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The Statist Approach to the Philosophy of Immigration and the Problem of Statelessness

Abstract: The issue of statelessness poses problems for the statist (or nationalist) approach to the philosophy of immigration. Despite the fact that the statist approach claims to constrain the state's right to exclude with human rights considerations, the arguments statist offer for the right of states to determine their own immigration policies would also justify citizenship rules that would render some children stateless. Insofar as rendering a child stateless is best characterized as a violation of human rights and insofar as some states have direct responsibility for causing such harm, the problem of non-refugee stateless children points to greater constraints than most statist accept on states' right to determine their own rules for membership. While statist can ultimately account for the right not to be rendered stateless, recognizing these additional human rights constraints ultimately weakens the core of the statist position.

Keywords: statelessness; immigration; nationalism; human rights; statism.

Introduction

The statist (or nationalist) approach to the philosophy of immigration maintains, as its name suggests, that states are the proper locus of immigration decisions. On this view, state sovereignty (or, in some cases, just state jurisdiction¹) authorizes states to make immigration decisions, and states are charged with looking after their own interests and those of their citizens. And in ideal democratic circumstances, the state makes decisions that reflect the will of its people. But even under ideal circumstances, a key feature of the statist approach is that whatever states might be said to owe to their citizens, states owe relatively little to non-citizens. And in the absence of real authority above or beyond that of states or nations, there is no method of enforcing rights claims if the states involved decide not to guarantee rights to particular non-citizens – or even to their own citizens. Ultimately, this last point is a problem arising from the supremacy of nation-states and their role in securing and guaranteeing human rights, and it reflects the political reality refugees and the stateless face in the world today.

Until recently, however, philosophers of immigration (statists and non-statists alike) have largely neglected the link between immigration policies and

¹ Michael Blake, 'The Right to Exclude,' *Critical Review of International Social and Political Philosophy* 17/5 (2014), 521-537, pp. 531-5.

states' broader rules for citizenship.² As a result, few theories of immigration have even taken up the issue of statelessness, perhaps because a great number of the world's stateless are neither refugees nor immigrants. Many individuals are stateless because of the ways that particular states set up their rules for citizenship. This turns out to be a bigger problem for the statist approach than for the other approaches to the philosophy of immigration, since the other approaches appeal to values and structures other than the state to address such issues. The problem of statelessness derives primarily from states' exercising their authority to set their own rules for citizenship, which is at the very heart of what justifies the statist approach.

And statelessness is neither a small problem nor an insignificant one: in 2011, the United Nations High Commissioner on Refugees (UNHCR) estimated that there were as many as 12 million stateless people in the world.³ Stateless individuals suffer deprivations of fundamental liberties and privileges, including health care, travel documents, basic education, the ability to own property, and family protections. Stateless individuals also have little to no representation in the governments under which they live. So statelessness is a real issue, and one that any defensible philosophy of immigration should be able to address directly. The statist approach has difficulties doing that, in no small part because of the structure of its core commitments. Statists seek to obviate these difficulties by appealing to human rights to constrain the pursuit of states' rights against non-citizens. The problem, as the following discussion will make clear, is that the plight of the stateless, especially that of non-refugee stateless children, illuminates additional human rights considerations statisticians have not adequately contemplated, perhaps because many statist arguments for excluding immigrants would also exclude the stateless as well. Ultimately, I think the statist approach can address the problem of statelessness, but to do so, it would have to endorse greater human rights constraints on a state's right to set its own membership policies than most statisticians currently allow or seem ready to accept.

The Statist Approach and Human Rights

Many philosophers, including John Rawls, Michael Walzer, Christopher Heath Wellman, Michael Blake, and David Miller, offer arguments supporting the right or prerogative of states to determine their own immigration policies

2 Two recent examples of articles that speak directly to this linkage: Jan Brezger and Andreas Cassee, 'Debate: Immigrants and Newcomers by Birth – Do Statist Arguments Imply a Right to Exclude Both?' *The Journal of Political Philosophy* 24/3 (2016), 367-78; and Luara Ferracioli, 'Citizenship for Children: By soil, by blood, or by paternalism?' *Philosophical Studies* (2017), 1-19.

3 UN High Commissioner for Refugees (UNHCR), *Helping the World's Stateless People*, September 2011, UNHCR / DIP / Q&AA4 / ENG 1 <<http://www.refworld.org/docid/4e55e7dd2.html>> (Accessed: 3 April 2018).

and their own requirements for citizenship. Given the political realities I have already mentioned, these arguments make a good deal of sense, even if the role of states is arguably deeply arbitrary.⁴ Statists appeal to the state's sovereignty over its territory and its people, often invoking some form of the right to self-determination, to ground the state's strong duties to its own citizens as well as the state's right to decide whom to exclude or include as members. These appeals to self-determination are most often grounded in a liberal view of the state, though some statist ground their views in communitarianism instead. Though various statist theorists construct the state's right to exclude or include in different ways, giving it different weights, typically the resulting right is understood as a *prima facie* one. Other liberal (or communitarian) values and human rights considerations compete with it and can, at times, provide constraints on the pursuit of that right. Such constraints can moderate a given theory considerably, but the core statist commitment is to presume *ceteris paribus* the state has the right to set its own immigration and citizenship policies.⁵

One problem with the way statist ground this *prima facie* right is that their arguments rely, either explicitly or implicitly, on the idea that states only have weak duties toward non-citizens. Assuming that states do not owe much to non-citizens, statist then argue that the states' inaction (failure to grant a citizenship to individuals) causes no direct and blameworthy harm to those individuals; rather, they are merely failing to provide a benefit, their duty to provide which is not terribly strong in the first place. Framed in this way, it is less likely that considerations involving non-citizens will be able to come close to overriding or constraining a state's *prima facie* right to exclude or include individuals.⁶ But in the case of refugees, the key to the statist approach is that a given state's duty to grant citizenship is weak and their failure to grant it less problematic, because the blame for failing to providing a safe haven for refugees is in fact shared by all of those states that could grant status to those non-citizens but fail to do so. And this blame is shared by all of those states unless another state decides to grant them, in which case the other states are off the hook. So without

4 Phillip Cole makes a very strong case that national borders, national identities, and even nation-states themselves are contingent and arbitrary. Interestingly, he also argues that the membership rules that nation-states create are imbued with that same arbitrariness. See Phillip Cole, 'Beyond Reason: The Philosophy and Politics of Immigration,' *Critical Review of International Social and Political Philosophy* 17/5 (2014), 503-520.

