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ARTICLE

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Can the right to internal movement, residence, and employment ground a right to immigrate?

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ABSTRACT

This article challenges Kieran Oberman's derivation of a right to immigrate from the right to *internal* movement, residence, and employment. His argument depends on a *cantilever* strategy, which finds it illogical to recognize one right without recognizing an analogous second right. This differs from a *direct* argument, which derives a right directly from an essential human interest, and an *instrumental* argument, which identifies one right as a means to protecting another right. The strength of a cantilever argument depends on the direct or instrumental foundations of the initial right and the aptness of the analogy between it and the new right that one seeks to establish. Oberman's argument fails on both accounts. First, his defense of the initial right to *internal* movement, residence, and employment, although portrayed as a direct argument, actually rests on inapt cantilever analogies with other rights, such as freedom of speech or religion. Second, the overall cantilever argument for deriving the right to immigrate fails, because immigration across fiscally separate states is not analogous to movement, residence, and employment within a single, fiscally unified state. Instead, a right to travel and visit is the proper outcome of Oberman's argument.

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Like many political theorists, I began my career by living out of a suitcase, moving from one temporary position to another. In the span of four years, I moved from Durham, North Carolina, where I completed my Ph.D., to Washington, DC, to Blacksburg, Virginia, and to St. Peter, Minnesota, before finally settling down in Lewisburg, Pennsylvania. Though personally exhausting, these moves were legally quite easy. As an American citizen, I could travel to each new location, establish a new residence, and work at my new job. I needed no permission from any government officials to travel to these new places, although police officers did monitor my compliance with traffic laws. Establishing a residence by signing rental contracts did sometimes require showing identification, and finalizing an employment contract did require proof of a legal right to work in the USA, but these were straightforward processes. My ability to move, reside, and work were never seriously in question, given my American citizenship. As a result, I was able to realize my aspiration of working as a professor of political theory, albeit after a rather circuitous route.

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Such easy movement, residence, and employment would not have been the case if my moves had instead been from Durham North Carolina to Tangiers, Morocco, Lima, Peru, and Lagos, Nigeria, prior to finally settling down in Pamplona, Spain. Each move would have required me to acquire a U.S. passport and receive a work visa from the new country, which would retain the discretion to deny my request. If one of the countries in my sequence of jobs denied me my visa, I might have been forced to find a non-academic job within the USA, ending my career aspirations. This discrepancy of foreseeable outcomes grounds the contention that the right to *internal* movement, residence, and employment justifies a similar right to immigrate, understood as the right to *external* movement, residence, and employment. If citizens enjoy the right to move within their own country in order to realize their aspirations, foreigners should be able to move to other countries in order to realize theirs. It is simply illogical to grant one right while denying the other.

This type of argument depends on what David Miller (2016, 15–16) calls a cantilever strategy, according to which it would be illogical to recognize one right without recognizing an analogous second right. Cantilever arguments differ from the direct and instrumental strategies for grounding rights. The *direct* strategy contends that a right directly protects an essential human interest, while the *instrumental* strategy holds that a right is an instrumental means to protecting another human right, which in turn directly protects an essential human interest. The strength of a cantilever argument depends on the direct or instrumental foundations of the initial right and the aptness of the analogy between it and the new right that one seeks to establish.

Importantly, a right to immigrate requires more than a cantilever extension from an internal right to movement alone. This is because the international analogy with domestic movement is simply a right to travel across borders and visit for a temporary period. Immigration differs from international travel and visitation by including a right to reside indefinitely in the new country, which in turn presupposes the ability to satisfy one's basic needs. Employment is a typical means for satisfying basic needs, but it is hardly sufficient. Access to health care and, if one has children, access to elementary education will also be required. Thus, the right to immigrate must be derived from a bundled right to internal movement, residence, and needs satisfaction.

This type of cantilever argument has been most forcefully advanced by Kieran Oberman and Joseph Carens. Importantly, this argument differs from the question of whether the internationally recognized right to *emigrate* from any country requires either a symmetrical right to *immigrate* to any country or a global duty among all states to distribute the right to entry among those seeking to exit (See Cole 2000, 43–59; Miller 2007, 208–9; Lenard 2015). The Oberman-Carens approach simply focuses on the analogy between immigration and domestic movement, not on the right to emigrate per se.

In this essay, I challenge Oberman's attempt to derive a right to immigrate from the right to internal movement, residence, and employment (hereafter abbreviated as IMRE). I focus on Oberman for two reasons. First, Carens grounds his right to immigrate on an analogy with a right to internal movement alone, never providing an argument for the rights to indefinite residence and needs satisfaction. Oberman recognizes this shortcoming and defends granting all foreigners rights to indefinite residence and employment. Although basic needs satisfaction, not mere employment, provides the third leg of the proper foundation for a cantilever extension to

a right to immigrate, Oberman clearly improves on Carens.¹ Second, Carens portrays his account not as a direct imperative but as a thought experiment meant to prod rich countries to achieve of global justice, at which point it can be put into practice (Obermann 2013, 229, 277–8, 285). Conversely, Oberman defends the right to immigrate as claimable in today’s world, though as a non-absolute right which, like all other rights, can be overridden for sufficiently strong reasons (2016, 33).

But what counts as sufficiently strong reasons? This depends on the type of argument one adopts to ground a right. Whereas Oberman ostensibly pursues a direct strategy for a right to immigrate, he actually relies on a combination of the cantilever and instrumental strategies. In Section I, I summarize Oberman’s argument, the foundations of which are scrutinized in Section II. In Section III, I challenge the analogy between rights to IMRE and rights like those to freedom of speech, religion, and association, while in Section IV I challenge the analogy between the right to IMRE and the right to immigrate. In Section V, I conclude that a right to travel and visit is a more convincing outcome from Oberman’s argument.

