

Border Control, Territorial Rights and Feasibility

Abstract States more or less universally claim discretionary rights to decide who may or may not cross their boundaries, and to use force and violence to ensure compliance with these decisions. The justification of these practices has received much attention, but I think there is an important underexplored element of this debate. I argue that, in order to provide a plausible justification, it is indispensable to ask questions about *feasibility*. Any plausible defence of anything like the kind of border control regime actually in force will need to pay close attention to social scientific research into feasible alternatives.

Keywords: immigration; territorial rights; feasibility; border control; ideal theory.

When people cross international boundaries, they typically come up against the enforcement power of states. Walls, surveillance and militarised border guards are all regularly employed to prevent unauthorised access to states' territories. If a state decides not to allow you entry, they will usually make it difficult, and dangerous, for you to get in. And if you do succeed in entering a state's territory without authorisation, you may find yourself imprisoned and forcibly removed.

States make claims to territories (politically-defined areas of land) and make and enforce laws and directives that are supposed to apply universally over their claimed territory. They also claim (and are widely taken to have) reasonably extensive discretionary rights to determine who may or may not enter their territory. De facto, most states possess the *capacity* to enforce their immigration policies, but what could give states the *moral* right to act in this proprietary way over particular territories?

The recent global prominence and urgency of such questions have been accompanied by rapidly increasing philosophical attention. It is no longer the case that this is a neglected area of political philosophy. Nevertheless, I think there is an important underexplored element of this debate. In this paper, I will argue that if we take seriously two key desiderata for any account of states' right to exclude, it starts to appear indispensable to ask questions about *feasibility*. The most plausible way of meeting these desiderata (if they can be met at all) appeals to the *infeasibility* of achieving some important value without the state's exclusive border control. As well as highlighting an important set of questions for normative research into states' right to exclude, this conclusion on its own has substantive implications, I will suggest, for how we should think about and treat existing border-control practices.

I will begin by setting out the two desiderata. Next, I will argue that arguments that understand the right to exclude as a constituent element of the freedom rights of states (or other groups) fail to meet these. I will then outline the form of argument suggested by the desiderata, involving an appeal to some independent value promoted by granting the right, in which a crucial role is played by claims about feasibility. Some existing arguments, I think, can be interpreted as arguments of this form. If they are going to meet the desiderata, I argue, they will *need* to be interpreted in this way, and when they are it becomes apparent that assessing the permissibility of exclusionary practices will benefit from more thought about considerations of feasibility than they are sometimes given.

I. Two Desiderata

The practices of border-control engaged in by existing states, and the claims they make, form the subject matter of this paper. The question is how, or whether, these practices can be justified, and these claims vindicated. What kind of argument, if any, can a state make to show that its exercise of border control is morally acceptable and not mere collective might? But I will not take immigration decisions or policies one by one. That is, I will not ask what it takes to justify the enforcement of one particular immigration decision or policy rather than another, but instead how, or whether, we can ground the general right or authority to exercise discretion (within some limits) in deciding who to admit and who not to admit to a territory, and to enforce those decisions. A related distinction that is worth making is between the legitimate authority over immigration control and the substantive justice of immigration rules (see Stilz 2019: 188).¹ A question about the latter asks what a good (just) immigration policy for a particular territory would be. My question is concerned instead with legitimate authority: what gives a state (or other group) the standing to determine what the immigration rules are and to enforce them, i.e. to determine (forcibly) who can enter an area of land. Those questions could come apart: a particular agent may not be justified in enforcing a substantively just immigration policy because they lack the appropriate authority or standing. A group that had such standing, on the other hand, may sometimes be justified (all things

¹ Some might prefer to reserve the language of ‘justification’ for questions of substantive justice, but for the purposes of this paper, when I talk about justifying an action, I refer to the provision of an all-things-considered moral justification.

considered) in enforcing an immigration policy that is not substantively just.² My particular interest here is in a particular kind of *discretionary* authority (which I will sometimes refer to as a ‘right to exclude’); a group with such authority would be justified in exercising some degree of discretion in making and enforcing decisions about entry.³ That discretion need not be absolute; the question is whether a group can be justified in claiming *any* discretion, in, for instance, deciding to exclude some outsiders on the basis of its own sectional preferences, or making such decisions attributing some extra weight to the interests of its own members.

The primary question for practical purposes, of course, is the all-things-considered question about what justifies the forcible exclusion of an individual in a particular case. In some instances, it may be possible to justify excluding a particular individual from a territory by pointing to facts about their particular case: perhaps we have good reason to believe that if we don’t exclude you from this territory, you will go on to murder large numbers of people. (In such cases the question of substantive justice and legitimate authority probably do not come apart: it will probably be justifiable for *anybody* to exclude the particular individual in such circumstances.) But cases like that are rare. Most of the time, the only plausible avenue for justifying an individual’s exclusion will be an appeal to something more general. The kind of justification that I am interested in here is one that appeals to a right to discretionary control over immigration. That is, we justify excluding *you* by claiming that it is *up to us* to decide who gets to enter the territory (within certain limits).

² This latter is at least a conceptual possibility. One view that could be taken on the relation between substantive justice and authoritative standing is that substantive justice is a necessary condition for any policy to be justifiably enforced: no authoritative standing to enforce extends beyond the substantively just. I do not intend to rule out that possibility; the point here is just that the question whether an agent has the authority to enforce a policy is separable from its substantive justice.

