, however, successive governments, who wanted to prove that they were tough on immigration, "forgot"<sup>160</sup> about the circumstances of the Windrush generation, introduced a series of immigration restriction acts that were designed to limit non-white immigration and introduced the "hostile environment" without considering the effects that it would have on them (Williams 2020). Whilst the impact that the rollout of the hostile environment on the Windrush generation may not have been intended, it was, however, reasonably foreseeable (Williams 2020). Because it was reasonably foreseeable and caused harm to

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<sup>157</sup> The intent of particular policies may be gleaned by examining legislative debates, public statements and guidance given to those responsible for the implementation and enforcement of border policies.

<sup>158</sup> The reasons for states adopting policies may vary widely depending upon case, but a unifying theme is disincentivising the movement of those deemed "undesirable".

<sup>159</sup> Border controls at the time were located at the border, the internalisation of border controls in the UK are a relatively new phenomenon, so this was seen as unnecessary (Williams 2020).

<sup>160</sup> "Forgetting" about the status of the Windrush generation is a charitable reading of this case, but was a finding of the Williams report (Williams 2020).

many, these policy failings generated obligations to compensate those members of the Windrush generation that were harmed. However, there is a difference between this example and the former. In both circumstances demands of restorative justice are raised, but in the former we may attach more moral blame because it was the *intent* of the policy to cause harm<sup>161</sup>.

In short then, an examination of specific bordering practices reveals that these bordering practices may generate additional obligations towards migrants.

#### **Section 4: Implications, Limitations and Conclusion**

In this chapter, I have sought to highlight the partial and oversimplified conception of the border tacitly utilised by the existing normative literature. To characterise the border's impact on freedom as having a lesser effect on the freedom of members is insufficient. Rather, the border's impact on freedom is multifaceted, complex and is defined by the space in which it operates and how bordering practices are formulated. However, whilst I believe that breaking down the concept in this way better captures the way that border regimes coerce territorially present migrants, migrants, and potential migrants, it is important to note that this itself represents something of an oversimplification. This comes from at least two directions.

Firstly, this chapter has explored how border coercion affects freedom of non-members in relation to internalised, externalised, and territorially defined borders. However, as part of this, this chapter has not explored the implications of a potential migrant moving through a border. As an individual moves through these spaces and is granted territorial, participatory, and eventually full membership, a migrant is likely to encounter border coercion in various locations and be impacted by this in different ways. A possible implication of this is that the justificatory process for different forms of coercive interference need to be made as the impact of border controls may have a spill-over in their effect on freedom from one location to another. As such, it may be necessary for states to consider how border controls in one location may affect the freedom of migrants in other locations; the introduction of externalised practices that target particular groups of migrants may, say, have unintended affects for migrant communities of that group living within a state.

Secondly, whilst I have tried to pick apart how the border impacts freedom across multiple locations, this is itself likely an oversimplification as particular policies are likely to fall into more than one of these categories. To highlight this, take, for instance, the UK's Rwanda policy. This policy, and others like it, do not neatly fit into the types of border coercion explored within this chapter. Whilst this policy can be said to fall relatively neatly into the *targeted* category of bordering practices as a stated aim of the policy is to disincentivise certain routes of

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<sup>161</sup> A third permutation of this, that may also generate moral blame are those policies that intend to cause harm but do not. To return to the Laurel and Hardy example, if Laurel were to leave out the banana skin with the intent of tripping Hardy, but through his own incompetence placed this in such a way that Hardy was able to walk by without any harm. In cases such as this, we would be able to make a moral judgement regarding Laurel's conduct, that it we can say that Laurel acted wrongly by trying to harm Hardy, but the demands of restorative justice are not raised because of the lack of harm. In reality however, it is unlikely that this would be sustainable as a separate category as, even failed border policies that do not achieve their stated goals, are likely to have the side effect (which may actually constitute part of the initial aims of the institutor of the policy) that cause harm. For instance, the much publicised 'Go Home' vans used by the UK Home Office proved to be very unsuccessful in their aim of getting unauthorised territorially present migrants to voluntarily depart the UK, but contributed to the UK's broader 'hostile environment', and the subsequent impact of creating insecurity and precarity and impacting the ability of territorially present migrant's ability to plan for the future.

illegal entry to the UK (BBC 2022; Home Office 2022), this policy operates across multiple spaces simultaneously. Primarily, this involves targeting migrants who have entered the jurisdiction of the UK but have not been granted territorial admission at the border, before then moving these migrants into an externalised space where their claims will be evaluated. So, this could be said to be border coercion operating in two spaces - *at the border*, before then moving into an externalised space where the UK remains responsible for these migrants. Because of this, evaluating the impact of particular policies on the options available to and autonomy of non-members, it is likely necessary that this impact will itself be different in multiple spaces.

In conclusion, assessing the extent to which borders may interfere with the freedom of non-members and the degree to which states may generate additional obligations with their bordering practices is messy. However, if we do not engage with this complexity, then the extent of the normative significance of the border is lost. Whilst the underlying coercive threat that exists between a receiving state and migrants and a receiving state and potential migrants is similar irrespective of location, the effects of this towards individual freedom vary greatly depending on the space in which the control over the movement of borders is coercively regulated as well as in the form that this coercion takes. Instead, rather than seeking a single justification for border coercion, this justification must vary depending on how the freedom of territorially present migrants, migrants and potential migrants are affected by the coercive border controls of states.

## Chapter 4: Borders: Freedom Restricting or Freedom Protecting?

What, if anything, justifies a state's right to coercively control the movement of people through their borders? In the previous chapters of this thesis, I have examined how liberal commitments to freedom pull us in two contradictory directions. In Chapter One, we saw how, if we are to take liberal commitments to individual freedom seriously, then the flipping of justification that occurs at state borders, that migrants must apply to exercise freedom, is at best problematic. This was compounded when considering the way in which border exclusion interferes with important life choices and the fact that this is often done coercively. In Chapter Two, we saw how borders are morally relevant (even if their location is morally arbitrary) as they can protect or support important the freedom of members. Tearing down the boundaries of membership may undermine the right and ability of groups to make important decisions related to the use of shared goods and their collective future. This is not a small concern. After all, a commitment to a right of self-determination is widely held to be an inseparable and integral part of liberal political philosophy, which, amongst other things, is held to be a large constituent part of determining the legitimacy of state power. It seems then that on the face of it we are left with a thorny problem where some of liberals' most deeply held commitments are in tension.

In this chapter, I will revisit how the existing literature engages with the concept of freedom in light of the complexity of the border that was examined in the previous chapter of this thesis. The reason for this is fourfold. In the first instance, doing so will provide greater clarity to the existing cases for migration and exclusion. Each of the accounts put forward across the open-closed border spectrum are in part motivated by concerns for freedom, and examining how they engage with the concept may bring their claims into sharper focus. Secondly, and stemming from this, by examining how the existing arguments in the literature engage with the concept of freedom, we may gain greater clarity on the source or sources of their disagreement. Thirdly, re-examining how borders restrict and protect freedom in relation to a more sociologically informed conception of the border may reveal ways in which borders affect the freedom of those subject to border controls in ways not easily (or fully) captured within the existing literature. Fourthly, and because of these first three considerations, exploring how these positions relate to freedom may identify areas of shared concern from which a middle way may be found.

In doing this, I will argue that this debate over migration suffers from a second problem. Whilst both positions in the literature are motivated by a concern for "freedom", these positions take an overly narrow approach to the questions of *whose* freedom and what *constitutes* freedom. The divide in the existing normative literature cannot be understood as one side of the debate being (wholly) mistaken, nor can it be understood as miscommunication between debates operating between ideal and non-ideal theory. Instead, the divergence between these two positions can be understood in terms of the way in which the concept of freedom is drawn upon and whose freedom is primarily seen to be of normative primacy. I will argue that the normative literature draws, often vaguely or indirectly, upon at least three (broad) conceptions of freedom: (1) freedom as non-interference (including a neo-republican concern for non-domination), (2) freedom as individual autonomy, and (3) freedom as collective autonomy. However, when doing this, the normative literature on both sides of the debate draws upon a conception of freedom that is overly narrow, either in terms of 'whose' freedom matters

or by downplaying or undervaluing important components of freedom. As a result of this, I will argue that, rather than viewing the border as *either* freedom restricting or freedom enhancing, the border should be viewed as both restricting and enhancing freedom simultaneously. If this is recognised, then questions of admission and exclusion should be understood as how to balance different competing demands for freedoms from both members and non-members alike.

This chapter will be split into three sections. The first will examine how arguments for open borders engage with the concept of freedom against the backdrop of morally complex borders. The second will discuss how arguments for closed borders engage with the concept of freedom. Finally, in section three, I will discuss the implications of this analysis against the backdrop of the questions of whose freedom matters – that of members, non-members, or both – and what is the nature of the relationship between positive and negative freedom.

### **Section 1: Open Borders and the Concept of Freedom**

Freedom is an evocative concept that rests at the heart of liberal political theory and at the centre of a variety of political discourses. However, whilst evocative, it is also illusive. Should freedom be taken to mean the absence of interference into a private space for individuals, personal or collective rule, or the capacity for self-creation or rational choice? In the context of debates on migration, are border controls problematic because they interfere with individuals' choices or because they undermine the capacity of individuals to be part-authors of their lives? Or are they necessary to support the capacity for individuals to be part-authors of their lives, engage in self-rule, or to secure the conditions needed for freedom from interference? In this section, I will seek to interpret and develop the case for open borders presented in Chapter One, and in doing so, incorporate the more sociologically informed conception of the border developed in the previous chapter of this thesis. In doing so I argue that when making the case for open borders, the concept of freedom is drawn upon in three, often overlapping, ways: freedom as non-interference, freedom as non-domination, and freedom in terms of individual autonomy. Moreover, I will seek to highlight that whilst the border is problematised in terms of individual autonomy and non-domination within the existing literature, it is against the backdrop of complex borders that the border's effect on the freedom of non-members can be more fully understood.

#### *1.1 Borders and Non-Interference*

In problematising the border, the most readily apparent way in which those that advocate for open borders appeal to freedom involves freedom as non-interference or 'negative liberty'. Freedom, in this sense, consists of the absence of interference to choices and actions, or other forms of obstruction by others. One is 'free' to the extent that they may make choices or actions without interference or constraint from other agents (Berlin 1969; Steiner 2006, p.123; Miller 2006, p.3). To talk about freedom in this sense is related to the question "[w]hat is the area within which the subject – a person or group of persons - is or should be left to do or be what he is able to do or be without interference by other persons?" (Berlin 1969, pp.121-122). In this sense, the extent to

which one is free is measurable by the extent to which an individual is free from interference<sup>162</sup> by other agents. Governments may aid in securing freedom in this sense by protecting individuals from the interference of others but also may pose a threat to freedom through the implementation of coercive laws and repressive force (Miller 2006, p.3).

As we saw in Chapter One, a variety of theorists have highlighted and problematised the extent to which borders, often coercively, interfere with non-members' actions and choices (see for instance Abizadeh 2008; Wellman and Cole 2011; Kukathas 2014; Hidalgo 2014a). In his 1987 article, Carens opens with the image of states employing force towards "ordinary, peaceful people, seeking only the opportunity to build decent, secure lives for themselves and their families" whose *choice* to move from one state to another is blocked with the application of violence (Carens 1987, p.251). In developing this argument, Carens, amongst others, consistently points to the problem inherent in limiting 'basic freedoms' such as movement and association without reference to the interests of those whose options are restricted (see for instance Carens 1987, 2010, 2013, 2016; Hidalgo 2014a; Cole 2000, 2016; Brezger and Cassee 2016a).

As we saw in Chapter One of this thesis, this was part of the reason that these theorists sought to highlight why states' exclusionary border practices should be seen to be intuitively problematic. The restriction of movement through borders interferes with important choices and does this in at least two ways. Firstly, and directly, by states' exclusionary border practices. The erection of border fences, the detention of migrants, the turning back of leaky boats and other similar measures designed to regulate access to territory and institutions interfere with the choices available to non-members. Secondly, and indirectly, by reinforcing external restrictions on choices that occur elsewhere by closing routes that would allow individuals to circumvent these restrictions. To highlight this, consider the following. State A has a state religion and does not allow the practicing of other religions. To enforce this, it has instituted a set of coercive laws that threaten imprisonment and other sanctions as well as instituting religious education in an attempt to ensure that all of their citizens to adhere to this religion. State B is State A's neighbour. It has no such restrictions on religion and places no similar restrictions on their citizens choosing their religious practices, however it has border policies to restrict migration from other states including State A. Whilst these border controls in one sense represent an instance of direct external restriction, and it is State A, not State B that is restricting religious freedom, the border restrictions of State B reinforce the ability of State A to prevent their citizens from circumventing these restrictions<sup>163</sup>.

Freedom in this sense is consistently appealed to in the literature advocating for open borders, with similar concerns for border controls interfering with the choices and actions of non-members echoed throughout.

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<sup>162</sup> What may count as 'interference' has been the subject of considerable and systematic debate, notably by theorists such as Miller (1983), however for the purposes here what counts as interference may be simplified to any action taken by an agent that places either mental or physical barriers sufficient to prevent another agent from undertaking a choice or action that they otherwise may have done or chosen.

<sup>163</sup> Although freedom being restricted in this sense relies upon the further argument that states have either duties to assist non-members or that they have duties to assist non-members should their home states fail in their own primary obligations to them.

Kukathas, for instance, although highlighting that this may not in and of itself support a position of open borders, argues in these terms, stating that:

“borders prevent people from moving into territories whose governments forbid them to enter; and to the extent that they cannot enter any other territory, borders confine them within their designated boundaries... if freedom is held to be an important value, then there is at least a case for saying that very weighty reasons are necessary to restrict it” (Kukathas 2004, p.379).

Kukathas and Carens are not alone in their concern with non-interference. Cole writes in similar terms, pointing to the problematic nature of state use of coercion to limit the options, or scope of options, available to non-members (see for instance Wellman and Cole 2011; Cole 2016). Likewise, Abizadeh utilises a similar argument framed within democratic theory, in which he seeks to highlight the problematic nature of border exclusion by pointing to the coercive interference with the choices and options available to non-members absent democratic legitimation (Abizadeh 2008). As does Oberman (2016), who is concerned by the way in which border controls interfere with choices.

Against the backdrop of morally complex borders, we may add an additional layer to these theorists’ concern for the way that borders restrict negative freedom. Borders do this in multiple spaces, and, depending on how they are constituted, may do so to varying degrees, beyond the prevention of access to territory and the opportunities that access to a territory entails.

### 1.2 *Borders and Autonomy*

Whilst a concern for the way in which borders interfere with the choices of non-members is central to and underpins the case for open borders, it is often not the central thrust of these theorists’ critique of border controls. Rather, in criticising the way in which border controls interfere with the choices and actions of non-members, theorists such as Carens (1987, 2000, 2013) and Abizadeh (2008, 2010) are primarily concerned with *autonomy* or *positive liberty*, and stress the inherent violence of border regimes which operate as a mechanism for dehumanisation.

Positive liberty, to borrow Isaiah Berlin’s term, is related to the internal<sup>164</sup> forces or obstacles that may impact how an individual may act (Berlin 1969). Broadly speaking, one is free when one is their own master, when one is “a subject, not an object; to be moved by reasons, by conscious purposes, which are [their] own, not by causes which affect [them], as it were, from outside” (Berlin 1969, p.179). An individual is free when they are autonomous, when they are living a life that reflects their own ‘authentic’ desires and beliefs, when they are the “part author of [their] own life” (Raz 1988, p.205). However, whilst accounts of positive freedom may share the common feature of being concerned with internal forces or obstacles, accounts of positive freedom are varied and difficult to pin down. When he uses the term, Berlin employs it in three quite different senses: as the ability or capacity to act in certain ways, as ‘rational self-direction,’ and finally as collective self-determination (Berlin 1969, Miller 2006, p.10). These different ways of using the term go some way in capturing four different senses

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<sup>164</sup> Although one also needs to be free of certain external forces.

of the concept of autonomy: (1) a set of rights that express one's sovereignty over oneself, (2) an ideal conception of the person, (3) the capacity to 'govern' oneself, and (4) the actual condition of self-government (Feinberg 1989, see also Christman 1989, pp.27-49).

Autonomy, or positive liberty, then, is a broad term with multiple conflicting meanings. Central to each of these, however, is the conception of a person that can reflect and act on factors which are their own rather than being imposed from others. However, a component part of each of these (broad) accounts of autonomy is that the capacity for autonomy is dependent upon internal and external factors. Whilst Mill is primarily concerned with freedom in terms of non-interference and does not directly use the term 'autonomy'<sup>165</sup>, instead using terms such as *individuality* or *originality*, he does stress that individuals should be able to live in accordance with their own natures and argues that these natures are socially developed (Mill 2012; MacLeod 2023, p.76). Mill defends the notion of negative 'liberty', but he does so as part of strong idealist or positive concerns which are at their clearest when examining Mill's defence of freedom of speech. Whilst Mill objects to interference in and of itself, highlighting that the state has no business interfering in an individual's 'self-regarding conduct', his underlying concern derives from the idea of self-development (Flikschuh 2007; MacLeod 2023). For Mill, freedom from constraints or external interference is valuable because of its role in supporting individuals' abilities to decide for themselves what is good for them and pursue their own conception of the good (Mill 2012, pp.262, 263; Flikschuh 2007, p.11).

A similar picture can be found in Raz's three preconditions of autonomy which blur the line between 'positive' and 'negative' liberty. Raz identifies three conditions for preconditions for autonomy. The first of these are appropriate mental capacities. That is, in order to be autonomous an individual must have 'minimum rationality' such as the mental capacity to plan actions and break down the means required to achieve goals (Raz 1988, pp.372-373). The second requirement that Raz identifies is that the set of options available to an individual must be adequate (Raz 1988, pp.372-373)<sup>166</sup>. And finally, Raz's third requirement is independence (Raz 1988, p.377). In order to be autonomous, an individual's will cannot be wholly subject to another or that individual will not be pursuing one's own life goals, but rather those of another. For this reason, Raz draws special attention to manipulation and coercion (Raz 1988, p.378). Subjecting another to coercion both limits the options available to individuals and treats that individual as less than an autonomous agent (Raz 1986, p.156) by "distort[ing] normal processes of decision and the formation of preferences" and violating the independence of those that are subjected to it (Raz 1988, p.372). In addition to these preconditions, Raz argues that it is insufficient to simply be left alone, to be absent from interference. The idea of autonomous agents as part-authors of their lives

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<sup>165</sup> At least outside of his correspondence. When Mill uses the term is because he is engaging with his interlocuters using their own terms, or when writing in French.

<sup>166</sup> Identifying what constitutes an adequate range of options is a notoriously difficult problem. Whilst Raz does not provide a definite answer as to what constitutes an adequate range of options, however he does offer a broad guide to help identify what may be necessary to achieve this. This being that the options available must be meaningful. That is, that available options should include options that have long term distinct consequences, as well as options of little consequence and a good variety in between. These options should give an individual adequate scope to choose "long term commitments or projects and to develop lasting relationships and be able to develop and pursue them by means which we choose from time to time" (Raz 1988, p.374).

“reflects an image of individual human agents as creating value by their creative engagement with the world” (Blake 2001, p.269).

The account of autonomy that Mill and Raz articulate is a thick conception centred on the self-creation of value and *part authorship* of one’s life, and it has proved controversial for many (see for instance Dworkin 1988; Rawls 2005a, 2005b). Theorists such as Dworkin (1988) and Rawls (2005a, 2005b) have rejected the ideal of self-creation for making autonomy too demanding<sup>167</sup>. Rather than focus on the ideal of self-creation, Rawls, for instance, utilises a much thinner conception of autonomy where a person is autonomous if they act in accordance with their rational nature by following principles that reasonable people would choose based upon rational reflection, rather than the contingent features of our individual circumstances (Rawls 2005b, in particular pp.252-258). Whilst the ideal of self-creation may be rejected<sup>168</sup> for being too demanding, Raz’s and Mill’s exploration of the relationship between positive and negative liberty remain useful for highlighting the interplay between background conditions, minimum rationality, and a certain degree of non-interference for the realisation of individual “freedom”.

The capacity for autonomy has been drawn upon directly by Abizadeh (2008, 2014), and indirectly by theorists such as Carens (1987, 2003). For Abizadeh, as we saw in Chapter One, we see the link to autonomy when examining the democratic case for open borders. Abizadeh did this directly by drawing upon Raz’s conditions for autonomy by examining how border coercion interferes with the independence of agents (Abizadeh 2008, Raz 1988). Abizadeh points to Raz’s discussion that sees coercion as standing in need of justification because of its invasion of autonomy. Both Raz and Abizadeh see coercion as problematic in a few ways: (a) that being subject to coercion may destroy or hinder the development of the ‘requisite mental capacities’, (b) that it *eliminates options* that would have been available the person, and (c) that it eliminates the independence of an agent (Raz 1988; Abizadeh 2008). Coercion, for Raz and Abizadeh, is always seen to interfere with autonomy as it subjects an agent to the will of another as it generates internal barriers to acting on one’s preferences and desires, but the elimination of options only interferes with personal autonomy conditionally. Interference with choice is seen to only interfere with autonomy when it leaves an agent with an inadequate range of options (Raz 1988; Abizadeh 2008). In other words, Abizadeh is concerned with these barriers not in and of themselves but as a broader critique of how border coercion may interfere with personal autonomy.