Oberman’s argument

For Oberman, the right to immigrate contains the right to move across the borders of sovereign states; the right to establish residence in the new state (2016, 37); and the right to work there (2015, 244). Bundling these three components distinguishes the right to immigrate from the right to travel and visit, which lacks the last two elements. Conversely, the right to immigrate does not include the right to citizenship and its concomitant right to vote (2016, 34), nor the right to special governmental benefits, such as higher education grants or small business loans (2015, 245). Oberman defends an ambitious right to immigrate, but without obliterating the political salience of borders.

This ambitious right to immigrate stems from “essential interests” that ground other human freedom rights, ‘such as the human rights to internal freedom of movement, freedom of association, and freedom of occupational choice’ (2016, 32). But the right to immigrate remains a *moral* right, not a *legal* right, since it is not included within international legal documents, such as the 1948 UN Declaration of Human Rights, which enumerates rights to marriage, religion, expression, association, movement and residence within a state’s borders, along with the free choice of employment (2016, 33–4). His point is that a moral right to immigrate deserves recognition, even if it remains legally uncodified.

Because the moral right to immigrate must be derived from the legal right to *internal* movement, residence, and employment (IMRE), Oberman must first demonstrate how the latter is indispensable to essential *personal* and *political* interests. He contends that the right to IMRE facilitates individuals’ *personal interest* in accessing ‘the full range of existing life options’ regarding ‘friends, family, civic associations, expressive opportunities, religions, jobs, and marriage partners.’ A state ban on entering a region of the country means that ‘you cannot visit friends or family, attend a religious or educational institution, express your ideas at a meeting or cultural event, seek employment, or pursue a love affair, anywhere within that region’ (2016, 35). Such state interference is unwarranted, since it trespasses on the ‘personal domain’ within which the individual alone should determine ‘where she lives, with whom she lives, who her friends are, which religion she practices, which associations

¹For a critique of Carens’s argument, see Hosein (2013).

she joins, what work she does, and how she spends her free time' (2016, 44). The internal right to movement also facilitates the *political interest* in 'enjoying a free and effective political process.' State restrictions on internal movement seem to undermine political interests associated with freedom of expression, such as 'attending a demonstration' or 'the collection of reliable information.' And because 'one needs to move in order to meet people,' limits on internal movement also undermine the political aspect of 'free association,' along with 'everything that free association makes possible, including political dialogue, conflict resolution, and the free exchange of ideas' (2016, 36).

Oberman emphasizes that the right to IMRE, like other freedom rights, must be *expansive*, such that they grant individuals a *full* range of enjoyment, not merely an *adequate* range. He first notes that rights to freedom of religion, expression, and association all deserve a full range of enjoyment. If not, 'Judaism could be banned... as long as an "adequate" range of religions went unexpressed. The government could burn books in the town square...as long as there was an "adequate" range of books left on the shelves.' And meetings and clubs could be closed, 'as long as an "adequate" range of meetings and clubs remained open' (2016, 39). Returning to the freedom of internal movement, he suggests that if a country the size of Belgium provided an adequate range of life options, then the USA could sub-divide itself into a series of Belgium-sized regions and restrict people's movement to within those regions (2016, 39). Since presumably any of these restrictions would shock us, Oberman concludes that all freedom rights must allow for a full, not merely adequate, range of enjoyment.

Additionally, Oberman notes that foreigners already enjoy rights to expression, religion, marriage, association, privacy, and internal movement, but they are not granted rights to residence (2016, 37–8) and work (2015, 244). Because the right to immigrate includes these rights, Oberman must reject their exclusion. He does so by citing international law's interpretation of all human freedom rights as *extensive* (granted equally to both citizens and foreigners); *internally bounded* (limited only by the free choice of others); and *nonabsolute* (capable of being overridden by strong justifications). So long as the right to work is internally bounded by the decisions of the employer and employee, Oberman sees no reason why it should not also be extended to all foreigners, absent any strong justifications to the contrary (2015, 244).

Having ostensibly defended adding an expansive and extensive right to *internal* movement, residence, and employment, Oberman advocates a human freedom right to immigrate, understood as the right to *external* movement, residence, and employment. Both rights equally protect personal and political interests. Just as the restriction of internal movement to a particular region precludes my personal interest in falling in love with someone in that region, so too do immigration restrictions prevent me from falling in love with someone in another country. Just as the restriction on internal movement precludes my political interest in attending a protest in another region, so too do immigration restrictions prevent me from attending a protest in another country. Oberman insists that these latter political interests should not be frustrated by immigration restrictions, 'even if we assume the traditional view that people have no rights to political participation abroad. In order to make informed and effective contributions to the political process in one's own country, one must have the freedom to talk to, learn from, and cooperate with people living elsewhere' (2016, 36).

Oberman emphasizes that realizing these essential interests requires not merely a right to travel or visit, but a right to immigrate, reside indefinitely, and work. Because a right to visit would be temporally limited, it would still restrict the visitor's 'range of options...in much the same way as an entry restriction.' Not only does a time restriction limit the pursuit of 'long-term projects, such as romantic relationships and employment opportunity,' it also limits 'short-term activities such as visiting friends or attending a political meeting' to within the period validated by a temporary visa. Consequently, international visitation visas, just like domestic state permits allowing only temporary stay in a region of a country, 'violate the underlying interests in personal and political freedom' (2016, 37). And because indefinite residence presupposes the right to work, Oberman concludes that 'restrictions on employment are effectively restrictions on immigration as well' (2015, 244). The conclusion is that the realization of personal and political interests requires a bundled right to immigrate, reside indefinitely, and work.