5 Sarah Fine's neo-Roman republican approach to immigration that affords the state a place of prominence looks to be an exception here. But insofar as it is primarily focused on avoiding domination and opens the door to a possible cosmopolitan 'republic of republics,' perhaps it is not fair to characterize it as fully statist in the ways the other views I discuss here are. Also, Fine does not view the state's right to exclude as something of fundamental importance. See Sarah Fine, 'Non-Domination and the Ethics of Migration,' *Critical Review of International Social and Political Philosophy* 17/1 (2014), 10-30.

6 Interestingly, statist rarely make explicit how strong the state's *prima facie* right to exclude is and just how substantial a competing consideration must be to outweigh it – even though a great deal in the statist view rides on those two things.

a pre-existing obligation or commitment to grant status and with other states able to grant status in their place, the structure of the statist approach allows states either to escape blame for the harms that befall immigrants and other non-citizens or to diffuse that blame across numerous similarly situated states.

It is important to note that this characterization of the statist approach applies just as readily to non-citizens who are immigrants as to what Jan Brezger and Andreas Cassee call ‘newcomers by birth.’ Brezger and Cassee contend that the arguments statist employ to justify the state’s right to set immigration policies are ill-suited to, and often at odds with, the arguments they use to ground the state’s right to set citizenship rules for newcomers by birth.⁷ I agree that their analysis reveals a deep inconsistency in the statist approach, and one that may be difficult for statist to overcome – though Luara Ferracioli does make a persuasive statist argument that appears to avoid the pitfalls Brezger and Cassee identify.⁸ Arguably more important, however, is the fact that Brezger and Cassee demonstrate that citizenship questions – and the arguments that purport to answer them – must apply to both immigrants and newcomers by birth (Ferracioli acknowledges as much in her attempt to defend the statist approach against Brezger and Cassee’s arguments⁹). This idea, that the arguments statist offer to justify excluding some immigrants very often also justify excluding newcomers by birth, is a key insight upon which my arguments in the rest of this article will depend.

So the statist approach tends to hold that states have only weak duties toward non-citizens, whether they are immigrants or ‘newcomers by birth,’ and these duties are weak especially relative to states’ right to determine its own rules for membership. But consider policies such as those granting citizenship to a newborn only on the basis of the father’s nationality (*jus sanguinis*), as is the case in many countries in the world today. If the father is not a citizen of the country in which he and the mother and child live, then the child is a citizen of his father’s country and not of the state in which the family resides (the same is true of the father in such a scenario). But in some cases, the father’s nationality is problematic in some way, such as when his home state cannot reliably provide any semblance of the benefits and protections that normally accompany citizenship,¹⁰ when his home state is inaccessible to him and/or would not recognize his citizenship,¹¹ or when his home state no longer exists

7 Brezger and Cassee, (2016), pp. 367-78.

8 Ferracioli (2017), pp. 1-19.

9 *Ibid.* However, Ferracioli further argues that children within a state warrant paternalistic treatment, some of which only the state itself can give.

10 In 2018, this would seem to be an accurate description of Somalia, Eritrea, Syria, and at least several other countries.

11 This category would include Rohingyas from Myanmar, Kuwaiti Bedouins, Bhutanese of Nepali origin, among others.

or receives little recognition as a state.¹² In such cases, the child becomes effectively or actually stateless within the country of her or his birth because of these policies.

The plight of such non-refugee stateless children poses a problem for the statist approach because it challenges several of the claims statisticians rely upon to defend the state's right to exclude. While it is one thing to say that states have weak obligations to non-citizens that state sovereignty in the form of self-determination might override, it is quite another to say that states thus have the right to render innocent individuals stateless. To assert this latter claim is to extend the idea of states' rights or prerogatives to an unacceptable degree, because doing so would allow states to visit direct harm upon innocents just for the sake of controlling their own membership policies.¹³ While I am sure that few statisticians would feel comfortable endorsing that position, later in this article I argue that some of the foremost arguments statisticians make to justify the right of states to refuse citizenship to immigrants and refugees would also justify denying citizenship to some children in this way. After all, determining the contours of citizenship for newborns is just as necessary as immigration policy to protecting a state's right of association, its right to shape the content of its culture, and its right to decide who will benefit from tax-funded programs.

But first, it is important to make clear exactly what is at stake as we consider the plight of non-refugee stateless children.¹⁴ To deny some children citizenship so as to render them stateless is to visit upon them a serious harm, and one that can only reasonably be seen as a violation of those children's basic human rights. I contend that rendering individuals stateless imposes such a severe set of harms on them that states have a very strong duty to uphold innocent¹⁵ individuals' right not to be rendered stateless, and that duty is so strong that it overrides

12 This would be the case for many Palestinians currently living outside of Palestine as well as for some refugees from the former Yugoslavia.

13 Unfortunately, the idea of harming innocents to effect a state's membership policy is not unheard of: the Trump Administration's policy of separating immigrant children from their parents to deter others from seeking asylum in the United States is just such a practice.

14 Here, and throughout this article, when I write about 'non-refugee stateless children,' I mean to refer to newcomers by birth, or newborns made stateless by a nation's citizenship rules. But it is important to note that the United Nations 1961 Convention on the Reduction of Statelessness also requires contracting states to grant citizenship to children found abandoned in those states' territories and to children 'who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth.' I think that most, if not all, of my arguments here would apply just as well to these 'foundlings' as well (unless, as the 1961 Convention stipulates, a state finds out later that foundlings already have another nationality). UN High Commissioner for Refugees (UNHCR), *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012 <<http://www.refworld.org/docid/50d460e72.html>> (Accessed: 15 July 2018).