For Carens, and others, this may be found in the way in which they are concerned with interference but are at their strongest, by their own admission, in particular cases (Carens 1987). These stem from either the capacity for autonomy for those bringing claims to the border or, and this latter point becomes clearer against the backdrop of more sociologically informed borders, through the extent to which non-members are subject to dehumanising border controls that do not treat them as morally equal agents. To highlight this, let us return to Carens’ evocative image of force being directed towards “Haitians in small, leaky boats,” “Salvadorans dying

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<sup>167</sup> After all, our desires, beliefs and attitudes are influenced to varying degrees by individual circumstances that we may have very little control over (Taylor 2022, p.99).

<sup>168</sup> Although I believe that the use of a “thicker” conception of autonomy based in self-creation is compatible with the “middle way” that I shall articulate within this thesis.

from heat and lack of air after being smuggled into the Arizona desert” and “Guatemalans crawling through rat-infested sewer pipes from Mexico to California” (Carens 1987, p.251). In each of these cases, Carens draws our attention to these individuals as they ordinary people although, they are in desperate need, whose *choice* to move from one state to another is not only blocked, but is blocked with the application of violence (Carens 1987, p.251). Whilst Carens is concerned with the interference that border controls cause to the actions and choices of non-members, and the implications to the liberal commitment to equality of opportunity, these form part of a broader appeal to “freedom itself” (Carens 1987; Carens 2003, p.249). Carens unpacks this appeal by talking about freedom in multiple senses: as “being able to go where you want to go and do what you want to do, so long as you do not violate anyone else’s rights” (freedom as non-interference), as “not being subject to the will of another”<sup>169</sup>, but also in reference to securing an adequate range of meaningful options (Carens 2003, p.249; Carens 1987, pp.251-252). Whilst the first and second of these may support a ‘right to migrate’ more generally, it is in reference to the third of these that Carens’ argument is at its strongest. In each of the examples to which he draws our attention, the analogy that Carens makes between citizenship and feudal privilege is at its clearest in relation to the relative and absolute inequality between the Haitian or the Salvadorian on the one hand and members of Western states on the other. Carens concedes as much, stating that “[t]he argument is strongest... when applied to the migration of people from third world countries to those of the first world” (Carens 1987, pp.251-252). This is because the force of the argument from personal autonomy depends upon individual circumstances (Song 2018, p.101). Where an individual already possesses an adequate range of meaningful life options, an autonomy-based appeal for a right to migrate carries less weight than in cases where autonomy is undermined by an inadequate range of options. In other words, the case that Carens’ Haitian or Salvadorian is making is much stronger than that of an average economic migrant, given the paucity of the meaningful choices and actions – and the subsequent lack of capacity for autonomy – they face.

In addition to the capacity of the claims, bordering practices also impact autonomy due to the nature of border controls that have a disproportionate effect on those deemed undesirable. As we saw in the previous chapter of this thesis, many bordering practices are inherently violent and dehumanising and show a disrespect for the moral equality and indeed personhood of those subject to them. Being kept in prison-like conditions and being on the receiving end of other bordering practices that do not recognise moral equality all may be problematic for the autonomy of non-members.

Drawing on autonomy has broad implications for the way in which borders may, or may not, interfere with freedom. Utilising freedom as autonomy highlights how border controls may interfere with the freedom of non-members in two senses, both of which, to varying degrees, is situationally dependent. The first of these relates to how border coercion reduces the independence of non-members. However, whilst border coercion may always interfere with the independence of non-members, as we saw in the previous chapter’s discussion of bordering practices, the degree of coercive interference may vary greatly depending on non-members’ specific relations to internalised, externalised and territorially defined borders. Whilst this interference will always stand

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<sup>169</sup> Which draws upon neo-republican themes and Raz’s independence criterion of autonomy.

in need of justification, the weight of this justification correlates with the degree to which this coercive interference interferes with the independence of non-members (Song 2018a).

The second way in which border controls may interfere with or undermine the capacity for autonomy of non-members is by preventing or limiting access to a non-member's adequate range of options. This cannot be said to be an integral condition of the existence of border controls but is dependent upon the situational claims of non-members. In other words, border controls may be said to only interfere with a non-member's capacity for autonomy if they do not have an adequate range of options within a particular geographic area, whether through poverty, political instability or war, or because meaningful options are available to them only within the state to which they are seeking to immigrate, say through access to close family members, religions or romantic partners. As was explored within the discussion of Carens' argument that draws on autonomy, it is this latter criterion that is why many of us give intuitional weight to the claims of refugees, those seeking to reside with their spouses, or those with claims towards family reunification. When viewing freedom as autonomy, borders interfere with freedom in a more nuanced way depending upon the individual circumstances, ranging from negligible to severe. Moreover, as we saw in the previous chapter of this thesis, borders may impact the autonomy of non-members long after they have "crossed" a territorial border and are territorially present<sup>170</sup>.

### 1.3 Border Precarity and Non-Domination

A concern for non-interference and autonomy motivates much of the case for open borders, yet it is not the only way that "freedom" is referred to. Whilst a concern for 'negative liberty' or non-interference is present throughout the literature advocating for open borders, oftentimes this concern for non-interference may instead be understood as a concern for the way in which borders may create relationships that leave non-members open to *arbitrary interference* from states or more powerful nonstate actors (Fine 2014). Much as in the preceding two subsections, the extent to which borders may leave non-members in a precarious state and vulnerable to domination comes into sharper focus when using the more sociologically informed conception of the border<sup>171</sup>.

Referred to as neo-republican freedom, this conception of freedom is primarily concerned with unaccountable relationships characterised by domination which undermine an individual's ability to engage in self-rule (Miller 2006, p.2; Skinner 2010, pp.99-100; Fine 2014, p.11). In its classic formulation, this conception of freedom is captured by two commitments, that "*it is possible to act freely [...] if and only if you are a freeman*" (Skinner 2010, p.98, author's emphasis) and that "*it is possible to live and act as a freeman if and only if you live in a free state*" (Skinner 2010, p.99, author's emphasis). At the heart of this is a focus on *non-domination* and *arbitrary interference*, with one being free if they are "one who does not live under the arbitrary will or domination of others" (Lovett and Pettit 2009, p. 12). An act is arbitrary, for Pettit, when the agent who made a decision or

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<sup>170</sup> Or, for that matter, in broader and deeper ways before one reaches a territorial border through interaction with externalised borders.

<sup>171</sup> And is perhaps at its clearest when examining territorially present non-members and their relationship with internalised borders.

judgement was “in a position to choose or to not choose it, at their pleasure” (Pettit 2006, p.225) without accountability. Domination can therefore be understood to occur when:

“I dominate you in a particular choice to the extent that I have the capacity, not subject to your direct or indirect check, to interfere in the choice, and I can employ that capacity to make it more probable, defiance apart, that you will choose to my pleasure or taste” (Lovett and Pettit 2009, p.14).

In this sense, a slave with a benign master who does not interfere with the choices or preferences of the slave can still be said to be unfree because of the asymmetrical and unaccountable relationship between the slave and master (Pettit 2006; Fine 2014). This relationship leaves open the ever-present possibility that the master may interfere with the slave’s options, choices or preferences at the master’s own whim or pleasure without recourse. Within the neo-republican conception, not all forms of interference reduce the freedom of the individual who has been ‘interfered with,’ as certain kinds of external interventions might be nonarbitrary and subjected to accountability mechanisms. For example, citizens might be collectively bound by laws which are controlled by or otherwise track the preferences of the citizens themselves (Fine 2014, p.12), or people can become involved in relationships that are not asymmetrical and structured in domination. What matters here is that the interference occurs on an arbitrary basis, or in the absence of actual interference, that an individual is vulnerable to another agent who possesses the capacity for interference (Pettit 2006, p.226). To be subjected to the threat of another’s arbitrary will can interfere with the ‘freedom’ of the dominated party in at least two senses. First, the dominant actor can actually interfere with the choices and actions of the dominated party. Second, and perhaps more damagingly, the relation of domination can incentivise the dominated to change their behaviour in order to placate those who have the capacity to arbitrarily interfere (Pettit 2006; Fine 2014).

The idealised state does not dominate its own citizens, therefore, for democratic reasons, as the exercise of state power is directly or indirectly is controlled by those it governs; it is open to contestation by citizens, tracks the interests of, and is justified to, citizens (Pettit 2012, pp.57-58; Bohman 2008; Laborde 2008). However, this is not the case for non-members. Immigration policy is not subject to the control, consent, or contestation of non-members (Abizadeh 2008; Fine 2014, pp.18, 22-23). This is particularly acute for those whose interaction with state borders is not banal but one of critical importance, but even for those whose experiences of state borders are banal, the state’s border regime remains problematic in this sense. The decision to relocate and move states is one of the largest decisions that people who emigrate will (likely) make in their lives, and it is one that has a significant impact on subsequent options and opportunities available to them (Carens 2013, pp.227-228). To stand in a position of relative powerlessness over such a major decision is the embodiment of precarity and the subjection to domination.

This becomes more readily apparent when moving beyond a partial and idealised conception of the border. Contemporary states’ attempts to criminalise movement (through practices such as indefinite detention, high levels of surveillance, deportation to third-party states and denial of human rights such as housing and education) have brought stark relations of domination between receiving states and those seeking asylum or a better life. The concern for the arbitrary interference and precarity that bordering policies may represent is part

of the reason that I sought to highlight the deficiencies of the use of an idealised and partial conception of state borders in the previous chapter of this thesis. When borders are stretched from their traditionally located spaces, they leave non-members vulnerable to precarity and domination in ways not easily captured within the existing normative debate on migration. This may render (certain types) of border controls more problematic than they appear at first sight. When borders are internalised, territorially present non-members are all too often left in a state of precarity through vulnerability to arbitrary interference by the receiving state and their new compatriots. Whether through the UK's system of dual criminality<sup>172</sup> (Aas 2014; Home Office 2021), long-term ambiguity in status for US residents in the DACA scheme or Temporary Protection Schemes<sup>173</sup>, non-members being subject to checks by landlords when seeking to rent, checks by banks when seeking to open bank accounts, internalised borders have the potential to leave non-members open to arbitrary interference in a much more pervasive way than members.

Examples of how this may be done by state officials or citizens, whether through lack of legal status or because of lack of permanent status, are unfortunately not hard to find. It is common to find reports of employers in the US, and elsewhere, who are more than willing to employ undocumented migrants and exploit their willingness to work and their precarious position to force them to work long hours for low pay, often in unsafe conditions. If these workers do not complain and accept these conditions, questions about their undocumented status are rarely asked, with employers being able to exploit this precarity (through unsafe conditions and low pay) with the threat, spoken or unspoken, of a phone call to the police or ICE and subsequent deportation (see for instance Harris 2013; Soni 2017; Hendricks 2023). However, this may also come from another direction, with precarity being revealed in the way that states draw and redraw their borders. This latter point was discussed in the previous chapter but is worth briefly revisiting. Those affected by the Windrush scandal were predominantly born in UK colonies, had the right to move to and settle in the UK, and indeed were often incentivised to do so. However, as the UK changed its bordering practices throughout the 1970s and 1980s and increasingly moved immigration enforcement to sites other than the jurisdictional limits of the British state<sup>174</sup>, many of those who considered themselves to be and *were* British found themselves subjected to the denial of legal rights and threats of deportation.

Which of these types of interference is drawn upon, neo-republican or negative liberty, has practical implications for determining whether border controls interfere with freedom. When using a negative conception of liberty, border controls always interfere with the freedom of non-members. However, when using a neo-republican conception of freedom, border controls have the *potential* to interfere with the freedom of non-members. Consider the following. State A's border policies are designed in such that whilst the state sets criteria for which

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<sup>172</sup> See Chapter Three, section 3.3.

<sup>173</sup> Established in the 1990s, Temporary Protected Status is a program that allow migrants to remain and work in the US on a temporary but extendable basis. The result of this programme has been that those in the scheme are not considered to be lawful or permanent residents (or US citizens), despite many having lived in the US for decades (Roy and Klobucista 2023).

<sup>174</sup> It was only with the *Immigration Act (1971)* and *British Nationality Act (1981)* that border controls were increasingly internalised away from the traditionally located border and began to operate within the territory of the UK, which alongside the lack of need for immigration documents, poor record keeping and failing to carry over legal protections in the *Immigration and Asylum Act (1999)*, left many vulnerable to deportation, detention and other forms of precarity.

non-members may be granted admission, it does so in a way that seeks to minimise this power imbalance, say, by decoupling immigration offences from criminal offences, and ensuring that there is clear legal status for territorially present migrants with clear and accessible routes to citizenship. Moreover, State A ensures that migrants have the resources to make their case for entry and provides the space and resources for migrants to appeal to an independent body (say some hypothetical international agency or court) if the decision regarding entry does not go in their favour. Would this set of arrangements interfere with the freedom of non-members? If one takes the view that freedom is limited by interference, then yes. The choices and actions of non-members have been interfered with, even with these stipulations. When the concern instead lies with precarity, domination, and arbitrary interference, it is less clear that it would limit the freedom of non-members. Migrants in this sense, whilst subject to the power and interference of this state via its border policy, are in a *less precarious* position due to relative power being somewhat levelled and the decisions of the receiving state being up for contestation<sup>175</sup>.

This distinction matters, as it points to either a thinner or thicker conception of freedom, or a case where different interpretations of the concept of freedom conflict. Whereas one is free when one is left to their own devices and governments may secure this by ensuring that those subject to their authority are free from interference from their compatriots and from the government itself, securing freedom in a neo-republican sense may demand that governments interfere with choices and actions to limit relationships characterised by precarity, arbitrariness and domination. To highlight this, let us examine this in the context of (relatively) recently announced changes to UK immigration policy and spousal visas. In spring 2024, the Conservative government, with the stated aim of reducing net immigration, increased minimum income requirements from £18,600 to £38,700 for family visas, as well as increasing minimum salary requirements for skilled workers by over £10,000 (UK Parliament 2024). If one is concerned only with non-interference, then whilst this may reduce the options available to more non-members, and citizens wishing to live with their spouse, one is unable to fully grapple with the way in which this may undermine the freedom of both members and non-members. If we must also be concerned with non-domination and precarity, there are at least a further two senses in which the freedom of non-members is affected by this change in immigration rules. Firstly, and as a result of UK immigration rules requiring that spouses hold a spousal visa for several years before being eligible for applying for citizenship<sup>176</sup>, the ability to remain in the UK is tied to employment status at an above-average income. Should a non-member or their spouse lose their job, be too ill to work, or have any other circumstance arise that mean that one falls below this threshold, then the ability to remain in the UK is called into question, which may also be exploited by unscrupulous compatriots. But secondly, and relatedly, not only does this contribute to a more precarious status, due to the high cost of visas and this income threshold, it may force those in this situation to make important life decisions that they may not otherwise have made. The need to stay in relatively highly paid employment may also apply pressure to act in a certain way to remain above this threshold, whether by incentivising delaying

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<sup>175</sup> Although still are in a position of relative precarity given that a receiving state's immigration policy as a whole is not open to contestation.

<sup>176</sup> That lasts for two and a half years and must be extended for a further two and a half years before applying for citizenship at not inconsiderable expense.

starting a family to focus on a career, or staying in a hated, but well paid, job. How should the UK government respond to this? If one is simply concerned with interference, by doing nothing. Those immigrating, at least after the changes in these rules, knew that this would leave them in a precarious state and, once they possess a spousal visa, no one is directly interfering with their choices. If, however, one thinks of freedom in a neo-republican sense, then securing freedom requires that the government prevent or refrain from creating precarity and domination in order to reduce exposure to arbitrary interference. Or, in other words “individuals are meant to enjoy freedom as non-domination in virtue of being protected against the domination of others by an undominating state” (Pettit 2010, p.77). This distinction matters, as whether we use a thicker or thinner understanding of freedom has practical applications for viewing the border’s effects on freedom.

Neo-republicans seek to build on the liberal understanding of freedom as non-interference by seeking to highlight the importance of social and political arrangements related to precarity and security. Examining how borders operate in spaces other than the territorial and jurisdictional limits of the state, and how bordering practices may be designed to disproportionately affect some more than others, is necessary to capture the full extent of bordered precarity.

#### *1.4 Summary*

Freedom, or more specifically, concern for how freedom is restricted, is at the heart of the case for open borders and is drawn upon in at least three senses, the extent of which is more fully capturable against the backdrop of morally complex borders. The first of these is a concern for the way in which borders interfere with the choices and actions of non-members, with freedom defined as the individual in question not being impeded by external constraints. The second is centred on autonomy and the ability to be a part-author of one’s life. And finally, and related to these, domination, precarity and arbitrary interference which is most apparent when examining internalised borders. The way that these concepts of freedom are drawn upon also raises the further question of how these conceptions of freedom fit together. As we have seen, freedom as non-interference can support the capacity for autonomy, as may freedom as non-domination; one’s independence is reduced if one is subject to coercion, manipulation or held in a precarious position in arbitrary or dominating relationships. However, they may also conflict.

### **Section 2: Closed Borders and the Concept of Freedom**

Much as a concern for freedom is central to the case for open borders, freedom is also central to the case for closed borders. In this section, I will seek to highlight that those advocating for closed borders utilise multiple conceptions of freedom. I will argue that the case for closed borders rests on at least three conceptions of freedom, namely: authenticity, individual autonomy, and political or collective autonomy.

#### *2.1 Culture and Authenticity*

The first way sense in which freedom is drawn upon to ground states’ right to exclude can be found accounts that utilise a ‘thick’ conception of culture where freedom is understood as authenticity. This is best captured by Taylor who writes that “[w]e become full human agents, capable of understanding ourselves, and hence of defining an identity, through our acquisition of rich human languages of expression” (Taylor 1992, p.33). In

referring to language, Taylor argues that this should be understood in a broader sense, with language referring to the broader forms of human expression by which individuals define themselves (Taylor 1992, p.33). Taylor highlights this, as whilst he agrees with Mill that it is important that a life is self-chosen, that choice itself is meaningless unless there are options that are more significant than others, holding that the ideal of self-choice is dependent upon significance that is independent of it (Taylor 1992, pp.39-40). Individuals who seek to give their life meaning meaningfully define themselves and find significance in the options that are available to them do so against

“... history, or the demands of nature, or the needs of my fellow human beings, or the duties of citizenship, or the call of God, or something else of this order matters crucially, can I define an identity for myself that is not trivial. Authenticity is not the enemy of demands that emanate from beyond the self; it supposes such demands” (Taylor 1992, pp.40-41).

Otherwise put, for Taylor, we are only able to meaningfully define ourselves and give our lives meaning within the context of social relationships in which our identity is found through negotiation, dialogue, and contestation with others (Taylor 1992, pp.33, 47-48). Taylor emphasises the social nature of culture, and its importance to defining one’s identity as part of an appeal to the concept of *authenticity*, the idea that each one of us has “an original way of being human, an inner nature or an inner voice” (Song 2009, p.20). But this ideal of authenticity does not mean that an individual is an island, wherein one’s relationships are disposable. Rather, Taylor stresses the value of culture and its role in identity formation because it is only in the context of meaningful relationships that we may find and understand this inner self (Taylor 1992). In other words, authenticity is dependent upon a world of shared understandings in which people can define themselves in relation and in opposition to those that surround them.

Authenticity may be said to have an individual and collective element. As we saw in the second chapter of this thesis when examining arguments that utilise culture to ground exclusion, Walzer (1983) and Miller (1995, 2016) both draw upon a collective element of authenticity, albeit not explicitly. These theorists argue that “the political community is probably the closest that we come to a world of common meanings” and that the vehicle for this is the coming together of language, history, norms and shared understandings and values, with culture being a vehicle for producing a “collective consciousness” (Walzer 1983, p.28). Individually, people define themselves against this cultural backdrop, and collectively, in that a *people* is free when they are able to identify with and act in accordance with shared cultural values. It is also here, as well as in Taylor’s own writings, although not explicitly in the context of migration, that these theorists link the protection and preservation of distinct cultures with individual and collective freedom as authenticity.

However, as we have also seen in Chapter Two, securing the conditions needed to support ‘thick’ cultures capable of enabling authenticity or self-realisation may require limiting certain liberal freedoms<sup>177</sup>. This is likely to come from a number of directions. Firstly, and perhaps most noticeably, it often requires the deviation from liberal impartiality, with group differentiated rights and their exclusionary tendencies. Carens, in a rare defence

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<sup>177</sup> Indeed, the link between a ‘thick’ conception of culture and border exclusion rests upon this tendency.

of the value and moral weight of culture, does this when exploring group-differentiated rights in order to preserve the culture of “native Fijians”, rights which in turn impose coercive limitations on the choices of native Fijians and Fijian Indians (Carens 1992, pp.594-596). In addition to the effect of the ‘freedom’ of members of other cultural groups, protecting and securing the conditions for authenticity may also have problematic implications for the ‘freedom’ of individuals within cultural groups. Individual members of cultural groups may define their identity in relation to a ‘culture,’ but this does not mean that there are conflicting narratives, identities and interpretations of this culture (Song 2009, p.21). This raises the question of whose narratives and traditions should be preserved. Any actions taken to preserve this ‘joint culture’, particularly those that involve limiting the choices and actions of members (and non-members) of this cultural group, risk alienating and dislocating those within that cultural group who hold different narratives, or through “privileging certain members’ narratives of group identity, shoring up the self-respect of some at the expense of the self-respect of others”<sup>178</sup> (Song 2009, p.21).