As should be clear, a temporally unlimited right to immigrate, reside, and work depends on interpreting all human freedom rights as expansive, deserving of a full range of enjoyment. If humans have an essential interest in only an adequate range of life options 'large enough to award us a decent choice of occupations, associations, religions, and so forth but nevertheless far smaller than the total number of options the world has to offer, ...then the argument for a human right to immigrate collapses. States could offer this smaller range internally and no one would have an essential interest in entering a foreign state to access additional options' (2016, 38–9). Thus, the idea of a right to immigrate depends upon an expansive interpretation of all human freedom rights as requiring a full range of enjoyment.

Which type of argument is Oberman adopting?

Miller provides a helpful typology of arguments for justifying a right. A direct argument claims that a specific right is necessary in order to fulfill an essential human need. An instrumental argument justifies a specific right as a means to realizing other rights, which themselves are directly grounded. Finally, a cantilever argument contends that, if we already recognize some existing right, it would be illogical not also to recognize the desired new right. The direct strategy fails if the interests underlying it are not sufficiently strong, if the new right is not empirically feasible, or if it conflicts with other existing rights except in the rarest circumstances. The instrumental strategy fails if the new right really is not the least intrusive means to realizing the more foundational human right or if it imposes unacceptable costs. The cantilever argument fails if the analogy between the existing right and the new right is not apt (2016, 15–22).

Overall, using the right to IMRE to derive a right to immigrate involves a cantilever argument. But because 'a cantilever argument is only as strong as the foundation on which it rests' (Carens 2013, 245), Oberman must first defend the right to IMRE before extending it analogously to the right to immigrate. Oberman sometimes claims that the right to IMRE derives directly from essential human interests, but he also relies on instrumental, and cantilever justifications. He then uses a broad cantilever strategy to extend the right to IMRE to the right to immigrate. Oberman's argument thus looks like this.

P1. All humans have essential personal and political interests

P2. These essential interests must be protected by a list of human freedom rights (e.g. freedom of speech, religion/conscience, privacy/intimacy, personal security, association)

P3. Human freedom rights must be *expansive*, granting individuals a full range of enjoyment, not merely an adequate range

P4. Human freedom rights must be *extensive*, granted to both citizens and foreigners

(unlike rights owed only to citizens, such as the right to vote)

P5. Rights to internal movement, residence, and employment (IMRE) must be added to list of human freedom rights

(Direct Argument or Instrumental Argument to realize P2)

P6. Rights to IMRE must be *expansive*, granting individuals a full range of enjoyment, not merely an adequate range

(Cantilever Argument from P3)

P7. Rights to IMRE must be *extensive*, granted to both foreigners and citizens

(Cantilever Argument from P 4)

C. The right to immigrate (external movement, residence, employment) must be granted to all foreigners

(Cantilever Argument from P 5–7)

Premises 1–4 are relatively uncontroversial. Philosophers of many stripes provide direct defenses of human freedom rights, such as those regarding speech, religion, and conscience, most of which are now embedded in domestic and international law. More controversial are Premises 5–7, which form the core of Oberman’s understanding of the right to IMRE. It is not always clear whether Premise 5 is directly grounded on human interests or instrumentally related to existing rights in Premise 2. Premises 6 and 7 rely on cantilever extensions from the expansive and extensive understanding of the rights found within Premises 3 and 4, but it is unclear whether the analogy between them and IRME is apt. Finally, whether we can use a cantilever argument to extend IRME to the right to immigrate will depend on the collective strength of Premises 5–7. Below, I will challenge Premises 5–7, along with the concluding cantilever extension from IRME to the right to immigrate.

Assessing the right to internal movement, residence, and employment (IMRE)

Let us begin with Premise 5, the argument for adding IRME to the standard set of freedom rights. The first question is whether the right to IMRE is directly or only

instrumentally grounded. In an earlier article, Oberman openly adopts an instrumental argument, stating that the right to IMRE plays ‘an essential role in securing the free exercise of all other human freedom rights’ (2015, 244). Conversely, in a later article he tries to derive the right to IMRE directly from the personal interest in accessing ‘the full range of existing life options when they make important personal decisions’ and the political interest ‘in enjoying a free and effective political process.’ More precisely, Oberman lists essential interests in freedom pertaining to expressive opportunities; religious practice; marriage; family; friends; and civic association (2016, 35–6). He later adds interests in an individual’s freedom to decide ‘what work she does,’ ‘where she lives,’ and ‘with whom she lives’ (2016, 44).²

Note that essential interests are directly linked to rights to occupational choice (‘what work she does’) and the right to residence (‘where she lives’). All the other interests are already directly protected by other rights to freedom of expression, religion, conscience, privacy, marriage, and association. The right to IMRE can help to realize these other rights, but this is an instrumental argument, not a direct one. Indeed, most of Oberman’s discussion of IMRE are instrumental in nature. To this extent, they are compelling if they are the necessary, least intrusive, and least costly means to realizing directly justified primary rights. Still, a direct link between essential interests and IMRE can remain if protection of the personal domain requires the government to stay out of decisions about where you move, where and with whom you live, and what work you do. But to what extent must the government stay out of these decisions?

This question is crucial for Premise 6, which uses a cantilever argument to contend that IRME must be *expansive*. Oberman admits that Premise 6 is indispensable, because if an adequate ‘range of options is sufficient, then the argument for a human right to immigrate collapses’ (2016, 38–9). He responds with a cantilever argument. Granting only an adequate range of enjoyment to rights to freedom of religion, expression, and association would allow the state to ban Judaism, so long as an adequate range of other religious options were available; ban books, so long as an adequate range of other books existed; and shut down public meetings and social clubs, so long as others remained. So too granting only an adequate range of internal movement would allow the USA to divide itself into smaller units that restrict movement across their borders.

