

SYMPOSIUM
MIGRATION AND JUSTICE FOR PEOPLE ON THE MOVE



BROCK ON OPEN BORDERS

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Introduction

In her book *Justice for People on the Move*, Gillian Brock argues that legitimate states have rights to self-determination (Brock 2020). Brock also holds that, if states have rights to self-determination, then they have rights to control immigration to some extent. Moreover, Brock argues that unlimited immigration could endanger human rights. For these reasons, Brock thinks that legitimate states can permissibly restrict immigration. While Brock favors more immigration than the restrictive status quo, she rejects open borders. She understands her view as a “middle ground between the positions of those who advocate for open borders and their critics” (12).

Justice for People on the Move includes rich and insightful discussions of many areas of immigration policy. But, in this paper, I’ll focus on evaluating Brock’s arguments against open borders.

My conclusion is that Brock's arguments are unsuccessful. She falls short of providing a compelling case against the open borders position. Here's how I'll proceed. In section I, I'll consider Brock's argument for the position that legitimate states have rights to self-determination and this entails a right to control immigration. In section II, I'll examine Brock's argument that unlimited immigration may endanger human rights.

I

The Self-Determination Argument

International law says that "peoples" have rights to collective self-determination. For example, the United Nations Charter states that the goal of the United Nations is to promote friendly among nations based on "respect for the principle of equal rights and self-determination of peoples."¹ What does it mean for a people to have a right to self-determination? One plausible answer is that a right to self-determination is a right to control one's own affairs. More specifically, rights to self-determination are rights to govern and control a territory free from external coercion and intervention. But many political theorists also link rights to self-determination with the right to control immigration. They argue that collective self-determination justifies or entails the permission to regulate admissions.²

Gillian Brock agrees. In chapter 3 of her book, Brock asks: "What robust justification can be offered for the assumed position that states have rights to self-determination, which include reasonably strong rights to control borders?" She then writes:

¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed 11 November 2020]

² Cf. Walzer 1984 and Wellman 2008.

“This chapter seeks a justification for these default arrangements concerning robust rights to self-determination within a state system, one that is compelling to both insiders (those who are members of the state) and outsiders (those who are not)” (33). In other words, Brock is going to argue that, if states have rights to self-determination, then they have rights to exclude immigrants. She also says that “a justification for states’ claims to have rights to self-determination...entails the right to control admission to their territory” (5) and that it’s false that people have “an unconditional right to move” to other states (207). Instead, people have rights to “a fair process governing the determination of their rights” (208). Brock supports opening borders more than the status quo. But she thinks that some immigration restrictions are acceptable.

Brock sets out to show what it would take for states to have rights to self-determination. Her position is that state have rights to self-determination if they’re legitimate (38). But what does it take for a state to be legitimate? Legitimate states are required to satisfy stringent obligations. On her account, a legitimate state needs to respect the human rights of its citizens, be part of a legitimate state system, and participate in projects that sustain this system.

More precisely, Brock holds that “states may enjoy a right to self-determination when legitimacy conditions are met” and these legitimacy conditions are (38):

- A. *The Internal Requirement.* To exercise power legitimately, states must respect their own citizens’ human rights.
- B. *The System Requirement.* Exercising power legitimately is also conditional on being part of a legitimate state system.
- C. *The Contribution Requirement.* The legitimacy of the state system requires states to participate in the cooperative project needed

to sustain a justified state system. Individual states have some positive obligations that are generated in virtue of the legitimacy conditions on the state system.

Roughly speaking, Brock argues that states should respect human rights and contribute to the legitimacy of the state system by promoting human rights around the world. For instance, states could satisfy the contribution requirement by implementing policies that benefit poorer countries, like development aid. If a state satisfies these requirements, then this state is legitimate and has a right to self-determination. And rights to self-determination justify rights to control immigration.

Here's one interpretation of this argument:

1. A state is legitimate if it satisfies the Internal Requirement, the System Requirement, and the Contribution Requirement.
2. If a state is legitimate, then it has a right to collective self-determination.
3. If a state has a right to collective self-determination, then this state has a right to control immigration.
4. Some states (more-or-less) satisfy the Internal Requirement, the System Requirement, and the Contribution Requirement.
5. So, some states have rights to control immigration.

Let's call this: *the self-determination argument* for the right to control immigration. I'll now consider a couple of different problems for this argument.