15 It seems possible that one could justify the punishment of exile for some criminals such that one could say that those criminals *deserve* to be rendered stateless. While I will grant that possibility and limit my focus here to innocent individuals, I have my doubts that a state could easily justify rendering another individual stateless even as a deserved punishment.

the states' right to exclude/set their own rules for membership with respect to those individuals. In other words, the right not to be rendered stateless is a basic human right that weighs against and ultimately constrains states' right to exclude.

The Right Not to Be Rendered Stateless

My preferred way of describing statelessness is as *an acute and peculiar harm*. But following the language of the United Nations' 1951 *Convention Relating to the Status of Refugees*,¹⁶ the 1954 Convention relating to the Status of Stateless People,¹⁷ the 1961 Convention on the Reduction of Statelessness,¹⁸ Article 15 of the Universal Declaration of Human Rights,¹⁹ the Convention on the Rights of the Child,²⁰ and the fundamental protections called for under those conventions, it is also fair to say that statelessness is a *serious* harm for those who suffer under it. Statelessness is a serious harm because the liberties and privileges associated with having a nationality are fundamental ones, including basic identification papers, basic travel documents, basic education, health care, and various protections afforded to families. Beyond these fundamental rights and privileges, having a nationality also contributes crucially to one's sense of self-worth and self-respect (or, more to the point, lacking a nationality can undermine one's self-worth and self-respect), especially for children old enough to understand such things. The deprivations associated with statelessness impact deeply and broadly the lives of those who suffer them. These deprivations are also unique in that they are the sorts of harms typically only a state could visit upon an individual. It is for this reason that I refer to the harm of statelessness as an acute and peculiar one.

Accordingly, the right not to be rendered stateless is best understood as a basic human right, and not only because it would be difficult for it to be treated in any other way. The right not to be rendered stateless is a basic human right because the liberties and privileges associated with having a nationality are fundamental ones. The right not to be rendered stateless is a prerequisite for a minimally acceptable life in almost any society, and for this reason it is best understood as a basic human right.

16 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137 (1951), <<http://www.refworld.org/docid/3be01b964.html>> (Accessed: 2 January 2018).

17 UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117 <<http://www.refworld.org/docid/3ae6b3840.html>> (Accessed: 2 January 2018).

18 UN High Commissioner for Refugees (UNHCR), *Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness*, March 2014 <<http://www.refworld.org/docid/4cad866e2.html>> (Accessed: 15 July 2018).

19 UN General Assembly, *Universal Declaration of Human Rights*, December 1948 <<http://www.un.org/en/universal-declaration-human-rights/>> (Accessed: 15 July 2018).

20 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3 <<http://www.refworld.org/docid/3ae6b38fo.html>> (Accessed: 2 January 2018).

Some will no doubt object that the right not to be rendered stateless cannot be a basic human right because citizenship is not a naturally occurring phenomenon – it is rather a concept created and perpetuated by the current system of nation-states – and because citizenship is merely a benefit or a privilege conferred on individuals by states. First, it is interesting to note that the premises of this objection are part of the basic assumptions of the statist view. Given these assumptions, the statist argument goes, states violate no duty by failing to provide particular individuals with citizenship; rather, they only fail to provide them with a benefit. However, if it were possible for individuals to live and do well somewhere in the world without a nationality or if states were not the only entities to grant citizenship to individuals, then this objection might play differently. But as things are in the world today, those premises do not let states off the hook: they arguably make states responsible for providing nationalities to individuals.

States have taken on the role of providing nationalities, and in doing so they have created a world order in which a nationality is necessary for a minimally acceptable life. States cannot claim the exclusive prerogative to grant citizenship and then shirk the responsibilities that go with the system that has arisen from and perpetuates the exercise of that prerogative. As a result, states have a responsibility to keep that system from visiting serious harm on individuals, and the most constrained expression of that responsibility would be the duty not to render an individual stateless.

So not only is the harm associated with rendering another stateless a very serious one – and thus more difficult to override with other considerations the state may offer – but the duty is not limited in the ways that a state's duties to provide goods or privileges to non-citizens might be. Consider the distinction between the right to citizenship within a particular nation versus the right not to be rendered stateless. The former generates rights claims that a state can overcome relatively easily with its own (good) reasons, including that other nations with which that state has agreed to distribute refugee burdens have not yet taken on their agreed burden. The right not to be rendered stateless will generate obligations for a narrower set of individuals or entities than many humanitarian considerations would, since the direct violation of this right requires that a state somehow act so as to cause an individual to be rendered stateless.

Unlike with humanitarian violations, the responsibilities for which might be distributed across many possible states (making it difficult at times to determine who exactly is to blame for the violation), violations of the right not

to be rendered stateless will fall on one particular state, and it will be easy to identify in many cases which state is responsible. Of course, in some cases, states fail or are victims of wars and the subsequent redrawing of borders and even renaming of nations, in which case individuals may be rendered stateless through no particular state's fault – or through the fault of a state that no longer exists. But in many cases, like those resulting from nationality passing from the father and not the mother, the state at fault for the rights violation is clear and easily identified. In such cases, the individual involved and the international community would have a very strong basis for demanding remedies for such a rights violation.

Though it is not my goal to advance one, this last point suggests a rather tight and effective argument for birthright citizenship, and one that has distinct advantages over some other arguments for it.²¹ Rather than arguing that birthright citizenship is a better policy, all things considered, than is any other approach to dealing with the citizenship of children born within a state's borders, my argument here merely holds that states have a strong duty to avoid rendering stateless a child born within their borders, on pains of being responsible for a significant harm to an innocent. Theoretically speaking, if one is making a policy-based argument, the facts on the ground could conceivably change so that the advantages of birthright citizenship no longer outweigh the disadvantages. But the same is not true of my view here: so long as it remains wrong to cause significant harm to an innocent without justification, it will remain wrong to render a child stateless, and the duty to avoid that wrong will trump most, if not all, policy considerations.²²

The Statist Approach and (Apparently) Justifying Some Statelessness

If the right not to be rendered stateless is a basic human right and one that generates strong duties for a state, then the state's *prima facie* right to exclude

21 Joseph Carens argues for birthright citizenship for the children of resident citizens, of emigrant citizens, and of resident immigrants on the grounds that the children have some tie to the political community into which they are born, and as moral persons, it is necessary that they be afforded a place in that political community. See Joseph Carens, 'In Defense of Birthright Citizenship,' in *Migration in Political Theory*, Sarah Fine and Lea Ypi, eds. (Oxford, UK: Oxford University Press, 2016), pp. 205-224. Though one might be able to read Carens' position as a policy-based argument, it makes more sense to read it as a rights-based argument, in which the child's right to status within the political community into which one is born operates as a fundamental right. Conceived as a purely political right, however, this right would seem unduly narrow and would fail to give proper weight to many of the other harms associated with statelessness.