The cantilever argument for Premise 6 stands or falls on whether there is an apt analogy between IMRE and rights to religion, expression, and association. Unfortunately, the analogy is not apt. This becomes clear when we examine one framework for directly grounding rights, John Stuart Mill’s ‘harm principle,’ which states that ‘the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant’ (1978 [1859], 9). In applying the harm principle, Mill is careful to distinguish between opinions, which rarely affect the lives, liberty, health, or well-being of others and enjoy a virtually unlimited scope of liberty, versus actions, which can affect others in these morally relevant ways and thus are more prone to legitimate governmental regulation (Mill

²Oberman never articulates an essential interest in the freedom to move for its own sake, but I suspect he would endorse Carens’s direct argument that you ‘have a vital interest in being free, and being free to move where you want is an important aspect of being free. It’s not everything, of course. But it matters greatly’ (2013, 249).

1978 [1859], 53). When an action morally affects only the individual actor, Mill emphasizes that ‘the individual is not accountable to society for his actions in so far as these concern the interests of no person but himself.’ But when ‘actions as are prejudicial to the interests of others, the individual is accountable and may be subjected either to social or to legal punishment if society is of the opinion that the one or the other is requisite for its protection’ (93). So Mill’s harm principle provides operative distinctions between opinion versus action, and between self-regarding and other-regarding actions. These two distinctions reveal crucial differences between IMRE and other rights.

The distinction between opinion and action provide a strong defense of rights to freedom of expression, conscience, and religion, since these primarily protect opinions, not actions. Of course, screaming fire in a crowded theater can serve as a dangerous action, while religious beliefs could lead to actions that harm others, as in Locke’s example of religious rituals involving infant sacrifice. In both of these instances, lives and health are directly threatened. But because most manifestations of expression, conscience, and religion pertain to opinions that do not affect the lives of others, they are clearly entitled to a full range of enjoyment. Exercising rights to marriage, association, and even privacy all involve actions, but because these are usually affect the lives and liberty of consenting adults, they deserve a nearly full range of enjoyment. Only to the degree that these actions affect the lives and well-being of others, such as children, can the state justifiably regulate them. From the liberty of opinion and self-regarding action, we have a provisional, direct argument for granting a full a range of enjoyment to rights to expression, conscience, religion, marriage, privacy, and association. This is why we would not allow the state to prohibit specific religions, books, or associations, even if an adequate range of these remained available.

The problem is that the right to IMRE involves actions that directly affect the lives, liberty, health, and well-being of others in morally relevant ways. Because movement affects the personal safety and property interests of other individual agents, the state is almost always regulating it through regulations on driving, biking, and walking, and through property regulations that protect not only the owner (by prohibiting trespass) but also the mover (by granting easements for passage). Traffic regulations also further collective goals, such as the protection of the environment, historical landmarks, pedestrian oriented lifestyles, or scenery. Traffic regulations balance the interests of the mover against the interests of other individual agents and the community as a whole in order to grant the mover an *adequate*, not full, range of movement. If a full range of enjoyment were the standard, then many traffic regulations would be morally unacceptable. However, liberal democrats readily accept a plethora of coercively enforced regulations of movement but far fewer on expression, conscience, or religion. I regularly see on-duty police officers on the roads on which I drive, but almost never in the church where I pray.

As the right to movement is highly regulated, so too is the right to occupational choice. Before examining these regulations, we first have to specify what is meant by this right. A minimal interpretation of a right to occupational choice would state that the government cannot choose your job or career for you, say by assigning you to a job. A maximal interpretation would state that the government cannot prevent you from practicing *whichever* occupation you prefer, *wherever* you prefer. The minimal

interpretation is largely uncontroversial, but the maximal interpretation is untenable. This is because many occupations affect the lives and health of other people and are tightly regulated by the state through licensing and educational requirements. Just because I want to be a brain surgeon does not mean that I have a right to be one. The state can justifiably prevent me from doing so if I lack the requisite qualifications.

Moreover, it is also possible that the state can prevent me practicing brain surgery *in the location where I prefer*, even if I have the requisite qualifications. In rebutting the claim that a distributively just, national health care system deprives doctors of the basic liberty to practice wherever they prefer, Norman Daniels responds that the state can limit the number of medical licenses granted within a specific geographical area in order to facilitate an equitable distribution of medical providers across the entire country (1985, 121–2). So even if I have completed my medical training and have passed the medical board exams, the state can justifiably prevent me from practicing brain surgery in my preferred location of London, if brain surgeons are in oversupply there but lacking in Newcastle. Conversely, the state cannot prevent me from choosing to worship in Westminster Abbey, even if there are too many Anglicans in London but too few in Newcastle.³

This example is especially pertinent to the right to immigrate, since such state limitations on occupational choice apply precisely to location. In order to avoid a surplus in one location and a deficit in another, the state can restrict your pursuit of an occupation.⁴ Similar restrictions apply to the right to residence. Through zoning ordinances, states substantially limit one's choice of residence. Zoning ordinances can directly prohibit people from living in certain locations for purposes of safety or environmental protection, and they can indirectly do so through limits on the number of occupants permitted per residence or prohibitions on apartment buildings. Zoning ordinances can also preclude transient residency, not only by prohibiting hotels but also by preventing homeowners from renting out rooms in their houses on a short-term basis.⁵ Zoning laws can even regulate with whom one lives. This is controversial, but not due to a putative right to freedom of residence, but because of potential state infringement on the rights to privacy, family, and intimate association.⁶ Even Justice Thurgood Marshall, defender of the most stringent constraints on governmental power to regulate cohabitation, nevertheless found it uncontroversial for municipalities to prohibit non-familial residences, such as fraternities or sororities.⁷

³One might reply that the state can prevent you from worshipping in Westminster Abbey if on a given Sunday it has already reached its occupancy limit under the fire code. However, the government cannot tell me that I can *never* worship in Westminster Abbey, even if I show up early to beat the crowds. Conversely, by denying me hospital privileges in London, the government effectively prevents me from *ever* practicing brain surgery there.