Let's start with premise 1. My worry about this premise is that it begs the question against people who endorse a human right to

immigrate. Some philosophers believe that the right to immigrate is a human right. Consider Kieran Oberman's position (2016). Oberman points out that freedom of movement protects other human rights. For example, we have human rights to freedom of occupational choice and religious freedom. But we're sometimes unable to exercise these rights unless we can move. Suppose I live in a place where I'm unable to find a job of my choice and, if I could immigrate, I could find this job. Or suppose that I belong to a religion and I want to associate with my co-religionists. Yet there are few members of my religion in the state where I live, although many live in other states. If I could immigrate to these states, then I could satisfy my interest in associating with my co-religionists. In these cases, the freedom to immigrate would protect my religious freedom. Oberman argues that the interests that justify occupational freedom, religious freedom, and other human rights also ground a human right to immigrate.

Suppose that Oberman is right about this. Remember though that Brock thinks that legitimate states should respect human rights. But, if the right to immigrate is a human right, then states must respect this right too. And, if states must respect the right to immigrate in order to be legitimate, then Brock is unable to appeal to legitimacy in order to justify the exclusion of immigrants. At least, this move would presuppose without argument that people lack human rights to immigrate.

Here's another way of putting my complaint. Brock accepts the following two claims:

- (1) Legitimate states have rights to control immigration.
- (2) States must respect human rights in order to be legitimate.

But some defenders of open borders endorse:

- (3) People have human rights to immigrate.

If (2) and (3) are true, then (1) is false. So, Brock needs to show that (3) is false in order to establish the conjunction of (1) and (2). But I'm unable to find anywhere in Brock's book where she provides an argument against (3). Thus, the self-determination argument begs the question against those of us who think that the freedom to immigrate is a human right.

Let's suppose that Brock can rebut this objection. There are other problems with the self-determination argument. Consider the third premise in the self-determination argument:

3. If a state has a right to collective self-determination, then this state has a right to control immigration.

The issue here is that the phrase "a right to control immigration" is ambiguous. We can mean different things by "right to control immigration." Let's consider some different interpretations of premise 3.

Here's one gloss on what it means for a state to have a right to control immigration:

- Right₁*. It is morally permissible for states to control immigration by, say, restricting it.

Let's say that some policy is morally permissible if it's false that there's a decisive moral reason against this policy. So, according to *Right*₁, there are no decisive reasons against immigration restrictions, at least in some cases. Here's an analogy to illustrate. It's morally permissible for me to go for a walk after work. By this, I mean that there are no reasons against me going for a walk after work that defeat my reasons in favor of going on a walk. In this sense, I have a right to go for a walk. *Right*₁ says the same thing about immigration. If a state restricts immigration in certain cases, then the reasons in favor of these restrictions are undefeated.

But there's another possible interpretation of "right to control immigration" in premise 3. This is:

*Right*₂. It's wrong for external actors to interfere with a state's enforcement of its immigration policies.

On this interpretation, a right to control immigration is a claim-right against other actors. That is, external actors are under obligations to refrain from interfering with a state's immigration policies. Let's consider another analogy with the individual case. I have a claim-right to control how I spend my after-tax income. If other people stole my income, then they'd be violating an obligation to me. But this fact fails to imply that it's morally permissible for me to spend my income however I'd like. For instance, it could be wrong for me to refuse to donate part of my income to effective charities. In this sense, we can have rights to do wrong. It can be impermissible for me to perform action A even though it's also wrong for another actor to interfere with A. Perhaps the same holds true for states. Maybe states have a right to implement policy P despite the fact that P is impermissible.

Why does the distinction between Right_1 and Right_2 matter? It matters because the self-determination argument only works if Right_1 is true. However, the value of collective self-determination only supports Right_2 , not Right_1 . Let me explain. When people say that a state has a right to collective self-determination, they don't mean that this state's policies are, in general, morally permissible. Instead, people mean that a nation should have the right to chart its own fate, which implies that it's wrong for other actors to intervene in or interfere with this state through, say, military intervention.

But the permissibility of policies and laws, and the right against external interference can come apart. In fact, it's consistent to claim that a state has a right to self-determination and also that this state's policies are morally unjustified. Here's an example. I judge that the United States has a right to collective self-determination. So, it would be wrong for Canada to invade the United States and perhaps it would be wrong for Canada to interfere with the United States' affairs in more subtle ways too. But I also judge that some of the United States' laws are unjust. How are these judgments consistent? Simple. The right to collective self-determination fails to entail that the United States' policies are morally permissible. For this reason, my judgments don't conflict with one another.