22 This last point would seem to apply to some arguments against birthright citizenship as well. Ayelet Sachar attacks birthright citizenship as relying on circumstances we do not choose and cannot control, on her way to suggesting a tax on birthright citizenship to further the policy goal of alleviating global inequalities the practice may help perpetuate (interestingly, she does not argue that it should be eliminated as a practice). See Ayelet Sachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009). And Jacqueline Stevens argues that birthright citizenship, along with many other social institutions, should be eliminated in the pursuit of liberal ideals (though it is difficult to ascertain which of those ideals would be worth causing serious harm to a newborn to pursue). See Jacqueline Stevens, *States Without Nations: Citizenship for Mortals* (New York: Columbia University Press, 2009).

would need to be very strong indeed to override those duties. While few statisticians have grappled directly with the issue of non-refugee stateless children, it would also seem that few statisticians would be predisposed to think that the right not to be rendered stateless necessarily overrides the state's *prima facie* right to exclude. This much is clear in the arguments statisticians advance to support the state's right to exclude, since many of those arguments (which are mostly designed to justify excluding immigrants) would exclude non-refugee stateless children as well. These arguments pose difficulties for the statist approach, because either statism endorses the view that the state's right to exclude actually overrides the right not to be rendered stateless or it holds that the state's right to exclude is constrained by the human rights of non-refugee stateless children. The former position seems untenable, given what I have argued to this point, and the latter position moves the statist approach closer to one that focuses primarily on human rights (and secondarily on the rights of the state) – and considerably closer than it seems most statisticians appear ready to accept.

Ultimately, it is this second path the statisticians must follow, even if doing so limits states' ability to determine their own rules for membership more than statisticians usually allow. In this section, I defend this claim against a few key statist arguments for states' right to exclude. Each of the arguments that I will examine in this section would, on its face, exclude membership for non-refugee stateless children as well as other immigrants. The additional human rights constraints that the right not to be rendered stateless places on these three views also raises questions about the underlying justification each author offers for states' right to exclude. As a result, the right not to be rendered stateless not only constrains states' right to exclude non-refugee stateless children, but it also introduces doubts about the strength of statism's ability to justify excluding individuals with human rights claims.

Wellman and the Right of Association

Let us begin by examining Christopher Heath Wellman's statist argument from the right of association. In his 'Immigration and Freedom of Association,' Wellman argues for a deontological right of association for states, and importantly, he also argues that this right is not absolute and can be overridden. But in the case of obligations to help rectify or at least ameliorate the effects of bad luck with respect to where certain people are born (that is, in the case of the obligations arising from luck egalitarianism), Wellman claims that the right of freedom of association can be kept separate from questions of distributive justice. Wellman's argument is that where a nation can give aid in the form of money or other funding to 'even out' the disadvantage under which others suffer, then there is no reason to infringe upon that nation's freedom of association by

requiring it to grant citizenship (or other admittance) to individuals to whom it would otherwise prefer not to have as part of its 'union.' In other words, Wellman suggests that monetary payments can satisfy the demands of luck egalitarianism, keeping those demands from infringing on a nation's right of association.

While I am not convinced that monetary payments can suffice in all or even many cases of international distributive justice that might also involve immigration policies, for the sake of discussion, let us grant Wellman these points here. Still, it is difficult to see how his arguments from the right of association would fail to apply just as readily to non-refugee newborns. This seems particularly true when one considers how closely Wellman ties the right of association to a state's right to self-determination, as Wellman makes clear in the following passage:

[...] because the members of a group can change, an important part of group self-determination is having control over what the 'self' is. In other words, unlike individual self-determination, a significant component of group self-determination is having control over the group which in turn gets to be self-determining. It stands to reason, then, that if there is any group whose self-determination we care about, we should be concerned about its rules for membership.²³

So for Wellman, the right of association is a key component to a state's self-determination, particularly in the form of determining its membership.

But consider the case of Nepal, a nation of nearly 30 million people located in a narrow territory between India and the Tibetan region of China. The national status of the autonomous Tibet region is the subject of an intense political conflict that I cannot address here, except to note that the Nepali people have certainly taken notice of how their neighbor to the north has fought for independence from China for a long time now. The Nepali population is diverse, sharing many different languages and cultures with their neighbors to the north and the south, which makes it more difficult to appeal to shared linguistic, cultural, or religious traditions or practices in order to foster national unity. On Wellman's analysis, it would seem that Nepal would be well within its rights to refuse to grant citizenship to refugees of the conflict in Tibet. Further, it would seem that giving such refugees a safe place to stay would likely more than cover whatever 'debt' the Nepali people may owe to Tibetan refugees to compensate for the relative bad luck of having been born in Tibet (satisfying the demands of luck egalitarianism).

23 Christopher Heath Wellman, 'Immigration and Freedom of Association,' *Ethics* 119/1 (2008), p. 115.

But add in the fact that Nepali nationality passes to children directly from their fathers, such that a child born to a Nepali mother and a Tibetan father would not directly become a Nepali citizen,²⁴ and Wellman's analysis would seem to step onto shakier ground. First of all, Nepal's rules for nationality would appear to pass muster under Wellman's view, at least with respect to Tibetans under the circumstances specified here. After all, if Nepal has association/membership concerns about Tibetans, then it seems perfectly consistent for Nepal to deny citizenship to the children of all Tibetan immigrants as well.