⁴An anonymous reviewer suggests that Oberman would not be convinced by this argument, given his position that the UK cannot restrict physicians from emigrating to the USA to earn more money (Obermann 2013, 447). This is true, but only because of the fundamental right to emigrate that they enjoy not through their status as physicians but through their status as free individuals. Once they leave the UK for the US, there is nothing in Oberman's argument that would prevent the US from restricting their ability to practice in California rather than Wyoming, simply by restricting the number of licenses in the former relative to the latter. The right of the US to regulate where one practices a form of employment through the distribution of licenses is the relevant analogy here, not the general right to emigrate which has more to do with individual self-ownership.

⁵*Village of Euclid v. Amber Realty*, 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

⁶*Moore v. City of East Cleveland*, 431 U.S. 494, (1977).

⁷See Justice Marshall's dissent in *Village of Belle Terre v. Boraas*, 416 U.S. 1, (1974), 17.

So the right to IMRE differs substantially from rights of expression, religion, conscience, privacy, marriage, and association. While the latter reflect limitations on the state's ability to regulate opinions and self-regarding actions, the former reflects the state's broader latitude in regulating morally relevant, other-regarding actions. For this reason, we gave good reason to reject Premise 6, which provides a cantilever argument for understanding the right to IMRE as expansive (worthy of a full range of enjoyment, not merely an adequate range). In the end, the analogy is not apt between the right to IMRE and the rights protecting expression, religion, association and the like.

That said, the argument thus far fails to overcome two points. First, although it undermines Premise 6, it does not dispose of Premise 7, which holds that human freedom rights must be *extensive*, or granted equally to citizens and *all* foreigners, not just those with work and residence visas. Indeed, Premise 7 could survive an attack on Premise 6 by insisting that *both citizens and all foreigners* must enjoy equally *expansive rights* to expression, religion, association, and privacy and *equally restricted* rights to IMRE. The result is that the right to immigrate becomes a right to non-discrimination against foreigners.

In addition, Oberman could also draw on the reasoning in Premise 7 to challenge my argument that the harm principle differentiates the right to IMRE from other rights. Recall that Premise 7 depends on the interpretive principle that rights under international law must be extensive, internally bounded, and non-absolute. Drawing on this reasoning, Oberman could claim that my use of Mill's harm principle does not differentiate between the right to IMRE and other rights but rather provides examples of the type of 'strong justification' that states must give when intervening into any 'nonabsolute' right.

Let me respond to the second objection first. Any moral right should not be easy to override. Although Oberman might claim that a non-absolute right to IMRE can be overridden by sufficiently strong reasons, he never clarifies the *type* of justification needed to do so. This is problematic if it allows utilitarian justifications to override moral rights. As Ronald Dworkin argued decades ago, a utilitarian calculus should not justify overriding a moral right, even if it can justify a policy decision that restricts some forms of individual freedom. To illustrate this distinction, Dworkin contrasts restrictions on the moral right to free speech with restrictions on driving.

Because Dworkin conceives of no plausible moral right to drive wherever, and in whatever direction, one wishes, a utilitarian justification is sufficient to restrict the liberty to drive: 'though the New York City government needs a justification for forbidding motorists to drive up Lexington Avenue, it is sufficient justification...that the gain to the many will outweigh the inconvenience of the few' (1977, 191). Conversely, a government cannot rely on a utilitarian justification to restrict free speech. Importantly, this is because freedom of speech is a *moral* right, not simply because it is enshrined as a legal right within a country's constitution. As Dworkin puts it, 'If citizens have a moral right to free speech, then governments would do wrong to repeal the First Amendment that guarantees it, even if they were persuaded that the majority would be better off if speech were curtailed' (1977, 191).

So to override the moral right of free speech, a government must provide a qualitatively different type of justification, of which Dworkin proffers three examples. First the government must show that the values upheld by freedom of speech are not really at stake in a given restriction. Second, a moral right could be overridden if its

exercise in a specific case would abridge another right. Finally, a moral right could be overridden if its application would impose a catastrophic, as opposed to a merely incremental, cost to society (1977, 200).

To assert that the rights to IMRE are as equally expansive as other rights but can be overridden by sufficiently strong reasons leads us to a dangerously slippery slope that allows utilitarian calculations to justify restrictions on rights, including those to freedom of speech, religion, or association. Instead, Dworkin's concerns suggest that we need to restrict the scope of rights to include only claims that cannot be overridden by mere utilitarian calculations. Recognizing this point prepares us to more clearly assess Premise 7 and the broader cantilever argument for a right to immigrate grounded in the domestic right to IMRE. For as I shall argue in the next section, the right to immigrate across the boundaries of fiscally separate states introduces utilitarian calculations that are not present when considering the domestic right to IMRE.

Challenging the analogy between the right to internal movement, residence, and employment and the right to immigrate

Although the right to IMRE can be *directly* justified as deserving adequate enjoyment, the bulk of Oberman's defense relies on the *instrumental* argument that it helps to realize other rights. To the extent that this is the case, IMRE is justified only so far as it is the necessary and least intrusive means to realizing other rights and does not impose unacceptable costs on others. An obviously less intrusive and costly means for realizing other rights is the right to *internal* movement alone, without the right to establish a new residence and acquire employment. But because a right to internal movement alone will only provide a foundation for a cantilevered *right to international travel and visitation*, not a right to immigrate, Oberman rejects this option. As he puts it, an international 'right to visit is not sufficient,' since a 'time restriction on a person's stay restricts the range of options available to them in much the same way as an entry restriction does.' So if 'I wish to meet a friend or attend a meeting on Tuesday but face deportation on Monday, then I am denied these options, just as surely as I would have been had I been refused entry in the first place' (2016, 35–7).

