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# Can Brain Drain Justify Immigration Restrictions?\*

*Kieran Oberman*

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This article considers one seemingly compelling justification for immigration restrictions: that they help restrict the brain drain of skilled workers from poor states. For some poor states, brain drain is a severe problem, sapping their ability to provide basic services. Yet this article finds that justifying immigration restrictions on brain drain grounds is far from straightforward. For restrictions to be justified, a series of demanding conditions must be fulfilled. Brain drain does provide a successful argument for some immigration restrictions, but it is an argument that fails to justify restrictions beyond a small minority of cases.

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States routinely prevent peaceful people from living and working where they want to by subjecting them to immigration restrictions. This fact is well known and yet only relatively recently has it become the subject of philosophical debate. Previously, philosophers seemed content to let the popular assumption that it is up to states to decide who may enter their territory go unquestioned. Now a number of philosophers have begun to challenge this assumption. In their view immigration restrictions constitute an unacceptable curtailment of individual liberty. They note that people require freedom of movement in order to fulfill their basic life projects, such as pursuing a career, maintaining social relationships, and practicing their religion. Free movement within a state has long been recognized as a human right. Since people wish to move internationally for

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the same reasons they wish to move domestically, there seems a strong case for deeming the freedom to migrate to be of equal moral significance.<sup>1</sup>

Not all are convinced by this new line of argument however. Some philosophers have sought to defend the traditional idea that states are freely entitled to exclude foreigners from their territory. Yet even these philosophers agree that what was once simply assumed now requires defense. Immigration restrictions unquestionably curtail individual liberty. For this reason, if no other, they require justification.<sup>2</sup>

One possible justification for immigration restrictions is that they help to prevent brain drain, the large-scale migration of skilled workers from poor to rich states.<sup>3</sup> Brain drain affects many countries throughout the world. In Granada, Haiti, and Jamaica, the skilled emigration rate is above 80 percent. In Africa, Cape Verde has a rate of 68 percent; Mauritius, 56 percent; Sierra Leone 52 percent; and Ghana, 47 percent.<sup>4</sup> Brain drain need not always be deleterious. There are a number of compensa-

1. See Joseph H. Carens, "Migration and Morality: A Liberal Egalitarian Perspective," in *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, ed. Brian Barry and Robert E. Goodin (University Park: Pennsylvania State University Press, 1992), 25–47; Phillip Cole, *Philosophies of Exclusion* (Edinburgh: Edinburgh University Press, 2000); Ann Dummett, "The Transnational Migration of People Seen from within a Natural Law Tradition," in *Free Movement: Ethical Issues in the Transnational Migration of People and of Money*, ed. Brian Barry and Robert E. Goodin (University Park: Pennsylvania State University Press, 1992), 169–80; Darrel Moellendorf, *Cosmopolitan Justice* (Boulder, CO: Westview, 2002); Hillel Steiner, "Hard Borders, Compensation, and Classical Liberalism," in *Boundaries, Autonomy and Justice: Diverse Ethical Views*, ed. David Miller and Sohail H. Hashimi (Princeton, NJ: Princeton University Press, 2001), 79–88. Also see Sec. IV.

2. There are a multitude of justifications that have been offered for immigration restrictions, including arguments from national self-determination, state sovereignty, freedom of association, cultural diversity, and social justice. For these alternative justifications for immigration restrictions, see John Isbister, "A Liberal Argument for Border Controls: Reply to Carens," *International Migration Review* 34 (2000): 629–35; David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007); John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); Christopher H. Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 109–41; and Frederick G. Whelan, "Citizenship and Freedom of Movement: An Open Admission Policy?" in *Open Borders? Closed Societies?* ed. Mark Gibney (New York: Greenwood, 1988), 3–39. Note that whether or not one finds these other justifications compelling, the question of whether immigration restrictions can be justified on brain drain grounds remains of interest, not least because it is an argument that open border advocates, given their own commitments, should find particularly troubling. This is a point I develop below.

3. Here I define 'brain drain' narrowly. The term can also be used more broadly to mean the migration of skilled workers from any state to any other state, whether rich or poor. My use of the narrower definition reflects the focus of this article.

4. Devesh Kapur and John McHale, "Should a Cosmopolitan Worry about the 'Brain Drain'?" *Ethics and International Affairs* 20 (2006): 305–20, esp. 306–7.

tory factors, such as the remittances that migrants send home, which in some cases prove sufficient to turn brain drain into a net gain for poor sending states. But there are also cases in which brain drain is profoundly deleterious. Consider the case of the Zambian health care system. For a population of almost 12 million people, Zambia has only 646 doctors and 6,096 nurses. Between 1998 and 2003, 461 Zambian nurses were recruited to the United Kingdom. Around half of the 50–60 doctors who graduate from the country's only medical school each year emigrate soon after.<sup>5</sup> Brain drain saps Zambia's power to confront its horrendous levels of malnutrition, disease, and ill health. Fully 1.1 million Zambians have AIDS/HIV. Life expectancy is just 40 years.<sup>6</sup> In cases of this sort, brain drain leaves people who are already desperately poor worse off still.<sup>7</sup>

If rich states chose to enforce immigration restrictions against skilled workers from states suffering deleterious brain drain, instead of continuing to offer many of them residency visas, rich states would remove the strongest incentive these skilled workers have to leave. Conversely, if rich states lifted the restrictions that prevent more skilled workers coming, it would almost certainly worsen the problem. Given the costs that brain drain can involve, it seems to offer a strong argument for imposing immigration restrictions in these cases.<sup>8</sup>

Brain drain is not a justification for immigration restrictions that states themselves tend to offer. Indeed, skilled workers are among the

5. Joseph J. Schatz, "Zambia's Health Worker Crisis," *Lancet* 371 (2008): 638–39, 638.

6. Joint UN Program on HIV/AIDS, *2006 Report on the Global Aids Epidemic* (New York: United Nations), 487.

7. This article will not intervene in the important empirical debate over the extent to which brain drain is deleterious. Articles that highlight the possibility of beneficial brain drain include Michael Beine, Frederic Docquier, and Hillel Rapoport, "Brain Drain and Economic Growth: Theory and Evidence," *Journal of Development Economics* 64 (2001): 275–89; and Oded Stark, "Rethinking the Brain Drain," *World Development* 32 (2004): 15–22. Others find this revisionary literature unconvincing. See Riccardo Faini, "The Brain Drain: An Unmitigated Blessing?" (Development Studies Working Paper no. 173, Centro Studi Luca d'Agliano, 2003). This article stays clear of this empirical debate to focus instead on the normative question of whether, in those cases in which brain drain is deleterious, it can justify immigration restrictions. The only assumption the article therefore makes is that there are at least some cases where brain drain does impose severe costs on sending states. The medical brain drain from Zambia and other sub-Saharan African countries seems to be such a case.

8. The idea of using immigration restrictions to address brain drain is implicit in proposals made by Kapur and McHale in "Should a Cosmopolitan Worry about the 'Brain Drain'?" Their approach is considered below. The idea is entertained, if not endorsed, by Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), 198–212; and Lea Ypi, "Justice in Migration: A Closed Borders Utopia?" *Journal of Political Philosophy* 16 (2008): 391–418. It is rejected by Carens, in "Migration and Morality," 32–34; and Fernando R. Tesón, "Brain Drain," *San Diego Law Review* 45 (2008): 899–932.

potential immigrants that states are most willing to admit. Within the context of the philosophical debate over immigration restrictions, however, the brain drain argument has almost unique force. For it draws our attention to what everyone can agree is of significant moral importance: the needs of desperately poor people. Whatever weight one may award to an individual's freedom to migrate abroad, it seems hard to deny that the needs of the desperately poor take priority. To be prevented from entering a foreign state is one thing; to die from an easily curable disease for lack of medical attention is quite another. Critics of immigration restrictions, who tend to position themselves as defenders of the poor, should thus find the brain drain argument particularly troubling. If anything can justify immigration restrictions, it seems brain drain can.

Yet, this article finds that justifying immigration restrictions on brain drain grounds is far from straightforward. While it concludes that this justification can succeed, it also demonstrates that a series of demanding conditions must first be fulfilled. Together these conditions are likely to greatly restrict the range of circumstances under which counter-brain-drain immigration restrictions can justly be imposed. Brain drain does function as the basis for a successful argument for some immigration restrictions, but it is an argument that is of little use to anyone who wishes to defend restrictions outside a small minority of cases.