³ Some writers understand a ‘right to exclude’ as a claim right against others interfering in your excluding, and as involving a right to do wrong (e.g. Wellman and Cole 2011: 7-8 and Cole 2011: 163). Understood thus, an exercise of a right to exclude could be all-things-considered wrong, it would just *also* be wrong for others to interfere and prevent this wrong. That is not how I will understand the term. As I understand it, a right to exclude is a general moral authority to make and enforce immigration restrictions (perhaps within some limits). The possession of legitimate authority to do *x* settles the question of the all-things-considered justifiability or permissibility of your doing *x*. The substantive justice of an instance of *x* does not. If you have a right to exclude (in my sense), it could be that justice demands you *not* make certain exclusionary decisions, but if you decide to ignore that, you will still be *all-things-considered* justified in making the unjust choice, because it was *your decision to make*. Most defenders of a right to exclude will not take the discretion it grants to be total, and the limits may be fixed by considerations of justice, but any decisions you make within the scope of the right will not be *all-things-considered* wrong for you to make and enforce. (This is independent of whether the legitimate authority over exclusion includes a claim right that others *obey* your immigration laws (see Bertram 2018: 49), on which I will not take a stand.)

There are other kinds of general facts that might do the job. We could justify excluding you by justifying a *policy* of excluding a class of would-be immigrants or restricting immigration flows to a certain level, without appealing to a general discretionary right to exclude. If it turns out that a particular policy of exclusion is beneficial to the utilitarian calculus of overall global welfare, that may be a reason to adopt it. Suppose, for instance, that a particular pessimistic empirical picture of the effects of migration were true in a given case: high levels of migration would undermine social cooperation in a host society as well as causing brain-drain effects in a sending society, thus harming both societies overall.⁴ (Or, suppose that closing international borders is the most effective available means to prevent the kind of movement and mixing that causes a pandemic to spread.) For a utilitarian, these facts would suffice not only for the substantive justice of a restrictive policy, but also for us to be justified in enforcing it. If we are not utilitarians, such facts on their own might not be enough, but if the overall welfare gain from such a policy were very large, that might still suffice as a justification for the use of force. This, though, would only justify the enforcement of a particular immigration policy insofar as it is the best feasible policy in terms of aggregate welfare (or the best feasible way of avoiding a severe welfare loss);⁵ it would not give a state discretionary control of its borders, and would in principle justify the policy's enforcement by any agent. (In addition, an argument of this kind has no basis for distinguishing, as a matter of principle, between internal and international migration: if migration from the north of England to the south, for instance, would have significant harmful effects on welfare overall, the utilitarian case for restrictions would be just as strong.) I will set aside defences of border controls of this kind, but it is worth noting that if the kind of discretionary rights to exclude that will be my focus turned out to be unjustifiable, that need not mean that no restrictive policy could ever be justified.⁶

⁴ More nuanced versions of these empirical claims are made by Collier (2013); it is doubtful how widely they hold in the real world.

⁵ It would have to be the case that there are not feasible alternatives to immigration restrictions that could do as well or better in utilitarian terms. (For instance, it would have to be the case that negative effects of immigration on social trust would not be better addressed by designing institutions to *create* social trust than by restricting immigration, as Pevnick (2009: 150) and Cole (2011: 270) suggest.)

⁶ A fully act-utilitarian justification would have to take each immigration decision separately, but as soon as this utilitarian argument moves to the level of *policy*, it is likely to give the group *some* discretion over the details. A utilitarian argument of this sort could thus be thought of as a highly limited version of the form of justification I will lay out below.

This focus on discretionary authority over immigration is motivated by a concern with the kinds of border control rights states actually claim. (Although states do not typically claim *total* discretion, they do usually claim to be the legitimate authority, within some fairly expansive limits, over their own borders (Bertram 2018).) This concern with existing practices also suggests two desiderata for any justification of border control rights. A good account of states' right to exclude need not, of course, justify *all* existing practices of border control. Few will want to go that far. But an account of the right to exclude will not succeed in justifying anything that looks much like the real-world border regime unless it can justify a practice with certain basic features. First, state border control is *territorial*. That is, states admit people to, and exclude people from, geographical pieces of land, over which they claim exclusive rights. These decisions are significantly different from decisions to admit or exclude people from, for example, an online forum or database, or decisions about admission to a discussion group or chess club. Second, state border control is *enforced*. That is, states use force, and the threat of it, in an attempt to ensure that would-be entrants have *no real choice* about whether or not to comply with their decisions of admission or exclusion.⁷ (This enforcement is, of course, not always effective, but it is now fairly widespread that at least some attempt is made to enforce immigration policy, and in some cases the resources put into this attempt are quite substantial (see, for instance, Jones 2017: 34-5).) A plausible defence of a practice of this sort, I think, will need to meet at least two desiderata:⁸

- 1) It should account for a state's right to exclude from a *territory*.

As I have said, actual practices of border control are territorial in nature. Of course, states admit and exclude at multiple levels. Some of these boundaries that states create are not territorial, or physical, at all. For instance, states make decisions about *citizenship* or *membership*, which are usually separated from decisions about territorial admission. The rights associated with membership in a state are not typically distributed on a wholly territorial basis (members of a state are not necessarily present in its territory, and in some cases may never have been present, while not all of those present are granted membership).

⁷ Miller (2010) denies that immigration controls are *coercive* at least in a sense that demands democratic justification. I do not find this plausible (and I think Abizadeh's (2010) response is convincing), but I am not relying here on the claim Miller denies. That immigration controls are *enforced* in this sense is, hopefully, harder to deny.

⁸ These desiderata apply generally to justifications of border control practices at the level of particular individuals, as well as at the general level that I focus on.

States' decisions about admission to membership raise important normative questions in their own right, and we might be able to give a defence of a right to exclude from membership in *political associations*. But if we are to be able to think about the existing border control regime as justifiable in anything like its actual form, we will need more than that. An account of the right to exclude from membership on its own will not do, unless it *also* provides an explanation of how that right can give rise to a right to exclude from *territory*.