With this move, Oberman imposes an extravagant extension on personal freedom rights that are otherwise uncontroversial. He surreptitiously moves from a very basic, uncontroversial right to choose one's own friends, to a broader but still fairly uncontroversial right to visit my friend, to an unreasonably gratuitous right to visit my friend whenever and wherever I and my friend wish. I certainly have an essential interest in choosing and visiting my friend, but do I really have an essential interest or a right to visit her while she is in an important job meeting? I certainly have an essential interest in choosing to have children and living with them during their childhood, but if they are at a sleepover camp, can I just show up and demand the bunk under my daughter's, regardless of the rules of the camp? In both cases, my rights to visit friends and cohabit with my children are subject to reasonable limitations that require only a utilitarian justification to be upheld. My daughter's camp does not have to hire legal counsel to defend itself against my demand to bunk in her room, but it might if it prevented me from seeing her during normal visitation hours or staying with her if she were undergoing some sort of trauma.

Perhaps Oberman would respond that although the camp can exclude me based on their right to property, they can also consent to visitation, and the state has no right to interfere in whatever agreement is reached between us (Cf. Oberman 2013, 445). However, this is incorrect for precisely the reasons adumbrated at the end of the previous section. Let's say I signed a contract that did not grant me the right to stay overnight with my child during her camp, under any circumstances. If I merely make a claim that I wish to bunk under her because I miss her, the camp can override my claim with a simple utilitarian justification. But if my child were undergoing trauma, I could claim that enforcing their right to property would have a catastrophic effect on my child and must be overridden. In this latter case, the state may have to adjudicate this dispute in a way that respects the difference between rights versus other claims, and the type of justification appropriate to each. Consent alone does not resolve the issue.

Extending this to movement across borders, I may have an essential interest in visiting my family or attending a conference in another country, but that does not ground a right to move there. Rather, it is up to me to accommodate my interests within the bounds of the visa that grants me a right to travel and visit. If my visa ends on Monday, I should not wait until Tuesday to visit my family. Similarly, if my conference is on a Tuesday, then it is incumbent upon me to procure a visa that will end after the conference. Of course, this will require a duty of reasonable accommodation on the part of the country to which I wish to travel, but so long as this is the case, the right to travel and visit suffices. The right to immigrate is neither necessary nor the least intrusive means to securing the essential interests cited by Oberman.

While Oberman's application of a right to immigrate is tenuous in the case of short-term interests in visiting friends or attending conferences, what about 'long-term projects, such as romantic relationships and employment opportunities, which often require more time than temporary visas allow' (2016, 37). With respect to romantic relationships, the strength of the essential interest and the type of right needed to protect it depends greatly on their character. We can represent this on a spectrum. At one end are very short-term romantic or sexual encounters, such as dates or one-night stands; at the other are marriages or other long-term, committed relationships. Whereas the right to privacy protects short-lived intimate encounters from state intrusion, committed relationships with greater temporal extension and emotional, associational, and financial depth ground more extensive rights to privacy, marriage, and intimate association. Moreover, rights to marriage and intimate association not only limit state interference but also incur state benefits, such as tax credits, visitation rights, and privileges of confidentiality within judicial proceedings, along with state enforced obligations, such as spousal support or alimony, if the union dissolves. Applying this to questions of immigration, it is clear that marriage or long-term committed relationships implicate greater state involvement and perhaps do ground a special right to immigrate to committed partners. But it is hardly intuitive that individuals have a right to immigrate simply to pursue foreign flings.

The other mentioned long-term project – the pursuit of employment opportunity – reminds us that the right to immigrate, unlike the right to travel and visit, involves not only the right to movement across borders but also the rights to establish a residence and to work within the new borders. But if these latter two components of the right to immigrate are understood as instrumentally justified and open only to an adequate range of enjoyment,

they must be weighed in a utilitarian calculus against the costs they impose on prior residents and their collective representative, the state. Rights to expression, religion or conscience, privacy, or association impose few costs upon others. And even if the right to external movement alone, understood as a right to travel and visit, does impose infrastructure costs, the state can have foreigners offset these costs through taxes that are both general (tolls, gasoline taxes) and specific (hotel occupancy and airport taxes). This is not so easily done with the rights to residence and employment.

Establishing a residence almost always involves the state provision of basic residential infrastructure services, such as water, sewage, electricity, garbage disposal, and transportation access. Even if the resident must pay for all or part of these services, the state itself must first construct and later maintain the infrastructure that allows these services to be accessed. Moreover, if an immigrant arrives and resides with minor children, the state must also provide them with basic education. Finally, states that provide public healthcare to all long-term residents will incur further costs. Unless we are assuming a libertarian state (and perhaps an infrastructure-free frontier), establishing a residence will impose costs on the state and on prior residents of the community.