Defining freedom as authenticity is fraught with a tension between cultural and liberal (or positive and negative) freedom, with the securing of cultural continuity likely requiring interference with the choices available to members and non-members. To highlight this, consider Carens’ example that was highlighted above regarding ‘native’ Fijians and ‘Indian’ Fijians. In his 1992 article *Democracy and Respect for Difference*, Carens points towards the value of preserving native Fijian culture, although he does not refer directly to the concept of authenticity, and considers what measures are permissible to ‘preserve’ native Fijian culture<sup>179</sup>. Ultimately Carens advocates for differentiated limitations on the freedom of native Fijians and Indian Fijians such as the prohibition of the sale of Fijian land to Indian Fijians or non-members.<sup>180</sup> The reason he gives is that cultural goods, or the exercising and continuing existence of a recognisable native Fijian culture, are dependent in this case upon and exercisable only within a certain physical and institutional environment in which native Fijians continue to hold access to their land, as long as these policies do not harm Indian Fijians (Carens 1992). But such a policy, of course, has a multifaceted impact on the ‘freedom’ of Indian Fijians, non-members, and native Fijians themselves. The choices and options of non-members and Indian Fijians are limited by this denial of access to native Fijian institutions, but the choices and actions of native Fijians are also limited. These limitations on freedom, however, are deemed legitimate insofar as they provide native Fijians with continued access to their culture and its continued role in supporting native Fijians’ authenticity.

## 2.2 Culture and Autonomy

This, however, is not the only direction within the literature that seeks to link culture, exclusion, and freedom. Kymlicka (1989) and Margalit and Raz (1990) likewise view culture as a context of choice but, in what can be read as a response to the uncomfortable implications of Taylor’s use of authenticity, utilise the concept of autonomy as either part-authorship of one’s life or as rational self-rule, rather than point to claims of

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<sup>178</sup> In particular those who are likely to be harmed by this process of cultural definition. Song highlights that “internal minorities” - often women, sexual minorities, and other less powerful members of cultural groups are most likely to be policed and marginalised (Song 2009).

<sup>179</sup> He does also consider whether native Fijian culture is indeed *native* considering the legacy of colonisation.

<sup>180</sup> See the previous chapter of this thesis for a more in-depth discussion of this.

authenticity. Kymlicka argues that culture is necessary for autonomy in two senses. First, he contends, culture is what makes it possible to have a minimum number of meaningful options as, without culture, individuals lack the lens which gives the options available to them meaning in the first place. And second, culture contributes to a stable conception of the self that is grounded upon and at least partly defined in the social context of mutual recognition (Kymlicka 1995). For theorists such as Kymlicka, then, culture is a fundamental human interest, or what Rawls would call a primary good (Kymlicka 1989). What distinguishes this account of culture from that used by Taylor and from freedom as authenticity, is the distinction between culture as a good and culture as a centre of good. For Taylor, culture has non-instrumental value and is ontologically prior to individuals as it is only through culture that one's individuality may be formed (Song 2009, p.22). For Kymlicka, Margalit and Raz, on the hand, culture is valuable only as far as it provides value to individuals. Or in other words, a unique culture does not have value in and of itself, rather its value stems from its utility to individuals.

In making this argument, Kymlicka is drawing upon a conception of freedom that is centred on autonomy<sup>181</sup>. Much as when Carens (1987, 2003), Abizadeh (2008) and Cole (2011) draw upon this conception of freedom to seek to show that border controls undermine the autonomy of non-members, Kymlicka (1989), Pevnick (2011), and at times Miller (2016) argue the opposite. Namely, they contend that border controls are necessary to support the individual autonomy of members. Protecting societal culture through a right to exclude protects and supports their capacity for autonomy, through ensuring that members have continued access to a recognisable form of their shared culture, rather than being subjected to a painful process of dislocation by being required to adapt to a new culture, which they worry could happen *if* their cultural lens is destabilised through the introduction of new cultures or cultural understandings. To return to an example from the second chapter of this thesis, existing members of the National Trust would have their 'cultural lens' destabilised by the introduction of a sufficient number of new members to lead to the adoption of policies advocating for building industrial zones on national parks, with original members no longer being able to recognise this new shared culture. To turn back to migration, the introduction of a significant number of new members *may* affect the autonomy of members by changing cultural understandings of democracy, the relationship between citizen and the state, or other social and political relationships, and may dislocate an individual from what they perceived to be their culture and force them through a painful process of dislocation. Where this differs from Carens' (1987, 2003), Abizadeh's (2008) and Cole's (2011) use of autonomy, is that the focus is instead placed upon the 'freedom' of members as opposed to non-members.

In doing this, Kymlicka's position is similar to Rawls'. But in linking culture and autonomy, much as with Taylor's account of authenticity, there remains an underlying tension than needs to be resolved. On the one hand, one must protect access to a given culture in order to provide meaningful options, and at the same time protect an individual's freedom of choice in order to realise autonomous self-direction; the provision of the former can

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<sup>181</sup> Kymlicka is a little vague here as to whether he is referring to a more Kantian or Rawlsian conception of autonomy centred on the idea of rational self-rule, or a more Millian or Razian conception of autonomy centred on agents forming and pursuing their own meaningful life plans (Kymlicka 1996). However, in Kymlicka's discussion of culture and autonomy, Kymlicka does point to some culture's seeming incompatibility with individual autonomy and the need for a liberalisation of these cultures in order to enable autonomy for members of these cultures (Kymlicka 1996, pp.94-96).

require the limitation, to some extent, of the latter. There is also a second tension. This second tension is not at first sight as noticeable as it is within the open borders use of autonomy. In asserting and exercising a right to exclude in order to create and maintain the conditions for autonomy of members, states' border controls directly interfere with the choices of non-members or undermine their capacity for autonomy, either through blocking access to a meaningful range of options, through coercion, or both in concert. It is here, then, that we can see that the use of autonomy may pull us in two directions simultaneously. On the one hand, border controls undermine the capacity for autonomy among non-members, whereas the absence of a right to exclude may also undermine the capacity for autonomy among members.

### *2.3 Democracy, Autonomy and Collective Government*

A second way in which this concept of autonomy is drawn upon is in the context of broader claims made about the importance of democracy for individual self-determination. To examine this more fully however, it is necessary to briefly explore the case for the non-instrumental value of democracy in order to better capture how these theorists link collective self-determination, or collective rule,<sup>182</sup> to individual autonomy.

Dahl defines autonomy in terms of self-government, and self-government in terms of obeying laws that an individual themselves has chosen. "[T]o be morally autonomous *is* to be self-governing...[and] [t]o govern oneself [is] to obey laws that one has chosen for oneself," he writes (Dahl 1989, pp. 89, 91). For Dahl, in areas of collective decision making, there is no feasible system that will account for the autonomy of each individual member, as not all individuals' preferences are likely to be reflected in collective decisions. However, democracy delivers the greatest "feasible scope of self-determination for those who are subject to collective decisions, so it also maximally respects the moral autonomy of those who are subject to its laws" (Dahl 1989, p.91). Philpott holds a similar view. Philpott characterises democracy as the act of "governing oneself, of exercising one's autonomy in the political realm" (Philpott 1995, p.357). Here, Philpott argues that democracy should be viewed as an extension of the value of autonomy, or self-rule, at the individual level.

Whilst Philpott (1995) and Dahl (1989), are right to draw attention to a link between democracy and autonomy, theirs are not the most successful accounts linking democracy and autonomy. Dworkin, for example, rejects this conception of democracy, as it claims "anything a majority or a plurality wants is legitimate for that reason" (Dworkin 1996, p.364). Instead, he argues that democracy's link to autonomy rests in majority decisions made in the context of a community of equals (Dworkin 1996, p.364). Rather than democracy being a system that is simply instrumentally better placed to enable to have their preferences reflected in collective decisions, Dworkin, in advancing a partnership conception of democracy argues that

"[d]emocracy cannot provide self-government in the most literal sense... citizens of a political community govern themselves, in a special but valuable sense of self-government, when political action is

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<sup>182</sup> I use these terms, because whilst democracy is often the system of collective self-determination that is referred to when making the case for the right to exclude, it is not done universally with theorists such as Altman and Wellman making the case that this link collective self-determination and freedom without necessarily demanding that this take a democratic form (Altman and Wellman 2009).

appropriately seen as collective action by a partnership in which all citizens participate as free and equal partners, rather than as a contest for political power between groups of citizens” (Dworkin 1998, p.453).

The normative significance of democracy, and its link to the autonomy of its members, rests in the shared and collective exercise of power and the use of public reason in which individuals participate in politics as equals (Dworkin 1996, p.364). In rejecting a Kantian conception of autonomy as rational self-direction, Dworkin argues that democracy provides substantive equality through the provision of an equal voice and importance within collective decisions (Dworkin 1998, p.457). Dworkin points to a shared belief that individuals are in part responsible for the actions, and their consequences, stemming from decisions made by groups to which they belong that goes beyond any individual responsibility an individual may have (Dworkin 1998, pp.444-445). In taking pride, or feeling shame, for the actions taken by the collective of which we are a part, we are, in Dworkin’s mind, showing evidence of a “distinct agent through which we act vicariously” (Dworkin 1998, p.455). This shared responsibility for collective action, in Dworkin’s mind, is independently valuable due to its reliance upon the conditions of equality and respect, and it represents a tangible sense in which we engage in self-rule through membership in a collective ethical relationship (Dworkin 1998, p.457).

Whether or not one follows the route taken by Dahl and Philpott or Dworkin (1996, 1998) and other advocates of deliberative democracy such as Cohen (2007), Gutmann (1993) or Rawls (2005a, 2005b), what unifies these thinkers is viewing collective self-determination or democracy as a component part of individual autonomy<sup>183</sup>. Writing about collective decisions, Gutmann writes that the choices available to individuals, from the most important to the most trivial are “influenced and constrained by social context, over which political authority has the greatest control. If we are excluded from that authority, then we lack the autonomy in an important dimension of our lives” (Gutmann 1993, p.142). A key component of individual freedom, which is often brought into the sharpest focus by the people deprived of it, is freedom to play an active part in shaping one’s political context (Gutman 1993, p.143). Whilst we may say that the ability to form and pursue our own life plans is perhaps most important in the individual sense, to limit agency in group decisions that regulate and structure our lives is to simultaneously limit the scope of our moral autonomy as well as to deprive individuals of the dignity and respect as part-authors of our own lives (Raz 1988, p.156; Gutman 1993, p.143). In the context of areas where collective decisions are unavoidable, particularly where these decisions involve subjecting those that they affect to coercion, having input on these is instrumentally valuable, but it is also a “constitutive component of individual freedom” (Gutmann 1993, p.151).

Whilst these theorists are linked by holding to the connection between autonomy and democracy, there remains disagreement about the agent possessing autonomy. Theorists such as Altman and Wellman, when pointing to the value of collective decision-making, highlight that it is collective, not individual autonomy that is drawn upon when linking a right to exclude, democracy and freedom. They argue that that it is groups, not individuals, that are ‘self-governing’ in collective decisions (Altman and Wellman 2009, p.18). After all, in modern, large,

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<sup>183</sup> Although these theorists do not take the same step that Walzer (1983), Miller (2008, 2014, 2015, 2016) and Wellman (1999, 2008, 2016, and Wellman and Cole 2011) do and develop this Rousseauian conception of democracy into a defence of restriction of membership.

impersonal democracies, ours is one vote among millions, and as often as not, decisions taken do not represent the preferences of a large percentage of voters<sup>184</sup>. As a result of this, they argue, democratic decisions cannot be a reflection of individual autonomy, but should be understood as an exercise in collective autonomy. Drawing on Buchanan, they write that it “is simply false to say that an individual who participates in a democratic decision-making process is self-governing; he or she is governed by the majority”; unless self-government is defined as government by the majority, “an individual can be self-governing only if he or she dictates political decisions” (Altman and Wellman 2009, pp.25-26). Instead, they argue that democracy has non-instrumental value insofar as it reflects a group’s moral right to collective self-determination (Altman and Wellman, 2009, pp.25-26).

Autonomy in this collective sense is reflected in Wellman’s account based upon freedom of association (Altman and Wellman 2009, Wellman and Cole 2011), in Miller’s and Walzer’s appeals, in Song’s (2017, 2018) discussion of immigration controls and collective self-determination, and in Pevnick’s discussion of associative ownership. Each tie the ability for groups to be able to exercise collective autonomy with control over the boundaries of membership. Or put another way, they hold that collective autonomy is possible only when that collective is able to define and control the *self* that is exercising self-determination. Song does this explicitly, stating that “[w]hen would-be immigrants enter or remain in a country without authorization, they sidestep the political process by which members of the political community can define who the collective self is”, which “contravenes the right of collective self-determination itself” (Song 2018, p.67). An almost identical line is taken by Walzer, who states that “the right to choose an admissions policy is more basic than any of these [other policies]...[a]t stake here is the shape of the community that acts in the world, exercises sovereignty, and so on” (Walzer, 1983, pp.61–62), and Wellman who states that “[n]o collective can be fully self-determining without enjoying freedom of association because, when the members of a group can change, an essential part of group self-determination is exercising control over what the “self” is” (Wellman 2016, p.85). Pevnick takes a slightly different, albeit related route, centred on collective self-determination. In invoking the Lockean notion of property rights, Pevnick points towards the collection of members who together possess collective ownership of state institutions by virtue of their labour, which he claims entitles the collective to have “at least some discretion in making future decisions about how those resources will be used”, including whether and to whom membership may be given to in the future (Pevnick 2011, p.44).

The basic claim being made is that, in order for a group to be able to chart their collective future, engage in self-rule, and determine how to use the goods and resources available to them, they must have control over the boundaries of membership. As we saw in Chapter Two, this was the concern that motivated Miller (2016), Walzer (1983) and Song (2018a) for control of the contours of membership. When changes to the composition of the collective exercising self-determination are made through processes not agreed by that group, that group can no longer be said to possess agency as they no longer constitute the same ‘self’ (Miller 2016, p.62)<sup>185</sup>. When new

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<sup>184</sup> I have been on the ‘losing’ side of every general election and referendum in the UK since being eligible to vote.

<sup>185</sup> This point was discussed in detail in Chapter Three of this thesis, however to briefly recap, changes to the *self* are problematic when imposed from without, but are an integral part of one’s autonomy if changes to the *self* stem from the exercising of one’s self-directed freedom.

members are admitted to a group, the nature of the group itself changes, which may lead to both a group making decisions that it may not have done had these new members not been introduced, and changing the way that individual members experience being a member of the group (Song 2018a, p.66; Wellman and Cole 2011). In short, much as an individual who wakes up every morning with a different conception of how to lead their life could not be said to be autonomous as their indecision renders them incapable of having a consistent sense of self able to act upon these choices for more than a few hours, fluctuating membership as a result of a process not endorsed by current members reduces the capacity of states to pursue collective goals, adopt policies that reflect members' preferences, and through this, reduce the scope for collective autonomy.

In sum then, the concept of autonomy is drawn upon by theorists linking democracy and rights of exclusion in at least two senses, as individual autonomy, where democracy shows respect for members' autonomy as individuals capable of self-government, or as collective autonomy. Both of these conceptualisations require that members possess control over the boundaries of membership. However, whilst they both may require control of the boundaries of membership, when placed against the backdrop of more complex borders, it becomes quickly apparent that many of the securitised bordering practices employed by states that stretch the border do little to further the freedom of members and are therefore cannot be contained within the justification for closed borders.

### *2.3 Democracy, Justice, and the Equal Capacity for Liberty*

A third way in which the concept of freedom is drawn upon in order to ground a right to exclude utilises arguments that draw on culture and democracy, but does so indirectly. Miller, as we saw in Chapter Two, argues that is only within the context of trust and shared understanding, which he sees as facilitated by a shared culture, that democratic processes may adequately function and the conditions for securing equal liberty can be secured. Or, in other words, a shared culture and the right to exclude support individual autonomy by securing the political and social conditions needed for democratic sacrifice and solidarity.

Miller does this by drawing attention to accounts of the instrumental value of democracy<sup>186</sup> and to the institutional arrangements that characterise democracies, such as near-universal suffrage, freedom of speech,

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<sup>186</sup> Instrumental accounts of the value of democracy and collective decisions are unified in pointing to the value of democracy lying in democratic institutions ability to satisfy the preferences of the individuals subject to these institutions. Arguments for the instrumental value of democracy rest upon empirical information, to argue that democratic systems of government deliver greater utility for their members in at least three senses. In the first of these, the public nature of democratic decision making allows greater understanding of fellow citizens including their needs and their often-competing viewpoints. Theorists such as Sen fall into this camp. In his article *Democracy as a Universal Value*, Sen argues that democracy has instrumental value by "enhancing the hearing that people get in expressing and supporting their claims to political attention (including claims of economic needs)" as well as through public discussion which gives citizens the "opportunity to learn from one another and helps society to form its values and priorities" (Sen 1999, p.10). In other words, democratic decision making, and democratic culture, encourage citizens to understand their fellows through publicly giving reasons for their preferences when making group decisions. In the second of these, a variety of theorists have pointed to democracies better protecting importantly held human rights, and thirdly, by diffusing political power throughout a state through granting rights such as voting rights, democratic processes force governments to be accountable to the preferences of their citizens to a greater degree than systems where certain groups are deprived of equal status or political power (see for instance Mill 2012). A final sense in which freedom is appealed to is how they may support freedom is found in Miller's argument related to trust and the instrumental value of democracy. What unifies these instrumentalist accounts is the assumption that the value of government and collective decisions stems from their ability to satisfy the preferences of individuals. Here it is assumed that,

expression and assembly, being more likely to ensure that material resources and opportunities are distributed in a more egalitarian way, and decisions being more likely to reflect the preferences of citizens (Dworkin 1998). If as, Miller argues, a shared “culture” facilitates democratic functioning by providing a site of attachment necessary for individuals to sacrifice on behalf of others, culture is instrumentally valuable to liberty by supporting institutions that enable and maximise access to liberty (Miller 2016; Miller 1989, p.245). In other words, a stable political environment is likewise necessary to prevent arbitrary relationships, minimise precarity, and create and maintain the conditions needed for individuals to have the capacity for autonomy. Or, in Miller’s terms, “it becomes harder to gain support for policies that involve economic redistribution in favour of the poor, again for the reason that general considerations of social justice are displaced by group-specific demands” (Miller 2016, p.64). Autonomy, as we have seen, requires that individuals have both an adequate range of meaningful options, possessing minimum rationality and possessing independence (Raz 1988). However, the possession of these is at least somewhat dependent upon one’s broader political and social environment (Raz 1988, pp.422, 425). Access to an adequate range of meaningful options and the development of a minimum level of rationality required for autonomy is at least partly dependent upon access to resources, a stable environment in which to confidently be able to plan and act upon one’s life plans, and access to education in order to develop one’s rationality. Economic redistribution, the provision of social goods and services such as roads and security, as well as education and a broader stable political environment, therefore, support liberty and the capacity of individuals to live an autonomous life<sup>187</sup>.

Each of these freedom-related instrumental benefits of political stability and democracy are, for Miller, only realisable against the backdrop of social trust, which is in turn realisable only in the context of a mutually shared public culture (see for instance Miller 2016). In other words, Miller is arguing that in order to secure the voluntary cooperation of members, members must possess trust in order to agree upon and operate policies that look towards the common interest, particularly within the context of large and largely impersonal communities. On the one side, this is due to culture being a site of attachment necessary for individuals to sacrifice on behalf of others, and on the other, because cultural attachments are large enough to make democratic self-rule meaningful and equal liberty possible (Miller 2016; Miller 1989, p.245).

Miller concedes that immigration may not necessarily undermine public trust if migrants are successfully integrated, and the empirical evidence that Miller utilises to support this is tenuous at best<sup>188</sup> (Miller and Ali 2014; Shayo 2009). However, *if it is reasonable* to expect that the conditions required for freedom-supporting institutions is compromised by immigration, although it is not entirely clear under what circumstances this would be the case, then the freedom of the territorially present may be reduced.

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whilst the needs and preferences of individuals may be formed through social interaction, these needs and preferences exist independently of democratic processes (Anderson 2009).

<sup>187</sup> At this point it is worth mentioning that immigration does not necessarily undermine the conditions for this (as we shall see in the next chapter of this thesis), only that in situations that it does, then the capacity for equal liberty and the autonomy of members is reduced.

<sup>188</sup> Literature examining the relationship between social trust and national identity has conflicting and contradictory findings (see for instance Warren 1999; Ulaner 2002; Shayo 2009; Lenard 2012).

### Section 3: Implications and Further Questions

Underpinning the cases for a right to exclude and a right to migrate, then, are arguments predicated on the concept of freedom. Theorists from both sides of this divide utilise the concept to highlight that the presence or absence of a right to exclude is problematic. If, as I have sought to highlight, both sides of this debate rest their respective cases on the concept of freedom and its various conceptions/interpretations etc., how should we understand the difference in position between these two broad positions?

