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## Brain Drain

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# Brain Drain

FERNANDO R. TESÓN\*

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By “brain drain” I mean the emigration of skilled persons from poor countries to rich countries.<sup>1</sup> Traditionally, many have seen the brain drain as a curse for developing countries. Brain drain is bad, they think, because it hurts those left behind. Governments of developing countries promote this view as well, arguing that because “human capital” is an

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1. There is, of course, an important migration of skilled workers among rich countries. In this Article, however, I only address the brain drain from poor countries.

important determinant of economic growth, the loss of skilled individuals undermines the economic performance of the country.<sup>2</sup> As one researcher puts it, “[t]he brain drain increases the scarcity of highly needed skilled labour in developing countries and consequently reduces long-run economic growth and income.”<sup>3</sup> Taking this empirical claim as obviously true, many deplore the brain drain as somehow unfair, and suggest that something ought to be done to stem it.<sup>4</sup> Yet, to my knowledge, there has been no normative treatment of brain drain. The literature on global justice, usually favorable to freer migration, has kept silent on the issue.<sup>5</sup>

This Article argues against this conventional view. Most of the time there is nothing unfair about the brain drain, whether one considers it from the standpoint of the emigrant, the source country, or the host country. Critics of the brain drain make problematic empirical and philosophical claims. The *empirical* assumption of the critics, that the brain drain invariably hurts developing countries, is controversial. While a number of authorities endorse the conventional view that the brain drain hurts source countries, a contrarian literature suggests that the brain drain may *help* those left behind—that there is, in fact, a brain *gain*. Moreover, the *philosophical* claim that societies in some sense *own* individuals’ natural talents ought to be rejected.

This Article first examines the facts and summarizes various proposals that have been advanced to stem the brain drain. The evidence shows that (1) it is far from clear that the brain drain harms those left behind; (2) even if those left behind are harmed, that harm is far from devastating; and (3) because the brain drain allocates resources efficiently, it is likely to benefit many people globally, especially the world’s poor. For the sake of argument, this Article then concedes that the source country is harmed in some relevant sense, and asks whether this harm is *unjust*.

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2. South African Deputy President Thabo Mbeki asks rhetorically: “[D]o we not have need to recall Africa’s hundreds of thousands of intellectuals back from their places of emigration in Western Europe and North America, to rejoin those who remain still within our shores!” Thabo Mbeki, *The African Renaissance Statement of Deputy President, Thabo Mbeki*, SABC, Gallagher Estate ¶ 27 (Aug. 13, 1998), <http://www.dfa.gov.za/docs/speeches/1998/mbek0813.htm>.

3. Research Group on the Global Future, Center for Applied Policy Research, *Brain Drain* ¶ 1 (July 20, 2005), <http://www.cap-lmu.de/fgz/statistics/brain-drain.php> [hereinafter CAP Report].

4. See *infra* text accompanying notes 21–23.

5. Allen Buchanan, for example, recommends that the international community should support “efforts to liberalize immigration policies to increase economic opportunities for the world’s worst off . . . .” ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW* 193 (2004). Similarly, Moellendorf criticizes, on the grounds of justice, current immigration restrictions in developed countries, but does not mention the brain drain. DARREL MOELLENDORF, *COSMOPOLITAN JUSTICE* 54, 61–67 (2002).

After examining at some length the concept of self-ownership, this Article endorses the concept and discusses its relevance to the brain drain. Even assuming that those left behind are harmed in some sense by talented citizens who leave, the state has no claim over the skilled individual who emigrates because he has pre-political ownership of his talents. This Article then examines the argument that the talented citizen has a duty of reciprocity to the citizen's home country, and finds it wanting. Finally, the Article rejects the twin views that emigrants, in most cases, act wrongly when they leave, and that host countries act wrongly when they attract skilled immigrants. The upshot is that if the brain drain harms others, it is not an unfair harm.

### I. THE FACTS

International migration of talent has increased substantially since the Second World War.<sup>6</sup> A 2005 statistical study of selected countries shows that emigration of talent surpasses fifty percent in some countries.<sup>7</sup> Although scholars disagree about the extent of the phenomenon, no one seriously denies that it is happening. And no one seriously denies that the brain drain occurs mostly, but by no means only, from poor to rich countries. This is the brain drain that raises ethical concerns, because unlike most rich countries, poor countries urgently need scientists and doctors. A German doctor who leaves for the United States presumably does not hurt Germany much; a doctor from Ghana who makes the decision to emigrate is likely, it is thought, to hurt his home country.<sup>8</sup>

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6. According to a 1984 report by the United Nations Conference on Trade and Development (UNCTAD), around 400,000 skilled individuals migrated from developing to developed countries between 1961 and 1972. U.N. Conference on Trade and Development, *Proposals on Concrete Measures to Mitigate the Adverse Impact of Reverse Transfer of Technology on Developing Countries*, ¶ 25, U.N. Doc TD/B/AC.35/6 (July 20, 1984).