A similarly libertarian set of assumptions seems to underlie Oberman's minimalist recognition that a right to immigrate and work, could, by increasing the labor supply, suppress the wages of other workers (2016, 45–6). Overlooked by this framework is the much broader array of state arrangements entangled with employment. Working an occupation does not merely involve the employer, the employee, and other employees. It also involves the state, in its legal-coercive, fiscal, and monetary functions. In terms of *legal-coercion*, the state regulates employment through occupational safety and environmental regulations, minimum wage standards, rights and restrictions on union and collective bargaining arrangements, along with the professional licensing requirements discussed earlier. In terms of *fiscal* functions, employment is widely linked to the provision of state pensions, while in the USA (and other countries) it is also indirectly linked to state subventions for private health insurance. Finally, in terms of *monetary* functions, note that the USA Federal Reserve Bank directs its monetary policy at the dual goals of mitigating inflation while facilitating full employment. Granting all foreigners the right to work, which may hinder full employment, may require changes in monetary policy in response, taking us far beyond the mere supply and demand effects on labor markets. Instead, it invokes the type of utilitarian calculations more appropriate for justifying policy decisions than adjudicating moral rights.⁸

But does the internal right to movement and residence not also impose such costs? Yes, but these costs can be born more easily within a fiscally unified state. Oberman claims that recognizing a universal right to immigrate would result in a world that 'would in fact resemble the contemporary USA and the European Union, both of which allow citizens to migrate freely from one member state to another, but also allow state governments to reserve certain benefits for their own residents' (2015, 5). This portrait is inaccurate. The USA is a fiscally and monetarily unified federal welfare state. The

⁸Carens addresses concerns about the fiscal effects of a right to immigrate by accepting waiting periods before immigrants can access state welfare benefits and by claiming states with stingy welfare provisions have fewer grounds for restricting immigration (2013, 281). But as my examples suggest, even countries with weak welfare states will nevertheless confront monetary policy effects granting foreigners the right to work.

European Union is a union of fiscally separate states, of which those in the Eurozone share a common currency and monetary policy.

The differences between the fiscally unified USA and the fiscally disparate European Union are clearly manifest in the budgets of their different governing units. In 2011, the US federal budget was €4.526 trillion, while that of California, its largest state, was roughly €69.5 billion. In the same year, the EU budget was only €152 billion, compared to a French budget of €928 billion.⁹ As this suggests, the budgetary relationships between the US Federal government and its states is roughly inverse to that of the EU and its member states. Moreover, roughly 60 percent of the relatively large U.S. federal budget is devoted to welfare spending, primarily in the form of a unified pension and retirement health care system financed by nation-wide payroll taxes. For this reason, we can reasonably talk about an American welfare state, stingy though it be, but we cannot reasonably talk of a unified European welfare state. Instead, the EU is a confederation of fiscally distinct but internally generous welfare states (Olsen and McCormick 2015, 15, 28, 231).

American fiscal union means that the right to IMRE anywhere within the USA does not substantially affect its unified fiscal and monetary policies. Social Security and Medicare will receive contributions and dispense benefits regardless of whether an individual moves between jobs in Massachusetts, Ohio, and Texas before finally retiring in Florida. Internal movement, residence, and employment have little effect on this system, while monetary policy will seek to facilitate full employment and mitigate inflation for the whole country, not just any specific state.

EU fiscal disunion, conversely, means that movement, residence, and employment can have profound fiscal disruptions on member states, even those with a common monetary policy. Take the case of Portugal. Like other Southern European countries within the Eurozone, it has suffered from enormous trade and current account deficits with northern Europe, caused by relatively low productivity, the inability to devalue an independent currency, and a common Eurozone monetary policy whose mandate omits full employment (Pettis 2013, Chapter, 6). But unlike its neighbor Spain, Portugal has suffered far less unemployment, because its citizens have been more willing to emigrate to other EU countries with stronger economies. However, the exodus of 10 percent of its working age population has perversely created a domestic pension crisis, since Portuguese pensions are not underwritten by richer EU countries, and Portuguese retirees cannot follow their working age compatriots to richer EU countries and live off of their more solvent pension systems (Krugman 2015).

Thus, recognizing a universal right to immigrate would *at best* create the types of fiscal problems associated with free movement within the European Union.¹⁰ If so, then the fiscal problems that presently result from the right to immigrate within the EU reveals important dangers in a general right to immigrate even under the favorable conditions found within the EU. Of course, EU fiscal union, with a common pension and health system supported by EU-wide payroll and other taxes, might well solve this

⁹Budget data for the EU, France, and the USA are in Sbragia and Stolfi (2015, 100). Budget data for California are from <http://www.ebudget.ca.gov/2010-11-EN/pdf/Enacted/BudgetSummary/SummaryCharts.pdf>.

¹⁰I emphasize *at best*, given two caveats that Carens imposes on his argument for open borders. First, Carens contends that open borders can only exist in a counterfactual, distributively just world with the level of inequality presently found among EU member states. Second, Carens defends the practice of EU member states in restricting immigrants' access to welfare and pensions (2013, 272, 281–2). In both ways, the present structure of the EU provides the analogy for a world that recognizes a universal right to immigrate.

problem, although legitimating this system might require a stronger EU legal and political union as well. This would effectively create the often-dreamed-of USA of Europe, the equivalent of the USA of America. However, a fiscally, legally, and politically unified USA of Europe would no longer exemplify a right to immigration working successfully. Instead, free movement within the USA of Europe would merely be an instance of IMRE.

Now, defenders of a right to immigrate might respond that immigrants not only impose costs on but also confer benefits to the state, since they pay various taxes, work jobs, start businesses, and create new markets. *Whether* immigrants confer net benefits, *which* immigrants confer greater net benefits, and *how* the net benefits and costs of immigration are distributed among immigrants and prior members of the state are subject to an intense debate among economists, a debate I will not enter here. However, note that the utilitarian reasoning involved in addressing these complex questions is a good indication that we are moving beyond the domain of rights and moving into the realm of policy, where states face lower justificatory burdens and enjoy much greater latitude in basing their decisions on calculations of costs and benefits. By blurring the line between policy and rights, we run the risk of weakening the force of the latter, rendering them more easily overridden by reasons far weaker than those usually required. Indeed, accepting utilitarian abridgements to a moral right to immigrate might allow states to comply with that right only in the case of skilled or wealthy immigrants who provide net benefits to the receiving state. Is this where defenders of a moral right to immigrate want to end up?