Section I presents the reasoning behind the four conditions for exclusion to be justified on brain drain grounds. These are (1) that a skilled worker has a duty to assist her poor compatriots, (2) that this duty entails a duty to stay in her state of origin, (3) that a skilled worker's duty to stay and assist her poor compatriots can justly be enforced using immigration restrictions, and (4) that a rich state has the legitimacy to impose counter-brain-drain immigration restrictions. Section II argues that the first condition will often be met, since skilled workers will normally have two types of duty to assist their poor compatriots: an "obligation of repayment" and a "duty of assistance." An obligation of repayment is an obligation to repay the costs of training. A duty of assistance, by contrast, is simply a duty to make poor people better off. Section III turns to the second condition, arguing that skilled workers may have a duty to stay in their state of origin, but only if they can better provide the assistance they owe their poor compatriots by remaining in their home state and only if staying does not involve unreasonably high costs. Section IV argues that a skilled worker's duty to stay and assist her poor compatriots can only be enforced using immigration restrictions if rich states have no acceptable alternative means of countering brain drain. Section V questions whether rich states that have failed to fulfill their own duties of assistance to the global poor have the legitimacy to exclude skilled workers on brain drain grounds. Section VI concludes by laying out the full list of conditions under which exclusion can be justified on brain drain grounds.

Having spelled out the issues that this article seeks to address, it is worth noting one important question this article does not address, which is whether brain drain can justify the imposition of emigration restrictions by poor states against their own citizens. States are commonly thought to enjoy less discretion over emigration than immigration.<sup>9</sup> The right to emigrate is recognized as a human right in international law.<sup>10</sup> States that have violated the right to emigrate, such as the Soviet Union and the German Democratic Republic, have been widely condemned for doing so.<sup>11</sup> Still, as we shall see, many human rights are nonabsolute, and this seems likely to be true of the human right to emigrate. There are likely to be circumstances under which the human right to emigrate could permissibly be restricted, and brain drain may well be one of those circumstances. My hypothesis is that a poor state can justify imposing emigration restrictions on brain drain grounds as long as it fulfills a similar set of conditions as those presented in this article. I cannot defend that hypothesis here, however. This article attends to the question of what rich states should do to address brain drain. As long as poor states are unable or unwilling to prevent their skilled workers from leaving, rich states must decide how to respond. For those who are citizens of rich states, the question of how rich states should respond is of particular importance. We have the power to influence policy in our own states that we do not have in relation to other states. We need to decide whether to use our influence to promote or oppose the exclusion of skilled workers.

## I. THE FOUR CONDITIONS

In their article “Should a Cosmopolitan Worry about ‘Brain Drain’?” Devesh Kapur and John McHale set out three principles they claim should guide policy responses to brain drain: “global liberty (freedom of movement); global efficiency (maximizing the size of the global ‘pie’ of resources); and global equity (promoting equality or granting priority to improvements in the well-being of the less advantaged).”<sup>12</sup> They go on to advocate policies that, they claim, “lead to a better balancing of the three principles than the status quo.”<sup>13</sup> The policies they suggest include a less skills-focused immigration policy, temporary worker programs, and taxes on emigrants.<sup>14</sup>

9. This is not a view I share. See n. 61 below.

10. See article 13 (2) of the Universal Declaration of Human Rights (UDHR; 1948) and article 12 (4) of the International Covenant on Civil and Political Rights (ICCPR; 1966).

11. For a history of the use of emigration restrictions, see Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* (New Haven, CT: Yale University Press, 1987).

12. Kapur and McHale, “Should a Cosmopolitan Worry about ‘Brain Drain’?” 313.

13. *Ibid.*, 317.

14. *Ibid.*, 317–19.



It is notable that two of these three policy proposals implicitly involve immigration restrictions. A less skills-focused immigration policy involves excluding more skilled workers. Temporary worker programs involve restrictions on how long a skilled worker can stay. Still, these policies allow some kinds of immigration to continue (unskilled and temporary), and to that extent they leave room for “global liberty.” Kapur and McHale cannot then be faulted for failing to trade off their various principles. Nor should they be faulted for exploring various policy solutions to the brain drain problem—one of the aims of this article is to do just that.<sup>15</sup> Kapur and McHale can be faulted, however, for their underlying methodological approach. The idea that an ethical response to the brain drain problem involves simply trading off or “balancing” certain principles—whether it is the three principles Kapur and McHale refer to or, more simply, those of achieving free movement for skilled workers against securing assistance for their poor compatriots—is deeply mistaken. A full account must consider not only the results that different policies yield but also the means by which those results are obtained.<sup>16</sup>

Immigration restrictions coercively prevent people from being within a state’s territory. They may work by blocking entry (border guards, fences, etc.), forcing migrants to leave (deportation squads), or denying migrants a means to subsist within the country (bans on migrant employment). In each case the aim is the same: to leave would-be migrants with no alternative, or at least no acceptable alternative, to life outside the border.<sup>17</sup>

Imposing immigration restrictions against skilled workers on brain drain grounds involves not only coercing people in these ways, but also for a certain purpose, which is to try to get them to stay and work in their

15. See Secs. III and IV.

16. When Carens describes the brain drain argument for immigration restrictions as among “the sorts of arguments that have given utilitarianism a bad name,” I think he is referring to an argument involving a simple trade-off of freedom of movement for poverty reduction (Carens, “Migration and Morality,” 33). Carens goes on to reject counter-brain-drain restrictions except in cases in which skilled workers have an obligation to repay the costs of their training. Carens is right to reject an argument for restrictions based on a simple trade-off of freedom of movement for poverty reduction, but, as I shall show, a more sophisticated argument for excluding skilled workers (even when they have no training costs to repay) can be developed.

17. Immigration restrictions do not then include measures, such as an affordable emigrant tax, which simply make migration less rewarding. While I shall return to the emigrant tax idea in Sec. III, the question of when precisely such disincentives can and cannot be justified falls beyond the scope of this article. Also beyond the scope of this article is the question of whether and when rich states may actively recruit skilled workers overseas. The issue of active recruitment has generated concern among civil society organizations, which have, in turn, placed pressure on governments to sign voluntary codes of conduct, such as the World Health Organization, *Global Code of Practice on the International Recruitment of Health Personnel* (Geneva: World Health Organization, 2010).



home state and, thereby, assist their poor compatriots. To justify coercion of this sort, and for this purpose, one must do more than show that better results accrue; one must show that the skilled workers in question have a duty to do what they are being coerced to do.

The general rule here is that coercion should only be used against a person when that person is subject to a moral duty. This rule reflects the thought that coercion infringes on people's status as autonomous agents—people who can decide for themselves how to live their lives—and as such it requires justification. The justification that is called for is one that establishes an appropriate kind of connection between the coerced persons and the goal that is being pursued. Evidence that a person has a duty to do what they are being coerced to do establishes this connection.<sup>18</sup>

When the purpose of coercion is to get people to labor for the benefit of others, the no-coercion-without-a-moral-duty rule assumes particular importance. To coerce people to get them to labor for others, without first establishing that they have a duty to labor, is to come too close to treating them merely as a means to be acceptable.<sup>19</sup> Skilled workers are not tools; they are human beings who have their own goals and their own lives to lead. Unless they have a duty to stay and assist their poor compatriots, they should not be prevented from migrating. So while the general rule, no doubt, admits of exceptions, the present case is not one of them.

Demonstrating that skilled workers have a duty to stay and assist their poor compatriots itself involves two conditions: it must first be shown that skilled workers have a duty to assist their poor compatriots, and then it must be shown that this duty to assist entails a duty to stay.<sup>20</sup> For the first duty does not necessarily entail the second. Moreover, even if these first two conditions are fulfilled, it must further be shown that it is morally acceptable to enforce a skilled worker's duty to stay and assist her poor

18. There is an interesting analogy to be drawn between coercing people who have no duty to comply and two other (normally) wrongful activities: punishing the innocent and targeting noncombatants in war. In all three cases the victims, lacking a certain characteristic, do not seem liable to the treatment they receive. There is, no doubt, much more to be said here in support of the no-coercion-without-a-moral-duty rule, but pursuing this issue further here would take us too far off topic.

19. Contrast this with Robert Nozick's suggestion that to coerce people to labor for the benefit of others necessarily involves treating those people merely as a means (*Anarchy, State and Utopia* [New York: Basic Books, 1974], 30–33).