7. See CAP Report, *supra* note 3. In some cases, the percentage of skilled population that emigrates is staggering: 82.5% of Jamaicans with tertiary education live in OECD countries. DEVESH KAPUR & JOHN MCHALE, GIVE US YOUR BEST AND BRIGHTEST: THE GLOBAL HUNT FOR TALENT AND ITS IMPACT ON THE DEVELOPING WORLD 18 (2005). There are some surprises, though; not all source countries are developing countries. New Zealand and Italy experience high brain drain, while the brain drain from Italy and Russia exceeds the brain drain from Mexico and Thailand. See CAP Report, *supra* note 3. The emigration rates for skilled workers by region are 41% for the Caribbean region, 27% for Western Africa, 18.4% for Eastern Africa, and 16% for Central America. See KAPUR & MCHALE, *supra*, at 1.

8. Although, for noncosmopolitans who think persons owe a strong duty to compatriots, it would not matter if those left behind were citizens of a rich country.

The causes of brain drain are not hard to fathom. On the demand side, the explosion of knowledge-based industries in rich countries has increased the need for skilled workers in those countries. This in turn creates the wage differentials that attract educated immigrants. On the supply side, poor salaries and deficient working and political conditions in developing nations increase the incentives to leave. The expected benefits for the emigrant compensate for the considerable *costs* of emigration. Yet these benefits are not only financial: Brains go where other brains are, where they can face challenges.<sup>9</sup> Brain drain, then, is explained by a properly enriched application of two well-established economic laws: the law of labor supply and demand, and the law of comparative advantages.

As previously indicated, the traditional view is that the brain drain hurts the source country. In a classic treatment, the noted economist Jagdish Bhagwati took this harm for granted when he proposed taxing the foreign-earned income of the migrant.<sup>10</sup> There is a large amount of literature echoing this sentiment,<sup>11</sup> which has found its way to the informed press.<sup>12</sup> The general thrust of the traditional view is that emigration of human capital is detrimental to economic growth. Under this view, poor countries that see their talented citizens leave are likely to remain trapped in poverty, in part because good institutions are crucial for economic and political success, and educated citizens are the more likely institution-builders, so if they leave, the country never has a chance to take off.<sup>13</sup> Critics of the brain drain conclude that because the benefits of education are externalities that individuals do not take into account when making private decisions, “policies to curb the brain drain may be warranted.”<sup>14</sup>

This traditional view has been challenged by a number of scholars.<sup>15</sup> According to them, allowing emigration of talented persons raises the

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9. This was observed more than forty years ago. See Philip H. Abelson, Editorial, *New Centers of Excellence*, 150 *SCIENCE* 11, 11 (1965).

10. Jagdish N. Bhagwati, *The Brain Drain Tax Proposal and the Issues*, in *TAXING THE BRAIN DRAIN* 3, 3 (Jagdish N. Bhagwati & Martin Partington eds., 1976).

11. See generally the survey in Jagdish N. Bhagwati & John Douglas Wilson, *Income Taxation in the Presence of International Personal Mobility: An Overview*, in *INCOME TAXATION AND INTERNATIONAL MOBILITY* 3, 7–8, 13, 17 (Jagdish N. Bhagwati & John Douglas Wilson eds., 1989).

12. See *Go for It*, *ECONOMIST*, May 6, 2000, at 20.

13. See KAPUR & MCHALE, *supra* note 7, at 5–6.

14. William J. Carrington & Enrica Detragiache, *How Extensive is the Brain Drain?*, *FIN. & DEV.*, June 1999, at 46, 49.