- 2) It should provide a justification of exclusion that could be offered to the excluded.⁹

What we are considering are the actions of excluding states, and thus in a sense we are adopting their perspective, asking whether they can consider their practices to be justified. But those practices involve demands placed on others that they not enter a particular territory, as well as the enforcement of those demands. These are targeted at outsiders. The subjects of immigration law and enforcement are non-members of the state (Carens 2013: 257; Cole 2000: 186; Abizadeh 2008). If we are to be able to think of these demands and their enforcement as justifiable, and not simply as self-interested exercises of brute force, there needs to be a justification of them that could in principle be offered to those excluded that they could reasonably be expected to accept, and not merely a justification targeted exclusively at the state's own members. What I have in mind here is a minimal requirement on justifications of border enforcement: we need *at least* a justification that the excluded ought to accept, or would accept in appropriately idealised conditions. This is not the stronger claim that border controls must in fact *be* justified to, or accepted by, the excluded. That could well be the case, but here I only highlight a weaker minimal requirement.¹⁰ The minimal desideratum involves a test that we must be able to go through ourselves if we are to think of state border controls as *justified* uses of force. We take the subjects (or potential subjects) of immigration restrictions as they in fact are (or at least, as we understand them to be),

⁹ For a defence of something like this idea, see for instance Bertram 2018 and Sandelind 2015: 493.

¹⁰ Abizadeh (2008) makes the stronger claim.

Moore (2015: 188-9) rejects the individualist demand for justification to each would-be immigrant on the grounds that it involves a fallacy of composition. I think this is a mistake, though. To say that state S's policy of exclusion must be justifiable to would-be immigrant A is not to say that S's interest in excluding A must outweigh A's individual interest in entering the territory. (Moore is right to reject the need for the latter.) One way of justifying exclusion to A is just to point out that a general *policy* of exclusion (which permits A's exclusion) is justifiable and whatever justifies it outweighs A's individual claim to enter. (This is the kind of justification Moore prefers.)

along with the moral (or other normative) reasons or requirements that apply to them.¹¹ We then ask whether *those really existing people* would accept our justification, assuming that they are reasoning properly, taking into account all relevant considerations and so on, but also given their actual beliefs, commitments and material situation (at least as far as those beliefs and commitments are reasonable).¹²

II. Territorial Rights and Deontic Justifications

I will argue below that a good justification of a state's right to exclude, if it is to meet the above desiderata, will take the form of an appeal to some independent *value* promoted by a general practice of granting a state some degree of discretionary control over entry to a particular territory. And, I will argue, consideration of *feasibility* will be essential to such an argument. (Such a justification is not *act-consequentialist*: act-consequentialism could justify excluding a particular individual in a particular case, but not a general right to discretionary authority over immigration. But it is consequentialist in a wider sense: it takes the 'two-step' form familiar from, for instance, popular justifications of the institution of property in the vein of Hume, which claim that a practice overall serves some value, and then justifies individual actions in terms of their instantiation of the practice (see Essert 2016: 267-71).) But first, of course, we must acknowledge that there are common and prominent ways of thinking about the right to exclude that are more direct. That is, they justify the right not by a two-step appeal to its promotion of some independent value, but by a single-step appeal to the right's bearing a *constitutive* relation to some value or moral imperative. It is common to justify a state's (or other group's) right to exclude in terms of the idea that the group (or members of the group) have certain freedom rights of which the right to exclude is held to be a constituent element. I think the most plausible of these direct justifications (which I will refer to as 'deontic') fail to meet the above desiderata (unless reinterpreted along the consequentialist lines I will lay out in the next section).

¹¹ There are, of course, epistemic difficulties about both the normative and empirical components of such a test. I do not propose any epistemic conditions that these inputs must meet: the suggestion is just that we must *at least* expect that our immigration restrictions would be accepted by its appropriately idealised subjects on the basis of empirical and normative beliefs about them that are justified by our own epistemic standards.

¹² Such a test would need a way to separate those facts about people and their mental states that are held fixed from those that are not. I am not here proposing an account of moral or political justification, merely suggesting a minimal necessary condition, so I will not attempt to provide an account of how these things should be separated, but I think it is plausible that one could be given. (Compare Bohman and Richardson 2009. I think the kind of test I envisage may involve something along the lines of the kind of counterfactual idealisation they propose. Thanks to an anonymous reviewer for drawing my attention to this.)

There is a family of such direct justifications (whose members are, I think, the most discussed and most plausible deontic justifications on offer) that involve appeal to some kind of group rights to self-determination, sovereignty or moral independence (e.g. Walzer 1983; Wellman 2008, 2011; Altman and Wellman 2009; Pevnick 2011; Blake 2013; Fine and Sangiovanna 2014; Moore 2015; Miller 2016; Song 2018; Stilz 2019; for a survey see Fine 2013).¹³ It is clear that a mere right held by a group of people to exercise some measure of independent joint control over their collective affairs will not on its own meet our first desideratum: it will not establish a connection with *territory* (Fine 2013: 262; Fine 2010: 353-5). (We probably think that various private associations have some kind of self-determination rights, but these do not carry with them any rights over territory or land, unless the association happens to own some.) Thus, even if we accept the idea that group rights to be collectively self-determining ground collective rights to control the group's make-up, that is, to exclude from *membership*, we do not yet have any reason to accept any claims to *territory*.¹⁴