The difficulty arises when a Nepali person has a child with a Tibetan. If the father is Nepali and the mother Tibetan, then the child receives Nepali citizenship. If the father is Tibetan and the mother is Nepali, however, the child would be effectively stateless. Wellman actually contemplates analogous circumstances in the case of excluding on the basis of race (based on Walzer's 'White Australia' thought experiment):

Thus, unless Australia were already composed exclusively of white constituents (and no state is completely homogenous), it would be impermissible to institute immigration policies designed to approximate a 'White Australia' not because such policies might insult potential black immigrants (though no doubt it would) but because they would fail to treat nonwhite Australians as equals. And because no state is completely without minorities who would be disrespected by an immigration policy which invoked racial/ethnic/religious categories, no state may exclude potential immigrants on these types of criteria.²⁵

Following Wellman's argument here, it would seem that Nepal's nationality rules would face a similar objection: they fail to treat Nepali men and women (particularly, Nepali fathers and mothers) as equals, since citizen fathers can pass on their nationality to their children, but citizen mothers cannot – at least not without the help of a citizen father.

But notice that Wellman does not find the insult or harm to potential immigrants to be a problem – the key problem for Wellman in a case like this is that the policy impacts other citizens negatively and unfairly. So in essence,

²⁴ Technically, the child can apply to become a naturalized citizen: the Nepali Constitution adopted in 2015 prevents children born to Nepali women and non-citizen fathers from receiving citizenship via *jus sanguinis*, though they may become naturalized citizens. The problem is that the government almost never grants anyone naturalized citizenship. There is also an exception for children of 'unidentified' fathers, but the government has a very narrow interpretation of what 'unidentified' means, excluding, for example, those fathers who might be identified but who abandoned their children (and their mothers) very early on. See Subin Mulmi and Sara Shneiderman, 'Citizenship, gender and statelessness in Nepal: Before and after the 2015 Constitution,' in *Understanding Statelessness*, Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, eds. (New York, NY: Routledge, 2017), pp. 135-152.

²⁵ Wellman (2008), p. 140.

Wellman would have issues with Nepal's nationality rules only to the extent that they disparately impact Nepal's citizens and would have no clear concern for the children the policy has rendered stateless *per se*. That much is clear when one considers that Wellman would have no problem with the policy if the troublesome inequality were removed: it would seem perfectly acceptable to deny citizenship to the children of all immigrants from Tibet (such that even the Nepali father could not pass on his nationality to his child of a Tibetan mother).

In his 2011 book with Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?*, Wellman considers and responds to some of the sorts of concerns I have raised here. In that work, Wellman makes clear that on his view the sort of harms associated with statelessness would override his presumptive right of states to set their own rules for membership:

[...] I mean to defend the rights of self-determination not of all states but only of legitimate states, where legitimacy is cashed out in terms of satisfactorily protecting and respecting human rights. [...] And if my position entails that European states may exclude outsiders only if they are sufficiently responsive to the basic needs of individuals all over the globe, then it seems unfair to characterize my views as wrongly privileging the relatively insignificant interests of the haves over even the basic needs of the have-nots.²⁶

Of course, it is unclear exactly what 'satisfactorily protecting and respecting human rights' entails for a wealthy (European) state, especially if other states are not necessarily expected to share in the responsibility for that protection and respect. Still, it is not at all difficult to imagine that the demands of human rights could overwhelm a state's right to self-determination in most, if not all, respects. Under such circumstances, Wellman's concession here would result in a view that is focused primarily on human rights, with a state's self-determination playing a decidedly secondary and far less significant role, especially in light of the number of individuals across the globe who do not enjoy human rights protections. So with this move, Wellman avoids some of the more problematic implications of his statist view, but to do so, he has softened his statist commitments to the point that they operate like mere policy considerations in the face of much more significant human rights concerns. And once again, if the human rights concerns are widespread enough, the statist policy consideration

²⁶ Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011), p. 113-114.

never has a chance to come into play, and Wellman's view would then become one focused primarily on human rights.²⁷

But there is ample evidence elsewhere in Wellman's part of *Debating the Ethics of Immigration* that Wellman is not inclined to go anywhere near that far, in part because he sees responsibility for refugees as distributed across all states able to provide help. In what is perhaps the closest Wellman comes to considering a case like that of non-refugee stateless children, he analogizes the situation of refugees to that of a baby left on one's doorstep in the middle of winter. He concludes:

In both cases, one can nonvoluntarily incur a stringent duty to help the imperiled individual. But just as one can satisfactorily discharge one's duty to the vulnerable child without permanently adopting it, a state can entirely fulfill its responsibility to persecuted refugees without allowing them to immigrate into its political community.²⁸

In the chapter that follows this conclusion, Wellman goes on to argue that even if the nations able to help were to band together and create a system of shares of the collective responsibility for refugees, then a given country would be well within its rights to go so far as to pay other countries to take in its share (much as countries can in the case of carbon emissions under a cap and trade system). This argument is an extension of Wellman's position that states can avoid having to take in refugees or other immigrants if those states just provide aid that helps make the refugees' homeland livable or helps even out the would-be immigrants' relative disadvantages (as I discussed at the opening of this section). In other words, the demands of luck egalitarianism can be satisfied with distributive justice. For this reason, Wellman does not see refugees as an exception to the right to exclude he proposes.

Even though there are good reasons to think that Wellman's analysis would

²⁷ There are many theorists who argue that human rights should have primacy over states' right to exclude. Some of those, like Simon Caney and Thomas Pogge, do so in service of a cosmopolitan agenda that still acknowledges a role for states (whereas other cosmopolitans, like Seyla Benhabib, deny that states should have a role in the world order). Others, like Martha Nussbaum and Phillip Cole, are liberals who want to demonstrate that liberalism should be understood to give such primacy to human rights. Yet others, like William Barbieri, Jr., argue for the primacy of human rights for other reasons (in Barbieri's case, via appeals to non-domination). See Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005); Thomas Pogge, *World Poverty and Human Rights*, 2nd ed. (Cambridge: Polity Press, 2008); Seyla Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Harvard University Press, 2006); Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000); and William A. Barbieri, Jr., *Ethics of Citizenship: Immigration and Group Rights in Germany* (Durham, NC: Duke University Press, 1998).