Now let's return to immigration. I also hold the following two judgments about the United States' immigration policies. The United States' immigration restrictions are unjustified and it should massively expand the number of immigrants that it admits. But also it would be wrong for other states to somehow force the United States to increase the number of immigrants that it accepts. Here's a fantastical scenario. Let's imagine that, in the year 2100, the Chinese government endorses an open borders ideology. And China is far more militarily and economically powerful than the United States at this point. It could use its military and economic

power to compel the United States to open its borders. Would it be wrong for China to use its power in this way? Yes, because doing so would violate the United States' right to self-determination. Should the United States broadly open its borders? Also yes, because immigration restrictions are in general impermissible (on my view). Of course, you might disagree with my view about what a just immigration policy looks like. That's fine. But the self-determination argument isn't a reason to reject my view.

Brock doesn't spell out the notion of collective self-determination in much detail in her book. But at one point she does attempt to explain the importance of collective self-determination by appealing to the value of autonomy. She writes:

Autonomy is a central driver of many further needs, including political self-determination. As the need for autonomy signals, we have central needs to be authors of our own lives, that is, to have some important sphere of control over key decisions about the shape of our lives. The need for some personal control blends into participation in processes that allow collective control over our common affairs as well (24).

Brock's argument seems to go like this. Autonomy is valuable and autonomy requires that we have control over decisions that influence our lives. If that's the case, then political self-determination is valuable too because political self-determination gives us collective control over decisions that impact us. Can this argument help justify Right_1 ?

No. Let's grant for the sake of argument that the value of personal autonomy helps justify political self-determination.³ Yet,

³ It's doubtful whether we can justify political self-determination by appealing to the value of personal autonomy. One major problem with linking personal

even if we have a right to control our collective affairs, it hardly follows that any particular exercise of this right is morally permissible. To see why, let's suppose for a moment that the right to control our collective affairs did imply that exercises of this right were permissible. To be clear, Brock doesn't make this claim, but let's assume it for purposes of illustration. We might then make the following argument:

1. We, the members of a political community, have a right to control our collective affairs.
2. Restricting immigration is an exercise of control over our collective affairs.
3. If we have a right to control our collective affairs and implementing some policy is an exercise of control over our affairs, then this policy is morally permissible.
4. So, restricting immigration is morally permissible.

If this argument were good, then it would justify immigration restrictions. But notice that premise 3 has disastrous implications. It entails that virtually every policy is morally permissible. Suppose that we decide to exercise control over our affairs by banning freedom of speech, religious freedom, or whatever freedom you think is valuable. The above argument would imply that these

autonomy and political self-determination is that each of us has approximately zero control over political outcomes. Take voting in elections. My vote matters. But it barely does. I'm but one among many who vote in elections and the probability that my vote makes any difference to public policy is infinitesimal. And the same goes for almost all other citizens. Given that our individual political participation barely matters, it's hard to believe that political self-determination is valuable for individual autonomy. For more on this point, see Brennan 2017, chapter 4.

policies are permissible too. After all, a society would be exercising control over its affairs by restricting this freedom. But that's absurd. So, premise 3 is false. Even if some law is an exercise of collective control, this tells us nothing about whether it's permissible. And the same goes for immigration policy.⁴

Hence, the right to self-determination is unable to support the claim that immigration restrictions are morally permissible. Brock needs to justify Right₁ in order for the self-determination argument to work. But the right to self-determination only implies Right₂, not Right₁. So, we need another reason to accept Right₁. But Brock does have another argument for immigration restrictions. I'll now turn to this argument.

II

The Sheer Numbers Argument

In chapter 9, Brock argues that immigration restrictions can be justified if too many immigrants seek admission to a state. Here's her argument:

A large influx of migrants, without adequate advance warning and time to complete necessary planning, might significantly undermine delivery of essential goods and services, such as capacity to offer adequate education, health care, and law enforcement, all of which are necessary to secure fundamental human rights. Citizens might rightly feel aggrieved if such service delivery falls below what is needed to sustain their basic human rights.... [S]tates can give a human rights compliant accounting for decisions to deny admission given sheer numbers within a

⁴ I develop this argument in greater detail in Hidalgo 2014.

particular time frame: too many demands can begin to threaten human rights fulfillment for citizens (210).

How should we make sense of Brock's argument? I think that it's a lesser evil argument. Sometimes it's morally justified to act in a way that violates a right or produces harm if doing so prevents an even greater evil from occurring. Restricting immigration may harm foreigners and perhaps immigration restrictions also violate rights. But Brock suggests that a state can permissibly restrict immigration if this is necessary to prevent something sufficiently bad from happening. So, immigration restrictions may have a lesser evil justification. In particular, immigration might cause bad outcomes when too many people want to immigrate to a state that lacks the resources or capabilities to accommodate them. Immigration restrictions are justified in order to protect human rights overall in these circumstances. I'll refer to this as the *sheer numbers argument* for immigration restrictions.