One option would be, as often the case within the existing literature, to argue that the concerns of the other side are mistaken, that border controls are not coercive, that there are disanalogies between domestic and international movement, that culture does not play a role in the capacity for autonomy, or that the empirical data does not support trust facilitating the ability of institutions to protect and extend liberal freedoms or for democratic institutions to function. However, dispensing with these claims in their entirety is problematic given the strength of the arguments put forward on both sides of this debate. Alternatively, one could take a more watered-down version of this, and argue that, in making these arguments, particular elements of these arguments are overemphasised or underemphasised. To take a few examples, do they, for instance, take an overly narrow view of factors that contribute to the capacity for autonomy or to whom obligation and justification are owed? Candidates for this are not hard to find. Abizadeh's (2008) critique of border coercion and of states' claims to have a unilateral right to decide who to admit and who to exclude can be understood as a critique of an overly narrow account of state's obligations to support the capacity for autonomy. In highlighting the role of culture in supporting the capacity for personal autonomy, we are presented with compelling reasons to think that those advocating for more open borders either undervalue or do not give adequate weight to the moral value of borders and the social factors that may support the capacity for autonomy. Another option would be to consider at what 'level' of theory these arguments operate. Is this a case of miscommunication between debates operating between ideal and non-ideal theory? This certainly seems to be the case in places. Carens, for instance, presents alternate accounts in ideal and non-ideal theory, arguing that the case for open borders is stronger in the realm of ideal theory – even if, conversely, his argument that draws upon personal autonomy appears to be stronger in non-ideal theory (see for instance Carens 1987, 1996). This though only takes us so far given that most accounts advocating for and against a right to exclude are framed in terms of ideal theory.

In this chapter, I have sought to highlight that this divide can instead be understood as stemming from the way in which the concept of freedom is drawn upon. On the one side, border controls are seen to interfere with freedom in three distinct but overlapping, and some contradictory, senses. Firstly, they restrict freedom by interfering with the choices and actions of non-members (Abizadeh 2008, Hidalgo 2014a, Carens 1987, amongst others). Secondly, they interfere with the capacity of non-members to be autonomous. And thirdly, they interfere with the freedom of non-members by creating precarity, arbitrary relationships and domination (Fine 2014). Each of these, and the extent to which state borders do this, is brought into sharper focus against the backdrop of a more sociologically informed border. On the other, borders are seen to protect or further freedom by securing the conditions needed for members to make self-directed choices and actions (Miller 2016), by supporting the capacity for members' autonomy and for the exercising of collective autonomy (Kymlicka 1995;

Pevnick 2011; Altman and Wellman 2009; Wellman 2016; Song 2017, 2018), or by protecting the conditions necessary for an authentic life (Taylor 1992, 1994; Miller 2005). In short, the way in which freedom is drawn upon cannot be reduced to some crude distinction between positive and negative freedom, or a divide between the use of individual or collective freedom. Instead, freedom is drawn upon in often divergent and overlapping ways. At times, these conceptions of freedom directly contradict with one another, with the securing of freedom in one sense often demanding the limitation of it in either another sense or location. However, even when freedom is talked about and drawn upon in similar senses, whether in terms of autonomy, in securing liberal freedoms or in securing non-interference more generally, there are tensions and conflicts that exist not only between the open-closed spectrum but within them. When freedom is engaged with in similar terms, these tensions and conflicts can appear to support to contradictory positions.

One clear difference between the way in which this conception of freedom is used relates to the question of 'whose freedom.' To those advocating for open borders, the answer to this question is 'non-members', whereas those defending closed borders privilege 'members', with each camp all too often falling silent on the other group of concern, or at least providing no compelling reason why the freedom of one group should take normative primacy. To a certain extent, this is understandable. Those making the case for open borders rightly focus on how the border may problematically affect migrants' freedom; whilst border controls do affect the choices and options available to members, it is non-members who feel the sharpest end of these limitations and it is in the discussion of non-members that this restriction of freedom is at its most problematic. On the flipside, in defending a right to exclude from its critics, it is likewise understandable that thinkers like Miller focus on the freedom of members. These writers are often writing in response to the powerful liberal egalitarian case for open borders and can be understood as an attempt to remind these theorists about why borders surrounding territory and membership matter.

Doing this however provides an overly narrow response to the question of "whose" freedom matters. Whilst we may have compelling reasons to say that states have special obligations towards their members, this does not mean that this special concern may be exercised at the expense of the recognition of the moral equality of non-members<sup>189</sup>. Correspondingly, a simple maximising of the choices available to non-members cannot come at the

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<sup>189</sup> We may say that there are special obligations that may generate compatriot partiality, this does not mean that states should not be concerned with the freedom of non-members. To highlight this, consider the classic case put forward in order to support this – the relationship between a parent and child. A parent has obligations for the welfare of their child that they do not to the children of others. Holding that a parent may prioritise the welfare of their child over others does not undermine the principle of moral equality (as it does not presume that one child's life is more valuable than another), but the non-instrumental nature of the relationship may justify equal respect but not equal concern (Hart 1970; Dagger 1985; Abizadeh 2016). This does not mean that the parent has no obligations towards the children of others (if they are neglected), only that "part of what it is to value one's special relations non-instrumentally just is to attend to their interests more generously than one is required to attend to those of others" (Abizadeh 2016). Applying this to states is controversial and cannot be defended in its entirety here. However, the moral relevance of borders in supporting freedom gives us reasons for state partiality in this way whilst maintaining that states also should be concerned with the freedom of non-members. Song (2018a) does this within the context of collective self-determination "I believe the value of collective self-determination also plays an important role in a universalist approach to obligation... Collective self-determination provides a reason for favouring a system of separate states over a world state because the former allows political order to be established in a way that respects people's judgments about how they should be ruled... This means the state has special duties toward those within its territorial jurisdiction that it does not have toward outsiders" (Song 2018a, pp.53-54). As we have seen in preceding chapters of this thesis, borders have moral relevance because they support the freedom of members in other ways - lend.

expense of freedom of members. It is insufficient to simply highlight how the border may problematically limit, or protect, freedom, before jumping to a position of open or closed borders. Not all limitations on 'freedom' are necessarily problematic, and indeed are often permissible and uncontroversial when done for the sake of liberty (see for instance Rawls 2005a, 2005b)<sup>190</sup>. Rather than prioritise the liberty of one group over another, we must instead broaden our focus to include the freedom-related concerns of members and non-members. Viewed this way, questions of admission and exclusion become questions of how to balance the freedom of members and non-members, with this balancing being dependent upon the situational claims of members and non-members. In other words, the border may both simultaneously undermine the capacity of some individuals' capacity for autonomy in some locations and circumstances, and at the same time play an integral role in supporting the capacity for autonomy or political autonomy. Bordering practices may create precarity by creating the conditions for arbitrary interference in some locations, on the one hand, but on the other, they may support the conditions necessary for functional institutions capable of protecting and extending liberal freedoms in another. Rather than a blanket 'right to migrate' or 'right to exclude,' it is perhaps better to view this as how to ensure that individuals have access to an adequate range of freedoms by balancing different 'types' of freedom.

A second, and related issue is how these competing, and sometimes conflicting, conceptions of freedom relate to one another. As we have seen, these conceptions of freedom often compete and conflict with one another, with the securing of one sometimes coming at the expense of another. Whilst it is not the purpose of this chapter to advocate for one 'view' of freedom over the others, as to do so would likely be a thesis in and of itself, this discussion has sought to highlight that freedom is a complex concept, and taking an overly narrow view of the scope of freedom is likely to result in an inadequate picture of human liberty, how it may be lost, and how it may be protected. One can be unfree if one lives in a state of precarity, or if one is not able to achieve political self-determination and is instead governed by an unaccountable or arbitrary government. Equally, one may be unfree if one is subject to external constraints, whether by oppressive laws or a lack of resources that limit the range of options available to them. Or freedom may be lost because an individual cannot be a part-author of their life, when the process of internal preference and desire formation is compromised by coercion, manipulation, or indoctrination, each of which may prevent a person being rationally autonomous or being authentic to oneself. Taking an overly narrow view of freedom may result in freedom in meaningful senses being lost.

As such, questions around freedom and securing an adequate range of liberty for individuals will likely require a difficult, and oftentimes painful trade-off between freedom in different senses. Access to one's culture may be integral to one's freedom in one sense, whether in terms of authenticity or in autonomy, but access to it simultaneously requires limiting the scope of choice to those individuals who share in it. Continued access to culture will dictate in which language people are educated, determine which practices are supported and

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<sup>190</sup> John Rawls, for instance, argues that "the principles of justice are to be ranked in lexical order and therefore the basic liberties can be restricted only for the sake of liberty" and Raz argues that "A moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm, for harm interferes with autonomy" (Rawls 2005b, p.266; Raz 1988, p.419).

suppressed with the aid of government and the public purse and, as we have seen in arguments put forward in support of closed borders, limit the freedom of members (and non-members) associating with those who are not part of this cultural group. On the flipside of this, an individual's ability to decide how much to engage with their own culture, or indeed change the 'culture' with which they identify, is a consequence of individuals being able to engage in self-rule, decide which options have value, and meaningfully form and execute their own life plans through the exercise of individual freedoms such as freedom of conscience, movement, association and migration.

This, already a daunting enough process when considering how freedom may be secured within a polity, is compounded when confronted with the same question but with the broader focus of both members and non-members. We may, quite rightly, hold that securing the conditions for individuals to have continued access to their culture, or that supporting the ability for groups to exercise collective self-determination, supports the freedom of members, but securing this comes into conflict with the claims of individuals whose ability to access a minimum range of liberties is limited by those same measures used to support culture and collective self-determination. How should these be balanced? A question itself that is given greater complexity, and thus made much more difficult to answer adequately, when considering that those bringing claims to the border may have a pre-existing relationship with the receiving state or through empirical considerations that may alter the degree to which individuals will be vulnerable to precarity, domination or their ability to access meaningful options. These empirical considerations may be linked to family connections<sup>191</sup>, areas of restorative justice where the receiving state may in some way have full or partial responsibility for a migrant's lack of an adequate range of liberties, or through their possession of a shared culture which may undercut concerns related to the preservation of the receiving states continued access to their societal culture or cultures. Countervailing to this, whilst preserving a societal culture and supporting the conditions for collective self-determination may be important for protecting and extending the freedom of members, empirical factors may influence the extent to which this is the case<sup>192</sup>. Miller concedes as much. In discussing the relationship between immigration and interpersonal trust, Miller states that the relationship between the two is not straightforward. Rather,

“[o]ne variable factor is the degree to which the society becomes segregated, with incoming minority groups clustering in urban ghettos— or on the other hand, integrated through participation in voluntary associations and political movements that cut across ethnic and religious divisions. Another is the presence or absence of an inclusive national identity which can provide a bond that overrides sectional identities. Public policy, therefore, can be used to offset the potentially damaging effects of immigration on trust by encouraging integration and promoting a shared identity” (Miller 2016, pp.64-65).

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<sup>191</sup> Thus, raising important considerations for the freedom of individual members.

<sup>192</sup> This has broad implications for the moral efficacy of states bordering practices, as the securitisation and the stretching of the border in ways that do not directly contribute to the freedom of members (such as internalisations of the border that build precarity or the externalisation of borders) may not be justified in terms of a right to exclude.

More factors can surely be added to this list. Some cultures, by virtue of their number of adherents, or how widespread they are, are likely to be more resilient than others. Others, because of their emphasis on plurality, may demand more openness to be more consistent with their own values. Likewise, due to the large impersonal nature of modern democracies, can it really be said that the introduction of one, or indeed many new people, may not, in practical terms, do much to alter the “self” exercising self-determination? Is it much of a loss of liberty to individual members in these terms to admit non-members who do not have access to an adequate range of liberties when the nature of the group changes to such a small degree? The next, and final chapter, of this thesis will seek to explore these questions. In doing so, I will seek to highlight that there is likely to be no easy answer to these. Rather, whether the ability of a right to migrate or a right to exclude is dependent upon the situational claims of non-members and on the capacity of the receiving state.

#### **Section 4: Conclusion**

In this chapter, I have examined the way in which those who advocate for and against states’ right to exclude engage with and draw upon the concept of freedom. In doing so, I have sought to highlight that the existing literature in favour of open borders draws upon freedom in three, sometimes overlapping and sometimes conflicting, senses: freedom as non-interference, a neo-republican conception of freedom, and as autonomy as self-creation. Moreover, the extent to which borders interfere with freedom in these senses may be better captured when engaging with the sociological complexity of the borders given the often-dehumanising aspects of contemporary bordering practices and the precarity that is created when borders operate in spaces other than the traditionally located border. Whereas those in favour of closed borders appeal to freedom in three sometimes overlapping and sometimes conflicting, senses: as individual autonomy as self-creation, as authenticity, and as collective autonomy and refer indirectly to freedom through pointing to the necessity of political stability and functioning institutions to realise ‘freedom’ within particular localities.

Whilst each of the ways in which the existing literature engages with freedom is nuanced and serves to ground strong cases for a right to migrate and a right to exclude, both sides suffer from overly narrow responses to the questions of *whose freedom* and *what constitutes freedom*. By building on the view of the morally complex view of borders presented in the previous chapter of this thesis as well as through an exploration of existing normative literature, I have sought to highlight that each camp makes the mistake of the other and fails to fully capture how the border may restrict or support freedom. The result of this is that the legitimate freedom-related concerns of members or non-members are overlooked and that the border itself is mischaracterised. Rather than restrict *or* protect freedom, borders restrict *and* protect freedom simultaneously.

In the last chapter of this thesis, I will seek to pull together these insights to find a middle way by examining the empirical conditions that may strengthen and weaken the freedom-related claims of members and non-members. In doing so, I will argue that the determination of whether a state may morally permissibly exclude any given non-member is dependent upon the situational claims of members and non-members and that these are determined by empirical circumstances.

## Chapter 5: A Middle Way?

State borders function as a fault line. Not only do they physically separate members from non-members, but they also function as the point at which a number of pressing claims and obligations interact and compete with one another. Preceding chapters of this thesis have sought to highlight that these claims are weighty, and that arguments put forward in the existing literature have given us compelling reasons to accept – under certain conditions – both states’ ‘right to exclude’ and non-members’ ‘right to immigrate’, even if the extent to which each party may exercise these is unclear. Up until this point, I have sought to highlight that whilst the arguments presented on both sides of this debate are powerful, both sides suffer from two problems. The first of these was the utilisation of a partial and idealised conception of state borders that does not adequately capture how the location of borders may vary the extent to which the freedom of non-members is affected by the border. Borders themselves are complex and multifaceted and are pushed and pulled beyond and within the territorial and jurisdictional limits of states. Where non-members stand in relation to these internalised and externalised borders impacts their freedom in different ways, to different degrees and in ways that may be unrecognisable to one another (Balibar 2011, p.80). The second of these problems is that the existing normative literature provides an overly narrow response to the questions of *whose freedom*<sup>193</sup> and *what constitutes freedom*. On one level, those advocating for open borders all too often ignore or downplay the moral relevance of borders, whereas those advocating for closed borders do not give adequate weight to the way in which borders may restrict freedom. This is both surprising and problematic. Liberal commitments to freedom and moral equality<sup>194</sup> give compelling reasons to be concerned with state borders’ effects on the freedom of members and non-members alike. On another, the protection of freedom in one sense may require restricting it in another. These two factors interact, meaning that the border is freedom restricting and freedom protecting simultaneously.

Where then, does this leave us? In this chapter I will seek to build upon the groundwork laid down in previous chapters of this thesis to establish a ‘middle way’ that is sensitive to the concerns of those that advocate for open and closed borders. I use this term hesitantly, as I will not seek to establish some broad normative position capable of establishing some formula that, if used, would result in a clear position being pegged somewhere across the open-closed spectrum. To do so would likely be fraught with difficulties and would most likely result in an account that is either so threadbare that it would have little to say that may be action-guiding or would have to simplify the activity that occurs at state borders to such a degree that it would fail to fully capture the relationship between state borders and freedom. The freedom of members and non-members and the extent to which admission and exclusion impact their freedom is, to a large degree, context dependent, a context that is further complicated when considering the extent to which claims themselves may be affected by states’ own border practices. Rather, I will instead offer a more tentative position expressible as “open borders that may be closed” under particular conditions.

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<sup>193</sup> Or at least gives no adequate reason to show why the freedom of one group over the other should *always* take normative primacy.

<sup>194</sup> And in this context the morally arbitrary nature of one’s birth in relation to state borders and the way in which borders interfere with and further freedom.

In this chapter, I will argue that the extent to which states may legitimately exercise a right to exclude is situationally dependent, cannot be divorced from this context, and must adequately consider and engage with the moral complexity of “the border”. In doing this, I will seek to elucidate considerations that should be taken into account when making decisions of admission and exclusion, and through this, identify areas of shared agreement and concern. As part of this, I will seek to highlight that the claims of non-members are at their strongest when lacking an adequate range of basic liberties in their home states or when they possess particularity claims or claims of restorative justice. As part of this, I shall draw upon the sociological and normative complexity of the border (examined within Chapter Three) to argue that bordering practices themselves may generate additive and prioritising obligations towards non-members that may strengthen or generate a non-member’s case for border admission. Whereas states may possess theoretically unlimited obligation towards certain migrants, these duties are in practice limited by the capacity of states to meet these obligations without undermining (to a significant degree) the freedom of existing members.

To do this, this chapter will be split into three sections. In the first of these, I will seek to highlight how the strength of the claims brought to the border may vary in strength by examining five (broad) types of claims: those of refugees, those of economic migrants, those with family and spousal claims, those with claims of restorative justice, and those whose claims for repair may have been produced by ‘the border’ itself through punitive bordering practices. In the second section, I will discuss how the countervailing claims of members are likewise dependent upon context, with the freedom of members not being affected equally by border admission. Finally, in section three, I will discuss how these claims interact and offer a framework for how these should be resolved which is centred on a state’s capacity to fulfil obligations, before discussing the implications of this middle way approach.

## **Section 1: A Tale of Five Migrants**

### *1.1 Refugees and Economic Migrants*

Not all claims that are brought to state borders are equal. It is quite common within popular discourse (and, for that matter, the academic literature) on migration to distinguish between refugees, in common parlance those migrants at severe risk of harm and those who make claims of justice, and economic migrants, those viewed as ‘simply’ seeking better economic opportunities. Rather, I shall follow theorists such as Shacknove (1985) and Kukathas (2016) in arguing that this divide is artificial<sup>195</sup> (outside of international law). However, discussing and breaking down the normative underpinnings of these two broad “classes of migrant” is of value as it helps to elucidate what freedom-related claims are being made by non-members and, by extension, the extent to which border controls may restrict the freedom of non-members.

The first of these, refugees, are unusual in popular and policy discussions surrounding migration in that states concede that they may have obligations to grant admission to refugees/to them in certain conditions. All but the most ardent of theorists advocating for closed borders make exceptions for refugees. Miller, for instance, after

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<sup>195</sup> In doing so arguing for what David Owen (2020) call the “humanitarian” conception of a refugee (Owen 2020, pp.4-5). In this, the underlying moral obligation is to prevent undeserved harm and restrictions of liberty (Owen 2020, p.7).

making the case for a right to exclude, makes an exception for refugees arguing that they “have a very strong, but not absolute, right to be admitted to a place of safety, a right that is now recognised in both law and international practice” (Miller 2007, p.227). Likewise, in a similar vein, Walzer argues that whilst states should possess (very) broad discretion over who, if any, they admit, this should be sensitive to refugees (Walzer 1983, pp.43-51). There is something that is intuitively different about the claims that refugees make that is reflected by Miller’s and Walzer’s concessions, even where they otherwise hold to an expansive right to exclude. What are they?

Perhaps it would be helpful to start with the most common, if not universally recognised, definition of a refugee. The 1951 *United Nations Convention Related to the Status of Refugees* defines a refugee as someone who,

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (UN 1951, 1A2).

Underpinning this definition is the commitment that some sort of bond based upon protection and assistance exists between a citizen and their state, that this has been severed in the case of those that suffer persecution, and that this is sufficient to place obligations on other states to assist those in these circumstances (Shacknove 1985, p.275). This definition, however, is glaring because of what it excludes. Those whose liberty is restricted or who are harmed by means other than persecution are noticeably excluded. What about those caught in failed states, warzones, famine, and abject poverty, or those who risk seeing their homes sink beneath rising tides? And what of those whose liberty has been restricted, whether through persecution or broader harms that have left them displaced, but who have not, either because of a desire to remain in the place that they call home or lack of capacity, crossed state borders and are displaced within their home state? None of these people are covered by the 1951 definition, although even though they may be in just as precarious a position.

This definition, and what it omits, has been controversial from its inception. In response to this<sup>196</sup>, the Organisation of African Unity (OAU), after incorporating the language surrounding persecution, adopted a very different definition in which a refugee is one who

“owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality” (OAU 1969, Article 12).

This definition is clearly broader in that it captures many who are displaced by reasons other than persecution such as the Cambodians fleeing the Khmer rouge in the 1970s and the Ukrainians fleeing the 2022 Russian

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<sup>196</sup> Although this is a response to the 1951 definition, it can also be understood as reflecting very different historical contexts with the 1951 definition being a response to the European experience of totalitarianism and totalitarian states’ persecution of religious, ethnic and other minorities (Shacknove 1985, p.275).

invasion of Ukraine. Indeed, the OAU definition conceptually differs from the 1951 UN definition in that it recognises that that bond of assistance and protection that exists between a citizen and their state may be severed in a variety of diverse ways, whether through the frailty of institutions, civil war and discord, environmental collapse, or foreign intervention, with some states, at times, being incapable of having this adequate bond with its citizens (Shacknove 1985, pp.275-276, 271-284; Gibney 1999, pp.170-171).

Both definitions, the much narrower (and more problematic) UN definition and the 1969 OAU definition, tap into the “social liberalism” position within liberal international political thought that holds to, and advocates for, a “two-level conception of international society in which there is a division of moral labour between the domestic and international levels” (Beitz 1999, p.272). Whilst this position varies in significant ways, it is unified by (a) holding that all states should respect human rights conceived as universal minimum standards that apply across different cultural and institutional understandings, and (b) holding that states are the primary holders of responsibilities to meet these rights within their territorial and jurisdictional limits, with other states having responsibilities to support this in special circumstances (Beitz 1999). These special circumstances can be said to be centred around access to a basic range of liberties<sup>197</sup>, human rights or some other minimum standard of adequacy that enables individuals to live a minimally decent life.