²⁸ Wellman and Cole (2011), p. 123.

not be able to handle the stateless in the same way he claims to handle refugees,²⁹ the deeper problem is how Wellman relies on the presence of other nations able to help to diffuse responsibility for providing status to immigrants, refugees and arguably even the stateless. Cole argues that this move Wellman makes actually threatens to undermine completely the notion of a right to a nationality:

However, as we've seen, if no particular state has an obligation to provide nationality to a stateless person, the right to nationality begins to look empty and statelessness becomes a genuine danger for many people. Despite the child's right to a life as a family member, we cannot force any particular family to adopt it, and despite the right to life as a member of a nation-state, we cannot force a particular state to 'adopt' a stateless person. We seem to be stuck between the general right to a nationality and the right of states to exclude, and so Wellman's position seems immune from exceptions even in the case of statelessness.³⁰

It seems that Wellman has yet to consider the possibility that a state might be directly and solely responsible for rendering a child stateless, and that the right not to be rendered stateless ultimately gets us unstuck from between the general right to a nationality and the right of states to exclude.

While the seriousness of the human rights violation certainly matters to Wellman, the source of the responsibility for addressing those violations is even more important to his statist agenda. If I am right that a state can be solely and directly responsible for rendering a child stateless, then Wellman's view can no longer rely on the distribution of responsibility across those states able to help. For this reason, non-refugee stateless children represent a clear exception to Wellman's right to exclude, but not one Wellman seems particularly willing to accept.

Michael Walzer and Preserving Cultures

Michael Walzer and David Miller both offer statist approaches that depend upon the right of cultures to preserve their unique character, but Walzer's view is more grounded in communitarian concerns than in liberal ones. Of the two, Walzer's view is the more difficult to decipher on the question of whether his defense of the state's right to exclude would also justify rendering some newborns stateless. This is because Walzer cites democratic norms and norms of community self-rule early in *Spheres of Justice* in concluding a section on the

²⁹ Later in the same book, Cole argues that the stateless represent an exception to Wellman's arguments for the right to exclude, even if refugees do not, because Wellman misapplies his analogy of the baby on the doorstep (and the permutation of it that allows one to pay for another to take one's responsibility for it). *Ibid.*, p. 254.

³⁰ *Ibid.*, p. 252.

circumstances under which guest workers should be given citizenship (or some status very close to it):

Leaving aside such international arrangements, the principle of political justice is this: that the processes of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory, work in the local economy, and are subject to local law.³¹

But soon thereafter, in opening a section on Membership and Justice, Walzer writes:

The distribution of membership is not pervasively subject to the constraints of justice. Across a considerable range of the decisions that are made, states are simply free to take in strangers (or not) much as they are free, leaving aside the claims of the needy, to share their wealth with foreign friends, to honor the achievements of foreign artists, scholars, and scientists, to choose their trading partners, and to enter into collective security arrangements with foreign states. But the right to choose an admissions policy is more basic than any of these, for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.³²

Clearly, to the extent there is some right to exclude on Walzer's view, it is grounded in a state's right to determine the character of its own community, and democratic values pick up the slack when it comes to non-citizens living within a state's borders. In fact, the exception Walzer carves out for guest workers could be read broadly to include anyone who lives in the territory and might be affected by the community's decisions. I will return to this exception shortly, but first, Walzer's core commitments warrant closer examination.

Walzer's core commitment regarding membership is that states should have wide latitude in making their own immigration decisions, especially those decisions that might impact the character of their communities (where

³¹ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), p. 59.

³² *Ibid.*, pp. 60-61.

‘character’ seems quite broadly construed). And excluding newborn children could certainly be one way to try to preserve a community’s particular character. This much is clear in Walzer’s thought experiment he calls ‘White Australia’ that I referenced above with respect to Wellman’s criticisms of it. In the White Australia example, Walzer argues that a state could discriminate on the basis of race in its immigration policies.³³ That Walzer would be willing to endorse such an argument makes clear that his view is not grounded in liberal values, but it also demonstrates just how strong Walzer thinks the state’s right to self-determination is (and what kinds of other considerations it outweighs).

Leaving aside the problems associated with Walzer’s toleration of racial discrimination in membership decisions,³⁴ one might object on Walzer’s behalf that, with respect to a state’s right of association or its right to shape the content of its own culture, a child born to a citizen mother raises fewer problems for maintaining the character of a community than would fully formed adults presenting themselves at the border as immigrants. If this objection holds, then the issue of the non-refugee stateless here would have less practical impact on a view like Walzer’s than I have suggested. However, there is no guarantee that children will choose to perpetuate the culture, nor is there any guarantee that a particular child will turn out to be the sort of person with whom others in the society will want to associate.³⁵ In essence, the appeal of dealing with a newborn instead of an adult immigrant comes down to a) children are more malleable than adults, and b) very young children pose no real threat to culture or security – or at least they will not for quite a long time. So on a view like Walzer’s, it is not at all clear that (or how) setting policies governing citizenship for children born within the state’s borders is relevantly distinct from putting immigration policies into place, especially with regard to the communitarian justification Walzer provides for the state’s right to exclude.

But as I indicated above, it seems that Walzer could respond here by invoking his exception for guest workers, noting that democratic values require that a state include anyone who lives in the territory and might be affected by the state’s decisions. It is important to note that this response does not distinguish between immigration policies and rules for citizenship, since it would apply equally well to immigrant workers and to non-refugee newborns.³⁶ But to the

³³ *Ibid.*, p. 47.

³⁴ Wellman and Miller both provide effective arguments against such a position: Wellman (2008), pp. 138-141; and David Miller, ‘Immigration: The Case for Limits,’ in Andrew I. Cohen and Christopher Heath Wellman (eds.), *Contemporary Debates in Applied Ethics* (Malden, MA: Blackwell Publishing, 2005), 193-206, pp. 203-204.

³⁵ Samuel Scheffler makes a similar point, only with much broader implications, in ‘Immigration and the Significance of Culture,’ *Philosophy & Public Affairs* 35/2 (Spring 2007), 93-125, especially pp. 93-105.