A number of writers have argued, though, that the self-determination rights of particular kinds of groups are such that their exercise requires certain territory-related rights, and if we consider these self-determination rights sufficiently important, this fact could constitute grounds for granting the territory-related rights (see, for instance, Nine 2012; Moore 2015; Miller 2016; Stilz 2019). Not any old territory-related rights will do, however. First, we may have a right to be in a piece of land or to use a piece of land in certain ways without having any right to exclude others from it. My friends and I have every right to go for a stroll in public Victoria park, but it is not our business to decide who else may or may not be in it. There may be occasions where one's ability to continue to use a territory that one inhabits depends on excluding certain others from it, but that is not in general the case, so no right to discretionary control over entry follows automatically from the right to continue to use or inhabit a territory in particular ways. Second, we can distinguish jurisdictional territorial rights (the right or authority to make and enforce laws or directives *over a particular geographical area*, i.e. over *anyone* physically located in this area) from property-like territorial rights, including *exclusionary* rights (cf. Ypi 2013: 242; Simmons 2016a: 4-5; Miller 2011:

¹³ Some, but not all, of these arguments may be reinterpretable according to the consequentialist framework I will set out below.

¹⁴ Even that first idea, though, has been subject to heavy criticism (see especially Abizadeh 2008; Fine 2010, 2013; Hidalgo 2014b; van der Vossen 2015; see also Song 2018: ch. 3).

253). There is no reason to assume that property-like rights will automatically follow from jurisdictional rights.¹⁵ Creating and enforcing law in a given territory need not involve determining who is, or can be, in that territory. So, even if we grant a group self-determination rights and accept that *use* rights and *jurisdictional* rights over a particular territory follow from these, more is still needed.

To make this final step, self-determination justifications have appeared to rely on the assumption of a kind of entitlement, held by territorially self-determining groups, to avoid acquiring obligations to others located in the territory.¹⁶ Insofar as the presence of others in a given territory *does* (or *would*) generate moral obligations for the self-determining group (or its members), then, the thought seems to be, they are entitled to demand that these others not access the territory in order to avoid incurring unwanted obligations.¹⁷ This assumption, though, is rarely argued for and, in fact, it seems quite implausible to attribute such a territorially-defined immunity to collectively self-determining groups *unless* we have already granted the group exclusionary rights over the territory.

When pressed on the need to establish exclusionary claims over territory, some self-determination theorists have turned to the obligations that a jurisdiction-exercising group seems to incur toward those present in the territory over which it exercises jurisdiction (Walzer 1983: 59; Wellman 2008: 133-4). To admit people to a territory (for the long term, at least), they note, without admitting them to membership of the state that exercises jurisdiction over that territory would create a sub-class of ‘resident aliens’ inconsistent with the egalitarian demands of democracy. To avoid this undemocratic form of oppression or injustice, states have a responsibility *not* to deny membership to any long-term inhabitants of their territory. Thus, they conclude, the right to communal self-determination (and to determine membership

¹⁵ Some (e.g. Stilz 2009, 2011; Simmons 2016a; Miller 2011) do seem to bundle these things together and Moore (2015: 196) argues that the authority to make rules about entry and exit is a part of jurisdictional authority. In some sense, this is true, but once we see that different territorial rights *need not* come as a bundle, it makes sense to decouple them: it makes sense to keep immigration rules separate. There may be good reasons for granting jurisdictional authority in the narrow sense (i.e. the right to determine and coercively enforce rules over *whoever* is in a given territory) that do not support a right to determine *who may be in* that territory. Ypi (2013) convincingly argues that there is good reason to doubt whether the available accounts of jurisdictional rights, even if successful as such, will be able to ground rights to exclude (see also Nine 2019; Sandelind 2015).

¹⁶ Thanks to Daniel Sharp for discussion of this point.

¹⁷ This assumption, or something like it, seems to be implicit in arguments made by Walzer (1983: 59), Wellman (2008: 133-4), and Blake (2013).

of a political association) must also support a right to decide who may become a long-term resident of their territory.¹⁸

On the face of it, though, that seems like quite an odd conclusion to draw. A more natural thing to conclude, given the same observations, might be that a state that exercises jurisdiction territorially must grant membership to all long-term inhabitants of the territory over which it exercises jurisdiction. (For comparison, suppose it is permissible for you to play loud music in a public park, so long as earplugs are available for everyone in the park who wants them, but it would be wrong for you to play the music while there are people in the park without access to earplugs. From that, we do not conclude that you can put up a fence so that you can continue playing your music without providing earplugs, but rather that you can only play the music if you have provided earplugs to all.) It only appears sensible to conclude that the jurisdiction-exercising group has a right to exclude from the territory if we are already predisposed to see the group as having exclusionary claims to the territory, or (more charitably) we take self-determining groups to possess the kind of right to avoid acquiring certain sorts of obligations to others that was mentioned above.

One option is to defend a quite general right to avoid unwanted obligations (Blake 2013). But, as Javier Hidalgo (2014a) has pointed out, this seems to have untenable consequences. More plausibly, we might think that some people have special connections to a territory such that they are entitled to avoid obligations incurred by others' presence in that territory. If others have every right to be in a territory, no less right to be in it than you do, it does not look plausible to suppose you have any claim against obligations generated by their simply being there. (I have no claim, for instance, when you join me in an otherwise empty public park that we both have every right to be in. Now that you are there, I have certain new obligations, such as not to take up an excessive amount of space, not to make an antisocial amount of noise, and so on, but that fact does not give you any reason to refrain from entering.) What is needed is to show that there is some asymmetry between an 'inside' group and an 'outside' group such that the

¹⁸ Fine (2013: 259) discusses this argument, and points out some problems with the argument, but I think its difficulties in fact are deeper.

former are entitled to demand of the latter that they not enter a territory in order for the inside group to avoid the obligations that would automatically be incurred if they did.