20. Someone may suggest that as long as states pass laws to enforce counter-brain-drain immigration restrictions, skilled workers have a duty to comply. They have a duty to comply simply because they have a duty to obey the law. On this view, no duty, independent of law, need be identified. The problem with this objection is that it is unclear why foreigners should be thought to have a duty to obey immigration law unless they have an independent duty to do so. Traditional arguments for the duty to obey the law (consent, fair play, de-

compatriots using immigration restrictions. It is not true that all moral duties can permissibly be enforced; many cannot. Finally, it must be demonstrated that the rich state that intends to enforce a skilled worker's duty to stay in her home state by imposing counter-brain-drain immigration restrictions has the legitimacy to do so.<sup>21</sup> For even if a duty can be enforced, it is not the case that anyone can enforce it.<sup>22</sup>

We have then four conditions for the imposition of immigration restrictions to be justified on brain drain grounds. Since these four conditions will form the skeleton upon which the rest of the article hangs, let me formally set them out here.

A rich state can justify imposing immigration restrictions against a skilled worker on brain drain grounds only if:

1. The skilled worker owes assistance to her poor compatriots.
2. The skilled worker has a duty to stay in her state of origin to provide the assistance she owes her poor compatriots.
3. It is permissible to enforce a skilled worker's duty to stay and assist her poor compatriots using immigration restrictions.
4. The rich state has the legitimacy to impose counter-brain-drain immigration restrictions.

Having set out these four conditions, the rest of the article will be dedicated to the task of investigating what would make these conditions true. In other words, our aim is to discover the subconditions that attach to these four main conditions. The final result will be a full list of the conditions that must be satisfied if immigration restrictions are to be justified on brain drain grounds.

## II. A DUTY TO ASSIST

It seems plausible that most skilled workers will owe some measure of assistance to their poor compatriots. In fact, there are two different sorts

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mocracy, etc.) run into significant problems even in the case of citizens, the case for which they are tailored. These arguments are even more unlikely to succeed in binding foreigners, since foreigners ordinarily lack the sorts of ties (membership, receipt of benefits, enfranchisement) upon which these arguments rely.

21. Sometimes "A has the legitimacy to do X" is used to mean nothing more than "A is justified in doing X." This is not what "legitimacy" means here. Here, the concept is invoked to ensure that, in answering a question about justification, we do not focus solely on the act but also upon the agent that would perform the act. Here, the question "Does A have the legitimacy to do X?" means something like "Given relevant facts about A, does A qualify as an agent with the standing to do X?"

22. I present the arguments for each of these last two conditions in Secs. IV and V.

of moral requirements they may owe: an “obligation of repayment” and a “duty of assistance.”

An obligation of repayment is owed by skilled workers who have acquired skills, during their adult life, at the poor state’s expense.<sup>23</sup> It obliges them to repay the costs of their training either with money or with their labor. This obligation may have been formalized within a contract that a skilled worker signed before starting her training. But even if no such contract was signed, I think a skilled worker would be under an obligation of repayment, assuming that (i) she consented to receive the training, (ii) she knew the training was provided to her in the expectation that she would go on to benefit her poor compatriots, and (iii) her state can ill afford to provide such training for free. If one consumes the resources of the poor in the knowledge that they expect reciprocation, one has a duty to reciprocate in the manner they desire or at least repay them the costs of the resources consumed.

An obligation of repayment is essentially an obligation skilled workers have not to make their compatriots worse off than they would have been had the skilled workers never been trained. The training of skilled workers should not be a net loss for their compatriots. Not all skilled workers will owe an obligation of repayment. Many will have fulfilled their obligation after years of productive work. Others will have paid for their own training and thus have no debts to repay.

A duty of assistance, by contrast, is simply a duty that skilled workers have to make their poor compatriots better off. It arises independently of any prior action or commitment the skilled workers made. Even if some have fulfilled their obligation of repayment by paying off the costs of their training or have avoided incurring this obligation in the first place by funding their own training, this duty of assistance would still require them to assist their poor compatriots. In this way, the duty of assistance binds even those who have no obligation of repayment.

How much must skilled workers do to fulfill their duty of assistance to their poor compatriots? One answer to this question is that they must do their “fair share,” that is, their share of the overall assistance burden once it has been fairly divided among all those that are obligated to assist.<sup>24</sup> This answer raises two further questions: (i) What is the overall assistance burden? (ii) What is a skilled worker’s fair share of this burden?

23. As the qualification suggests, I do not think skilled workers have an obligation to repay the costs of the basic education they received during childhood. Here I follow Carens, who argues: “Everyone is entitled to basic education, and children cannot enter into binding contracts. Whatever investments a society makes in its young, it cannot rightly require direct payment” (Carens, “Migration and Morality,” 33).

24. This is the approach taken by Liam B. Murphy in *Moral Demands in Nonideal Theory* (Oxford: Oxford University Press, 2000).

The overall assistance burden is the amount of money and other resources required to bring the skilled worker's poor compatriots up to the level of welfare they are entitled to enjoy. Different theories of global justice offer different accounts of what level of welfare the global poor are entitled to enjoy, but one plausible view is that all humans have a right to enough food, shelter, health care, and other basic necessities they require to lead a minimally decent life.<sup>25</sup>

How large a skilled worker's fair share of the overall assistance burden is will depend on whether she has a "special duty" to assist her poor compatriots, as a compatriot, beyond her "general duty" to do so.<sup>26</sup> A general duty of assistance is a duty to help someone in need that falls on anyone with the money or skills to help, foreigner and compatriot alike. I assume that people are bound by general duties to help the global poor. Were skilled workers only subject to this general duty, they would not be required to make any greater sacrifice for their compatriots than anyone else who is equally able to assist, whether that be foreign skilled workers or foreigners with money to spend. Indeed, since many people in rich states are better off than most skilled workers in poor states, the latter may actually be required to contribute less than the former, at least as far as monetary contribution is concerned.<sup>27</sup>

In addition to a general duty to provide assistance to their poor compatriots, skilled workers may also have a "special duty" to do so, based on ties of citizenship or nationality. If skilled workers do owe special duties to their poor compatriots, then we can demand a greater level of sacrifice from them than from foreigners. But the idea of special duties to compatriots is controversial. Those who defend it claim that our relationship to our compatriots is one that we have reason to value. They regard compatriots as people who form a community, not just people who happen to live in the same territory.<sup>28</sup> The analogy sometimes drawn is with special duties to friends and family. Typically the relationships we have with our friends and family are relationships we have reason to value, and this seems to explain why we also have reason to show them special

25. Miller, *National Responsibility and Global Justice*, 163–200; Rawls, *The Law of Peoples*, 105–200.

26. For the distinction between general and special duties, see Robert E. Goodin, "What Is So Special about Our Fellow Countrymen?" *Ethics* 98 (1988): 663–86.

27. I am assuming that the general duty to provide assistance to the global poor demands that each make an equal level of sacrifice, rather than contribution. Since some are better off than others, an equal level of sacrifice will demand an unequal level of contribution.

28. Andrew Mason, "Special Obligations to Compatriots," *Ethics* 107 (1997): 427–47; David Miller, "Reasonable Partiality towards Compatriots," *Ethical Theory and Moral Practice* 8 (2005): 63–81.

concern.<sup>29</sup> Opponents of the idea of special duties to compatriots question whether it is compatible with the idea of human equality.<sup>30</sup> If all humans are equal, why should we show greater concern for our compatriots than for foreigners? These opponents may accept that we have special duties to friends and family, but they would dispute an analogy between these intimate relationships and the relationship that ties compatriots.<sup>31</sup>

Now, it might be thought that the debate regarding special duties is crucial to the question of whether immigration restrictions can be justified on brain drain grounds. For it might be supposed that only special duties are strong enough to ground a duty upon skilled workers to stay in their home state.<sup>32</sup> While the question of whether skilled workers have a duty to stay forms the subject of the next section, I wish to deal with this precise issue here in order to show why, on the contrary, general duties to assist have the potential to ground a duty to stay.

The reason why some might think general duties are too weak to ground a duty to stay is because general duties do not require native skilled workers to make any greater sacrifice for their poor compatriots than skilled workers from other countries who are equally able to assist, and yet it is rarely argued that skilled workers from other countries have a duty to move to poor countries to assist people there. Why should it be left to native skilled workers to reside in their country if they owe no more to their poor compatriots than anyone else?

It is certainly true that the idea of special duties to compatriots and the brain drain argument for immigration restrictions form natural companions. Demands that skilled workers make significant sacrifices for their poor compatriots find easy expression in the language of patriotism. However, it is not true that general duties are incapable of grounding a duty to stay. There are three important points to be made here. First, I am assuming that general duties require equal levels of sacrifice from people who are equally able to assist. But people who are better able to assist may be required to make further sacrifices. Many skilled workers from poor states are likely to have relevant skills and experience that make them better able to assist their poor compatriots than foreign skilled workers.