³⁶ My claim here assumes that Walzer is willing to extend the application of democratic values beyond just guest workers to include non-refugee newborns. Nevertheless, given the context within which Walzer offers the exception for guest workers, there is some reason to believe that it matters to Walzer that workers materially contribute to the community.

extent that this exception can be read to protect non-refugee newborns by granting them citizenship, it does so for the wrong reasons. While it is true that eventually having the ability to vote in elections is a direct prerequisite for at some point participating in a democracy, other benefits of citizenship, like health care, education, and the bases for self-respect are at best only indirectly important to fostering effective democratic participation. Yet other benefits, such as travel documents and protections for families, seem to have little connection to democratic participation or representation at all. The correct reason for granting citizenship to non-refugee newborns is that a state has a strong duty to avoid imposing serious harms on innocent individuals. Walzer's view goes wrong here because its statist commitments are grounded in communitarian principles and constrained by democratic ones, when neither can adequately address the harms at stake as the human rights violations that they are.

David Miller and the Priorities and Character of a State

Finally, David Miller offers a liberal statist approach that, like Wellman's and Walzer's views, appeals to self-determination arguments. However, unlike Wellman, Miller explicitly avoids talking of self-determination as a right and instead discusses it in terms of competing considerations of justice among compatriots.³⁷ But Miller cashes out his arguments from self-determination first and foremost in terms of a state's priorities regarding how resources should be spent:

By self-determination here, I mean the right of a democratic public to make a wide range of policy choices within the limits set by human rights. Among the most important choices are precisely those that concern levels of public expenditure on housing, schools, hospitals, and so forth (I come back later to consider cultural choices). Since, for the reasons just given, both the rate of immigration and the personal characteristics of the immigrants (such as their likely education and health needs) will affect all of these measures, immigration control is an essential lever in the hands of the demos. Deprived of that lever, it loses control of those expenditures, unless it decides to abandon liberal principles and deprive the incomers of these essential services. The argument here, to avoid misunderstanding, is not that a self-determining political community *must* close its borders, but that it must have the *right* to control its borders in order to preserve a meaningful range of policy choices without detriment to the human rights of those it chooses to admit.³⁸

³⁷ David Miller, *Strangers in Our Midst* (Cambridge, MA: Harvard University Press, 2016), pp. 70-71.

³⁸ Miller (2016), p. 62.

And while he gives consideration to the human rights of non-citizens, Miller argues, as Walzer does, that citizens do not owe non-citizens consideration as a matter of justice – though citizens might owe non-citizens consideration for humanitarian reasons.

A few passages in *Strangers in Our Midst* suggest that Miller could be swayed by a case like that of non-refugee stateless children, and that he might be willing to treat such a case as a matter of justice. In particular, in a footnote to his concluding chapter, Miller argues that a state would owe refugees compensation in the form of admittance and perhaps citizenship if that state helped cause the conditions for the refugees' flight (here, refugees fleeing lands that are no longer inhabitable due to global warming, where the receiving state is partly responsible for the global warming). Given that the owing of compensation in this case seems due to the direct role the state played in causing the need for the compensation, it seems fair to think that Miller would take a similar approach with respect to states' rendering children stateless. This would seem especially true in light of the fact that the state would be wholly and not merely partially responsible in the case of non-refugee stateless children.

However, it is not entirely clear on Miller's view that the global warming case generates an obligation that is a matter of justice rather than a merely humanitarian obligation. It is unclear because for Miller matters of justice appear to range over obligations between citizens or obligations arising from within a demos.³⁹ Now, perhaps Miller would think that obligations to refugees fleeing the effects of global warming arise from the actions of the demos, and thus rise to the level of matters of justice, or it could be that the obligation here is just a particularly strong humanitarian obligation. It matters which it is, since Miller's view focuses on competing considerations, and matters of justice are considerations that get considerably more weight and priority than do humanitarian ones.

Given the rest of Miller's positions in *Strangers in Our Midst*, it seems more likely that Miller would view the presence of non-refugee stateless children as generating only humanitarian obligations. If that were the case, his theory would treat the duty to avoid rendering an innocent stateless as an obligation that a state can decide to honor or disregard, as suits its interests and needs. In that case, to the extent that Miller's view would address the case of the non-refugee stateless, it would do so via a secondary consideration (humanitarianism), while its core commitments would offer no help on the matter. This would be

³⁹ In considering two other permutations of the global warming example, Miller states, 'In both cases, I think, the correct answer is that the obligation to admit would in these circumstances be humanitarian in nature, not something that justice demands, which also implies that it would be a matter for the citizens of the receiving society to decide upon – they could not be forced to comply, either by the refugees themselves or by third parties.' Miller (2016), p. 163.

a difficult position for Miller to maintain, however, since it would seem also to allow a state to justify directly causing all sorts of other harms to non-citizens (including those of other states) if the citizens of that state determined it was in their interests to do so – when many of those other harms would be clear violations of long-established international law.

Perhaps that last point is a reason to think that Miller's view would actually treat the plight of non-refugee stateless as a matter of justice (so as to avoid the problematic conclusions I suggested just above). So, for sake of argument here, let us assume that is the case. Even with that assumption in place, it is far from obvious that Miller's view would necessarily protect newborns from being rendered stateless. After all, Miller tends to view rights demands as occurring within a state, whether they come from citizens or non-citizens, as constrained by that state's ability to provide whatever is needed to honor those demands. Miller's view also focuses a great deal on weighing competing considerations, be they the different demands of justice within the state or humanitarian demands coming from outside of it. Accordingly, it would seem that Miller could identify some matters of justice that would outweigh the non-refugee newborn's right not to be rendered stateless.

Consider the following example: Jordan has long honored Palestinians' 'right of return' to their homeland by offering Palestinians residency status within the country (though in the past Jordan has also offered Palestinian refugees full citizenship, while still treating those Palestinians as refugees with the right of return). As a result of these policy choices, nearly half of the population of Jordan is Palestinian or of Palestinian origin.⁴⁰ Now, if Jordan were ever to acknowledge that it is a majority Palestinian state, that fact alone would likely change the nature of the Israeli-Palestinian conflict, since the presence of another majority-Palestinian state would then undermine the Palestinians' leverage in their negotiations for a Palestinian state separate from Israel. As a result, Jordan's role in the Middle East would change dramatically, as would its very character as a state, since it would then be in a position of needing to defend Palestinians' interests in a way that it does not (or does not always do) now. Jordan might then also find itself inundated with even more Palestinian refugees. Beyond fundamentally changing Jordan's character as a state, especially as it relates to other states on the international stage, this new role would place significant additional financial and military burdens on the state.