It is here, then, that these theorists and international law distinguish between refugees and those that are motivated to change their state of residence due to personal preferences or economic and social opportunities. This latter category, defined as economic migrants, according to the European Commission, are those who seek to change their state of residence for economic reasons, “in order to seek material improvements to their livelihood” (European Commission n.d.). As part of this, the European Commission makes it clear that this does not overlap with those who may be classed as refugees (European Commission n.d.). This is obviously a very broad category of people that would include economically disadvantaged people undertaking low-paid (albeit better paid than in their state of residence) seasonal work, to highly educated and economically prosperous individuals. However, despite this being a broad category, the key conceptual difference between refugees and economic migrants that is referred to, albeit unclearly and indirectly, appears to be that in the case of the former, that bond between a citizen and their state based upon protection and assistance has been severed, and in the case of the latter, it has not. Or, in other words, economic migrants are not calling on states’ secondary obligations to support some morally sufficient minimum standard of life, but are instead those “whose human rights are not at risk by remaining in their country of origin but who have a personal interest in moving to the new society for employment or other reasons” (Miller 2015, p.398)<sup>198</sup>.

How well, though, does this separation hold up as two distinct categories beyond a distinction made in international law? Or at least hold up as two categories in which the claims of one *always* have more moral force and urgency? To explore this, let us turn to a few examples to explore whether the claims of refugees are as

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<sup>197</sup> Expressible in terms of freedom in terms of non-interference, non-domination, autonomy, collective self-determination and authenticity, with these themselves being at least somewhat dependent upon socio-political-economic conditions.

<sup>198</sup> Although this separation itself rests upon the assumption that immigration controls themselves do not undermine human rights (Miller 2015, p.398).

conceptually distinct as these two categories seem to imply. Whether one uses the narrower 1951 definition of the broader but still overly narrow<sup>199</sup> AOU definition, it would be a mistake to say that the ‘claims’ of refugees always have more moral force and urgency, as the bond between citizen and state can be cut in a variety of ways, whether through negligence, state incapacity or deliberate action. This is further complicated when considering that the restriction of liberty (or harms) to which an individual is exposed as a result of this are not necessarily equal in terms of severity or urgency (Kukathas 2016). An individual’s life may be at risk, or an individual may not have access to an adequate range of basic liberties or life options, but that does not mean that the degree to which an individual’s life is at risk is equal (Kukathas 2016, p.257). One may suffer political persecution, but that does not necessarily mean that the restriction of liberty one faces because of political persecution is necessarily similar, that they equally put one at risk of harm, or are equally urgent. That is, one may be at risk of execution, long or short-term detention, or some other unjust sanction such as the loss of civil or political rights (Kukathas 2016, p.257). Determining harm or the extent to which freedom is compromised involves making judgements about the extent to which an individual is at risk of harm, a problem that becomes more difficult when moving from the same source of harm to comparing harms stemming from different sources such as absolute poverty or environmental collapse (Kukathas 2016, p.257).

If, as we should, we take a broader definition of a refugee, the line between economic migrant and refugee becomes very blurred. Many of those who would normally be considered to be economic migrants face similar circumstances and move because their life or their family’s life is at risk. Severe and absolute poverty, exposure to high crime areas and the lack of opportunity all pose similar challenges to individuals accessing a basic range of liberties or adequate range of life choices to make a minimally decent life. For many, the frailty of domestic institutions may mean that there is little hope of these being addressed if they are to stay in the location that they call home. The plight of many people in these situations is severe enough that they are willing to risk low paying (but much higher than they otherwise would have been paid), high risk and precarious work that can often blur the lines between modern slavery and legitimate employment. Many migrants from places such as India and Nepal use schemes that are precarious and open to exploitation such as the Kafala system in the Arab States<sup>200</sup> in order to send remittances that would far exceed what they would have earned back to their families (Kadioğlu 2022; ILO n.d.). In other words,

“[t]here are many refugees whose plight is more serious than that of most economic migrants; yet there are also many would-be economic migrants who face greater threats to their well-being than do some refugees. Not all economic migrants are in the same boat; nor are all refugees” (Kukathas 2016, p.258).

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<sup>199</sup> Since it excludes those who are internally displaced or those who, for one reason or another, are not able to leave their state of residence (Kukathas 2016, p.255).

<sup>200</sup> It is common for employers in the Kafala system to confiscate passports, force workers to live in crowded and unsanitary conditions resembling labour camps and reduce their financial independence through recruitment and other fees. Whilst these are actions that are not permitted by laws governing the Kafala system, these violations often go unenforced and the precarious nature of their employment – the ability to stay is dependent upon their employment – provides incentives for violations to go unreported (Kadioğlu 2022).

The point here is that whilst these categories may be useful shorthand, holding refugees and economic migrants as two discrete categories does not hold up to close inspection, at least in terms of access to an adequate range of basic liberties. The primary obligations that states have to ensure minimum welfare and equal capacity for liberty can be either severed or failed to be fulfilled in a variety of different ways. Whilst there is something normatively significant about a state *deliberately* cutting the bond of assistance and protection that exists between it and its citizens, this does not necessarily mean that these types of claims are the most urgent. Rather, it is the lack of access to an adequate range of basic liberties or primary goods and the inability of states to rectify these failings that determine the urgency of claims. Because of this, rather than differentiating between refugees and economic migrants in determining the strength of claims that may be brought to the border by non-members, it is better to examine the degree to which non-members are able to access a basic range of liberties centred around some moral minimum standard alongside the ability and willingness of that non-member's home state to redress them. Given that the extent to which an individual's freedom may be constrained or compromised, or the extent to which they are at risk of harm may originate from a broad variety of sources, the extent to which their home state has the capacity, willingness and ability to redress and protect that individual from harm may vary in degree and urgency, these claims exist on a continuum. Many of those whom states would call economic migrants, then, have claims that should be viewed as just as, if not more urgent, than many refugees.

However, given the emphasis placed in this discussion on *economic migrants* who do not have access to a basic range of liberties, it is worth spending a little time discussing those for whom this is not the case. Many people move for greater scope for economic opportunities of personal preference as opposed to dire need. Do these migrants have autonomy-based claims? Whilst perhaps these claims are narrower and less urgent, as we saw in Chapters One, Three and Four, border restrictions still represent a problem for their autonomy and non-domination. To highlight this, consider the following. An American academic, who holds a position at a US university, has been offered a position at a UK university that they wish to accept because they believe that the department will be a good fit for their research. Let us also assume that this academic has no previous ties to the UK such as family or spousal reunification. This academic cannot make claims based upon lack of access to a basic range of liberties or access to an adequate range of meaningful options given their economic position and similarities between the positions. Despite this, the choice to relocate is still one of the most important life decisions that they make and is one that has a significant impact on all subsequently available options available to them (Carens 2013, pp.227-228). To stand in a position of relative powerlessness over such an important life decision, where a receiving state may interfere with that decision at their discretion, is a meaningful restriction of freedom. It is also, as we saw in Chapter Three, one that may be exacerbated by punitive, overly securitised, and dehumanising border practices that build precarity and undermine the capacity for autonomy. As such, there is a strong presumptive case for freedom of movement because of the restriction of liberty that occurs at state borders. Whilst these claims may not be as strong or as urgent as those who do not possess access to a basic range of liberties, they still possess freedom-related claims of entry. Naturally, this is a sliding scale. Many are not so destitute so as to have strong and urgent claims and yet are not in a privileged position where movement

represents preference rather than pressing autonomy-based claims. For those who fall somewhere across this sliding scale, the strength of their claims depends on their context.

In sum, the claims of *migrants* exist on a continuum of strength and urgency, but unless there are correspondingly powerful claims possessed by members, the claims of non-members demand that states open their borders. Where “high-status” economic migrants’ claims may differ is that they may be more easily outweighed by the countervailing claims of members.

## *1.2 Particularity Claims*

Non-members may bring a series of claims that may be additive and prioritising based upon a pre-existing relationship with the receiving state or their interaction with (the internalised, externalised and territorial) bordering practices of states. Often referred to as ‘particularity claims,’ this broad category may cover everything from family and spousal reunification and to claims related to restorative justice (Miller 2015, pp.401-403). Whilst I cannot fully grapple with each of these claims, a more limited examination may highlight at least three things: firstly, that urgent freedom-related claims can be made by non-members that do not rest on access to a basic range of liberties, that the claims that may be brought to state borders may be complex and multifaceted, and that the complexity of these claims may in part stem from the construction of complex borders.

### *1.2.1 Family and Spousal Reunification*

Let us start with family and spousal reunification claims, and with the simpler parts of this. Here, a migrant is linked to a particular state, or states, because of a pre-existing and normatively significant relationship that they have with existing members of a receiving state. The reasons for giving weight to claims of spousal or family reunification are not difficult to construct. “Few things are more important than being allowed to reside with one’s spouse and dependent children. To require a state to curtail their entrance would be to ask it to bear a very heavy burden” (Gibney 2004, p.771). Indeed, family reunification is one of the few claims that contemporary states consistently recognise, with claims of this kind accounting for around 40% of legal migration in OECD countries<sup>201</sup> and it is recognised as a fundamental interest in European human rights legislation (ECHR 1950). Why is this? For Carens (2003), Lister (2010) and Miller (2015), the strength of claims of family reunification rests in the rights of existing members to have the opportunity for a family life and rests, therefore in claims of “social justice stemming from citizenship” and the ‘freedom’ of existing members (Miller 2015, p.401). In the words of Meilander,<sup>202</sup> existing members’ claims to family and spousal reunification are so strong because

“[w]e are bound to our family members through a more richly complex web of relationships, a mixture of love and dependence, than we share with any other people. These relationships give rise to especially intense feelings of mutual affection and concern. To deprive someone of these relationships is to deprive

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<sup>201</sup> Although recent proposed amendments to UK immigration policy appear to cut across this consensus on the importance of these claims (OECD 2023; BBC 2023b). Here, the conservative government proposed plans to double the income threshold required for UK citizens to be eligible to bring their spouses to the UK from around £18600 to £38,700 (BBC 2023b) – set to be introduced in early 2025 – well above the current national average income. Similarly, recently proposed changes to UK immigration rules prevent undergraduate and taught postgraduate students from bringing dependents to the UK for the duration of their studies.

<sup>202</sup> Who is generally in favour of state’s discretionary control over admission and exclusion.

him of his richest and most significant bonds with other human beings. That is something we should do only in rare circumstances” (Meilander 2001, p.182)

We cannot simply substitute another person with similar characteristics for our partners, parents, or children, and access to these relationships, or forced separation from them, may undermine one’s access to meaningful options and ability to form and execute life plans that involve or are dependent upon these options<sup>203</sup>. In short, the prevention of access to meaningful relationships may undermine one’s capacity for freedom in a way that is as pervasive as lack of access to certain opportunities, choices, or actions. Border policy that separates those with whom we have close relationships cuts both ways and restricts the capacity for freedom for affected members and non-members alike. Whilst Carens (2003), Lister (2010) and Miller (2015) are right to highlight the role that family and spousal reunification plays in terms of social justice and the freedom of existing members, it is a mistake to view this solely as a question of the freedom of existing members. The same reasons that make coercive barriers to the accessing of these meaningful relationships problematic for the freedom of affected members makes these coercive barriers problematic to the freedom of non-members. Just as meaningful relationships and life choices are closed off to members by border policies that restrict their access to their loved ones, so too is this access restricted to non-members by these same exclusionary border practices. Family and spousal reunification differs from the more universalist claims put forward by refugees and some economic migrants in that theirs is a dual claim.

“While refugees and other economic migrants often base their claims for entrance on need alone, the situation of the family entrant is more complicated. In their case, the state is faced with a claim on two fronts: not only does the foreigner concerned have a claim for entry based on *universal* considerations – ‘Take me in because families should be together’. But the state’s members, many of whom are former immigrants, also have a claim of a *particular* sort: you owe it to me as a citizen to allow my cousin, daughter or spouse to enter” (Gibney 2004, pp.13-14, emphasis in original).

Given the importance of one’s access to meaningful relationships, claims of spousal and family reunification are powerful ones that relate to the freedom of members and non-members and bind these claims to particular states.

### *1.2.2 Borders and Remedial Responsibility*

This is not, however, the only type of particularity claim that can be brought to state borders. Admission of non-members has been defended by Souter (2014) as a means of redressing harms caused by that state. Here, Souter argues that asylum should at times be given to non-members as a form of reparation for past injustices, with this stemming from a state’s special obligation to give refuge to those whose lack of state protection stems from the receiving state’s past actions (Souter 2014). In doing so, Souter takes a not too dissimilar route to Walzer who likewise held that

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<sup>203</sup> This has been more thoroughly defended by Honohan (2009).

“[t]owards some refugees, we may well have obligations of the same sort that we have toward fellow nationals. This is obviously the case with regard to any group of people whom we have helped turn into refugees. The injury we have done them makes for an affinity between us: thus Vietnamese refugees had, in a moral sense, been effectively Americanized even before they arrived on these shores” (Walzer, 1983, p. 49).

Just as an individual who crashes into and damages another’s car, states possess obligations to remedy the harms or the restrictions of liberty that they have caused. States can be linked to those who have suffered by one or more of the following: (a) causal responsibility, (b) moral responsibility, (c) the capacity to provide remedy, (d) outcome responsibility, (e) whether they are tied by community and (f) whether the state benefited from the harm caused (Miller 2004, pp.101-102; Brooks 2011). Souter specifically applies this in the context of those in need of asylum due to the harm caused by the responsible state being sufficiently damaging so as to deprive them of state protection. This raises the question of the extent to which reparation is the central driver of an obligation to admit (Souter 2014; Miller 2015, p.401). However, collective responsibility for harms caused is both a useful tool to answer the question of why one state rather than another should take on responsibilities for human rights protection in certain cases and it may strengthen the claims of certain migrants. Or put another way, State X invades State Y and as a result of this invasion State Y is no longer capable of supporting institutions to protect the basic liberties of the citizens of State Y. State X is directly responsible for the harms now suffered by the citizens of State Y, and this responsibility is sufficient for State X to now protect the basic liberties of the citizens of State Y as opposed to any other state. The UK’s Afghan resettlement scheme may fall into this category<sup>204</sup>. As the UK, amongst others, bears moral responsibility for the war in Afghanistan, and those who aided UK, US and coalition forces are at risk of reprisal due to this aid, the UK holds obligations towards these Afghans. As direct aid to them in Afghanistan is unlikely to help them, offering resettlement is an appropriate reparation.

In certain cases, this may demand admission to those harmed by state policies, even if the admission of non-members may not be the most appropriate remedy in all situations. Suppose that one state, or a group of states, inflicts environmental damage to the territory or one or more other states through rising sea levels caused by global warming, or the construction of a dam that affects the arability and availability of fresh water in another state. In each of these, the harms caused by the state generate obligations to remedy this harm, but the obligation for reparation is to remedy the damage – to restore the flow of water, to clean-up the oil spill or to fund flood defences or land reclamation project (Miller 2015, p.402). However not all harms are resolvable or fully resolvable through aid to affected individuals and areas. Areas may be made uninhabitable, or they may be made unsafe for some or all residents of an area (Miller 2015, p.402)<sup>205</sup>. In these circumstances, those harmed

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<sup>204</sup> Although this scheme has, in practice, been far from adequate and fraught with difficulty. In a 2023 report, the Refugee Council enumerated a number of failings such as the woefully low levels of Afghans accepted into the scheme and that many are still housed in temporary accommodation with the failings of the scheme cited as one of the main drivers of small-boat cross-channel migration (Refugee Council 2023)

<sup>205</sup> Think here of Afghans who aided coalition forces and the harms that they are now exposed to as a result of their aid now that the Taliban, once again, control Afghanistan.

or prevented from accessing a basic range of liberties choice may choose border admission as a reparation is appropriate given that other forms of reparation to aid them in situ are inappropriate and unlikely to aid them given the ongoing threat of harm (Souter 2014). Whilst claims of restorative justice may strengthen the claims of migrants and assign responsibility to particular states, the extent to which this has been strengthened is only possible through an analysis of the particular circumstances of those bringing these claims.

At this point, it is worth considering an objection to this by asking whether, in cases such as these where land is rendered uninhabitable for some or all of its inhabitants as a result of a third-party state, it is really claims of restorative justice that are the primary claims at play. Rather, it appears that the primary claim operating here relates to a lack of access of basic liberties or status as 'refugees' (Miller 2015). This is a claim that is hard to resist. However, the normative force of restorative justice, and its implications for admission, is not dependent upon the demands of corrective justice being the primary claim of potential migrants. Rather, the normal relevance of this sort of particularity claim stems from its role in generating additive and prioritising obligations. That is, that it generates additional obligations on certain states towards non-members in order to discharge their remedial responsibility<sup>206</sup>. In doing so, it assigns responsibility to the state, or states, that caused harms to meet the claims that have been created because of their actions. Here, it is there two types of claims running in concert that leads to refugees being "*doubly deserving*" (Souter 2014, p.340 emphasis in original). "[N]ot only are they at risk of serious harm and thereby entitled to asylum on humanitarian grounds, but they are also deserving of reparative asylum *specifically* from a particular state" (Souter 2014, p.340 emphasis in original).

States, then, may generate additive and prioritising obligations towards non-members because of the harms that they cause in the formulation and execution of their policies and these, at least in some circumstances, give powerful obligations to admit as a form of remedy. However, it would be a mistake to view remedial obligations arising only in the context of external actions. Rather, in cases of illegitimate border policies that dehumanise and cause harm, punitive and cruel bordering practices may also generate remedial obligations which in some cases may demand admission as the most appropriate remedy. In examining the sociological complexity of the border in the third chapter of this thesis, I argued that bordering practices may raise questions of restorative justice and that the extent to which they do so is related to the intent, impact and targeted/non-targeted nature of their construction and the extent to which they restrict freedom and cause harm. Moreover, because of the stretching of borders so that they operate within as well as without of the territorial confines of the state, borders may generate remedial responsibility to territorially present and extraterritorial non-members. In short, in discussing targeted and non-targeted border controls and the intent and impact behind them, many bordering practices cause harm in the same way as states' external actions.

Border controls can restrict freedom generate precarity, and undermine the autonomy of and illegitimately limit the choices of non-members. In exploring the externalisation and internalisation of borders and the effects of this on the freedom of non-members, previous chapters of this thesis have highlighted an array of examples where border policies do this in a way that is more problematic than the simple elimination of choices and

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<sup>206</sup> Which could take the form of monetary reparation or some other form of reparation.

actions. Whether through the use of transit control regimes to limit non-members' movement through third party states (Campos-Delgado 2017), the use of long-term detention in on or off-shore detention facilities, dual criminality regimes (Aas 2014, 2017), a lack of resources to make the case for admission in a hostile and biased environment, or push-back tactics in the Aegean or Mediterranean, border policies have the potential to generate severe harm and precarity in ways that look not too dissimilar from other actions that may generate additive and prioritising obligations. Is admission, then, to be an appropriate remedy to these harms? Perhaps not in all circumstances, but in conjunction with other claims, admission may well be the most appropriate form of reparation in certain circumstances, particularly in relation to those subject to internalised borders. To consider this, let us explore a few examples.

For the first of these, let us return to an example used earlier in this thesis, the long-term detention of Behrouz Boochani. To briefly recap, Behrouz Boochani, a Kurdish-Iranian dissident journalist fled Iran in 2013 after many of his colleagues were arrested for publishing material that opposed the Iranian government. Behrouz, on his second attempt to enter Australia, was detained outside of Australian territorial waters before being held for four years in an off-shore detention facility in Papua New Guinea. Upon his release in 2019, he was unable to leave the country because of a lack of travel documents. At play in this case are several claims. Perhaps the central claim of justice relates to Behrouz's (well founded) claim to be a refugee, with his claim to admission being predicated on states' secondary obligations to secure a basic range of liberties. Yet Australia's border policy also exposed Behrouz to severe harm by reducing him to the status of a prisoner for attempting to bring an asylum claim to Australia's border. Given that the extent of the harm suffered went beyond what may be reasonable to regulate movement through borders, and given Australia's failure to give adequate weight to Behrouz's primary claim, surely this is sufficient to generate remedial responsibility. Here, Australia has causal, moral and outcome responsibility for the harms that Behrouz faced due to his long-term detention and then abandonment in a third-party state, a state in which he would have likely remained, were it not for New Zealand granting him admission. Due to Behrouz's inability to return to Iran, admission to Australia would likely have been the most appropriate remedy to the harms he suffered from the state's punitive offshore detention policies. Some might argue that it is Behrouz's claim to be a refugee that should be the primary claim at play, not the suffering and deprivation of freedom that he experienced at the hands of the Australian state. But, as we have seen from the previous discussion in relation to remedial responsibility as the result of states' external actions, the presence of other claims does not diminish those that are generated by the actions of a receiving state and may generate additive and prioritising obligations towards Behrouz.

What about other harms suffered by those subjects to border controls? Consider the following examples. Simon, a non-British national moved to the UK for work and after living in the UK for several years met and then married a British citizen. Simon then moved from a work to a spousal visa and is due to have this renewed<sup>207</sup>. In the run up to his renewal application, however, his wife has fallen ill and cannot work. The UK has recently introduced changes to its immigration rules, unreasonably doubling the financial threshold of eligibility for a spousal visa.