We have already granted, though (if only for the sake of argument), that there may be an asymmetry between the territory-related claims that members and non-members of a self-determining group can make. In particular, we have granted that a group with rights to self-determination may have a right to exercise jurisdiction over a particular territory. Might it not be, then, that the claim self-determination theorists like Walzer and Wellman are making is that, *given* that the group is entitled to exercise jurisdiction over an area, and that the group is entitled to control its own membership, it is entitled to avoid incurring the particular obligations arising from the exercise of territorial jurisdiction that would interfere with the control of membership?

The problem, though, is that this assumption is unmotivated: the only plausible reason for making it is that we have already assumed what we are trying to prove (i.e. that self-determining, jurisdiction-exercising groups have exclusionary territorial rights). In granting a right to jurisdiction, as Walzer and Wellman readily admit, we do not grant an unrestricted right to set and enforce whatever rules the right-holding group prefer (cf. Higgins 2013: 156-7, 161). Oppressive rules that would create a resident 'sub-class', for instance, are clearly out. Similarly, a right to self-determination is not a right to act as you please (as we easily see in the individual case). It does not include, for instance, an unlimited right to force *others* to act as you would like them to. So, when we encounter a circumstance where the exercise of jurisdiction and control over membership (assumed to be a component of self-determination) can only be made compatible with each other by forcibly preventing others from doing something they would otherwise be entitled to do, we cannot immediately assume that the combination of the two rights justifies such a use of force. The only reason that I can think of, then, to suppose that jurisdictional rights or self-determination rights carry with them a special right against unwanted obligations generated by the presence of others in a territory would be that the group has some sort of exclusionary claim over the territory (the outsiders, in other words, do not have every right to be there). But to assume that would be to beg our question. What we need is an *argument* to show that the former rights must include or carry with them exclusionary territorial rights.

This gap can be bridged, and some defenders of the self-determination view do attempt to do so by supplying independent grounds to think that self-determining groups need exclusionary rights over a territory, for instance by appealing to the necessity of exclusive control of a particular territory for a functioning state (Pevnick 2011: 57; Wellman 2008: 131; Wellman 2011: 100), or for the maintenance of a shared culture (Miller 2005: 199-201). But this, then, becomes the crucial claim. It is a claim about the importance of territorial control for achieving some independent good, rather than about the direct requirements of the freedom rights of political associations. This is the kind of argument I will turn to in the next section. An argument of this form *might* remain more fully focused on self-determination, if it appealed in a consequentialist fashion to some *value* realised by self-determination, for which exclusive territorial control is needed.¹⁹ Still, though, this is an indirect argument about the necessity of exclusionary territorial control for realising some value, not a direct deontic argument about freedom rights of groups. There may, though, be deontic arguments that do not neglect territory in this way. Lockean, or property-based, theories may be read as providing deontic grounds for exclusionary territorial rights. These views rely on the idea that transformation or improvement of land or, in the Lockean phrase, the ‘mixing of labour’ with it, can give rise to certain exclusive entitlements to control the land. These arguments come in individualist versions, according to which individuals gain *property* rights over land in this way and transfer certain incidents of those rights to the state through consent (e.g. Simmons 2016a; Locke 1980), and collectivist versions, according to which *groups* (peoples, states, nations, communities) gain such entitlements by *collectively* transforming or improving the land (e.g. Nine 2008, 2012).²⁰ I will not address these views properly here. I suggest that the value-based form of argument I will describe is the most plausible way of meeting the two desiderata because, whatever their success as accounts of jurisdictional and resource rights, I am sceptical that Lockean accounts, at least when read as one-step deontic arguments, can ground rights to *exclude* from territory.²¹ I do not have space to argue this here, though, so I will simply acknowledge that these views stand as possible alternative ways of meeting my two desiderata. (These views could, alternatively, be read as two-step arguments of the form I describe below,

¹⁹ Some of the existing arguments might be read in this way. Cole (2011: 242) suggests that Wellman’s version of the argument, despite official protestation to the contrary, depends on making a claim of this kind.

²⁰ Elements of this view also seem present in Meisels (2005) and Miller (2007, 2011).

²¹ For critical discussion of these views, see Ypi 2013.

in which case they will need to answer the same questions I raise for such value-based justifications below.)

III. Value and Feasibility

I thus think that the most plausible way in which a justification of a right to exclude might seek to meet my two desiderata is by taking the form of an appeal to an independent *value* achieved by granting a state or group discretionary control over a particular territory. But there are three, perhaps obvious-seeming, though nevertheless significant, consequences for such an indirect argument that follow from my second desideratum, the need to offer a justification to the excluded.

The first is that we will need to identify a value that others (the excluded, and not just the members of the excluding state) have reason to care about. It would not do, for instance, to point out that exercising exclusive control over a territory is something that our culture attributes value to, *unless* we could also argue convincingly that outsiders ought to care about this culturally-specific value. This means that, *either* we must be able to make a case for the identified value being of universal (culture-independent) value, that is, for its being something whose value everyone ought to be able to recognise (whether or not they in fact do), *or* the identified value must be something that the diverse value-systems of all would-be immigrants in fact *do* (at least implicitly) recognise.²² None of this is to say that we must identify a benefit *received* by the excluded. This desideratum does not rule out, then, justifications that only appeal to benefits to insiders (members of a state); all that is demanded is that these benefits have value that outsiders are able (or ought to be able) to recognise. Second, though, a corollary of this is that the value identified must outweigh any value that would be associated with the migration of outsiders into the territory (or their ability to do so) and any disvalue or wrong associated with the *enforcement* of border control policy itself (see Mendoza 2015; Lister 2020).