So a right to immigrate, reside, and work imposes profound effects on the legal-coercive, fiscal, and monetary functions of states. These effects can be systematically addressed by a legally, fiscally, and monetarily unified state, even a federally divided one such as the USA. These effects are not so easily managed across fiscally independent states, even relatively equal ones like those in the EU, or those with a common monetary policy, like the Eurozone. So whereas a right to IMRE can easily be granted, a right to immigrate cannot. This is because recognizing IMRE as a right within a fiscally unified state need not raise the types of utilitarian considerations so destructive to the concept of rights. Thus, the cantilever argument for the right to immigrate fails, because its analogy to IMRE is not apt.

A right to travel and visit

Instead, the narrowest and least costly means for realizing primary human freedom rights across borders is a right to travel and visitation. This right allows individuals to visit family and friends, attend conferences and demonstrations, and participate in dialogue and learning. The right to travel and visit is aptly analogous to the right to internal movement alone, without the right to residence and employment. While the right to travel and visit, either internally or externally, imposes costs upon others and the state, these costs are smaller and easily compensated. A right to travel and visit will impose smaller, temporally limited infrastructure costs upon the state and its taxpayers, and it will not require the state to provide health care or educational benefits. Moreover, the visitor can defray these costs through tolls, fees, and fuel taxes paid by domestic and international travelers, along with airport and hotel taxes paid only by the latter.

But how should we understand the broader right to internal movement, residence, and employment, a widely recognized legal right? Is this merely a right of citizenship, like the right to vote? If this is the case, can legal immigrants be denied this right? Apart from narrow exceptions based on national security, I think not. Rather, the rights to internal movement, residence, and employment are best understood as *denizen rights*, accessible only to citizens and foreigners legally within the country.

Like Carens (2013, 241–2), Oberman draws a sharp dichotomy between the human rights accessible to foreigners versus narrow citizen rights to vote and hold office, and both authors emphasize that international law places the right to movement on the human rights side of the division. But international law does not grant foreigners rights to indefinite residence or to work. Descriptively, rights to indefinite residence and employment are granted not only to citizens but also to legal foreign denizens. Normatively this third category is defensible in light of the broader ways that movement, residence and employment implicate the state's legal, fiscal, and monetary functions. Given the complexity of the functions involved, it makes sense that the state find ways to regulate the number of new denizens it contains, so as to ensure that the future contributions of those denizens match up well with the legal, fiscal, and monetary burdens imposed by their rights to movement, residence, and employment.

But if a bundled right to movement, residence, and employment is not a general human right, a disentangled right to internal movement alone might be. As I have suggested earlier, an apt analogy may exist between a more minimal right to internal movement and a right to travel and visit across borders. Whereas a right to immigrate must include the rights to reside and to work in a new country, the right to travel and visit does not. If foreigners are to realize their essential interests in visiting family and friends in other countries, then they should be allowed to travel to other countries to do so.

Of course, the right to travel and visit is nonabsolute. This means that states can restrict this right to the degree that they have appropriately strong justifications to do so. But recall that the right to travel and visit, like the right to internal movement, deserves only an adequate range of enjoyment and is largely instrumentally justified as a means to realizing other rights. Thus, the justifications required to restrict the secondary right to travel and visit need not be as strong as the justifications required to restrict moral rights to freedom of speech or religion. So for instance, the recipient state may restrict a foreigner's right to travel and visit if it fears that the visitor will impose financial costs, such as healthcare, during the visit. But these restrictions should be focused on the conditions of the individual visitor and their ability to offset foreseeable costs. While visas can justifiably be denied, doing so cannot be based on blanket judgements about visitors from certain countries. If this is the case, then blanket travel restrictions or barriers on people from poor countries become unjustifiable.

Similarly unjustifiable are blanket travel bans on people from Muslim countries. We can better understand why by examining the decision of the 9th Circuit Court of Appeals to block the Trump administration's Executive Order 13780 banning visitors from six majority Muslim countries. According to this court, the President retains the statutory authority to suspend the entry and visitation rights of foreigners, but only after making a 'sufficient finding that the entry of these classes of people would be

detrimental to the interests of the USA' [*State of Hawaii v. Trump* (2017), 2]. The Court vacated the Executive Order because there was 'no sufficient finding...that the entry of the excluded classes would be detrimental to the interests of the USA' (*Hawaii v. Trump*, 36). For instance, a draft report by the Department of Homeland Security stated that citizenship was not a 'reliable indicator of potential terrorist activity,' while the final version of this report, issued days before EO 13780, noted that 'most foreign-born...violent extremists likely radicalized several years after their entry to the USA' (10–11). In addition, the Court noted that the Order's use of nationality as the basis for creating a class of individuals excluded from traveling to and visiting the USA 'could have the paradoxical effect of barring entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war' (41). As a result, the travel ban ended up being not only *overinclusive* (by excluding individuals unlikely to commit terrorism), but also *underinclusive* (by admitting those who may be likely to do so).

Although the US Supreme Court ultimately (and I believe erroneously) upheld a version of this Executive Order in *Trump v. Hawaii* 585 US (2018), I focus on the 9th Circuit Court of Appeals opinion to demonstrate the type of strong justification that I believe is needed to override a right to international travel and visitation. As I see it, the state must provide real evidence that such restrictions are in place in order to mitigate potentially catastrophic costs. That the Trump administration could not at the time provide evidence that its travel ban was a rational means to achieving national security speaks volumes about its mendacity and incompetence.

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