15. See Andrew Mountford, *Can a Brain Drain Be Good for Growth in the Source Economy?*, 53 *J. DEV. ECON.* 287, 287–88 (1997); Oded Stark, *Rethinking the Brain Drain*, 32 *WORLD DEV.* 15, 16 (2004); Jean-Pierre Vidal, *The Effect of Emigration on Human Capital Formation*, 11 *J. POPULATION ECON.* 589, 589–90 (1998).

returns on education.<sup>16</sup> In other words, if people have a non-negligible probability that by investing in education they may migrate to another country where salaries are higher, they will predictably invest in their education. The possibility of brain drain, then, creates an incentive for more education, and this benefits the country, assuming that only some of those persons will in fact emigrate. Compared to a closed economy, “an economy open to migration differs not only in the opportunities that workers face but also in the structure of the incentives they confront; higher prospective returns [to education] in a foreign country impinge on [education] decisions at home.”<sup>17</sup> Even conceding that the country may experience some loss, this “brain gain”—defined as the increased investment in education in the source country—must be computed to calculate the effect of migration, and the brain gain may exceed the brain drain. To these gains one must add the “brain circulation,” that is, those persons who return to their home countries after studying or working abroad. Although these findings have been disputed,<sup>18</sup> they are weighty enough to cast doubt on the view that the harm to source countries is as devastating or univocal as had been earlier assumed.<sup>19</sup>

A couple caveats about the economic literature are in order. First, the formal analyses offered, although indispensable, assume that the wage differential is the only relevant incentive to emigrate. In reality, immigration has many other costs and benefits. In terms of costs, the emigrant leaves his culture and his family, perhaps to go to a place where he will not speak the language or will feel otherwise alienated or isolated. In terms of benefits, as I indicated, he may be seeking values other than money, such as intellectual and scientific challenges. Second, the whole brain

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16. See, e.g., Stark, *supra* note 15, at 19 (asserting that low probability of migration motivates individuals to underinvest in human capital); Vidal, *supra* note 15, at 596–97 (arguing that labor migration provides incentive for human capital formation in the source country).

17. Stark, *supra* note 15, at 16. The brain gain hypothesis has been recently endorsed by a United Nations study. See UN News Centre, UN Report, Brain Drain Can Also Be Brain Gain for Some Source Countries (Apr. 18, 2008), <http://www.un.org/apps/news/story.asp?NewsID=26338&Cr=unu&Cr1>. The study does recognize that in some areas such as health care brain drain remains a concern.

18. See Maurice Schiff, *Brain Gain: Claims About its Size and Impact on Welfare and Growth are Greatly Exaggerated*, in INTERNATIONAL MIGRATION, REMITTANCES, AND THE BRAIN DRAIN 201, 201–24 (Caglar Ozden & Maurice Schiff eds., 2006).

19. The variables are many: Even proponents of the traditional view make distinctions between different types of countries. Kapur and McHale suggest that the brain drain will affect medium-sized countries more than small countries. KAPUR & MCHALE, *supra* note 7, at 178–79.

drain versus brain gain debate is about whether the brain drain hurts the source country. Yet any normative assessment of the brain drain should take into account its effect on *everyone*, and in particular the world's poor. This variable is not addressed in the brain drain literature, which focuses on the harm to the source country. Although the effect of the brain drain on the *global* population—that is, whether or not the brain drain helps everyone in the aggregate—is difficult to establish, there is no suggestion in the literature to dispute the conjecture that if talents are put to their best and highest uses, they will end up benefitting a larger number of people. This is not hard to accept in the aggregate, although it may or may not be true in a particular case. A scientist who is poorly paid and lacks laboratories and qualified assistants is less likely to contribute beneficial knowledge than a scientist who works under favorable conditions. On the other hand, a doctor who practices in poor, rural areas in a developing country *seems* to be helping deserving persons more than a doctor who treats millionaires in the Mayo Clinic, even though his services are arguably put to their best and highest use.<sup>20</sup>

## II. PROPOSALS TO STEM THE BRAIN DRAIN

Those who criticize the brain drain have proposed several measures to curb it. These proposals can be grouped into three categories: measures adopted by source states, measures adopted by receiving states, and measures adopted through international cooperation.<sup>21</sup> In turn, the source country may use the “stick” and enact measures of control, or use the “carrot” and enact measures to increase the incentives to stay. The most obvious control measure is the exit visa, which subjects emigration to the government's permission. This is now discredited for obvious reasons, although some would accept exit visas in extreme cases, for example, to prevent emigration of doctors and nurses during a serious epidemic. Only slightly less objectionable are proposals to forcibly delay emigration, for example, by adding years to medical training.<sup>22</sup> The country may also enact fiscal controls. The government can tax the foreign-earned income of the emigrant, or establish financial burdens such as an exit tax. These measures raise the cost of emigration. Source states may also try to address the causes of the brain drain by creating incentives to stay, such as improving salaries and working conditions and, more

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20. I say *seems* because even this cannot be said with certainty. What if the Mayo Clinic patient is a great economist or scientist who, if cured, will help rescue *millions* of persons from poverty?