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<sup>207</sup> Current UK immigration policy demands that spousal visas have to be renewed at least once before those on spousal visas may apply for citizenship (Home Office n.d.)

Simon's income alone does not meet this new threshold, which threatens his ability to remain in the place that he now calls home. It forces Simon and his wife to make the impossible choice of uprooting themselves and moving to another location or no longer living together<sup>208</sup>. Secondly, consider another example. William arrived in the United States as an undocumented migrant under the age of 16. He now qualifies for the DACA program, as he is still under 20 and does not possess a criminal record. However, whilst this DACA status does give some protections, they are only temporary rights to live, study and work in the United States on a rolling two-year basis. William still has no path to permanent residency or citizenship and, worse than this, the protections granted to him are dependent upon the programme continuing. Finally, consider Michael, who moved to the UK as a child and has lived there for his entire adult life following his arrival in the UK from a former British colony when documentation was not required. He now has children who are UK citizens and whilst Michael was eligible to apply for citizenship, he, for whatever reason, has not. Now say, that whilst he had not previously possessed a previous criminal record, Michael (whilst thoroughly regretting his actions) got involved in a fight at a pub and received a conviction for assault. Under UK immigration rules, a criminal record is taken into consideration when making decisions about visas, and so now Michael's ability to stay in the place that he has made his home is called into question.

In each of these cases the individual is in a highly precarious position because of the internalised border regimes of the receiving state. Over time, each of these individuals have made meaningful attachments with their receiving communities, but these intrusive border policies threaten, to greater and lesser degrees, their ability to live autonomously in the place that they now call home, even if each of these individuals do not, in the end, end up being deported. Whilst it is perhaps difficult to attach a figure to it – whether one, three, five or some other arbitrary number of years – moral claims to remain strengthen over time (Carens 2013, pp.113-114), and the enforced precarity of their position (and potential deportation) causes these migrants harm through the long-term restriction of freedom. Given this restriction of freedom, and the strengthening of claims over time, surely this also demands remedy? In each of these cases, each individual's ability to access and maintain the attachments that they have made over time and the ability to execute their life plans which involve these attachments is constitutively undermined. In the cases of William and Michael, these individuals do not have any meaningful attachment to their ostensible 'home' state. Given this, a formalised status or pathway to citizenship (along with other potential remedies) likewise appears to be the most appropriate remedy to the harms caused by a border policy which unnecessarily restricts freedom, creates harm and precarity.

### 1.3 Summary

This discussion has sought to highlight that the strength and type of these claims that non-members may bring to the border are complex, and that determining the strength of these claims, and the extent to which borders limit their freedom, depends upon their context. Whilst there is a *prima facie* case for freedom of movement, key normative considerations for examining the strength of the claims of non-members centre on whether a non-member has access to a basic range of good or liberties and the extent of harm to which they may be subject,

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<sup>208</sup> This example is based upon recently (as of the time of writing) announced proposed changes to the UK's immigration rules, the details of which have not yet been adequately articulated.

as well as whether or not they possess any special ties with a receiving state that may generate additive and prioritising obligations for receiving states. However, whilst I have sought to separate out these claims, in part for clarity and simplicity, it is likely that claims brought “to the border” by non-members will rest upon some combination of these normative considerations. As part of this, I argued that, outside of international law, the distinction between refugees and economic migrants confuses as much as it clarifies. Rather than focus on these categories, it is better to instead examine the extent to which a migrant lacks access to a basic range of liberties and the extent and severity of harm to which a migrant is exposed, a task which requires an examination of a non-member’s situational context. Taken together claims of admission may vary in strength and to adequately assess these, one must examine the type and context of these claims.

## **Section 2: The Freedom of Members and the Admission of Non-Members**

A focus on the claims of non-members, is, however, only a part of the picture as members also have important freedom-related claims that intersect with non-members’ claims at state borders. As theorists advocating for states’ right to exclude have demonstrated, a bundle of freedoms is protected by the control of movement through borders (see for instance Pevnick 2011; Song 2012, 2017, 2018; Miller 2008a, 2011, 2014, 2015, 2016; Walzer 1983 and others). Here, these theorists have sought to highlight, with varying degrees of success, that admission absent democratic endorsement represents a restriction of the freedom of members either in terms of collective self-determination or individual autonomy. However, much as the claims of non-members may vary in strength, with border exclusion representing a greater or lesser restriction of their freedom depending upon their situational claims, so too does the degree to which the freedom of members is affected by border admission. In this section, I will argue that whilst some of the claims that these theorists advance are situationally powerful based upon the extent to which admission *actually* affects the freedom of members, outside of specific situations it isn’t clear how the freedom of members is restricted by immigration. In doing so, I argue that the effects of migration on the freedom of members is likewise situationally dependent and may likewise be placed upon a continuum.

### *2.1 Autonomy and Admission*

Two of the most powerful arguments for a right to exclude rest upon an appeal to individual autonomy, via the role that culture plays in supporting the capacity for autonomy, and in collective self-determination. However, whilst both of these arguments may provide a powerful *prima facie* case for a right to exclude, on closer inspection it is less clear how far these can be pushed.

To highlight this, let us return to both of these arguments in turn, starting with an appeal to autonomy via culture and an example previously discussed in this thesis: Carens’ discussion of respect for difference and a deviation from liberal impartiality in the context of Fiji. Carens accepts and endorses separate administrative arrangements for native Fijians and Indian Fijians as well as policies designed to prohibit the selling of land held by native Fijians. He justifies these arrangements by pointing to the relative fragility of native Fijian culture as well as asserting that “[f]ormal inequalities may actually contribute to the goal of treating people as moral equals or giving their interests equal moral weight” (Carens 1992, pp.594, 595, 596). Native Fijian culture, at least according to Carens,

is dependent upon continued access to land owned by native Fijians, as this land is “central to the native Fijian understanding” and “constitutive of native Fijian identity” (Carens 1992, p.595). Yet, native Fijian culture, in Carens’ mind, is particularly precarious due to a series of empirical factors. In the case of Fiji, there are a relative low number of adherents of native Fijian culture, and its continuance is pressured by a competing and distinct culture operating alongside it and dependent upon access to particular institutions and specific geographies. This example is powerful and native Fijian culture appears fragile because of these factors operating in concert. Whilst Carens is primarily concerned with encroachment from Indian Fijians and not migration, it is not hard to apply this same argument to provide a powerful case for the right of native Fijians to exclude. A way of life that provides self-understanding to its members is under a tangible threat because of the precarity of its culture. For useful shorthand, let us call cases like these ‘culturally vulnerable contexts’.

However, how many contemporary cases of migration can be said to be like this? Most contemporary liberal democratic states contain not just multiple cultures, but multiple understandings and competing definitions of these cultures, even amongst their adherents. Most contemporary liberal democratic states are not subject to the same pressures as those experienced by native Fijians due to their number of adherents or resilient institutions. The United Kingdom, for instance, does not resemble the strong cultural case for exclusion. With a population of close to 70 million, a history of multiculturalism, and, prior to this, a multiracial empire, a lack of (at least at first sight) dependence upon access to certain geographical spaces, the United Kingdom’s “societal culture” is not under the same pressures as native Fijian culture, despite what many populists would have us believe. A similar picture can be painted in the US and across Europe. Can these liberal democratic states make an appeal to culture in the same way? It is hard to see how. The strength of the case for a right to exclude based upon culture, whether using a thick or thin conception of it, is dependent upon the extent to which the cultural lens may be destabilised by the admission of non-members. The empirical circumstances of these states, as well as their cultural commitments to individual freedom make it very difficult to make the case that their respective cultures are at risk by admission in the same way as cases like Fiji. This is not to say that it is implausible that there may be particular circumstances in which claims related to cultural preservation cannot be made, only that the argument would be much weaker and unlikely to stand up to the often-pressing claims by non-members. If, say, the number of culturally dissimilar individuals seeking to migrate in a short space of time was way beyond the institutional capacity of the UK to integrate them.

These two examples, if not quite representing extremes, represent how broader social, political and other empirical factors may affect the efficacy of the argument for exclusion on the basis of preserving a shared culture. In a state like the UK or the US, the influx of culturally dissimilar non-members has, over time, impacted the broader cultural context experienced by members, whether in food eaten, the shops that one sees on high streets or some other of the myriad ways in which these societies have changed over time. Yet the relative resilience of these states has meant that cultural change has been gradual and organic. Because cultural change is gradual, and may not even be noticeable to many, members are still able to access recognisable elements of the culture and engage with new elements at their discretion. In cases such as these, it is less clear that the same autonomy-based concerns linked to a shared culture can ground a right to exclude when the admission of new

members does not seem to represent a meaningful restriction on members' freedom. On the contrary, in culturally vulnerable contexts such as in Carens' Fiji example, the environment that makes cultures precarious makes these concerns much more tangible and pressing. There will undoubtedly be cases in between these two positions. A given culture may be in a precarious state, but it may not be at risk to the same degree as that of the native Fijians. A previously culturally homogenous state that experiences a large influx of migrants over a short space of time may grapple with significant changes existing culturally understandings<sup>209</sup>. However, it is this broader context that determines the strength of these claims and the extent to which the freedom of members is restricted in this sense; they may be strong, weak, or somewhere in between.

Whilst the claims of members may be strong in some (albeit unusual) cases where immigration represents a severe restriction of their capacity for autonomy, it is not necessarily clear however that this would *always* translate into a right to exclude. To highlight this, let's return to Carens' Fiji example, but this time, imagine that a number of individuals who lack access to an adequate range of primary goods and are in a position of severe peril appeal to Fiji for admission, and for the sake of argument, only Fiji is in a position to aid these individuals. Would Fiji be able to legitimately exclude these individuals? Or framed another way, would Fiji's obligations towards these refugees be greater than the need to preserve native Fijian culture? An argument in favour of preserving native Fijian culture may be successful in cases where the loss of it may reasonably result in the breakdown of social order, however, outside of cases such as these it isn't clear why a concern for the preservation of native Fijian culture should outweigh the far broader and more pressing freedom related concerns of refugees. Whilst Fiji may retain a right to exclude those who are not bringing the same strong claims as these refugees, Fiji's secondary obligations to support non-members' access to an adequate range of basic liberties exist in tension with the obligations it may have to enable access to native Fijian culture for its members. Even in cases where members possess strong claims grounded in access to culture, countervailing concerns may situationally outweigh these claims. Or, in other words, strong claims may not necessarily translate to a right to exclude.

## 2.2 Collective Self-Determination and Admission

A similar problem emerges when examining the effects of migration on a receiving group's ability capacity for self-determination. Here, a series of interconnected questions are raised as to how far migration *actually* limits the capacity of receiving states to exercise collective self-determination. The first of these relates to how much control over the "self" one has to have to be self-determining. Here, one could formulate this argument in a weak or a strong sense (Song 2018, pp.72-74). In its strong form, this argument demands full control over the "self" in order to be self-determining. This, though, sets a threshold which is far too high to meet given the distinctive ontological character of a collective "self". Here, fluctuating membership and members' exercising of liberal freedoms in adopting new, or amending existing, values intersect so that groups go through an organic and constant process of definition and redefinition often outside of the "control" of that collective self. The United States of today is not the same "self" as the United States of the 1960s (see for instance Riche 2000; Cohn

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<sup>209</sup> It is also worth pointing out that challenging existing cultural understandings is not necessarily a bad thing and may lead to a richer understanding of an engagement with an existing culture.

and Caumont 2016; Frey 2020). Births, deaths, and changing attitudes related to the permissibility on discrimination on the basis of race and gender, amongst a myriad of other factors have all meant that the United States today is almost unrecognisable from past iterations of itself. As such, we must turn to the weaker form of this argument to have more success. Rather than demanding full control over the “self”, this argument in its weaker form is concerned with changes to the self that are adopted and endorsed through an internal process of deliberation and reflection rather than being imposed from without (Song 2018). Or, put another way, the adoption of new norms, values, and decisions must reflect the fluctuating memberships of groups through births, deaths, and individual members *choosing* to adopt, amend or reject new values and norms, rather than being imposed from without, whether by a colonial master or by the influx of new members in a way that “bypasses that group’s normal processes of deliberation and decision-making” (Van der Vossen 2015, p.283).

What does this mean for the way in which the freedom of members may be impacted by the unauthorised admission of non-members? From here, there are at least two ways of evaluating how admission absent democratic endorsement may restrict the freedom of members. The first of these is to focus on the *effects* of this admission on a receiving political community. For the admission of new members to be in contention with a groups’ collective self-determination, Van der Vossen argued that two conditions must be met. Firstly, the introduction of non-members must “bring about a change in the *values of the community as a whole*” (Van der Vossen 2015, p.283 emphasis in the original). And, secondly, these changes to the values of the community must be made outside of that group’s internal processes of deliberation and decision-making (Van der Vossen 2015, p.283). Or in other words, even if new values are introduced to a group, this will not undermine capacity for collective self-determination if members are able to evaluate and decide through the exercising of liberal freedoms to incorporate amend and endorse these new values as opposed to them being imposed from a colonial master or from down the barrel of a gun (Song 2018, p.72). Using this, to assess whether or not the freedom of non-members is *actually* limited by the introduction of non-members outside of democratic endorsement, one must look to its *effects* on the receiving political community. This seems to be the principal concern of Wellman (2008), Walzer (1983), and Miller (2016). As we have seen, each have put forward arguments that are concerned with the way in which a lack of control over the contours of membership may lead to groups making decisions that they would not otherwise have done. They can make certain viewpoints more pronounced or change the way in which existing members experience the group (Wellman 2008, 2016; Miller 2016; Walzer 1983). Each of these theorists are concerned that any changes to receiving societies happen in a way that bypasses normal processes of deliberation and decision making. On this reading, for immigration to actually restrict the capacity for collective self-determination, it must have effects on the receiving political community.

This, though, is open to problems from two connected directions. In the first instance, immigration must actually influence the receiving society as a whole. However, it is less than clear that most forms of immigration have this result. The introduction of new people into a receiving society does not typically alter communal values, at least not in the short term or absent relatively rare empirical conditions (Song 2018). Much as the extent to which immigration may affect the capacity for autonomy is dependent upon context, it also appears that this is the case when examining receiving societies’ capacity for collective self-determination. In large liberal democratic states

with citizen rolls in the tens of millions, the introduction of new members absent democratic authorisation cannot be said to undermine the receiving state's capacity for collective self-determination in any meaningful way. In the UK, for instance, widescale immigration to the UK from former, and at the time current, colonies in the wake of the 1948 British Nationality Act did not clearly alter the values or processes of government of the UK. The UK remained committed to the rule of law, individual freedom, parliamentary democracy and a range of other political and social institutions and continued a trajectory of increasing social liberalisation. It is hard then to see how exactly this restricted the ability of existing members to engage in collective self-rule, or, if one was to contest this assertion and argue that it did alter the communal values of the UK, it is difficult to assert that it did so in an extensive way. This is not to say that immigration cannot alter the capacity for collective self-determination of receiving states, only that absent conditions that amplify the effects on the receiving society in way that bypasses ordinary processes for deliberation, the effects on the freedom of members are likely much smaller than Miller (2016), Wellman (2008, 2016) and Walzer (1983) imply.

What would these cases look like? Consider the following. State A is a small state with a population in the tens of thousands and, because of historically low levels of immigration, is culturally homogenous. It is a functioning democracy whose citizens have an overlapping consensus and understanding of their shared political process, of the relationship between citizen and state, and of public deliberation. However, despite its high degrees of public engagement and deliberation, there are fault lines over certain pressing issues that may have a significant impact on the future direction that that state will take with existing members being fairly evenly split on these key issues. Now imagine that a large group of people from State B are not happy with a proposed or existing policy in State A and moved to State A without authorisation with the intention of swaying the policy adopted by State A to one that is more favourable to them. And further, that the result of this is that the favoured policy of the citizens of State B is adopted. In a case such as this, the capacity for the members of state A to exercise collective self-determination has been undermined. Factors such as the fault lines in existing political debates and the small numbers of existing members have made the receiving society particular susceptible to the introduction of new norms, habits and preferences from this large influx of similar-preference-holding non-members who have sought to alter the decisions taken by State A in line with their own preferences. However, whilst there are elements of this case that may be familiar when discussing real world examples<sup>210</sup>, and that certain empirical circumstances may make migration more or less likely to change public policy, real-life examples that raise the same problems for collective self-determination are likely to be rare.

The second, related, problem is that the *effects* on receiving groups' capacity for self-determination appear to be largely indeterminate, at least outside of specific conditions. That is, at the point of admission, it is unclear how and to what extent, if any, the admission of any non-member will affect the receiving society. The

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<sup>210</sup> Whilst an example of intrastate movement rather than interstate movement, people moving in order to sway the future direction of a state is somewhat reminiscent of settlers moving to Kansas in the 19<sup>th</sup> century in order to sway whether the territory was admitted to the Union as either a free state or a slave state. No doubt readers of this thesis will be able to think of examples of states with either small populations or divides over values, norms, habits or policy preferences that may make them more susceptible to making decisions that would not otherwise have been made. The presence or one or more of these criteria or present criteria being more or less acute may increase the impact on the freedom of members.

introduction of new members *may* have the potential to change the direction or shape of public deliberation, but any attempt to determine this at the point of admission in the context of large, multicultural states is difficult at best. To explore this, let us return to Wellman's golf club analogy that seeks to highlight the importance of collective self-determination via freedom of association. In seeking to highlight the presumptive right to freedom of association for even trivial relationships, Wellman points to the way in which the admission of new members may affect the way that members experience being a member and how this may affect future rules governing the acquisition of membership (Wellman and Cole 2011). However, whilst Wellman is right to highlight these potential effects, it is not clear that the admission of any given member may necessarily lead to these sorts of changes, or the extent to which future changes may stem from admission as opposed to any other factor that may alter the chain of causality from admission to when changes to this association occur. As Wellman specifically highlights Augusta National golf club and its exclusion of female members, let us use this as the basis of an example to explore this further. Imagine that this golf club accepted a series of new members who are strongly opposed to this ban on the admission of female members and that whilst over time the number of new members that objects to the admission of females policy grows to represent a sizable minority within the golf club's membership and that Augusta changes its membership rules to allow female members. Can we say that this change of admissions policy was the result of the admission of new members that opposed the group's current rules governing admission? Possibly, but not without further information. Those admitted who opposed the rules governing membership are still in a minority and any change would require some existing members being swayed one way or another, and, given that this change happened over time, the admission of any single member was unlikely to contribute to this change without knowing a lot more about that member such as whether this member was particularly persuasive. Even if these new members were a contributing factor to this change, we would still not be able to say that those admitted are necessarily responsible for these changes. This point becomes clearer when moving from this small association to large impersonal states where multiple issues and policy responses run simultaneously, and where those that are admitted are not nearly as unified in their preferences and mostly seek to integrate into the receiving community<sup>211</sup>.

Taken together, whilst admission certainly has the potential to limit receiving state's capacity for self-determination and may represent a limiting of existing members' freedom, it is less clear that these are always strong claims<sup>212</sup>. Rather, much as when examining the effects of admission on receiving states' obligations or on

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<sup>211</sup> When assigning normative responsibility for any given outcome, we must rely upon "implicit norms concerning the capacities that human beings can be expected to possess" (Miller 2004, p.245) as outcome alone does not necessarily mean that one is morally responsible for the effects of their actions, only those effects that were predictable – "if I toss an orange pip over the edge of a cliff and in doing so precipitate a rock fall, I am causally responsible, but not outcome responsible, for the damage that ensues" because the effects of the tossing of the orange pip were not reasonable predictable (Miller 2004, p.245).

<sup>212</sup> Although it should be noted that these theorists may respond in saying that I have misinterpreted their positions, and instead argue that the capacity for collective self-determination may be undermined even without any effects of immigration on a receiving state. Rather than relying on the effects, these theorists may instead argue that a component part of what it means to self-determining is that it controls the contours of membership. This is the route that Song (2018) takes. Here, it is

the capacity for individual autonomy of members, the empirical context of the receiving state may amplify or dampen the effects that admission has on the receiving groups' capacity for self-rule.

### *2.3 Obligations Generated by Admission*

Finally, let us turn to arguments that relate to the functioning of democratic and justice-supporting institutions in a receiving state and a concern for the way in which new obligations may be generated that 'burden' existing members. When an individual seeks to migrate to a new state, what that person is seeking is "a new relationship of rights-protection – one in which a new state, and hence new persons, will bear the burden of protecting that individual's basic rights" (Blake 2014, p.532, see also Blake 2003, 2013). In practical terms, this means the orientation or reorientation of existing institutions (or the creation of new institutions) to meet these new obligations. What this may entail may be as diverse as the provision or expansion of health services, social housing and social security, not to mention the creation of additional services in order to meet liberal demands for equality such as the provision of translators, accessible language training, and the creation of services to enable individuals with different linguistic and cultural background to be able to participate as equal members. This is the basis of Blake's defence of immigration controls (Blake 2001, 2003). Here he asks what may justify, in cases where an individual's basic rights are being met, the limitation of freedom of a group through unwanted obligations. Whilst the provision of these expanded obligations may not burden many economically advanced and institutionally stable states, it is not implausible that this may not be the case for economically disadvantaged or unstable states, or where the volume of migration is sufficiently high that states cannot adequately protect the rights (and freedom) of new and existing members (Blake 2001, 2003).