29. Samuel Scheffler, *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (Oxford: Oxford University Press, 2001), 97–110.

30. Paul Gombert, "Patriotism Is Like Racism," *Ethics* 101 (1990): 144–50.

31. Harry Brighouse and Adam Swift, "Legitimate Partiality, Parents and Patriots," in *Arguing about Justice: Essays for Philippe Van Parijs*, ed. Axel Gosseries and Yannick Vanderborght (Louvain: Presses Universitaires de Louvain, 2011), 115–23, esp. 118–19; Christopher Heath Wellman, "Friends, Compatriots, and Special Political Obligations," *Political Theory* 29 (2001): 217–36, esp. 221–24.

32. Anne Raustøl, "Should I Stay or Go? Brain Drain and Moral Duties," in *The International Migration of Health Workers: Ethics, Rights and Justice*, ed. Rebecca S. Shah (Basingstoke: Palgrave Macmillan, 2010), 175–88, esp. 178–79.

For this reason, a native skilled worker may have a duty to reside in her own country that a foreign skilled worker does not share. Second, it is likely to be less costly for a native skilled worker to stay in her home country than it is for a foreigner skilled worker to move there. People tend to have strong social attachments binding them to their home state. If a foreigner moves to a poor country, she must abandon these attachments, but this is not true of the native who stays. This second point, like the first, shows that general duties alone can provide some support for the common view that a duty to reside in a poor country falls on those who live there.

Third, however, the common view that only natives can be obligated to reside in a poor country is open to question. Global poverty is a grave evil which demands a determined response. The idea that some people, particularly comparatively privileged people from rich states, have a duty to go and do essential work in poor states, at least for a time, does not seem so strange. There are in fact thousands who make such journeys each year with organizations such as Voluntary Service Overseas, and many of these volunteers no doubt feel driven by a sense of duty. Interestingly, if even some foreign skilled workers have a duty to move to poor states, then we seem required to reconceptualize the problem. We must think not just about getting “them” to stay but also about getting “us” to go. Indeed, the problem would cease to be best described as one of ‘brain drain’ but rather one of ‘brain shortage’, signifying a lack of skilled labor, whether native or foreign.

I shall not pursue these matters further. The important point to note here is simply that, contrary to initial impressions, general duties to assist can ground duties to stay, and thus one need not believe that people owe special duties to their compatriots to make a brain drain argument for immigration restrictions. Since this is so, and since the question of whether special duties exist is a controversial one, I shall leave the issue aside. I shall assume only that everyone who is able to assist the global poor has a duty to do something and leave it open as to whether their compatriots must make any greater sacrifice than foreigners.

I have explored, if briefly, the question of what a skilled worker’s fair share of the overall assistance burden may be. We should note, however, that whatever the correct answer is to that question, there is a further question that needs to be asked, namely, does this fair share represent the extent of the skilled worker’s duty of assistance? What if other people fail to do their fair share? This is hardly a hypothetical possibility. Whatever the truth regarding the extent of people’s duties to the global poor, I think it is safe to say that most people are currently not doing enough. Suppose a skilled worker has done her fair share but others have not: can the skilled worker allow her poor compatriots to suffer as a result, or must she take up the slack? Again we are in controversial territory, but I will work with the assumption that skilled workers can have what may be called a

“secondary duty” of assistance, to fill in for noncompliant others, even after they have fulfilled their “primary duty,” that is, their fair share.<sup>33</sup>

Whatever one’s position regarding general/special duties and primary/secondary duties, one need not think the duty of assistance is limitless. The idea that people have an “agent-centered prerogative” allowing them to do less than is required to produce what might otherwise be thought the best result is one that receives wide support.<sup>34</sup> I shall assume that, under certain circumstances, skilled workers will be able to assert an agent-centered prerogative in the face of demands that they provide further assistance to their poor compatriots. Some proposed duties can be rejected as simply too demanding.

To conclude this section, let us formally set out the first two subconditions for justifying the use of immigration restrictions on brain drain grounds. Immigration restrictions can only be justified if a skilled worker owes assistance to her poor compatriots. She owes assistance if:

- 1.i. She relied on state funds to pay for her training and has not fulfilled her obligation of repayment *and/or*
- 1.ii. She has not fulfilled her duty of assistance.

### III. THE DUTY TO STAY

Do a skilled worker’s duties and obligations to assist her poor compatriots entail a further duty to stay in her state of origin? A skilled worker would only have a duty to stay if two subconditions are satisfied. The first is

- 2.i. The skilled worker cannot provide the assistance she owes from abroad.

A skilled worker might be able to provide the assistance she owes from abroad were the right institutions in place. To allow a skilled worker to fulfill an obligation of repayment, a system of forgivable loans could be instituted under which workers are given the choice to either labor in their home state or repay their debts in cash payments from abroad. To allow skilled workers to fulfill their duties of assistance, poor states could

33. Support for the idea of secondary duties of assistance can be found in Goodin, “What Is So Special?” 686 n. 61; and Peter Unger, *Living High and Letting Die: Our Illusion of Innocence* (Oxford: Oxford University Press, 1996), 39–40. Liam Murphy argues against it in Murphy, *Moral Demands*.

34. See G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), 61–62; Thomas Nagel, *Equality and Partiality* (New York: Oxford University Press, 1991), 169–80; Samuel Scheffler, *The Rejection of Consequentialism: A Philosophical Investigation of the Considerations Underlying Rival Moral Conceptions* (Oxford: Clarendon, 1982).



learn from the American example and tax their emigrants.<sup>35</sup> If poor states have problems collecting an emigrant tax, as many will, then there is the possibility that rich states that host their emigrants could collect it for them. The revenue from such taxation could potentially be so large that the skilled workers benefit their poor compatriots more from abroad than they would do by staying home. The revenues raised could be used for a variety of purposes, but one obvious use would be to meet the costs of replacement workers.<sup>36</sup>

One thing that is to be said in favor of these proposals is that they seek to address the brain drain problem by alternative means to immigration restrictions, yet they do not remove from skilled workers the burden of fulfilling their duties to their poor compatriots. In this way, these proposals differ from those that place additional burdens elsewhere: proposals that I shall return to in the next section. Nevertheless, it is by no means certain that skilled workers will be able to provide the necessary assistance from abroad. Take the emigrant tax proposal: it may fail for two reasons. First, a skilled worker, such as a doctor or a teacher, who provides an essential service, can only compensate for her absence by paying an emigrant tax if there are other workers back home to replace her. The tax revenues from emigrants could go to make salaries at home more attractive, but in some states conditions will be so bad that higher salaries will not be enough to prevent skilled workers from leaving. Second, there may be problems in collecting or spending the emigrant tax revenue. For instance, a poor state may find it impossible to collect this revenue, and rich states may refuse to collect it for them, or a poor state may suffer from an incompetent or corrupt government that cannot be trusted to distribute the revenues effectively.

We have reason to think, then, that some skilled workers will find it impossible to provide the requisite assistance from abroad. But even so this does not necessarily mean they have a duty to stay. To demand that someone stay when she wants to move is to demand that she accepts a significant additional burden. In some circumstances this burden will be so great so as to make it impossible to say skilled workers have a duty to

35. For analysis of the American example, see Mihir A. Desai, Devesh Kapur, and John McHale, "Sharing the Spoils: Taxing International Human Capital Flows," *International Tax and Public Finance* 11 (2004): 663–93, esp. 678–82.

36. For discussion of emigrant taxes, see Jagdish N. Bhagwati and Martin Partington, *Taxing the Brain Drain: A Proposal* (Amsterdam: North Holland, 1976); and Desai, Kapur, and McHale, "Sharing the Spoils," 190–95. An emigrant tax might need to be accompanied by a tax on expatriation to prevent skilled workers from simply changing their citizenship to avoid taxation. Would an expatriation tax be morally wrong? Only if one thought that the duties skilled workers owe their poor compatriots are based (a) only on special duties that (b) expire at the moment a skilled worker chooses to switch their citizenship. Cosmopolitans (among others) are likely to reject (a), nationalists to reject (b).

stay even if it is the only way they can provide the assistance they owe and even if leaving will necessarily make their poor compatriots worse off. As noted above, everyone has an agent-centered prerogative allowing them to resist duties that are too burdensome. Thus, we may say that a skilled worker only has a duty to stay if

- 2.ii. She will not face an unreasonably high cost in staying.