21. Here, I generally follow KAPUR & MCHALE, *supra* note 7, at 177–209.

22. See, e.g., Gumisai Mutume, *Reversing Africa's 'Brain Drain'*, AFRICA RECOVERY, July 2003, at 18.

importantly, by pursuing economic and social policies that bring progress, freedom, and prosperity to their society, thus eliminating the causes of the brain drain. Finally, the source state may adopt measures to strengthen its relationship with the diaspora of talented nationals, thus softening the adverse impact of the brain drain.

Receiving countries may discontinue immigration policies that lure talented immigrants, either by changing welcoming immigration laws or by refraining from direct recruitment of skilled persons in poor countries. Thus, for example, the federally-funded Fulbright Scholarship program requires foreign graduates to return to their home countries.<sup>23</sup> Finally, poor and rich countries may agree, by treaty, for example, that the rich country will compensate the poor country for the brain drain.

### III. THE STATE AND THE EMIGRANT

There are several ways to evaluate the facts and proposals related to brain drain. One could take an economic approach and say that the brain drain simply allocates human resources efficiently in that brain drain puts talents to their best and highest use.<sup>24</sup> Because skilled workers migrate where their talents are most wanted and rewarded, the total output is maximized, at least when the effect of the brain drain is considered in the aggregate. Under this view, asking whether the brain drain is fair is like asking whether the fact that Americans buy Japanese DVD players is fair. Seen from this perspective, liberals should not be opposed to the phenomenon either. The brain drain is a free exchange across borders, like free trade: The immigrant seeks employment and the foreign employer takes the immigrant as an employee. Only a police state tells persons that they should work here or there. Scientists, doctors, and teachers should be free to seek employment wherever and whenever they want.

But of course, the question is not so simple. An efficient outcome may be unfair. Perhaps citizens who consider leaving should pause; perhaps emigrating violates duties owed to fellow citizens. Some may even suggest that the government, acting on behalf of the citizenry,

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23. It is not clear if the purpose of this provision is to help poor countries or to curb immigration.

24. For a defense of liberal immigration laws—and not just brain drain—along these lines, see Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in JUSTICE IN IMMIGRATION 158, 158–59 (Warren F. Schwartz ed., 1995).



has the power to enforce such duties and make emigration difficult or impossible. Just as the government, it is thought, has the power to enforce our duties toward others by redistributing wealth through taxes, so the government can legitimately induce the wayward sheep to stay in the herd. Finally, it might be argued that rich countries are wrong to actively entice educated immigrants, whether by enacting welcoming immigration laws or by aggressively recruiting foreign talent.<sup>25</sup> In so doing, it might be thought that rich countries are unduly preying on an important resource that developing countries need to grow in the long run.

This Article rejects the common approach of treating talented persons as the human capital of the state.<sup>26</sup> This language suggests that talented persons are a *resource* of the state, so that the state should be able to regulate how many should emigrate or stay in the country. Such an approach unduly personifies the state as the owner of human capital, just as an investor owns his money, and therefore fails to treat persons as autonomous agents. Any liberal theory should give weight to individual choices, and the issue should be whether those individual choices—the decisions to leave—are open to moral criticism. Any political measure to address the brain drain should cohere with the pride of place that a liberal polity assigns to individual freedom.

Accordingly, few disagree that citizens have, in principle, a right to leave their country.<sup>27</sup> Indeed, requiring exit visas, or subjecting emigration to the government's permission, is the mark of many past and present oppressive regimes.<sup>28</sup> Although exit visas have sometimes been defended, that position is mercifully discredited today, and preventing people from leaving their own country is a violation of international law.<sup>29</sup> A major purpose of the right of exit is to allow citizens to choose among different

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25. A well-known example is the United Kingdom's aggressive recruitment of Filipino nurses. For an overview, see CTR. ON MIGRATION, POLICY, & SOCIETY, INVESTIGATING THE IMPACT OF HEALTH CARE RECRUITMENT FROM THE PHILIPPINES (2006), <http://www.compas.ox.ac.uk/publications/Briefings/Briefing-1206-Philippines.pdf>.

26. For the seminal paper on the importance of human capital, see Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 17, 35 (1988).