However, whilst the admission of new members generates new obligations, this does not necessarily impose 'costs' on a receiving society, or at least there may be a trade-off between the admission of non-members aiding states to fulfil their existing obligations towards members<sup>213</sup> and these new obligations. Numerous studies have shown that migration, overall, benefits the economies of receiving states in several ways, including contributing skills lacking in domestic workforces, contributing more to taxes than they receive in benefits, and boosting the working age population (see for instance OECD 2014; Valverde and Latorre 2017). In the UK, for instance, immigrants significantly contribute to the UK's ability to provide medical care for its citizens, given that foreign-

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admission absent democratic authorisation that is problematic for the capacity of receiving states' collective self-determination as it "bypass[es] any process through which their entry and settlement could be authorized [by the receiving state]" (Song 2018, pp.73-74). This sets a much higher bar. Here any admission absent democratic authorisation represents a restriction of a group's capacity for collective self-determination. Whilst this may largely bypass the problems raised by using the effects on the deliberation and decision-making outside of normal processes of deliberation highlighted above, it still runs into the deeper tension between democratic will and broader moral obligations. Here, even were we to accept this position, whilst admission absent authorisation may represent a restriction of freedom, just as moral obligations demand that we act or refrain from acting in certain ways (such as refraining from interfering from another's choices and actions or providing aid where the cost to us does not require us to be heroic), so to do broader obligations demand the granting of admission in certain instances even where it may restrict the freedom of members. This is perhaps at its clearest in the broad consensus around the strength of claims of refugees and acceptance of obligations to grant admission in these cases - even if contemporary states all too often fail to fully live up to these obligations – however, as the first section of this chapter has sought to highlight, we should take a much broader view when highlighting those with claims of this sort. States' secondary obligations to protect and further access to a basic range of liberties may demand some sacrifice over control over their collective future in order to support access to a range of basic liberties to those who bring claims to their borders.

<sup>213</sup> Including protecting and extending members' freedom.

born members of staff make up around 19% of the NHS' workforce, a significant portion of which comprise clinical roles (House of Commons 2023). Whilst admission does generate new obligations on a receiving state, it is a mistake to view this in zero-sum terms because of the economic and social benefits of migration and the potential for migrants to aid and expand the capacity of the receiving state to meet existing obligations to existing members.

#### *2.4 Summary*

In preceding chapters of this thesis, I have explored how concern for individual autonomy and collective self-determination gives powerful reasons for supporting states' rights to exclude. However, the strength of these claims is dependent upon empirical realities. Much as how the claims of non-members may vary in strength depending on context, so too do the claims of members; these also exist on a continuum and may be strong, weak, or somewhere in between. The strength of the claim to exclude any given non-member is dependent upon a number of empirically grounded, normative considerations. These include: (1) the severity of the threat to a member's capacity for autonomy, (2) the extent to which receiving societies are "burdened" by new obligations and (3) whether there is a genuine and provable case that the capacity for collective self-determination would be irreparably harmed. However, in discussing the claims of members, centred on culture, collective self-determination and obligations generated by admission, I have sought to highlight that, unlike the claims brought by non-members, arguments put forward to support a right to exclude are problematic from two directions. Firstly, the situations in which these claims to a right to exclude are at their strongest are seemingly relatively rare and do not characterise most instances of immigration to economically developed liberal democratic states. And secondly, whilst the claims of migrants are often relatively determinate, that is, the way in which borders interfere with their freedom and the strength of their claims are relatively clear, with migrants being able to point to likely consequences of exclusion on their welfare, those made by members in receiving states are often very vague (and are sometimes predicated on misapprehensions about the costs and impact of immigration). We may also add a third, which, whilst not necessarily problematic, tempers the permissible use of securitising border practices to support a right to exclude. It is not clear how many of the internalised and externalised border practices employed by states protect the freedom of non-members in terms of autonomy, collective self-determination or generated additional obligations<sup>214</sup>. Taken together, whilst there will likely be many instances in which states may possess a strong case to exclude some non-members, the case for a right to exclude is much weaker than that made in the existing normative literature.

### **Section 3: Mediating these Claims: The Capacity of States and Implications**

#### *3.1 Mediating the Claims of Members and Non-Members*

Up until this point, I have discussed how the competing claims of migrants and receiving states may vary in strength and that the strength of these claims is dependent upon the context in which they are made. The complexity surrounding the determination of the relative strengths of the claims of members and non-members

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<sup>214</sup> In fact, as we saw in the previous section of this chapter, the reverse may be true given that bordering practices may raise remedial responsibility to those who have been illegitimately harmed or deprived of access to freedom.

makes the determination of a clear position pegged somewhere across the open-closed divide difficult at best and likely to miss the full extent of the complexity of these claims. Because of this, rather than trying to state how “open” or “closed” borders should be, I have sought to highlight a series of factors which impact the extent to which the border is freedom restricting or freedom protecting. Engaging with the way in which morally complex borders may restrict the freedom of non-members and examining the way in which the strength for the case for exclusion is dependent upon empirical circumstances aids in better elucidating the factors that should be considered when navigating between the competing claims of members and non-members. The case for admission is at its strongest when non-members possess morally weighty claims and when there is either minimal or positive impact on the freedom of existing members. By contrast, it is at its weakest when the extent to which the freedom of non-members is not compromised by exclusion or the bordering practices of states, and where their admission, for one reason or another, may limit the freedom of members in one or more meaningful ways. However, whilst this ‘basic structure’ may work well enough in cases such as these, what about cases which require a trade-off between the concerns of members and non-members?

In cases such as these, the concept of *capacity* may function as a guide. When talking about rights, obligations are limited by an agent’s capacity to fulfil them. When one asserts a right, one is articulating a “high priority prescription of a freedom or benefit that generates definitive obligations for parties other than the right holder” (Nickel 1983, p.32). It is quite common, even if contentious, to distinguish between positive and negative duties to support rights (Nickel 1983, p.36). A thorough exploration of the implications of this is beyond the scope of this thesis; however, for clarity and simplicity, positive obligations can be defined as those that require some form of action on the part of those bearing the obligation to support a right, and negative obligations as some form of inaction in order to not interfere with another’s exercising of a right. In reality, obligations to adequately support a right will involve some combination of both of these, with these obligations spread amongst various parties. A right to freedom of expression, for example, will place negative obligations on others to refrain from interfering with an individual’s speech and choices of clothing (amongst other things). Alongside this, positive obligations are placed on agents, whether communities, families or most likely an individual’s home states to create institutions that enable individuals to adequately access this right and prevent others from interfering with this right (O’Neill 2005, p.428). As such, obligations to secure rights are not a costless exercise and require, in the case of positive obligations, identifying specific agents who bear obligations towards a particular individual (Shue 1988, p.688; O’Neill 2005).

Because of the costs associated with securing rights, we can make at least two broad assertions related to the extent of these rights and moral judgements related to the failure to secure them. In the first instance, the claim that is being made by an individual to have a right must be sufficiently weighty to justify the obligations on others to secure access to this claim (Feinberg 1973). Because of this, the feasibility of these obligations must be taken into account when asserting the extent of a right. To borrow Nickel’s example, the sick may have a claim to be visited and comforted during their convalescence, but this claim may generally be met without generating an obligation for healthy people “to visit all of the sick, or even some fair share of them” (Nickel 1993, pp.79-80). Constraints of feasibility and affordability place limits on how one may be required to respond to the moral claims

of others. If context did not limit what is feasible, new rights may be generated and existing rights may be more expansive<sup>215</sup> (Nickel 1993, p.80). In the second instance, we can recognise that an agent has an obligation to support a right and yet, in certain circumstances, not assign moral judgment for failure to fulfil this obligation. To use a well-known example from Singer, an individual may have an obligation to assist a person drowning in a pond and may receive moral judgement for failing to do so, but only where the risks to that person are not excessive. Or, expressed another way, we could morally blame this person for failing to fulfil their obligation to assist if they do not provide assistance because they don't want to ruin their clothes or believe that it would be inconvenient to access a rescue line or buoyancy device. But we would not be able to do so if that person would risk their life by trying to save that individual, if, say, they did not know how to swim or the pond in the example was replaced by a stormy sea. These two examples represent extremes. In the first instance the 'costs' associated with fulfilling duties of assistance are virtually non-existent, and in the second come with a serious question mark that the drowning person *can* be rescued and a high likelihood that the cost for the would-be rescuer would be their own death or serious injury. However, these cases do raise questions as to how *demanding* a theory of moral obligation should be. That is, these cases raise questions as to how far moral obligations extend in the face of these costs<sup>216</sup>.

When discussing the limits of moral obligations, “[a] morality’s demands might be ‘disproportionate’ either because the gains in view are too small or because the sacrifices that would be required are too great” (Goodin 2009, p.7). Ordinarily, a theory of moral obligation is too demanding if it demands that people be saints or heroes, as to do so would expose people to enormous obligatory burdens and sacrifice what they may consider to be their own basic interests (Fishkin 1982; Carens 1996). This is not to say, however, that it cannot demand sacrifice or that the sacrifice that it demands cannot be great. Rather, the sacrifice that moral obligations may demand are linked to the magnitude of the moral harms. Moral obligations, then, may place heavy demands on us, but these demands are limited by feasibility. When we ask what moral obligations may demand of us, including what we must sacrifice, answers to this are constrained by the ability of agents to fulfil them, often expressed as “ought implies can” (Lichtenburg 2010). This is usually understood to mean that one is not morally required to undertake an action unless it is possible to do it (Lichtenburg 2010, p.126). An individual may not be morally required to rescue a drowning person if they cannot swim and the rescue requires that that person is able to swim. Or where that rescue would require collective action from six lifeguards and there are not six lifeguards. Whether through the non-compliance of some lifeguards or a lack of funding for an adequate lifeguards, “the duty to rescue the passengers of the stranded boat is cancelled because the four lifeguards do not have a duty to undertake a rescue when doing so constitutes a substantial risk to their lives” (North 2016, p.84)<sup>217</sup>. This, though, is only one

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<sup>215</sup> This is the central thrust of the *adequate range* argument put forwards by theorists such as Miller (2007) and Pevnick (2016).

<sup>216</sup> This thought experiment has been a topic of significant discussion and disagreement (see for instance Singer 1979, Fishkin 1982, Scheffler 1986, Nickel 1993, Goodin 2009, Lichtenburg 2010, Arneson 2012 amongst others). I will not respond to these theorists and debates directly. However, it is worth briefly articulating the most prominent positions within these debates and discussing the implications of using these approaches within the context of trade-offs between the oftentimes competing obligations to support the freedom of members and non-members in the context of migration.

<sup>217</sup> This is a more limited version of an example used by North (2016) to explore the effects of non-compliance on the action-guiding role of justice.

dimension of what may limit the extent of our moral obligations towards others. In assessing the extent of obligations towards another, we must then ask questions around feasibility, which itself

“is not a simple factual matter, even though it may appear to be. When we ask whether a party can bear a burden, we really want to know whether that party can bear a burden without abandoning other responsibilities that ought not to be abandoned” (Nickel 1993, p.81).

In assessing whether it is feasible to rescue the drowning individual, we must ask not just whether it is practically possible for an individual to do so, but also whether it is practical for an individual to do this without compromising their capacity to meet other obligations that they may have<sup>218</sup>. The would-be rescuer may be a parent who has obligations to their children, obligations that they may not be able to meet were they demanded to risk their life every time another individual is in danger<sup>219</sup>.

This ‘limit’ to obligations based upon feasibility or capacity seemingly applies analogously to states, whether as primary or secondary holders of obligations<sup>220</sup>, as it does to individuals. Some states, much like some individuals, are better equipped to meet moral obligations, whether because of their financial resources, administrative control or coercive power (Nickel 1983, p.37), than other states. In the context of migration, obligations to support access to a basic range of liberties for non-members are limited by the demand that they do not overburden a receiving state to the extent that it undermines the capacity of the state to meet the primary obligations that they have towards their own members, that “it not place too much strain on the state and that it not require too many sacrifices from current citizens” (Fishkin 1982; Carens 1996, p.163). Given that the admission of non-members may limit the freedom of members to varying degrees based upon context, states must assess the extent to which obligations that they possess towards non-members can be met without compromising obligations to support the ‘freedom’ of their existing members.

State capacity, then, may mean that there is a trade-off between the freedom of members and non-members, with states having to make an evaluation regarding *for whom* freedom is restricted more by admission or

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<sup>218</sup> Which may be equally as pressing.

<sup>219</sup> Here we may also distinguish between primary or secondary obligations to support rights, whether through some theory of special obligations practicality. To highlight this distinction, let us briefly return to the drowning person example. Here, if it was a child that was drowning in the pond, we may expect that child’s parent (or someone delegated by the parent) to have a primary obligation to the child (in this case via rescuing them from the pond or more generally to provide that child care) but that others may have a secondary obligation if those bearing primary obligations are unable, for whatever reason, to fulfil them.

<sup>220</sup> Analogously to this assigning of obligations and special obligations to individuals, it is common to hold to this moral division of labour when discussing states. Here, when discussing states’ obligations to support human rights, it is common to hold that human rights generation three types of obligation: to *respect*, to *protect*, and to fulfil specific rights (Blake 2014, p.531). The first of these, respect, is universal in scope, and demands that states do not violate human rights irrespective of location, however the second and third of these are – in the first instance - locally realised with states being primarily responsible for creating and operating institutions capable of securing the conditions for right holders to be able to exercise their rights (Blake 2014, pp.531-532). In other words, respect for human rights and individual freedom is universal in scope and demands that all agents irrespective of location do not interfere with an individual’s secure access to these through their actions, but who is obligated to uphold and secure access to human rights is dependent upon one’s locality – which in general means the state that one resides (Blake 2014; Nickel 1993; 2007). I will not however defend this position here as it is utilised by theorists across the open-closed debate and from a variety of different theoretical positions encapsulating those as diverse as many communitarians and cosmopolitans (Miller 1995, Walzer 1983, Ypi 2008, Rawls 2005b, Vincent 1986, Nickel 2007 and others), and on pragmatic grounds as much established international law rests upon this distinction (see for instance ICC 1999).

exclusion. But what about difficult cases where the claims of both members and non-members are strong? Or to put it in terms of the more extreme version of the Fiji example used earlier, whose claims should take priority when it can be reasonable expected that the admission of non-members *would* undermine the ability for the Fijians to exercise collective self-determination when those seeking to enter have urgent and pressing claims where failure to admit would expose them to severe harm? It is here that we may find that we have reached the limits of what normative political theory may do. Reasonable people may disagree on the relative weight to place on relevant normative consideration or disagree with how to interpret (often-conflicting) empirical evidence relevant to a particular case (Rawls 2005a, pp.55-57)<sup>221</sup>. Different normative considerations pull us in conflicting directions, and there is space for the reasonable to disagree and be divided on this and other normative issues.

With this caveat in mind, I believe that there are two areas where we can make some small progress in hard cases such as these. The first of these is that if it is reasonable to expect that admission would undermine the justice-supporting institutions needed for collective self-determination of the equal capacity for liberty then states may permissibly exclude. If the ability for states' institutions to do this is compromised, it doesn't matter if migrants are admitted as they still wouldn't have access to a basic range of liberties, and this would come at the additional cost of compromising members' access to a basic range of liberties. The second of these, and more tentatively still, is that in cases short of supporting the conditions needed for the capacity for equal liberty, is that whilst lamentable, cultural freedom may have to be sacrificed in order to meet obligations towards non-members. Whilst states may show partiality to their members and this may be compatible with moral equality (Goodin 1998; Waldron 1993; Mason 1997; Song 2018a), this does not give justification to "discharge one's special obligations to co-participants at the expense of general duties one might otherwise have to non-participants" (Abizadeh 2016, p.110). Even in cases where admission would represent a significant restriction on the freedom of members, they are perhaps not as pressing as death, destitution or oppression. Both of these two points pull us in conflicting directions. As we have seen, however, the actual circumstances of hard cases such as these are remote and difficult to find given that claims related to the freedom of members being limited by migration are both less frequent and less urgent than is portrayed by those advocating for closed borders. More than this though, it is not just that the freedom of members is not affected as extensively as implied within the closed borders literature, but that these claims often do not stand up because that are trumped by the stronger and more urgent liberty claims of migrants.

In discussing the extent to which the freedom of members may be supported or restricted by admission is dependent upon context, I have sought to highlight that it is only in the context of the empirical situation of a particular receiving state that we can determine the extent to which the freedom of members is affected by the admission of non-members and, from this, the capacity of states to accept new members. To determine this, we must ask questions such as does a state have the financial resources and institutional resilience required to meet obligations that are generated, extended, or need re-orientating by admission? Has the volume or pace of

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<sup>221</sup> Rawls goes on to name another three factors which may contribute to reasonable disagreement: (1) the way that individuals may assess and place weight on values may shaped by life experiences, (2) conflicting normative considerations may make assessment difficult, and (3) the number of values may be incorporated into any social institution is limited (Rawls 2005a, pp.56-57).

admission been to a degree that members' collective self-determination has been meaningfully reduced and could illegitimately alter decisions that that group will make? Will the introduction of new members aid in supporting existing states' obligations to support the freedom of individual members by enabling them to access meaningful relationships? Many more questions can be added to this list, but it is only in examining them, in conjunction with examining the claims of non-members, that we can identify whether a particular state may have a strong enough case to outweigh claims of freedom of movement that non-members bring. In brief, the capacity of states is defined by the *actual* ability of states<sup>222</sup> to meet obligations towards non-members alongside the *actual* effects on existing members of receiving states<sup>223</sup>.

### 3.2 Implications

Where does this leave us? To those who began reading this thesis in the hope of clear guidance as to whether states are obligated to a position of open borders, closed borders, or some other point along the open-closed spectrum, the argument put forward in this thesis is likely to disappoint. Open borders that may be closed is not, at first sight particularly helpful guidance. However, it would be a mistake to view this as "unhelpful guidance". The role of political theory is not to elucidate clear policy proposals, to legislate how we should live, or to provide some algorithm capable of telling us how to act in any given situation. Rather, by its nature, political theory furthers our moral understanding and aids in facilitates a conversion on the efficacy of policy, with the guidance that it provides necessarily being general and requiring application. Because of this, the "clarity" that is offered is of a different sort than a specific set of concrete rules.

The claims that intersect at state borders are complicated. State borders restrict and protect freedom simultaneously, and the extent to which they do this is largely dependent upon the context of those who interact with them. The stretching of borders beyond and within the territorial limits of the state, the way in which borders are constructed, and the varying and shifting claims of non-members who interact with borders mean that borders themselves are complex and have widespread normative implications. Borders can generate

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<sup>222</sup> It is here that it should be stressed that what a state's capacity to meet obligations is likely to differ from what governments may claim to be their capacity in order to limit the extent of their obligations. Here governments, especially those who are ideologically sceptical of migration are likely to underestimate the effects of migration on a receiving society and downplay their ability to meet obligations that they possess towards non-members. This is not to say that politics may not interfere with the capacity of states to meet obligations, only that the circumstances that it may do so are more narrowly defined and likely confined to serious issues (and articulable) issues related to public order and trust in democratic processes.

<sup>223</sup> Determining the limits of obligations based upon feasibility may be a difficult enough prospect, but we also face an additional layer of complexity. Whilst some (if not most) of the problems that "create" the situations for a lack of access to an adequate range of primary goods or basic liberties are caused by failures of a state, with secondary obligations stemming from this failure, we are faced by a second order level of *non-compliance* that may generate further obligations – the failure by some or many states to meet their secondary obligations towards refugees. Put another way, when states fail to meet the obligations that they have towards those who lack access to an adequate range of basic liberties, does this generate additional obligations for other actors to "pick up the slack"? I believe that the answer to this is yes but that any additional obligations are likewise limited by feasibility although due to concerns of space and for maintaining the focus of this chapter I can only sketch this out. The reason for this is that "it is implausible to think that noncompliance could somehow change the internal properties of a principle and render it incapable of delivering coherent, consistent, and determinate verdicts... [c]onsequently, if non-compliance does undermine the action-guiding capacities of a principle, it must be because it affects an agent's ability or duty to comply with a principle of justice" (Noth 2016, p.81). Here, secondary obligations continue to be action-guiding to non-compliers - by telling them to do their fair share - as well as to "willing compliers" - by telling them to do their fair share and pick up the slack left by those who refuse to comply (North 2016, pp.82-86). For a more in-depth discussion on non-compliance and the action guiding role of justice, see North (2016).

precarity, domination, and dehumanisation, but they can also protect freedom, and the extent to which they do this depends upon the space(s) in which they operate and how they are formulated.

In short, they are difficult to navigate at the best of times and a gordian knot at all others. If we take the freedom of members and non-members seriously, any attempt to balance and weigh these competing claims requires an oftentimes painful trade-off between the freedom of different people, in different senses and in different places, even if the liberty claims of migrants will often trump those of members. However, recognising this complexity helps elucidate considerations that may serve as guides when making judgements around whether an individual has a right to migrate or states may exercise a right to exclude. Whilst I have not been able to offer any more than high-level guidance on the moral efficacy of border admission and exclusion, this does not mean that no implications may be drawn from this. There are at least three broad implications, which relate to the ability of non-members to make claims, the legitimacy of border policies and border controls, and the right to exclusion owing to a receiving state's lack of capacity.