The third consequence of the second desideratum is that it will not do just to show that the practice of forcible discretionary exclusion from a territory has *some* value, nor even that the value realised outweighs

²² There are serious empirical difficulties associated with identifying actually universally shared values, and I do not claim that there are any. The point is just that *if* such a value could be identified, we might have a convincing justification. By referring here to ‘value-systems’ I mean only to refer to the overall system of values and norms recognised by an individual, not to attempt to locate these in larger cultural groups. (Thanks to an anonymous reviewer for pushing me to clarify these points.)

any value that would be realised by the immigration of those excluded. To show that a border control policy realises some value (even a very significant value, or one more important than any that could be realised by the prevented immigration) is not to show that that border control policy is *necessary* to realise that value, that is, that the same value could not be achieved in some other way. To provide outsiders with some reason to respect our exclusion policy, we would need to show that there is some significant value realised by our exercising border control that outweighs any value that would be achieved by allowing them into the territory *and that could not be achieved* (without excessive costs) *through some other means*. To point out that our use of force on you produces some significant non-outweighed value does not justify that use of force if that same net value could be achieved *without* the use of force (cf. Carens 2013: 269; Oberman 2013: 442). In particular, we will need to be careful to be sure that the value identified in fact depends on the group's exercising *exclusionary* control over the territory. That is, we need to be sure that the same value could not be achieved simply by allowing them to *use* the territory in certain ways or to exercise *jurisdiction* over it.

The relevant kind of possibility is presumably not logical or metaphysical possibility. We do not need to show that there is no *logically* possible alternative way of achieving the value in question. The relevant notion, I presume, is some notion of *feasibility*. Suppose there is a sense of 'feasibility' such that something's being *infeasible* in this sense rules it out as a possible object of moral requirement. (The importance of this supposition generates important complications, on which I will elaborate below.) Given this understanding of 'feasibility', if we can identify something valuable achieved by a state's exercising border control, and if any alternative ways of achieving that value are *not feasible* in the constraining sense, then that plausibly will justify the practice (so long as the value is not outweighed by any countervailing considerations and so on). But if there are feasible alternative ways of achieving the same value, we will not have done enough.

It seems, then, that a plausible indirect value-based justification of group *G*'s discretionary exclusion from a territory *T* that could be offered to the excluded will meet the following conditions:

- a) It will identify a value realised by *G*'s exercising discretionary border control over *T* that those excluded can be expected to recognise;

- b) This value must outweigh any value that would arise from the excluded migrating into, or being able to migrate into, *T* and any disvalue or wrong associated with the enforcement of *G*'s immigration policy itself;²³
- c) There must not be any feasible ways of achieving this value that a) do *not* involve *G*'s exercise of discretionary border control, and b) are not subject to *stronger* moral objections than *G*'s exercise of discretionary border control (in some relevant sense of 'feasible').

How, then, might such a justification go? Let us take an example: could a justification of discretionary exclusionary control that meets these conditions be constructed on the basis of the value of cultural stability?²⁴ The first challenge for such an account will be to convincingly show that this value is one that outsiders have reason to care about. It does not look plausible that this could be done by pointing to the value of the culture itself (the value of particular cultural practices, or of the products created by them, whose maintenance could be thought in some way threatened by culturally diverse immigration). Claims about the aesthetic, moral or other value of a particular practice or cultural artefact are likely to be hard to ground in culturally neutral terms, and thus rarely identify values for which we could reasonably expect universal recognition.²⁵ But there are less culturally partisan ways that one could appeal to the value of some sort of sociocultural stability. To give one example, we might notice the importance of the social practices that surround us for our ability to understand our environment and to make meaningful choices.²⁶ Where too many of these practices change dramatically at once, it will have a disorienting effect, impeding our ability to find our way around and make sense of our world, which, if severe enough, may be harmful, even debilitating. This is not the place to *make* the case that the value of avoiding such a

²³ These first two conditions (or something like them) are already sometimes recognised in the literature (on the first, for example, see Bertram 2018; on the latter, for example Fine 2013: 262-4; Fine 2010: 348; Higgins 2013: 157). It is particularly the third condition and its implications (see below) that I think is not generally, or adequately, recognised or considered in this debate.

²⁴ There is a family of defences of the right to exclude that appeal to attachment to territory and its significance for a group's cultural life, identity or stability of place, including Miller 2007, 2011, 2016; Meisels 2005 and (partially) Moore 2015, 2019; Walzer (1983) does not obviously connect his argument up with territorial claims, but he could be understood as making an argument of this sort. Not all of these obviously take the form I here describe, but I think in order to meet these conditions they will need to.

²⁵ The value of cultural *diversity* seems like it will pose similar problems, unless there is a strong case to be made for the *instrumental* value of sociocultural diversity for e.g. innovation or economic productivity.

²⁶ I make this point about 'orientation' in Guillery (unpublished manuscript). Related points about the cultural dependence of autonomous choice are made by multiculturalist writers (e.g. Dworkin 1985: 228-33; Kymlicka 1989: ch. 8; Kymlicka 1996: 82-4; Margalit and Raz 1990: 448-9; Raz 1994: 176).

harm, of the ability for ‘orientation’ in the world, is something we all have reason to recognise, but it is a little more plausible that such a case could be made.²⁷ And if it can, we have the basis for an appeal to the value of a certain kind of sociocultural stability: just the kind and degree necessary to avoid harmful disorientation.