Does the sheer numbers argument succeed? Anyone who rejects absolutism should concede that we can permissibly abridge right or inflict harm in order to prevent disastrous outcomes. Suppose that you face the following option: you can either pinch an innocent stranger's arm in a painful way or else ten other people will die. Obviously, you should violate one person's right to bodily integrity in order to save ten lives. Similarly, imagine that government officials can either admit a hundred thousand more refugees or protect the basic human rights of one million citizens. Officials should opt to protect the human rights of citizens. The reasons to protect the human rights of a greater number of people can defeat the reasons to protect the urgent interests of a smaller number of people. So far, so good. The sheer numbers argument is in principle sound.

But there's a problem. Defenders of open borders also endorse the sheer numbers argument. They agree that states should restrict immigration if that's necessary to avert sufficiently bad outcomes. Joseph Carens is the most influential advocate for open borders in philosophy. But Carens writes: "the state is obligated to admit as many of those seeking entry as it can without jeopardizing national security, public order and the maintenance of liberal institutions" (Carens 1992, 30). In other words, while Carens holds that there's a strong presumption in favor of open immigration, he concedes that this presumption can be overcome in circumstances when admitting immigrants would produce very harmful consequences. Kieran Oberman argues in a similar vein that states can restrict immigration to avoid social cost if "the costs are particularly severe and there is no acceptable alternative means to address them."⁵ Other advocates for open borders, such as Michael Huemer (2010), say the same thing.

Why is this a problem for Brock? This is a problem because Brock sets out to defend a middle position between a closed and open borders position. As I noted in the introduction, Brock describes her position "as a human rights oriented middle ground between the positions of those who advocate for open borders and their critics." If Brock wants to defend a middle ground between advocates for open borders and their critics, then she needs to show that there's something wrong with the open borders position. Yet the sheer numbers argument fails to distinguish Brock's position from the advocates of open borders. Like Brock, these advocates accept that states can restrict immigration for lesser evil reasons.

Perhaps Brock might respond that, while there's no theoretical difference between her position and that of open borders

⁵ Cf. Oberman 2016, 46.

advocates, she disagrees with them on the empirics. Defenders of open borders tend to be skeptical of lesser evil arguments for immigration restrictions. They concede that it's in principle possible for lesser evil considerations to justify immigration restrictions. But they tend to deny that lesser evil considerations justify immigration restrictions in practice. Maybe Brock disagrees with advocates of open borders on this point. She may think that open immigration would produce worse consequences than open borders advocates believe. As a result, the sheer numbers argument justifies actual immigration restrictions. Brock writes that she favors institutional arrangements that “would result in more open and transparent processes for admission and are expected to lead to an opening of borders, though there would still be important ways in which states could plausibly restrict the numbers of new members and have reasonable control over the selection process” (226). While Brock avoids saying this outright, she indicates that the sheer numbers argument can justify actual immigration restrictions.

But, to show that the sheer numbers argument can justify actual immigration restrictions, Brock must establish the large influxes of immigrants have large negative effects on the protection of human rights. However, Brock doesn't provide this evidence. Nonetheless, we can still ask: is there any evidence that sudden and large increases in immigration have very harmful effects on the protection of human rights in recipient states?

There are a number of cases where countries experienced a rapid increase in immigration. One of the most famous is the migration of Cubans to Florida. In the early 1980s, many people fled communist Cuba and escaped to Miami. Over 100,000 migrants reached Miami over a six-month period.⁶ There are other cases like this. For example, a large number of Russian Jews

⁶ Cf. Card 1990.

immigrated to Israel after the collapse of the Soviet Union⁷ and over two million Syrians have immigrated to Turkey.⁸ Economists have studied each of these cases in order to examine the impact of immigration on recipient societies. These economists have found that large increases in immigration had few negative effects on native citizens on net. Consider wages. The sudden influx of immigrants sometimes temporarily depresses wages. But wages rapidly recover after a few years. The same holds for employment rates and other measures of economic welfare.

What about the impact of immigration on other elements of social welfare, such as crime, education, housing, and so on? In his book *Open Borders and International Migration Policy* Joel Fetzer investigates the impact of unexpected and massive increases in immigration on a range of social outcomes in three case studies: the immigration from Algeria to Marseille in 1962 after the withdrawal of the French government, the Mariel Cubans to Florida in 1980, and the migration of Eastern Europeans to Dublin in 2004 after the enlargement of the European Union in 2004. In each of these cases, the recipient society took in a large volume of refugees and immigrants during a short period of time. What was the overall impact? Minimal, especially in the long-run. Fetzer does find some short-term negative effects. Immigration seems to increase crime somewhat and strains the housing supply. But most of these effects dissipated over time. Fetzer concludes: “the empirical case against open borders is overstated... any significant effects from large-scale migration seem manageable” (Fetzer 2016, 119).⁹

⁷ See Friedberg 2001.