27. Thus, John Rawls says that a well-ordered society must recognize the right of emigration as a human right. JOHN RAWLS, *THE LAW OF PEOPLES* 74 (1999).

28. See R. Adam Moody, *Reexamining Brain Drain from the Former Soviet Union*, 3 THE NONPROLIFERATION REVIEW 92, 92 (1996), available at <http://cns.miiis.edu/pubs/npr/vol03/33/moody33.pdf>. Interestingly, Soviet bloc regimes gave brain drain as their reason to control *all* immigration. In Cuba, for example, the regime routinely denies exit visas to health care professionals. E.g., *Denial Exit Visas a Health Care Professionals in Cuba*, MEDICINA CUBANA, Nov. 17, 2006, <http://medicinacubana.blogspot.com/2006/11/denial-exit-visas-health-care.html>.

29. E.g., G.A. Res. 2200A (XXI), art. 12(2), U.N. Doc. A/6546 (Dec. 16, 1966).

cultures, institutions, and legal systems. The right of exit is important for those who think that global justice should make room for various conceptions of the good, even some that are presumably decent but do not conform to liberal principles.<sup>30</sup>

Once the right of exit is accepted, it is tempting to say that this settles the issue of brain drain: The emigrant would simply be exercising his right to exit and the state has no legitimate power to stop him. However, this conclusion would be too quick, because although it might be true that the state cannot legitimately *force* the emigrant to stay, the state may perhaps raise the cost of leaving. If the brain drain is bad and something ought to be done about it—even though that something cannot be forcing persons to stay—arguably, state measures short of force that create incentives to stay are not necessarily objectionable.

Moreover, even conceding that the emigrants have a right to leave, one could still argue that they ought to stay. Political principles, that is, principles about the proper role of the state, may tell us that a liberal state cannot validly prevent someone from leaving. Emigrants may have a *political* right to leave, but perhaps they would act immorally if they did.<sup>31</sup> Although the state is barred from keeping them in, it can be argued that they still owe a moral duty to their fellow citizens to stay.

The preceding paragraphs summarize some of the measures that have been proposed to stem the brain drain. Some measures—where the state uses the stick—are measures of control, such as taxation of foreign income or interstate compensation. The other measures—where the state uses the carrot—are measures that create incentives for people to stay, such as facilitating the creation of quality research institutions, providing various kinds of subsidies and rewards, or strengthening a relationship with the diaspora. In order to evaluate these sets of arguments—the argument that the state may legitimately enact carrot or stick policies short of force to make emigration harder and the argument that the emigrant is doing something wrong—the moral-political relationship between the state and its citizens must be discussed.

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30. See RAWLS, *supra* note 27, at 71, 74.

31. Similarly, although I may act immorally in doing so, I have a political right to offend people in public and the government cannot silence me.

## IV. SELF-OWNERSHIP

### A. *The Classical View*

The critical threshold inquiry is whether a state has a moral claim to its citizens' talents. According to the classical-liberal tradition, the answer is no. John Locke famously claimed that "[t]hough the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his."<sup>32</sup> Here Locke distinguishes between property in one's own person and property in external things.<sup>33</sup> Because external things, such as land, were initially owned in common, those who were lucky enough to appropriate them first owed, perhaps, some compensation to latecomers. The idea here is that taking something from the commons *worsens* the remaining co-owners. Some think that this original duty of compensation that first appropriators owe to the rest provides a moral foundation for the distributive state, because it knocks down the first-appropriation rule as a basis for the right of private property.<sup>34</sup> Things were originally owned in common, so when first possessors took external things from the commons, they could not, given the scarcity of worldly goods, possibly satisfy the Lockean proviso, that is, leave "enough, and as good . . . in common for others."<sup>35</sup> Therefore, first possessors must arguably compensate others, and the state is the agent entrusted with implementing this duty.<sup>36</sup>

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32. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 185 (The Lawbook Exchange, Ltd. 2006) (1690). For modern restatements of the principle of self-ownership, see MICHAEL OTSUKA, *LIBERTARIANISM WITHOUT INEQUALITY* 11–19 (2003); Peter Vallentyne, *Libertarianism*, STAN. ENCYCLOPEDIA OF PHIL. § 1 (2006), available at <http://plato.stanford.edu/entries/libertarianism> ("At the core of full self-ownership . . . is *full control self-ownership*, the full right to control the use of one's person."). See also ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 171 (1974).