But there are two more challenges for such an account. First, it would have to show that not only is there value that would be gained from exclusion (the avoidance of disorientation), but this value is substantial and weighty enough to outweigh value that would be gained from migration, or harm that would be done by excluding. (There is probably reason to start from an initial presumption that this is *not* the case, since migration is just as likely or more to bring disorientation for the *migrant* as for pre-existing residents at the destination, and migrants have judged that their own interest in avoiding disorientation is outweighed by their interests in migrating. Of course, sociocultural changes will have different impacts on different people, and not all interests support moral claims, but there is nevertheless a significant hurdle to overcome.) Second, and perhaps most importantly, it would need to be shown that, in the relevant sense of ‘feasible’, the disorientation harm cannot feasibly (and morally acceptably) be avoided *other* than by exclusionary control. Are there, for instance, feasible measures that could be taken to control or limit the impact of immigration on the sociocultural practices in an area that do not involve *restricting* the immigration? Protection of tenancies could prevent the rapid disruption of communities; subsidies for particular businesses or associations could contribute to the maintenance of important social practices, and so on. If some such measures are feasible, and they do not themselves generate greater harms, we cannot justify *exclusion* on these grounds.

We can see then, that there are a good many questions an account of this kind will need to answer. Some of these are normative: we need a clear picture of what exactly the value in question *is*, and how weighty it is compared with others. But, importantly, some of these are empirical. To fully defend such an account, we need to know what the impact of immigration (and of particular immigrants) in a particular context would in fact be. In what ways would newcomers affect prevalent social practices, and how rapidly, and what would the effects of such changes be on residents? What measures are available to avoid any

²⁷ If the appeal is ultimately to the value of autonomy, it might be thought to rest on a controversial conception of the good, but the value of *orientation* may be more basic.

associated harms, and what would *their* possible costs be? These are social scientific questions that cannot be answered by armchair theory. The philosophy, though, frames the empirical questions that need to be asked.²⁸ I am inclined to think that *some* kind of justification for immigration restrictions in certain circumstances *could* be made in terms of the value of cultural stability. But once the challenges it must meet are identified, it starts to look unlikely that any very extensive discretion could be supported.

The framework I have suggested above, I think, also helps to see how *versions* of the self-determination and special-obligations arguments *might* be able to meet our desiderata. It is when interpreted as indirect arguments of the above form that these views seem most plausible. This involves *reinterpreting* the self-determination or special-obligations arguments as appeals to the independent *value* achieved by collective self-determination. Such an argument just says that there is some significant value promoted by a society's (or a nation's or people's) being able to determine together its own affairs, for instance, and the value of this in part depends on its being able to determine its own composition (the makeup of the collective 'self'). The claim here would have to be that what is valuable about a particular group's self-determination could not feasibly (and morally permissibly) be achieved without the ability to exercise exclusive control over the borders of a particular territory.²⁹ Again, when interpreted in this way, it becomes clear that one crucial question that such an argument will need to answer is whether it really is the case that what is valuable about a group's self-determination can only feasibly be maintained (in the relevant sense of 'feasible') if it is granted the right to control the borders of a territory. There are various other values that might be used to fill out an argument of the above form, including the value of achieving some morally important state function (protecting human rights, securing distributive justice, guaranteeing the rule of law); all will need to answer similar questions.³⁰

²⁸ This is further complicated by the persistence of social scientific disagreement over the empirical facts. There is no easy way around this problem, but philosophy can work with the social sciences to identify the questions that need to be asked.

²⁹ The argument of Moore (2015) seems to be of this kind.

³⁰ 'Functionalist' or 'legitimacy' theories (labels applied by Ypi 2013 and Simmons 2016a) can be understood in this way. The most prominent such account is given by Stilz (2009, 2011).

IV. Implications and Complications

I have suggested that a plausible defence of the right to exclude, the legitimate authority to make and enforce decisions regarding entry to a territory, seems to need to take the form of an appeal to some independent value achieved by granting such authority and the infeasibility of achieving that value otherwise. I have argued that this will require careful consideration of the nature of the value, and its acceptability to those excluded, as well as to its weight relative to competing or countervailing considerations. Most significantly, it requires attention to the feasibility of alternatives. As I have said, this will require engagement with the empirical evidence. But the significance of feasibility also gives rise to important but difficult *conceptual* complications.

The form of argument I described above depended on the supposition that there is a notion of feasibility that acts as a constraint on moral requirement. If all alternatives to territorial exclusion (alternative ways of achieving something valuable) are infeasible in such a sense, they cannot be morally obligatory. And then, if the value realised by exclusion is sufficiently important, exclusion is plausibly permissible. But what does it take for an alternative to be ruled out as a possible object of moral requirement? What it is for something to be feasible or not, and what role that notion plays in practical reasoning, are debated matters (see, for instance, Southwood 2018; Brennan and Southwood 2007; Gilibert and Lawford-Smith 2012; Wiens 2013). I think there are multiple different ways in which the notion of ‘feasibility’ can be made precise (and so multiple different sets of truth conditions feasibility claims might have), and it is not obvious that any single one of these is privileged as *the* morally relevant notion (as I argue in Guillery 2021; the following summarises, in very rough outline, a view defended more fully there). Suppose we ask whether a system of territorial jurisdiction with fully open borders is *feasible*. It is not immediately clear, I think, what we are asking: the question does not have a single determinate answer until further specification is given. One question we might ask, for instance, is whether, given people’s existing preferences and motivations and given the existing political system and balance of power, it is possible to bring about such a system. Another might be whether, even if these things are allowed to change, a stable system of territorial jurisdiction without border control is made impossible by some relatively deep facts about human nature. These questions, and others, may have different answers.