But when are the costs of staying unreasonably high? Let me suggest four plausible examples of skilled workers threatened by unreasonably high costs: (1) those separated from their immediate family, (2) those living in fear of persecution, civil conflict, or widespread violence, (3) those living in severe poverty, and (4) those working in dangerous conditions. In each of these cases, skilled workers risk losing goods of fundamental value. In the first case, it is the relationships that, for most of us, are our primary source of love and happiness. In the second, third, and fourth cases, it is security, health, and subsistence. It is unreasonable to expect anyone to sacrifice these goods in order to do work that benefits her compatriots.

Unfortunately, many skilled workers fall into one or more of these groups. One study lists “poor remuneration, bad working conditions, an oppressive political climate, persecution of intellectuals, and discrimination” as primary causes of medical brain drain.<sup>37</sup> In some countries, wages for skilled work are insufficient to cover basic needs. The monthly wage of a nurse in Zambia is a mere \$299; this is less than the \$350 a family needs for food.<sup>38</sup> In a study of Zimbabwean health professionals, 68.5 percent said they found it difficult to live on their earnings.<sup>39</sup> Across the developing world, health professionals are routinely forced to take on additional work just to get by.<sup>40</sup> The work that skilled workers are required to perform, moreover, is often stressful, unregulated, and unsafe. A combination of low staff to patient ratios, high rates of disease, and inadequate equipment place health professionals under significant mental and physi-

37. Tikki Pang, Mary Ann Lansang, and Andy Haines, “Brain Drain and Health Professionals,” *British Medical Journal* 324 (2002): 499–500, 499.

38. David Lusalle, “Why Do Zambian Health Workers Migrate Abroad? The Brain Drain of Zambian Health Workers,” *Bulletin of Medicus Mundi Switzerland* 104 (2007): 19–21, 20.

39. Abel Chikanda, “Skilled Health Professionals’ Migration and Its Impact on Health Delivery in Zimbabwe,” *Journal of Ethnic and Migration Studies* 32 (2006): 667–80, 674. Note that these examples of skilled workers living in severe hardship come from exactly the same sector and region that seems to offer the clearest example of deleterious brain drain: medical brain drain from sub-Saharan Africa.

40. John Connell, *Migration and Globalisation of Health Care: The Health Worker Exodus?* (Cheltenham: Elgar, 2010), 100.

cal strain.<sup>41</sup> In sub-Saharan Africa, the stress of work is compounded by the fear of contracting HIV-AIDS from patients. There is a shortage of clinical gloves and high incidents of needle-stick accidents during vaccinations.<sup>42</sup> In many countries safety regulations are either ill-enforced or nonexistent.<sup>43</sup> War and civil conflict have also been important factors in prompting skilled workers to leave. Iraq lost up to 8,000 of its 17,000 doctors after the 2003 invasion.<sup>44</sup> Liberia had 400 doctors prior to war in 1989, but only twenty by the time the war ended in 2003.<sup>45</sup>

These statistics suggest that many skilled workers have strong reasons to leave, such strong reasons, in fact, that it would be unreasonable to expect them to stay. This second subcondition thus significantly restricts the scope of justified counter-brain-drain immigration restrictions. If a skilled worker does not have a duty to stay, she should not be prevented from leaving.

However, skilled workers who enjoy an adequate degree of safety and prosperity inside their country of origin and who could not provide the assistance they owe from elsewhere will have a duty to stay. The next question to be asked, then, is whether any such duty could justly be enforced using immigration restrictions.

#### IV. ENFORCEMENT

For immigration restrictions to be permissibly used for the sake of enforcing a skilled worker's duty to stay, it must be the case that

- 3.i. There is no acceptable alternative means of ensuring that the poor compatriots receive the assistance they are owed.

One acceptable alternative has already been mentioned: rich states could collect emigrant taxes on the skilled workers they host. Even when that policy is not available, however, another might be: rich states might be able to provide the required assistance to compensate for the effects of deleterious brain drain out of their own revenue. Rich states could use their revenue to fund a salary increase for skilled workers in poor states to

41. Ibid., 107–9.

42. Debbie Palmer, "Tackling Malawi's Human Resources Crisis," *Reproductive Health Matters* 14 (2006): 27–39, 31.

43. International Council of Nurses, *Position Statement: Occupational Health and Safety for Nurses* (Geneva: ICN, 2006), 3.

44. Gilbert M. Burnham, Riyadh Lafta, and Shannon Doocy, "Doctors Leaving 12 Tertiary Hospitals in Iraq, 2004–2007," *Social Science and Medicine* 69 (2009): 172–77, 172.

45. Ministry of Planning and Economic Affairs, *National Human Development Report, 2006* (Monrovia: Government of Liberia, 2006), 45.

encourage them to stay voluntarily or to pay for the training of replacement workers.

Now, since rich states owe general duties of assistance to the global poor, it might be that any assistance required to counter brain drain merely forms part of what rich states already owe. But suppose a rich state has already fulfilled its initial duty of assistance. Would it have to seek to provide extra assistance to counter brain drain before it could impose immigration restrictions against skilled workers? The claim that it would amounts to a demand that rich states take on extra burdens to make up for a failure by skilled workers to fulfill their duties to their poor compatriots. This may seem unfair. Why should a rich state have to take up slack left behind by skilled workers if it could instead use immigration restrictions to enforce the duties skilled workers owe?

I accept that it is unfair if rich states have to provide extra assistance to make up for a failure by skilled workers to fulfill their duties to their poor compatriots. Nevertheless rich states must seek to provide this extra assistance before they can justify imposing counter-brain-drain immigration restrictions. I add this condition because I am convinced by the argument that the freedom to cross borders is a basic liberty much like domestic freedom of movement, association, or religion. Since the freedom to cross borders is a basic liberty, the freedom should only be restricted for the sake of ensuring that desperately poor people receive the assistance they are owed, not for the sake of avoiding unfairness to rich states.<sup>46</sup>

This argument requires some unpacking, so let me explain, first, why the freedom to cross borders should be considered a basic liberty and then, second, why this point implies that rich states cannot impose immigration restrictions unless they first seek to provide extra assistance themselves. The idea that the freedom to cross borders is a basic liberty follows from a proper understanding of the basic liberties that are already well recognized: freedom of movement, association, expression, religion, and occupational choice.<sup>47</sup> These freedoms are listed as human rights in a number of international human rights documents, including the Universal Declaration of Human Rights (UDHR) and the Interna-

46. For related arguments, see Phillip Cole, "Towards a Symmetrical World: Migration and International Law," *Ethics and Economics* 4 (2006): 1–7; and Judith Bueno de Mesquita and Matt Gordon, *The International Migration of Health Workers: A Human Rights Analysis* (London: Medact, 2005).

47. The argument I make here will be necessarily brief. I have, however, made the argument at length elsewhere. See Kieran Oberman, "Immigration as a Human Right" (unpublished manuscript, 2012; available at SSRN: <http://ssrn.com/abstract=2164939>), and "Immigration and Freedom of Movement" (DPhil diss., University of Oxford, 2009). For related literature, see n. 1.

tional Covenant on Civil and Political Rights (ICCPR).<sup>48</sup> Within the borders of states, people are entitled to choose where they go, who they see, what they read, which (if any) religion they practice, and what work they do.

There are two important points to be made concerning these (already recognized) basic liberties. First, their scope is extensive. People are entitled to more than just a degree of choice; they are entitled to something like the most extensive range of choice that is compatible with the rights and liberties of others. To see this, note that governments can violate basic liberties by banning just one option within a wide range. A ban on Judaism (say) would violate freedom of religion even if all other religions were to go unrepressed. Likewise, a ban on an individual association (the Sierra Club, the Philosophical Society, etc.) would violate freedom of association, and a ban on an individual work of literature (*Ulysses*, *The Satanic Verses*, etc.) freedom of expression, even if all other associations and works of literature remained available.<sup>49</sup>

Further evidence of the extensive nature of basic liberties lies in the fact that they are thought to entitle people to access options available in foreign states once those states have permitted the person's entry. The human right to freedom of movement, for instance, is one that "everyone lawfully within a State enjoys," whether citizen or foreigner.<sup>50</sup> If a UK citizen passes US immigration in San Francisco, then the human right to freedom of movement, conventionally defined, entitles her to travel to Los Angeles or Seattle or anywhere else in the United States that she wishes to go. The same is true of the other basic liberties. While she is lawfully within US territory, she is entitled to associate, worship, and express herself as she pleases. The United States must guarantee these basic liberties "to aliens and citizens, alike."<sup>51</sup>

Second, however, basic liberties are neither unbounded nor absolute. Each person's basic liberties are bounded by the rights and liberties of others. One person's basic liberty to free association is bounded by the rights of others to refuse association. No one can force others to asso-

48. See articles 13 (1), 18, 19, 20, and 23 (1) of the UDHR and articles 12 (1), 22 (1), 18, and 19 (2) of the ICCPR.

49. Compare this to Miller's claim that basic liberties entitle people to no more than an "adequate" range of options: "a reasonable choice of occupation, religion, cultural activities, marriage partners and so forth" (Miller, *National Responsibility*, 207). The above-mentioned examples indicate how radically out of step Miller's view is with the conventional conception of basic liberties. Of course, it is theoretically possible that convention has got it wrong here; that, in fact, restrictions upon particular religions, associations, or books are compatible with respect for basic liberties. For reasons I present elsewhere, I think we should stand by the conventional view. See Oberman, "Immigration as a Human Right."