33. See also OTSUKA, *supra* note 32, at 11–21.

34. See, e.g., WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 116–21 (2d ed. 2002).

35. LOCKE, *supra* note 32, at 186. Many commentators have argued that the Lockean proviso cannot possibly be satisfied.

36. I state this position—that because the Lockean proviso cannot be satisfied, the state has the power to redistribute external goods—arguendo because I have serious reservations about it. First, from the fact that an original appropriator is not entitled to a piece of land, it does not follow that *others* are entitled to it. In other words, why, in the state of nature, are external resources treated as *terra communis* and not as *terra nulla*? See Fred D. Miller, Jr., *The Natural Right to Private Property*, in *THE LIBERTARIAN READER* 275, 284–85 (Tibor R. Machan ed., 1982). Second, there are strong empirical reasons to defend private property and first appropriation as creating a strong right to external things, but that discussion is beyond the scope of this Article. My aim in this Article is to reject the collective ownership of natural assets. I do this by showing that

However, individuals did *not* appropriate their natural assets from the commons: Those came *attached* to them. It follows that a person's claim over himself—his body, his talents, his mind—is stronger than his claim over external things. If this is true, the state needs an especially strong justification to appropriate a person's talents—certainly stronger than the justification it needs to appropriate the external things a person holds.

However, the precise meaning of people owning their own *talents* is unclear. That I own an *external thing* means that I have the right to exclude others from the use of that thing. The notion of trespass is fairly clear: If I own my house, you trespass if you occupy my house without my permission. And, conversely, to suggest that I do not *really* own my house means that others, such as the government, may expropriate it or regulate its use in accordance with the demands of justice. If we think about money, for example, we can say that I own my income if I can exclude others from my bank account. Conversely, to say that I do not really own my income may mean that the government can tax it in accordance with whatever justified policies the government pursues.<sup>37</sup> So, regardless of whether I morally own or do not own my external things, the *meaning* of ownership is fairly clear.

Similarly, the meaning of owning my physical *person* is fairly clear: Others cannot invade my body, even for the general good. That someone owns himself means that he should have a primary say over what may be done to his body because, as Warren Quinn put it, “any arrangement that denied him that say would be a grave indignity.”<sup>38</sup> The government cannot, for example, take my healthy kidney to give it to someone who needs it more. Most people agree that the right to exclude others from the use of my body is more stringent than the right to exclude others from the use of external things such as land. But in each case, the meaning of ownership is clear because both land and body are *tangible*, physical objects.<sup>39</sup>

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this particular argument for redistribution, even if sound, does *not* apply to natural assets. Miller thinks that the objections to collective ownership of talents apply equally to collective ownership of external goods. *Id.* at 284–85.

37. In this sense, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 9 (2002).

38. WARREN QUINN, *MORALITY AND ACTION* 170 (1993).

39. Not everyone agrees, however. See Kasper Lippert-Rasmussen, *Against Self-Ownership: There are No Fact-Insensitive Ownership Rights over One's Body*, 36 *PHIL. & PUB. AFF.* 86, 117 (2008) (claiming that most of the intuitions that are said to derive from self-ownership are better explained by other principles).

But the meaning of self-ownership over talent is not so clear. What would it be for others to treat, for example, my musical abilities as theirs? One can imagine the government *forcing* me to play the guitar in public. But that necessarily entails actual or threatened physical bodily coercion. Indeed, any instance one can imagine of others *literally* appropriating my talents—for example, the government performing forcible surgery on my brain to extract my musical talents—involves an egregious invasion of my body and is thus forbidden by any plausible political theory.

So, to say that I do morally own my talents has to mean something beyond saying that my body and mind cannot be literally appropriated by others. What it means, to make sense for a plausible political theory, is that the government has only a limited power to *tax the income* generated by the use of my talents. On the classical view, one may perhaps say that the government can tax my talent-generated income in order to produce genuine public goods. But the government cannot tax me to realize social justice, because others lack any justice-based claim over my natural assets. Because my talents have come attached to me, and they are not goods that I have taken from the commons, the income I generate from them is entirely mine.<sup>40</sup> These personal talents are not traceable to any violent or otherwise suspect appropriation in the past. If someone traces the chain of title of the land I own, they may find that at some point in the past someone stole the land from somebody else. But no examination of the chain of title of my natural assets will reveal any blemish. Those assets came with me from the day I was born; I did not take them away from anyone else.