⁸ Cf. Cengiz and Tekguc 2018 and Tumen forthcoming.

⁹ One possible exception is crime in Miami. The migration from Cuba did seem to increase crime in this case. However, it’s worth keeping in mind that this case

So, even large and unexpected influxes of immigration don't seem to have substantial negative effects on the receiving society on the whole. Note that I'm not claiming that immigration has no negative effects. The consequences of immigration are complex and some of these effects are negative. But the sheer numbers argument says that immigration restrictions are justified if immigration undermines the delivery of essential goods and services in a way that would threaten the human rights of citizens. Moreover, to satisfy this criterion, immigration must surely do more than strain certain public services or impose some costs on citizens. Instead, immigration must impose severe costs on a recipient society and there must be no alternative way of mitigating these costs except immigration restrictions. And there's little evidence that rapid and large-scale increases in immigration have severe social costs of this kind or that we lack good alternative means of addressing these costs. I thus conclude that the sheer numbers argument generally falls short of justifying immigration restrictions in practice.¹⁰

At this point, an objector might argue that, although the sheer numbers argument is generally unsuccessful, immigration has other harmful consequences, and that immigration restrictions are necessary to prevent these harms. There are many *possible* harms from immigration and I'm unable to consider all of them here.¹¹ Let me touch on one of them that's sadly relevant these days. Consider global pandemics. Migrants, tourists, and other international travelers spread pandemics around the world, such as

is unusual. The Cuban government explicitly encouraged criminals to leave the country.

¹⁰ Of course, I'm unable to rule out the possibility that there may be rare cases where this argument does have force.

¹¹ For instance, Brock emphasizes the harms that the emigration of skilled workers cause in her other work. See Brock 2009. For a response to Brock's arguments, see: Hidalgo 2017.

the COVID pandemic. Shouldn't states have restricted immigration in order to stop the spread of COVID? Brock might argue that more immigration restrictions would have been justified for human rights reasons. COVID poses a grave threat to the human right to health and other human rights. Therefore, states should have closed their borders to prevent contagion. This style of argument is friendly to Brock, as it appeals to human rights in order to defend immigration restrictions.

But I'm also skeptical that this argument will succeed. The problem with this argument is that governments already heavily restrict international immigration, and many of them, such as the United States government, did introduce more stringent restrictions in response to the spread of COVID. Nonetheless, these measures seem to have had little effect. COVID spread throughout the world regardless of more controls on immigration. At most, controls on immigration slightly delayed the spread of the disease. In fact, I doubt that most states could have stopped the spread of COVID unless this state was willing to entirely close its borders to virtually all trade and tourism as well. Even then, I'm unsure whether these drastic measures would have worked because they wouldn't have effectively kept out all unauthorized migrants.

For sure, there are exceptions to these claims. Some small island nations have had success at combating the pandemic in part by restricting immigration.¹² But this doesn't seem to be the experience of the vast majority of countries. In any event, there may be viable alternatives to radically restricting immigration that also reduce contagion across borders. For instance, states could implement mandatory health screenings and isolation periods for

¹² This mirrors the effects of immigration restrictions to contain the influenza pandemic in the early twentieth century. Only small, isolated island nations could effectively stop the spread through immigration controls. See World Health Organization Writing Group et al. 2006.

immigrants prior to admission. So, I conclude that even the exceptional threat of a global pandemic is unlikely to justify substantial restrictions on immigration in general.

Conclusion

In *Justice for People on the Move*, Brock favors institutions and policies that would lead to more immigration. She puts human rights front and center in her account of a just immigration policy, and a concern for human rights tells in favor of more liberal immigration laws. Nonetheless, Brock stops short of endorsing open borders. In this comment, I've examined Brock's arguments for rejecting free international movement. I contend that Brock has not succeeded at defending a middle position between advocates of open borders and their critics. Moreover, my suggestion is that a human rights approach to immigration policy should support open borders. After all, if the right to immigrate is also a human right, then a framework for evaluating immigration policy that emphasizes human rights should oppose immigration restrictions. Thus, I invite Brock to either clarify and restate her arguments against free movement or, as I think preferable, endorse the ideal of open borders.

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