50. Human Rights Committee, General Comment No. 27: Freedom of Movement (Article 12), para. 1.

51. Human Rights Committee, General Comment No. 15: The Position of Aliens under the Covenant.

ciate with her; to do so is harassment, not free association. Similarly, basic liberties to free expression and movement are bounded by property rights that prevent people from reading other people's books or walking on other people's land without the owner's consent. Basic liberties demand that when people make themselves and their property available to others, the state does not interfere, but people can refuse to make themselves or their property available, and those refusals must be respected.<sup>52</sup>

States, too, can restrict basic liberties, but only when necessary to prevent grave costs. Thus, for instance, a state might legitimately choose to ban a political protest if it would result in a serious threat to social order, but it cannot do so to prevent some more minor cost, such as offense felt by the protester's opponents or temporary disruption of traffic. The thought here is that basic liberties are important but nonabsolute, "resistant to trade-offs but not too resistant."<sup>53</sup> This is how they are understood in international human rights documents, such as the UDHR and the ICCPR, that include a list of reasons that justify curtailment.<sup>54</sup>

This conception of basic liberties, as extensive but also bounded and nonabsolute, is a conventional one. Nevertheless, it is a conception that has radical implications for immigration policy, since the idea of a basic liberty to cross international borders is one that follows directly from it. If basic liberties entitle us to an extensive range of choice, then we are entitled to access jobs, civic associations, religious institutions, friends, family, romantic partners, opportunities to study, and opportunities for

52. Miller identifies the latter point but misses the former when he claims that private property falls outside of the ambit of a right to free movement (Miller, *National Responsibility*, 206). As long as we have permission to enter an area of private property, such as our home, school, church, or office, our right to free movement entitles us to do so. Were things otherwise, it is doubtful that the right to free movement could even protect our ability to access an "adequate" range of options, as so many options are situated on private land. It is true that private property makes the exercise of free movement conditional upon the consent of property owners, but, as indicated, conditionality of this sort is a feature of most basic liberties, reflecting, not the unimportance of options that lie beyond an "adequate" range but the importance attached to property rights and individual consent. A conditional right is a genuine right, no less real or important for being conditional; this is a point that Miller himself ably makes elsewhere (*ibid.*, 209).

53. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 37. I shall leave aside the question of what precisely makes a cost grave enough to justify the restriction of a basic liberty, although at least two factors seem relevant: (i) the extent of the cost that individuals experience and (ii) the number of individuals that experience the cost. For more on the issue of when basic liberties and, relatedly, human rights can be justifiably restricted, see Griffin, *On Human Rights*, 57–82; Rawls, *A Theory of Justice*, 474–80; and Jeremy Waldron, "Rights in Conflict," *Ethics* 99 (1989): 503–19.

54. See article 29 (2) of the UDHR and articles 12 (3), 18 (3), 19 (3), and 22 (2) of the ICCPR. The UN Human Rights Committee has provided further guidance on justified curtailment of free movement and free emigration in its General Comment No. 27.

expression (protests, public meetings, conferences, etc.) available in other states. States cannot justify denying us these options on the basis that we already have a degree of choice in our home state. Such a justification does not work to justify immigration restrictions any more than it works to justify domestic restrictions against individual religions, associations, or works of literature. Indeed, as we have seen, the idea that people are entitled to access options available in other states is already partially recognized in international law. Once admitted to a state, foreigners are entitled to move, associate, worship, and so forth, freely within it. Yet, if basic liberties are so extensive that they entitle people to access options in other states upon admission, then they are also sufficiently extensive to entitle people to access options in other states before admission. The recognition of a basic liberty to cross international borders completes the incomplete recognition that current human rights law gives to the value of accessing options abroad.

But what about the bounds upon basic liberties set by individual rights and liberties? Could these not justify immigration restrictions? No. If some citizens do not wish to associate with foreigners, marry foreigners, listen to what they have to say, or admit them to their property, then they can do so by refusing to make themselves or their property so available. What they cannot do is dictate the use of public space or deny to other citizens the freedom to make these choices for themselves. (Note that even in the most xenophobic of states, some citizens wish to associate with foreigners.) Immigration restrictions overreach individual rights of refusal, turning the preferences of some into the law for all.<sup>55</sup> As such, they violate not only the basic liberties of foreigners but those of citizens as well.<sup>56</sup>

The only possible justification for immigration restrictions, then, seems to be one that refers to the threat of some grave cost, whether that cost would be borne by host state citizens, the citizens of the sending state, or the migrants themselves. That justification is one that is consistent with the idea of awarding the freedom to migrate the status of a nonabsolute

55. Christopher Wellman has suggested that we regard states as large-scale analogs of those domestic associations, such as marriages, churches, and clubs, which have the power to choose their membership. But while there are good reasons, to do with intimacy and conscience, for some domestic associations to enjoy this power, these reasons do not extend to states. If there is any kind of domestic association that best resembles states, it is regional areas such as federal states, provinces, and cantons, and yet crucially these do not have the power to exclude outsiders. For the argument that freedom of association can ground a right to exclude, see Wellman, "Immigration and Freedom of Association," 109–41. For persuasive arguments against, see Sarah Fine, "Freedom of Association Is Not the Answer," *Ethics* 120 (2010): 338–56; and Miller, *National Responsibility*, 210.

56. Steiner, "Hard Borders," 79–80.



basic liberty. But if the freedom to migrate is a nonabsolute basic liberty, what implication does this have for the argument for restricting immigration on brain drain grounds? On the one hand, it does not mean the argument should be rejected altogether. If people in poor states are left without the assistance to which they are entitled, their needs are left unfulfilled and their very survival is put at risk. This is precisely the sort of cost that is grave enough to justify the restriction of a basic liberty.<sup>57</sup> When a rich state cannot use its own resources to compensate for the effects of deleterious brain drain, then the rich state may indeed be justified in imposing immigration restrictions. On the other hand, if migration is a basic liberty, then immigration restrictions cannot be imposed to avoid a less than severe cost, and the imposition of distributive unfairness upon rich states fits this latter category. Once people's basic needs have been fulfilled, basic liberties should not be restricted for further gains in the fair allocation of economic resources.<sup>58</sup> This, then, is why I contend that rich states must seek to provide extra assistance to compensate for the effects of deleterious brain drain before they consider enforcing immigration restrictions against skilled workers. This is true even though skilled workers may have a duty to stay in their home state in order to provide their fair share of assistance.<sup>59</sup> A skilled worker may have a duty to stay, but, since she has a basic liberty to migrate, she also has a right to violate her duty.<sup>60</sup>

Note that this position is in fact no different from what many already believe about the importance of the freedom to migrate when set against distributive fairness. Consider here the example of British doctors who, attracted by higher salaries in the United States, emigrate or threaten to emigrate from the United Kingdom. As a result of their actions, the British National Health Service has to spend money on retaining those who threaten to leave by paying them higher wages and/or replacing those that act on this threat. Since doctors are well off in any case, it seems unfair that they should impose these additional costs by pursuing their own self-interest, and British doctors may well have a duty to stay in Britain rather than emigrate or threaten to emigrate to the United States. Yet, despite the unfairness, it would be wrong for the United Kingdom to prevent doctors from emigrating to the United States or, for that matter,

57. In other words, global poverty can be thought of as an emergency situation, much like a breakdown in social order or the spread of an epidemic. On this, see Elizabeth Ashford, "Utilitarianism, Integrity, and Partiality," *Journal of Philosophy* 97 (2000): 421–39.