I think that the concept of ‘feasibility’ is best understood as *multivocal*, admitting of multiple different specifications (with correspondingly different truth conditions). These can be differentiated in terms of the facts of the world held fixed. Not all of the possible ‘specifications’ of feasibility can act as constraints on practical or moral requirement. It is too simplistic to treat it as a straightforward binary matter whether a particular alternative to territorial exclusion is feasible. For most such alternatives, there will be some specifications of ‘feasibility’ according to which the outcome will be feasible, and others according to which it will not. This, then, clearly complicates the assessment of a justification of a right to exclude along the above lines. We need not only an empirical appraisal of the facts (*given* a set of facts to be held fixed, it is an empirical question whether a particular outcome is consistent with those facts), but also a *normative* judgment about the facts that we can legitimately hold fixed in declaring a conceivable alternative to exclusion to be ruled out.

One key service performed by framing justifications of the right to exclude in the terms set out above, then, is to highlight important questions that need to be asked, in particular about *feasibility* (as well as about the nature of the values appealed to, as discussed previously). The concept of feasibility, or infeasibility, plays a crucial role in any plausible justification of discretionary exclusionary territorial control, as I have argued. But that concept is slippery and ill understood. There is no *single* univocal notion of feasibility that can automatically be assumed to be the relevant one, the one that rules alternatives out of consideration. There are thus two important kinds of question concerning feasibility that will need attention in order for a justification of exclusionary control to be fully assessed:

- What aspects of the current state of the world must alternatives to exclusion be consistent with in order to be obligatory? That is, in what sense must they be *feasible*? How *realistic* must they be?
- Given an answer to the previous question, *are* there in fact alternatives consistent with the relevant facts of the world that would achieve the values in question?

Answering the first kind of question is a task for normative philosophy, the latter for the social sciences. A full assessment of the justifiability of exclusionary claims, then, will require both to work in tandem.

Thinking about the justification of border control in this way helps also to see how certain further questions might be settled. An argument of the above form (at least when fully filled out) will provide

straightforward answers to certain questions that a number of existing accounts have found difficult to answer. The exact extent and boundaries of the geographical area a state or group can justifiably exclude from are directly fixed by such an argument. A state or group is justified in excluding from just that area without which it cannot feasibly achieve the value appealed to. If the boundaries of a state's (or group's) exclusionary rights are in doubt, we can determine whether it can exclude from a given area at the edge of its territory by asking whether the state or group *needs* to be able to exclude from that additional area in order to realise the relevant value. Is exclusion from this marginal zone essential, for example, to the state's shared identity or its ability to collectively determine its own affairs? Or is it necessary for the maintenance of a functioning state, or of a system of law and rights-protection? (More precisely, is it *feasible* to achieve these things without excluding from the given marginal area?)

The value-based argument also straightforwardly settles questions about *who* a state or group may permissibly exclude (or, in other words, about the limits of the state's/group's discretion). I said above (footnote 10) that we can agree with Moore that justifying a policy of exclusion need not involve showing that, for each excluded individual *E*, the excluding group has an interest in excluding *E* that outweighs *E*'s interest in entering the territory. It would be sufficient to show that a *policy* that permits excluding *E* is needed to achieve something of value that outweighs *E*'s interest in entering (and that of anyone else whose exclusion the policy permits). So, we do not determine the limits of a state's discretion over who to admit by asking, for each prospective entrant, whether the value achieved by excluding *them* outweighs the harm done. But still, justifying a policy of exclusion is not all or nothing. Only if there is no feasible less harmful policy that achieves the value appealed to can a policy be justified. Thus, a state or group is justified in excluding individual *E* only if the least harmful feasible immigration policy that achieves the value in question permits *E*'s exclusion. The extent of discretion that can be justified will be the extent necessary to secure the value identified. Thus, the question will be whether the value identified depends not only on the state's limiting immigration, but also on its having discretion over who to admit. If, for instance, it is feasible to realise the relevant value by granting discretion only over the admission of a subclass of migrants (e.g. those whose interest in migrating falls below some strength threshold), only that degree of discretion will be justifiable. (So, for example, it will likely be harder to justify discretion over the admission of refugees than other migrants.)

I want to conclude by saying, lest this paper appear to provide a schematic defence of the right to exclude, that it is not intended that way. The challenges for a successful such defence are significant, and I certainly do not want to claim that there *is* a way of meeting these challenges. One thing that seems clear (and I think many defenders of the right to exclude would agree) is that the existing international regime of border control is not justifiable in its entirety. I have presented the conditions that I think an argument would have to meet to justify anything like the core practices of border controls we tend to take for granted, but I leave it open whether there is any way of meeting them. It may turn out, that is, that defenders of open borders are right (e.g. Carens 1987, 2013; Cole 2000; Oberman 2016; Huemer 2010). But to claim that immigration restrictions involve an absolute wrong and could never be justified seems too extreme. In certain empirical circumstances, a good case for discretionary control over immigration *could* be made *if and insofar as* there is some genuinely significant and non-outweighed universally-recognisable value that depends on it. Insofar as there is *not*, it may still be possible to justify particular instances of exclusion, if and when a particular policy of exclusion achieves some value that outweighs any harm it does to those excluded by it and there is no feasible *less harmful* way of achieving the same value. If the challenges for a defence of the right to exclude are as significant as I am inclined to think they are, though, we might want to phrase the claim I have made here as the claim that a practice of (discretionary) border control cannot be justified *unless* there is some significant, universally-recognisable and non-outweighed value that cannot feasibly be achieved without it.

In addition, there is an important negative conclusion that can be drawn just from noticing that justifying exclusion depends on feasibility premises. It is an implication of this that the right to exclude is not a right that peoples, nations or states have *automatically*. That is, it is not a right they have simply in virtue of being organised into a state, or having some kind of significant connection to the land, or possessing some other morally significant characteristic. The practice of border control can only be justified, if and when it can be justified, *insofar as there is no feasible alternative*. In other words, if there are ways to do without it, those should be taken.

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