If Jordan wanted to limit further Palestinian immigration as a way of forestalling this possible scenario, it would seem that Miller's view could readily justify a policy of *jus sanguinis* for Jordan. Given that Jordanians would not want

⁴⁰ Palestinians in Jordan (2018) <<http://minorityrights.org/minorities/palestinians-2/>> (Accessed: 2 January 2018).

to take on the roles associated with being the majority-Palestinian state next door to Israel, the state would have an interest in preventing more Palestinian immigration, and policies rendering the children of Palestinian men stateless would serve as a strong deterrent, at least for Palestinian men. At first, this might seem like an odd means of addressing Palestinian immigration, but consider: a) it reflects a key cultural preference in Jordan for patrilineality, and b) it would have the effect of dissuading some Palestinian immigration, while continuing to offer Palestinians status on the auspices of a 'right of return,' thus keeping in place a key policy that has partially defined the character of Jordan as a state. In other words, it is not difficult to imagine very significant reasons – reasons crucial to the state's finances, its security, its role in the world, and even its basic character – for Jordan to institute a policy that would render the children of Palestinian fathers stateless. On Miller's view, these considerations would weigh very heavily, and it seems at least plausible that they would outweigh considerations of justice owed to the innocent newborns in question here. After all, Miller does argue that a state may not meet the demands of justice if they require too much of the state and its citizens; and it seems plausible to say that requiring a state to redefine itself so as to undermine its financial solvency, security, and fundamental role in the world might be asking too much of it.

But perhaps I have read Miller's treatment of the demands of justice within a state uncharitably here, and maybe Miller's view would actually allow much less flexibility with respect to those demands. If even very significant state considerations cannot outweigh what justice the state owes to its citizens (or those to whom it causes direct harm), then Miller's view would be a rare statist approach that would address my example case here. But to get to that conclusion, one must first get past the substantial evidence in Miller's view that he would see the treatment of non-refugee stateless children as a humanitarian concern and not a matter of justice. Also, before one could arrive at that conclusion, one would need to assume that Miller would readily accept that in the case of non-refugee stateless children, the state in which a child is born is responsible for rendering her stateless if it does not grant her citizenship – and that assumption seems tenuous given how weak Miller seems to think the duties are that states have toward non-citizens. In sum, even though it is possible that Miller's view could address my example case here, little in his statist approach suggests that it would easily depart from its deep statist commitments in a case like that of non-refugee stateless children.

In this section, I have examined three strong statist lines of argument defending states' right to exclude. It seems, however, that each of them would not only justify excluding immigrants, but could also justify excluding some 'newcomers

by birth,' rendering them stateless. But if the right not to be rendered stateless is a basic human right, then the statist approach must accept greater human rights constraints on states' right to determine their own rules for membership than these three authors seem willing to accept in the works discussed above. For Walzer, this means that states must go beyond democratic considerations to recognize the human rights of non-refugee stateless children. For Wellman and Miller, this means accepting that the overall balance of rights considerations tips more toward human rights and against states' *prima facie* right to exclude than they have previously allowed. Given their pre-existing commitment to human rights, this move is easily available to both authors. Such a move also has the advantage (for all three authors) of buttressing key liberal or democratic commitments within each view: in particular, it would rule out patrilineal nationality, both on the grounds that it discriminates against female citizens and that it can render some children stateless. The views that would result from making such a move, however, would represent a weakened or deflated statism, as they would have more prominent and more operative commitments to the human rights of non-citizens.

Conclusion

Statists hold that the proper locus of decisions concerning rules for membership is the state. They also maintain that states owe much more to their own citizens than to non-citizens. The plight of non-refugee stateless children provides a reason to question both of these statist positions, at least to some degree. The right not to be rendered stateless is a basic human right, and one that states are uniquely in the position to uphold (or violate). This right generates strong duties on the part of states toward non-citizens, duties that will in some cases override or limit states' right to determine its own rules for membership.

While non-refugee stateless children pose difficulties for the statist approach, statist can address these difficulties by recognizing that the right not to be rendered stateless represents a basic human rights consideration that should constrain states' right to exclude. But such recognition on the part of statist would require them to forsake some state control over rules of membership in favor of human rights protections. Most statist views, especially those grounded on liberal values, can make this move without generating many (or perhaps even any) internal inconsistencies, since they are already committed to human rights constraints on the state's *prima facie* right to exclude and since the state bears a clearer responsibility for rendering a child stateless than for failing to provide benefits to other potential non-citizens who might want them.

Aside from the fact that most statisticians would not so readily endorse such a move, the statist recognition of the right not to be rendered stateless would put a strong human rights consideration – and an overriding one – into a place of prominence in the statist approach. Unlike many other human rights considerations a statist might endorse,⁴¹ this one speaks directly to and limits states' ability to determine their own rules for membership. Consider, by contrast, the human rights constraint that would preclude states from controlling immigration by shooting would-be immigrants at the border on sight. Such a constraint says nothing about the legitimacy of a state controlling immigration overall, but rather only about the legitimacy of doing so in that way. But the human right I have argued for in this article requires that states rule out altogether policies that would render a child stateless, regardless of how they might go about doing that. That would mark a significant weakening of the core statist position that theorists like Wellman, Walzer, and Miller defend and a corresponding increase in the significance of human rights within that approach.

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⁴¹ Just to take one example, David Miller argues that a state '[...] may of course remove people without residence rights from the territory so long as the methods employed do not themselves violate human rights by virtue of their brutality.' Miller (2016), p. 117. And it is important to note that Miller does not view *all* human rights considerations to be of this sort, since he also argues that non-citizens have human rights claims to food, shelter, and medicine and not just against being deprived of those things.