58. Rawls, *A Theory of Justice*, 476.

59. My approach here follows Cohen, *Rescuing Justice*, 182–95.

60. See David Enoch, "A Right to Violate One's Duty," *Law and Philosophy* 21 (2002): 355–84; and Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92 (1981): 21–39.

for the United States to prevent the doctors from immigrating.<sup>61</sup> Raising additional tax revenues to address the problem may involve an unfairness, but it remains an acceptable alternative to restricting a British doctor's freedom to migrate.<sup>62</sup>

The case of British doctors is relevantly analogous to the case of skilled workers from poor states. In both cases, the detrimental consequences of granting the freedom to migrate can be avoided if those in a position to provide extra assistance are willing to do so. The British taxpayer in the British doctor case and rich states in the case of skilled workers must pay more. And in both cases, while such a solution represents an unfairness to those who must provide this extra assistance, it is nevertheless required, since the two alternative solutions, of curtailing the workers' freedom to migrate or denying their compatriots the provision of some basic good, are unacceptable.

But what about situations where, for whatever reason, rich states have no acceptable alternative means of ensuring that the migrant skilled workers' poor compatriots receive the assistance they are entitled to? In such cases, we face a simple dilemma between the first two options: the freedom to migrate for skilled workers or assistance for their poor compatriots. Given such a dilemma and given the moral evil that poverty constitutes, the use of immigration restrictions can be justified on brain drain grounds. However, it is not necessarily the case that rich states have the legitimacy to impose these otherwise just immigration restrictions. That is a point to which I now turn.

## V. LEGITIMACY

Rich states owe duties of assistance toward the global poor, which many believe they are failing to fulfill.<sup>63</sup> The question then arises whether rich states have the right to impose counter-brain-drain immigration restrictions if they fail to fulfill their own duties of assistance to the global poor.

There is no simple answer to this question. A general principle, that only states which are fully just can legitimately enforce justice, would be implausibly strong. Since all states, like the individuals who live within them, are morally imperfect, a rule of this sort would set the bar of legitimacy too high. We would be forced to wait, as crimes go undeterred and taxes go uncollected, for a perfectly just state to emerge. We might be left waiting forever.

61. Some argue that there is a moral asymmetry between emigration and immigration that makes restrictions on the latter much easier to justify than on the former. For why this view is mistaken, see Cole, *Philosophies of Exclusion*, 43–59.

62. For a closely related discussion, see Cohen, *Rescuing Justice*, 199–200.

63. This would seem to include former UK Prime Minister Gordon Brown. See "Brown Admits Failures in Fight against World Poverty," *Guardian*, January 11, 2005.

Yet the extreme contrary view, that there is no connection whatsoever between an agent's right to enforce moral duties and her own moral performance, also seems mistaken. In domestic cases we do recognize a connection between the two when we set high standards for police officers, judges, and other law enforcers for abiding by the law and other official rules. There is a social expectation that law enforcers who break the law should be considered candidates for dismissal, and that expectation extends even to cases in which the law enforcer's law breaking is done off-duty and does not affect her work of enforcing the law upon others. Why should this be so? There are at least two reasons.

First, there is a concern with perception: the thought that justice should not only be done but be seen to be done. The perception of those against whom the law is enforced is particularly important. Since voluntary compliance is much preferable to coercive enforcement, people should be encouraged to perceive and accept the moral principles underlying the law. Yet people are unlikely to perceive or accept the moral principles underlying a law if they also observe law enforcers breaking the law. When the law is enforced by law breakers, the impression rendered is that the law is morally void. Second, there is a certain kind of disrespect shown when a law enforcer forces others to abide by law that she herself breaks. She effectively establishes a double standard, treating others differently from herself. They must obey her, but she can act as she pleases. A law enforcer who treats others as her equals makes no exceptions in her own case. She is prepared to stand with others, bearing with them the burdens that she forces upon them. While she maintains the power to coerce, she remains an equal under the law.

Both of these considerations I think arise in the brain drain case. Skilled workers seem unlikely to perceive counter-brain-drain immigration restrictions as the just enforcement of moral duties they already hold if the states enforcing the restrictions have failed to fulfill their own moral duties toward the global poor. Likewise, when rich states fail to fulfill their own duties toward the global poor, but nevertheless enforce the duties of skilled workers, they exhibit toward the skilled workers a form of disrespect: they are forcing others to act in a way that they are not prepared to act themselves.<sup>64</sup>

One difference, however, between the case of domestic law enforcement and the brain drain case is that while there are other candidates to

64. Let me offer a third example of a case in which an agent seems to lose the legitimacy to enforce justice because of the agent's own failures to fulfill the requirements of justice. It seems impermissible for a rich person who has herself failed to fulfill her own duty of assistance to the global poor to steal from other rich people to give their money to the poor. Whether or not redistributive theft is ever permissible, it is impermissible in this case precisely because of the rich person's refusal to abide by the redistributive principles that

replace law-breaking police and judges, there are, realistically, no other candidates to enforce immigration restrictions besides existing states. If counter-brain-drain immigration restrictions are to be enforced, we must rely on existing states to do the enforcement. While in the domestic case we are not, ordinarily, forced to choose between permitting the unjust to enforce justice and going without enforcement altogether, in the brain drain case we are. Surely when this is our choice, when the existing states are, so to speak, the only sheriffs in town, they retain the legitimacy to enforce counter-brain-drain immigration restrictions no matter how poorly they fulfill their own moral duties?

There is certainly something to this argument. Perhaps in most ordinary cases rich states will retain the right to enforce restrictions despite their own failures. But there seems to me to be at least some cases in which this is not true. There are at least some cases in which the failure of a rich state to fulfill its own duties robs it of the legitimacy to enforce restrictions, even though this means that no restrictions will be enforced. Consider, first, a case in which skilled workers only have a secondary duty to stay and assist their poor compatriots because a rich state has failed in its own primary duties toward people in that country. Suppose, for instance, that, ten years ago, a poor country suffered high rates of a disease such as TB or HIV. Addressing the disease required (a) dedicated work on the part of health professionals and (b) resources from rich states (medicines, equipment, money for awareness raising, etc.). Suppose, further, that, in the intervening period, health professionals did engage in dedicated work but rich states failed to provide the required resources. Now, ten years on, the disease remains prevalent. In such a case I do not think a rich state can exclude the health professionals in order to get them to address the high disease burden that the rich state itself is responsible for. The health professionals may have a duty to stay and assist their poor compatriots struggle to keep the disease at bay, but this is not a duty that the rich state has the legitimacy to enforce.<sup>65</sup>

A second case is one in which a rich state has failed to fulfill its duty of assistance to the skilled workers it wishes to exclude. Recall that many

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she seeks to force upon others. An example of this sort can be found in Judith Jarvis Thomson, "Turning the Trolley," *Philosophy and Public Affairs* 36 (2008): 359–74, at 365.

65. I am assuming here a view of collective responsibility that allows for states, or at least democratic states, to be regarded as agents. Of course states are made up of large numbers of individuals, who disagree about politics and take different political actions. Nevertheless, when political leaders, acting within the roles properly assigned to them, make decisions, one can regard their actions as actions taken by the state. So we may speak, say, of Canada deciding to give so many dollars in aid each year, although, of course, not all Canadians made any such decision. This explains why those in charge of immigration policy cannot sidestep questions of legitimacy by claiming that they share no personal responsibility for other areas of government policy. What policy makers have the legitimacy to do is restricted

skilled workers living in poor states are poor themselves. Even when these skilled workers are not so poor as to make a duty to stay overly demanding, they may nevertheless be owed assistance by a rich state. If a rich state fails to provide this assistance, I do not think it can legitimately exclude the skilled workers it has failed to assist. That exclusion would prevent the workers from accessing the jobs and opportunities in the rich state that would allow them to achieve the better life that was owed to them all along. When a skilled worker has experienced hardship and deprivation in the service of her poor compatriots, it is not for a rich state who has failed her to enforce any remaining duty she may owe. Skilled workers may have a duty to endure the injustice of having to live in poverty for the sake of their poor compatriots, but that duty should not be enforced by the states that are responsible for this very injustice.<sup>66</sup>

What is special about these cases? In both cases the two considerations described above (regarding perception and disrespect) arise. Indeed, they seem especially acute. Were a rich state to exclude skilled workers in these cases, the perception created is a particularly poor one because the hypocrisy involved is particularly strong. Similarly, exclusion seems particularly disrespectful given the prior injustices perpetrated by the rich state and the problems these have caused skilled workers and their poor compatriots. There are, most likely, other considerations that arise in these cases, but the task of identifying them is one I shall set aside here.