At this juncture, classical thought bifurcates. The right-wing version of classical liberalism claims, with Locke, that the *material* wealth generated by mixing my natural assets, or my labor, with external things is also mine.<sup>41</sup> The state can only tax me for the production of genuine public goods, and no more. Under this view, sometimes called right-libertarianism, self-ownership justifies private property of external things.<sup>42</sup> The left-wing strand of classical liberalism claims that mixing my labor with external things does not erase the fact that those things were originally taken from the commons, and the state may therefore tax me to compensate others. Under this view, sometimes called left-libertarianism, self-ownership does not justify private property of

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40. However, this income may perhaps be subject to the public goods exception.

41. For a presentation of both views, plus the liberal-egalitarian view, see OTSUKA, *supra* note 32, at 15–16.

42. The right-libertarian view is well described by Peter Vallentyne: “Libertarianism holds that agents initially fully own themselves and have moral powers to acquire property rights in external things under certain conditions.” See Vallentyne, *supra* note 32, ¶ 1.

external things.<sup>43</sup> Notably, both sides agree that persons own themselves; right and left simply differ on the extent of the claim that society may have over the *external* things I hold.

### B. *The Liberal-Egalitarian View*

Liberal egalitarians have challenged the robust notion of self-ownership that characterizes classical liberalism. As we saw, classic liberals, right and left, believe that self-ownership entails (1) a strong right to control one's mind and body that bars others from forcible intrusion, and (2) a strong right to all the income that one can generate from one's mind and body, including labor.<sup>44</sup> Many liberal egalitarians agree with some version of (1), but not with (2). They agree with classical liberals that the state may not invade someone's body or mind in a manner inconsistent with basic liberty. But liberal egalitarians do claim that the state can extensively tax people's talent-generated income. For example, John Rawls has famously argued that a central aim of justice is to "nullif[y] the accidents of natural endowment," not only because this is necessary to implement equality, but also because we do not *deserve* our talents.<sup>45</sup> For Rawls, "the most obvious injustice of the system of natural liberty [that is, a system where, among other things, people can use their natural assets as they please] is that it permits distributive shares to be improperly influenced by these factors *so arbitrary from a moral point of view*."<sup>46</sup> But Rawls goes further: He also criticizes what he calls "the liberal conception"; that is, one that improves upon natural liberty by securing equality of opportunity.<sup>47</sup> Rawls argues that "even if [the liberal conception] works to perfection in eliminating the influence of social contingencies, it still permits the distribution of wealth and income to be determined by the natural distribution of abilities and talents."<sup>48</sup> Rawls then immediately adds that "[t]here is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune."<sup>49</sup>

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43. For a full exposition of left-libertarianism, see LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2000).

44. See OTSUKA, *supra* note 32, at 15.

45. JOHN RAWLS, A THEORY OF JUSTICE 15 (1971).

46. *Id.* at 72 (emphasis added).

47. *Id.* at 73.

48. *Id.* at 73–74.

49. *Id.* at 74.

In other parts of the book he is even more explicit: “[T]he difference principle,” for Rawls, “represents, in effect, an agreement to regard the distribution of natural talents as *a common asset* and to share in the benefits of this distribution whatever it turns out to be.”<sup>50</sup> Natural talents are, indeed, “a collective asset.”<sup>51</sup>

The consequence of this view for brain drain is that the emigrant does not own his talents. His natural assets are part of a common pool that services others. This obligation may make his decision to leave open to moral criticism on grounds of justice, even if the state cannot, consistently with the priority of liberty, force him to stay. Similarly, the government can enforce that social obligation by taxing the income generated by the use of his natural assets. Put differently, under this view, a person is *only* entitled to whatever income shares are allotted to him by a theory of justice, and the fact that he does not deserve his natural assets allows the state to redistribute the income generated by those natural assets in the way justice requires. The only reason why society allows a person to keep some of his talent-generated income is because doing so maintains that person’s incentive to remain productive, and others, especially the poor, are thereby better served. He owns his talents in the sense that there is no morally permissible way for the state to literally appropriate them, but he does *not* own his talents in the derivative sense that he is entitled to the income generated by their use. If, by some psychological quirk, people would continue to acquire and use their talents regardless of how much the state would appropriate the income thus generated, under the liberal-egalitarian view, the state could tax one hundred percent of such income in order to implement social justice.

I have always thought that the view that natural talents are collectively owned is the most objectionable claim in *A Theory of Justice*. To be sure, the claim that the state can tax talent-generated income is not in itself the most objectionable, because here Rawls generally agrees with many others.<sup>52</sup> Rather, what should be rejected are the *reasons* Rawls gives to justify those policies.