In the first instance, whilst states may, in certain situations, permissibly exclude non-members, this does not mean that they may do so without dialogue with and reference to the claims of non-members. A variety of weighty claims can be brought to the border by non-members and the moral legitimacy of exclusion may only be judged in reference to the individual claims brought by non-members. From this, we can highlight several more practical policy implications. Chiefly amongst these are that states must evaluate the claims of non-members as what they are: claims brought by individuals that are specific to those individuals. To assess whether it is morally permissible to exclude a particular individual, it is necessary to examine the particular claims that they bring 'to the border', rather than in reference to a broad and impersonal immigration quota, and where there are concerns that admission will limit the freedom of members, to make sure that these concerns are concrete, articulable and a direct result of admission. This has broad implications for the legitimacy of specific border practices. Given that the *justness* of exclusion is based, in part, on an evaluation of the claims of non-members, policies that either prevent claims from being heard and weighed on their own merits are not just illegitimate, but prevent exclusion from being just. Contemporary examples of border practices that fall into this bracket are unfortunately not hard to find. The fact that a migrant may only be able to bring their claims to a receiving state by hopping over a fence or crossing a channel in an unsafe boat because that is their only way that they may bring claims should not be a reason to deny admission, as the strength of their claims for admission for entry exist independently of their mode of travel. Connected to this, and in part stemming from the multiple spaces in which borders are now constructed, states possess positive obligations to ensure that people can make claims of entry easily and from a variety of locations, at the very least at those points where non-members interact with the "borders" of receiving states. The inability to reach territorial borders should not impede non-members' ability to make claims of entry to a receiving state given that internalised borders are often designed to stop them reaching the territory of a state to make claims of admission.

A second direction, stemming from the demand that states engage with the claims of migrants on their own terms, is the demand that non-members have the ability to adequately make these claims. At the most basic level, perhaps, this would demand access to legal counsel to navigate what is often a byzantine structure of rules

governing admissions procedure in order to adequately make their case for admission. To highlight this, consider a relatively recent case from the US. In 2019, Carlos (not his real name) fled Brazil with his sister and nephews after his son was murdered in front of him in an act of gang violence. Because Carlos, who is Afro-Indigenous, was not able to read or write and spoke only Portuguese, immigration staff at the Calexico detention centre (who spoke only English and Spanish) used AI-powered voice translation and, because of a regional accent, the system used didn't accurately pick up or translate what Carlos said in interviews with immigration officials, resulting in a six-month long detention during which he was unable to meaningfully communicate or make his case for refugee status (Bhuiyan 2023). However, an unnecessary long detention is not the only risk faced by those with inadequate access to translation. Many in Carlos' situation have had translation errors weaponised against their claims (Bhuiyan 2023). In the UK for instance, allegations have been levelled at the Home Office for instructing third-party translators to assess whether migrants' accents match their regions of origin often without sufficient knowledge to make that assessment as well as using minor differences in translation between interviews (with these often using different translators) as the basis to reject asylum claims. Translation is the tip of this particular iceberg, with access to a variety of services needed for migrants to adequately make their case for asylum and to lodge an appeal, should their case have been not adequately heard. Receiving states, in order to legitimise their border policies, must provide migrants with the means to make their cases in an easy, accessible, and accountable manner.

The second part of this equation relates to counterclaims made by states. In this chapter, I have sought to demonstrate that arguments put forward in favour of states' control of movement through their borders are powerful within the context of specific empirical circumstances. These circumstances, however, do not characterise most examples of contemporary immigration and, as a result, these claims for a right to exclude are much weaker than their advocates would imply. Immigration may limit the freedom of members, and in certain circumstances it may do this in broad and varied ways, but in most contexts the extent to which migration *actually* limits the freedom of members is vague, indeterminate, and poorly defined. In making counterclaims against migrants, especially those who bring strong claims to their borders relating to their own access to liberty, states should be able to articulate how their admission would be problematic to the freedom of members and be able to do this in a concrete way.

In the second instance, states must be very careful as to how they internalise and externalise their borders. In chapters three and four of this thesis, I have explored how the spaces in which 'the border' operates may affect the extent to which the freedom of non-members is restricted by it. Here we must return to the distinction between the *legitimacy* of an immigration policy (whether the administration of any border regime adheres to human rights) and its *justness*. As we have seen in previous chapters of this thesis, regulating movement through borders restricts the freedom of non-members and to an extent this is inextricable from the control over the contours of membership and admission to territory<sup>224</sup>. However, this does not mean that any policy enacted to

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<sup>224</sup> And through this that to an extent certain elements of the border are pulled and pushed within and without the territorial and jurisdictional limits of a state - after all it is implausible that border security may be so secure so as to prevent any unauthorised border crossing across every forest, desert, river or beach.

regulate movement through borders is morally permissible, as states need to be sensitive to the degree to which their border policies harm and limit the freedom of non-members.

Internalising and externalising borders vis-a-vis the controls that regulate movement can restrict freedom in far deeper and more pervasive ways than the mere limiting of non-members' choices and options. In one direction, previous chapters of this thesis have sought to demonstrate the extent to which precarity may be generated through the internalisation of borders when ordinary state coercion and border coercion operate simultaneously and are mutually supporting. Here, bordering practices may restrict the freedom of non-members in ways that leave their long-term status uncertain and prevent them from participating on equal terms with citizens, even where they have formal status to settle. Specific border policies that target particular individuals or routes of entry, that build precarity, or that limit freedom in ways not strictly necessary to regulate movement through borders may be criticised independently of whether a state may permissibly exclude any given individual. Many contemporary states' border policies may be criticised in this way. Whether it is the UK's 'hostile environment', the ensuing Windrush scandal, its system of dual criminality, or its raising of the income threshold required for spousal visas, the lack of clear route to a long-term formalised status and citizenship for those in the DACA or Temporary Protected Status programme in the United States, or sharing information between law enforcement and immigration enforcement agencies, border internalisations may undermine migrants' material and psychological security and their ability to make long-term meaningful life plans, leaving them vulnerable to exploitation. Policies like this are unfortunately far too common, deeply dehumanising, and cannot be justified by virtue of the fact that states may be able to legitimately exclude some non-members. Rather, independent justifications are required for border control policies such as these. From here, we may point towards some more practical policies that may mitigate the effects of the border on the freedom of non-members. Firstly, states should seek, as far as possible, to decouple the criminal justice system from regimes of border control to minimise the extent to which borders restrict the freedom of non-members. Secondly and related to this, states should ensure that non-members who receive some forms of admission – but not full membership – have formalised routes to full legal status and citizenship that are accessible (such as not being prohibitively expensive). One does not need to be an advocate of open borders to be able to point to how deeply problematic many contemporary states' border policies are. States possess extensive obligations towards non-members and border policies and practices that do not give these concerns weight, or worse, harm those towards whom they have obligations cannot be justified.

Finally, whilst states may, due to lack of capacity, exclude those who bring claims to their borders, including, in some circumstances, those who bring strong claims to their borders, this does not absolve them of their obligations towards those individuals, rather it "moderate[s] the blame and magnify[ies] the praise associated with performance or non-performance of those duties" (Goodin 2009, p.8). The feasibility or capacity of states to meet their obligations towards non-members (whilst not abandoning obligations that states possess towards their own citizens) is not fixed in stone and may be increased with effective public policy and communication with their citizens. Rather than nullify any obligations towards non-members who bring strong claims to state

borders, a lack of capacity instead places obligations on states to increase their capacity so that they are better able to meet these obligations in the future.

#### **Section 4: Conclusion**

In conclusion, in this chapter I have sought to establish a middle way between a position of open and closed borders. As part of this I have discussed how the case for admission and the case for exclusion are grounded in the concept of freedom and that the strength of each freedom-based claim is dependent upon the broader circumstances in which these claims are made. In doing this, whilst arguing that exclusion represents a restriction of freedom, I have sought to highlight that the claims of non-members may be strengthened by a number of factors, including: a lack of access to basic liberties whether through poverty, persecution or any number of other harms to which individuals may be exposed and for which they have little recourse within their own state, but also particularity claims and claims of restorative justice, including those created by states' bordering practices and the space(s) in which borders operate. These, I argued, may be mutually supporting and may link particular non-members to particular receiving states. On the other side of this, whilst I argued that admission has the potential to restrict the freedom of members, that this is neither universally the case, nor does admission necessarily represent an *equal* restriction of freedom of members. As a result of this, the moral permissibility of exclusion is based upon a trade-off between the freedom of members and non-members with obligations to admit only being limited by the capacity of states and obligations to support the freedom of existing members. Absent very rare circumstances, however, the claims of members are likely to be trumped by the stronger and more urgent liberty claims of members.

## Conclusion

Since starting this project, it has been rare to find a period in which issues related to movement and the acquisition of membership have not featured prominently within popular political discourse. Despite the humanitarian challenge that this represents, it has been unfortunately common to see migration and the claims of migrants met with increasing scepticism and hostility. Whether it has been the UK's 'hostile environment' or now former Rwanda scheme, Donald Trump's first election campaign pledge to build a border wall between the US and Mexico, President Biden's executive order limiting the number of asylum seekers than can cross lawful ports of entry per day, the EU's decision to sharply curtail the extent of search and rescue activities in the Mediterranean, or its push-back tactics in the Aegean, recent years have seen states seek to disincentive migration with border policies that dehumanise and cause severe harm. Popular discourse in relation to these policies and the claims of migrants have also been deeply polarised. This polarisation may be broadly divided between those who view states' policies that dehumanise and inflict harm on ordinary, peaceful and often desperately poor or vulnerable people with moral outrage, and bitter resentment by those who view most migrants as economic opportunists and who worry about the ability of states to integrate vast numbers of migrants without disrupting the social, economic and political ties that characterise their communities. In the hope of cutting past this highly charged, often racialised debate and finding greater clarity as to how we can mediate between the claims of migrants and members, I turned to the existing normative debates discussing the ethics of movement and membership and found a debate which was almost as polarised.

Whilst the existing normative literature is (mostly) unified in rejecting states' claim of sovereignty as an adequate normative basis for the unilateral control of movement through borders and in holding a deep scepticism of the dehumanising border controls that states often employ, this is where this unity ends. On one side are those who call for open borders in almost all cases (e.g. Fine 2013, Kuthakas 2005, Oberman 2016), with borders viewed as morally arbitrary constructs which require significant justification. For the most part, these thinkers conclude that border controls either ought not to exist or ought to have only a very limited function (see for instance Carens 1987; Abizadeh 2008; Oberman 2016; Freiman and Hidalgo 2011, 2016; Cole 2000, 2016 amongst others). On the other side are those theorists who justify strict border controls on the basis that states have competing obligations to maintain democratic legitimacy, cultural homogeneity, democratic stability and social harmony at home, and see the curtailment of immigration as vital for those aims (see for instance Walzer 1983, Miller 2016, Wellman and Cole 2011; Pevnick 2011 amongst others). Whilst each of these cases presented are powerful, they are also problematic in their own ways. The first, a position of open borders, undervalues the moral relevance of the border and of national membership, resulting in the legitimate concerns and interests that citizens have being overlooked. Whereas the second, a position of closed borders, fails to give adequate weight to the often pressing claims of migrants and fails to fully recognise the international duties of rescue that states have. In so doing, they make the opposite mistake of the first camp and so fail to adequately support an international migration regime that would protect and advance human rights. In short, the existing literature provides powerful normative grounds that pull us towards two seemingly incompatible positions, both of which have uncomfortable implications.

This thesis is a response to this polarisation and an attempt to reconcile the concerns of those who argue for “open” and “closed” borders by identifying what obligations liberal democratic and multicultural states have to grant admission to non-members.

In Chapter One, I began this exploration by examining and defining “migration” and “migrants”, exploring how borders restrict freedom and why this should be intuitively problematic for liberal egalitarians. After doing this, I turned to the existing normative literature that advanced liberal arguments advocating for a position of open borders. The case built up by theorists such as Abizadeh (2008, 2010, 2016), Hidalgo (2014a, 2014b), Freiman (and Hidalgo 2016), Cole (2000, 2016, and Wellman 2011), Brezger and Cassee (2016a), and Carens’ (1987, 1996, 2000a, 2000b, 2013, 2015, 2016, 2018), amongst others, points towards the presumption of freedom of movement. In addition to a *prima facie* case based upon the flipping of the standard liberal justificatory argument that occurs at state borders (see for instance Cole 2000; Wellman and Cole 2011; Abizadeh 2008), I explored three distinct but overlapping arguments. The first of these was the case for considering freedom of movement to be a human right. By examining the intrinsic, instrumental, and constitutive reasons for considering movement to be a human right, we saw that the same reasons to value it domestically also apply to international movement (see for instance Carens 1992, 2003, 2013; Cole 2011; Freiman and Hidalgo 2016; Oberman 2016). The second was based in the need to democratically legitimate state coercion and drew attention to a boundary problem in democratic theory (Abizadeh 2008, 2010). The third pointed to the morally arbitrary nature of one’s birth in relation to state borders in determining one’s life prospects and capacity for equal liberty (see for instance Cole 2000; Wellman and Cole 2011 and Carens 1987, 2015). Each of these arguments are mutually supporting and draw upon commonly held liberal intuitions regarding the lexical priority of liberty and the restriction of liberty being justified only in terms of liberty. In examining these, I argued that the case for open borders is sufficiently powerful to be the starting point for any discussion of how open or closed borders should be, with any border restrictions justified from this position.

Following this, in Chapter Two, I turned to the countervailing case that seeks to highlight the moral relevance of state borders. In examining these arguments, I argued that whilst arguments based in associative ownership and freedom of association are problematic, there is a correspondingly powerful case for state control of the boundaries of membership and a “right to exclude”. Theorists in this camp quite rightly draw attention to the way in which a right to exclude may: (a) enable groups to exercise collective self-determination (see for instance Walzer 1983; Pevnick; Miller 2016; Song 2016), (b) enable individuals to be autonomous by supporting a culture that acts as a lens to make meaningful choices meaningful (see for instance Kymlicka 1995, Miller 2005), or (c) secure the conditions necessary to realise freedom within a given locality (see for instance Miller 2016). In short, whilst several of these arguments ran into problems (notably arguments based in property, freedom of association and “thick” conceptions of culture), these theorists successfully highlight the moral relevance of state borders due to their role in protecting the freedom of members. Whilst, then, there is a strong liberal and democratic case for open borders, there are also strong reasons for closed borders. A concern for freedom appears to pull us in two contradictory directions.

After examining the cases for open and closed borders, I turned to two problems with the existing normative debate. The first of these, which I examined in Chapter Three, is the use of a partial and overly idealised conception of state borders that fails to adequately capture the activity that occurs at them. Because of this, many normative political theorists fail to capture the full normative implications of state border regimes today. Whilst an in-depth exploration of the complexities of state borders have been undertaken by critical international relations scholars, sociologists, and political geographers, this complexity has not been incorporated into normative debates on the moral efficacy of admission and exclusion. Border controls today internalise and externalise the border, with the result that the freedom of non-members may be affected to varying degrees and in ways not easily captured by utilising a conception of the border that is tied to the territorial and jurisdictional limits of states.

In Chapter Four, I drew upon this sociological complexity of the border to turn to, what I argued is, the second of these problems within the existing normative debate, namely, the overly narrow response to the questions of *whose freedom* and *what constitutes freedom*. Both sides of this debate are motivated by a shared concern of freedom, but they diverge in the responses to these questions. I argued that those advocating for open borders are primarily concerned with the freedom of non-members and thus focus on the way in which borders are freedom restricting, whereas those advocating for closed borders focus on the freedom of members and thus primarily engage with the way in which borders are freedom protecting. Whilst this is, to an extent, understandable, the by-product of this is a polarised debate that does not adequately grapple with the freedom-related concerns of the other side of the debate or give adequate reasons about why the freedom of one group should take normative primacy. On the second question, I argued that the divide in positions in the literature can also be understood in terms of competing conceptions of the concept of freedom. Those advocating for open borders draw upon the concept as (1) non-interference, (2) individual autonomy and (3) a neo-republican concern for non-domination, each of which come into sharper focus against the backdrop of morally complex borders. Those scholars advocating for closed borders, by contrast, draw upon (1) individual autonomy and, more problematically, authenticity, (2) collective autonomy, and (3) an indirect concern for freedom directed at the political and institutional preconditions needed to realise “freedom” within particular localities. Rather than restrict *or* protect freedom, if we broaden our focus, we can see that borders restrict *and* protect freedom simultaneously with the securing of freedom in one location, or sense, often meaning the limiting of it elsewhere.

Finally, in Chapter Five, I built upon the groundwork laid out in Chapters Three and Four to argue that borders should be *open but may often be closed*. In this chapter, I argued that questions of admission and exclusion are ones that can require a trade-off between the freedom of members and non-members. Whether a ‘right to migrate’ or ‘right to exclude’ takes priority, in turn, depends upon the situational claims of members and non-members. These claims, I argued, cannot be divorced by context as the extent to which admission may undermine or support the freedom of existing members and the extent to which exclusion undermines or restricts the freedom of non-members is dependent upon a series of empirical factors. Do non-members have particularity claims or claims of restorative justice against a receiving state? Do they have, or lack, the capacity for autonomy in their home state? Have the border policies of a receiving state created the conditions for

precarity, domination, and arbitrary interference? To what extent does admission generate, or aid states in meeting, new or existing obligations? To what extent does admission limit the ability of existing members to engage in collective self-rule, whether due to the size, pace of change or the resilience of a receiving state's institutions? Only in the answering these questions within a particular context may we be able to say how open or closed a state's borders should be.

In doing this, I believe that this thesis offers at least three contributions to this ongoing debate. Each of these stands on their own merits and offers valuable contributions to this debate, even if readers ultimately disagree with my conclusions. The first of these has been to highlight the normative significance of 'the border' to questions of admission and exclusion. Utilising a more sociologically informed conception of the border that captures both the spaces in which it operates as well as how migrants interact with it has broad normative implications for any discussion of the moral permissibility of admission and exclusion. From one direction, a closer examination of how borders interact with the freedom of members and non-members affects the strength of the cases put forward to justify open or closed border. The full extent of the way in which borders may restrict (or protect) freedom is dependent upon the spaces in which they operate. At times, the restriction of movement through borders is more problematic than at others and an examination of the extent to which borders do this is only determinable by grappling with the moral complexity of the border and broader empirical circumstances. From another, violent and dehumanising bordering practices, including those that prevent the claims of non-members from being heard or taken into account when determining whether to admit or exclude, may generate obligations to admit even in circumstances where states may have been otherwise able to permissibly exclude. Or, in other words the determination of whether a border policy is just is dependent not only upon whether a non-member is admitted or excluded, but also upon the procedure for determining and enforcing decisions of admission and exclusion.

The second of these has been to highlight that, despite outwards appearances, there is a considerable overlap between the open and closed border positions, from which we may have discourse and reasonable disagreement. As part of this, I argued that there is considerable overlap between these two positions with both – broad – positions in the literature being underpinned by a shared concern for the concept of *freedom*. Where these positions differ, I argue, are centred on disagreements over "whose freedom" and "what constitutes freedom". Because, of this, I argued that rather than viewing borders as either "freedom restricting" or "freedom protecting", borders should be viewed as being freedom protecting and freedom restricting simultaneously, even if the freedom of members and non-members does not always conflict<sup>225</sup>. In recognising this, we may perhaps recognise that reasonable people may build a dialogue over how to protect and further the freedom of members and non-members, even if one rejects the specific solution that I have offered.

The third of these interventions may be found in my attempt to find a 'middle way'. I did this by seeking to grapple with the complexity of activity that occurs at the border and the complexity of claims that may be brought to

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<sup>225</sup> For instance in circumstances where a spouse is allowed to cross a border to be reunited with her partner or broader family, both a non-member and a member are made more free.

them. Rather than be able to clearly peg how open or closed borders should be across the open-closed spectrum, I argued that the claims of members and non-members cannot be divorced from the context in which they are made. Borders are complex and the way in which they may protect or restrict freedom is both messy and difficult to pin down. Whilst there are some circumstances in which we may be able to clearly identify cases where the case for admission or exclusion may be strong or weak, more likely determining whether admission or exclusion should take priority, this will involve a trade-off between the freedom of members and non-members even if those circumstances where the freedom of members is limited in a significant way are uncommon. From this, I highlighted three broad implications. Firstly, states must evaluate the claims of non-members as what they are: claims brought by individuals that are specific to those individuals. Here, states may be able to permissibly exclude but first they must enable individuals to make their case for admission and be able to clearly articulate how the freedom of members will be restricted, rather than rely on vague and ill-defined claims about how the freedom of members will be restricted. Contained within this are that states possess positive obligations to enable migrants to make their claims, including obligations to hear the claims of migrants at internalised and externalised borders. Secondly, whilst some internalisations and externalisations of the border are unavoidable, states must be very careful when doing this to avoid generating precarity and unjustifiable interference with the freedom of non-members. Finally, whilst there will be some circumstances where states may be able to legitimately exclude migrants because of a lack of capacity, this does not absolve them of obligations towards those individuals who have been excluded and places obligations on states to increase their capacity so that they are better able to meet these obligations in the future.

Finally, and stemming from these, I will offer one final thought for future research. We have likely reached the point where further discussion on the permissibility of admission and exclusion that engages only at the level of ideal theory is unlikely to be helpful. Existing research within liberal theory, which has primarily engaged with the topic at the level of ideal theory, has given us powerful normative reasons that ground a “right to migrate” and a “right to exclude”. However, given both the normative implications of the complexity of activity that occurs at state borders, further research that does not acknowledge and account for this complexity is unlikely to be able to offer anything more in the way of guidance. Because of this, political theorists working on migration should be engaged with this problem at the level of non-ideal theory. Work in this area has begun in recent years (see for instance Brezger and Cassee 2016b; Bosniak 2016; Hahn 2016; Owen 2016; Miklosi 2016; Oberman 2019, 2020), but more can be done to further integrate empirical complexities into this debate by drawing more directly on ongoing work in the fields of critical international relations, border security, and political geography.

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