Both cases involve prior injustice, and this fact may point to a possible remedy: the rich state involved may be able to engage in some sort of reparative act, such as issuing an apology or offering compensation or at least making a belated commitment to fulfill its duties. Having made some sort of amends for its own failures, a rich state may regain the legitimacy to enforce the duties of skilled workers. Nevertheless, in the absence of reparative steps, rich states do not have the legitimacy to enforce counter-brain-drain immigration restrictions in these two cases.

It might still be objected that even in the cases I have highlighted the overall consequences are better if rich states enforce counter-brain-drain immigration restrictions than if they do not. It is true that those who judge the permissibility of an act solely by its consequences will be unable to accept this latest set of conditions. But why should we think that the con-

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to what the state has the legitimacy to do. If the state fails to fulfill certain duties and thereby loses the legitimacy to perform certain actions, policy makers cannot direct the state to perform these actions, even though the policy makers themselves may bear no personal responsibility for the state's failures.

66. The view that rich states cannot exclude poor foreigners they have failed to assist is in fact a widely held view among the philosophers engaged in the immigration debate; it is a point highlighted in Kieran Oberman, "Immigration, Global Poverty and the Right to Stay," *Political Studies* 59 (2011): 253–68.

sequences alone are what matter? It has long been argued that other factors are relevant. For instance, many hold that the agent's intentions can, in certain contexts, render an otherwise permissible act impermissible; they accept, that is, the doctrine of double effect or some similar doctrine. The view expressed here, that an agent's own unjust conduct can, in certain contexts, render it impermissible for the agent to enforce justice, is not so different. Indeed this view has itself attracted support. Jesus endorsed it when he said to those wishing to punish an adulterer, "He that is without sin among you, let him first cast a stone at her."<sup>67</sup> The view has also found currency in popular political discourse: those opposing the US-led wars of recent years have often slammed human rights or anti-terror justifications for these wars by referring to the United States' own poor record in these areas.<sup>68</sup>

Interestingly, despite biblical and popular endorsement, the idea that an agent's own unjust conduct can render it impermissible for the agent to enforce justice has received little attention within academic philosophy.<sup>69</sup> Why is not clear. Perhaps philosophers have simply found it implausible, indeed, not even worth refuting. Stronger elaborations of the idea are indeed implausible.<sup>70</sup> But, as I hope to have shown, there are weaker elaborations that are plausible and as such demand consideration.

## VI. CONCLUSION

To conclude, let me lay out the full list of conditions and subconditions for justified exclusion on brain drain grounds.

A rich state can justify imposing immigration restrictions against a skilled worker on brain drain grounds only if:

67. John 8:7.

68. See Noam Chomsky, "Imperial Presidency," *ZMagazine*, December 17, 2004, <http://www.zmag.org/znet/viewArticle/7223>; and Edward Said, "A Monumental Hypocrisy: We Must Raise Our Voices, March in Protest, Now and Again and Again," *Counterpunch*, February 15, 2003, <http://www.counterpunch.org/said02152003.html>.

69. An exception is Daryl Glaser, "Does Hypocrisy Matter? The Case of US Foreign Policy," *Review of International Studies* 32 (2006): 251–68. The wider question of what (if anything) should be done to address hypocrisy in politics is discussed in David Runciman, *Political Hypocrisy: The Mask of Power, from Hobbes to Orwell and Beyond* (Princeton, NJ: Princeton University Press, 2008); and Judith N. Shklar, *Ordinary Vices* (Cambridge, MA: Belknap, 1984), chap. 2. A closely related argument to the one I have presented can be found in G. A. Cohen, "Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?" *Royal Institute of Philosophy Supplements* 81 (2006): 113–36.

70. Some of the antiwar arguments that refer to hypocrisy seem implausibly strong. See Glaser, "Does Hypocrisy Matter?"

Condition 1. The skilled worker owes assistance to her poor compatriots.

*She will owe them assistance if:*

- i. She relied on state funds to pay for her training and has not fulfilled her obligation of repayment *and/or*
- ii. She has not fulfilled her duty of assistance.

Condition 2. The skilled worker has a duty to stay in her state of origin to provide the assistance she owes her poor compatriots.

*She will have this duty to stay if and only if:*

- i. She can better provide the assistance she owes if she stays in her state of origin than from her state of destination.
- ii. She will not face an unreasonably high cost in staying.

Condition 3. It is permissible to enforce a skilled worker's duty to stay and assist her poor compatriots using immigration restrictions.

*This is so if and only if:*

- i. There is no acceptable alternative means of ensuring that the poor compatriots receive the assistance they are owed.

Condition 4. The rich state has the legitimacy to impose counter-brain-drain immigration restrictions.

*The rich state has this legitimacy if:*

- i. It has fulfilled its own duty of assistance to the global poor.  
*Or at least:*
- ii. The rich state is not seeking to enforce a skilled worker's secondary duty of assistance that the skilled worker only has because the rich state has failed to fulfill its primary duty of assistance.
- iii. The rich state is committed to fulfilling its duty of assistance toward the skilled worker.

How often will these conditions be fulfilled? In the case of almost all skilled workers, condition 1 will be fulfilled. However, the other conditions are far less likely to be fulfilled since many skilled workers have strong reason to leave, and there are many things rich states could be doing to address global poverty in general and brain drain in particular



which they are failing to do. In most cases, it seems, the brain drain argument for immigration restrictions will not succeed.

There may, however, be some real world cases in which the brain drain argument does succeed. For not all skilled workers are desperately poor; some enjoy a privileged social position and live in relative comfort. Nor is it the case that rich states are able to take effective action against poverty and brain drain in every poor state: some poor states are simply too corrupt and ill-governed for outside assistance to prove effective. Cases in which immigration restrictions can be justified on brain drain grounds are thus likely to be those in which these two factors are conjoined: they will be cases involving skilled workers who are relatively well off yet live in states which suffer from problems that block effective assistance from outside.

How, in practical terms, could a rich state identify those cases in which it can justifiably impose immigration restrictions on brain drain grounds? Let me suggest a three-stage process by which this might be done. First, the rich state would draw up a list of poor states, and sectors within those states, that suffer from deleterious brain drain. So, for instance, it might select the Zambian health sector, described in the introduction of this article, as a sector suffering from deleterious brain drain. Second, from the list it would select those cases in which alternative means of addressing the problem—taxing emigrants in the receiving state, raising salaries in the sending state, recruiting replacement workers to work in the sending state, and so forth—are unlikely to prove effective. The rich state would be able to select a case with confidence if it had already made determined efforts to address the problem there by alternative means. Third, it would continue to offer all skilled workers the opportunity to apply for family reunification and asylum. It would also expand the criteria for eligibility for asylum to include not only those with a well-founded fear of persecution (“refugees” under the current legal definition) but also those escaping desperate poverty, generalized violence, and dangerous working conditions.<sup>71</sup> This third stage is important in order to allow skilled workers who face unreasonably high costs if they stay in their home state a means to avoid being subject to immigration restrictions. Having undergone this three-stage process, the rich state would be left with a group of skilled workers, from the selected states, who have either failed to apply for family reunification and asylum or who have had their applications rejected. It is this group of skilled workers that the rich state would consider excluding.

This three-stage process would help to ensure that the first three conditions for justified exclusion on brain drain grounds are satisfied.

71. For the case for an expansion of this sort, see Andrew E. Shacknové, “Who Is a Refugee?” *Ethics* 95 (1985): 274–84.

Condition 4 is much harder to assess as it would require that a rich state undergo some form of self-assessment to see whether it has sufficient legitimacy to enforce restrictions. Whether any meaningful self-assessment of this sort can be done is questionable.

There are, then, likely to be cases in which immigration restrictions can be justified on brain drain grounds, and there are practical steps which rich states can take to help identify these cases. All the same, it may still seem surprising to some that brain drain cannot justify immigration restrictions outside this narrow range of cases. Brain drain can cause grave suffering, and it may seem odd that states cannot impose immigration restrictions to prevent grave suffering when they routinely impose such restrictions for a variety of lesser purposes. Yet, from the fact that immigration restrictions are routinely imposed, no one should deduce that they are easy to justify. Immigration restrictions restrict people's basic liberties to move, work, and associate as they wish and, in some cases, force individuals to remain in places that they have compelling reason to leave. Imposing immigration restrictions on brain drain grounds, moreover, involves coercing people in an effort to get them to labor for the sake of others. Counter-brain-drain immigration restrictions thus require a form of justification that, far from treating skilled workers as tools for development, takes seriously their rights, interests, and liberties. This is what this article has sought to provide.