First, it is not true that income distribution influenced by natural talents is as worrisome as income distribution influenced by social position. For, as I observed earlier, there is a significant moral gap between my body and my mind, on one hand, and the estate I have inherited from my rich parents, on the other. It is much more plausible to say that I morally own my body than to say that I morally own what I have inherited. The

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50. *Id.* at 101 (emphasis added).

51. *Id.* at 179.

52. For the reasons given in the text, this Article rejects this claim as well.

case for sharing my wealth is more plausible than the case for sharing my limbs or my thoughts. Correspondingly, the claims that others press on my material wealth are stronger than the claims that others press on my natural assets. Arguably at least, I, or someone before me in the chain of title, took material things from the commons, and fairness requires that I be willing to give some of that back to others. But I did not take my natural assets from the commons, and that makes an important difference in the claims that others have over my person. Rawls wrongly denies this difference between both kinds of assets.

Second, Rawls thinks that the reason why people should not be able to generate differential income from their natural talents is that people do not deserve them. But it is fallacious to say that not deserving *X* is a sufficient reason for not being entitled to *X*. And it is equally fallacious to suggest “that a person earns *Y* . . . only if he’s earned (or otherwise *deserves*) whatever he used (including natural assets) in the process of earning *Y*.”<sup>53</sup> To be sure, we do say that someone owns something *because* she deserves it: Someone has earned this award by her work, and so forth. Deserving something is a sufficient condition for coming to own it. People should get what they deserve.<sup>54</sup> But the concepts of owning and deserving are not coextensive. If I give you a gift, you may not deserve it, but my giving it to you surely counts for creating your right over the gift.<sup>55</sup>

This fallacy in Rawls’s argument is especially glaring when applied to natural assets. My limbs, my keen or deficient eyesight, my modest or sharp intelligence, are mine even if I do not deserve them. They are mine simply because they are attached to my person in a fundamental and intimate way, and it does not matter that my having them is in some sense morally arbitrary. The fact that my head, with my brain in it, is attached to my body is enough to justify title. Alternative arrangements that authorize others to have the primary say over what is to be done to my body and mind lead, in the vast majority of cases, to grave assaults

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53. NOZICK, *supra* note 32, at 225.

54. For a perceptive treatment, see David Schmidtz, *How to Deserve*, 30 POL. THEORY 774, 774 (2002).

55. There are multiple examples that illustrate this point. To my knowledge, this fallacy by Rawls was first detected by Robert Nozick. See NOZICK, *supra* note 32, at 225–27. In my view, Nozick there definitively laid to rest Rawls’s claim that natural assets should be collectively owned. See also Miller, *supra* note 36, at 278; Douglas B. Rasmussen, *Liberalism and Natural End Ethics*, 27 AM. PHIL. Q. 153, 158–59 (1990).



on human dignity.<sup>56</sup> Institutional arrangements that give others title to my natural assets are akin to slavery. Each person is the morally rightful owner of himself because the contrary view clashes with our intuitions against slavery and domination.<sup>57</sup>

Moreover, those who deny self-ownership of talents, and the Lockean extension of self-ownership to ownership of external goods, assume an unquestioned power of the state to redistribute everything. That is, they apply what I call here the “Collectivist Default Rule.” First, they question the self-ownership premise by providing counter examples where the cost of invading someone’s body or mind is minimal compared to the benefits. They then conclude that, because I cannot invoke self-ownership, the state *in principle* can take my natural assets—as well as my land, my income, and anything else I can hold—and give them to somebody who needs them more than I do.<sup>58</sup> However, such a conclusion does not follow: An additional argument is needed to show that the state’s right to appropriate anything is the default rule. Perhaps I cannot claim ownership of anything, but it does not follow that others can, and it does not follow that the state should.<sup>59</sup> Moreover, the Collectivist Default Rule—the rule that says that people do not really own anything, so let us have the state take things away—overlooks government failure.<sup>60</sup> Even if it might be an ideal practice for the government to take things away from those who hold them in order to further the common good, governmental institutions often fail. It is an open question, in those cases, whether empowering the failure-prone government is a better solution than returning to self-ownership and strong Lockean rights. The appropriate inquiry is whether it is preferable to assign title over my natural assets to me, or to assign it to others or to the state. Even accepting that the self-ownership

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56. Perhaps there is no more fundamental justification to be had for self-ownership. Perhaps self-ownership is derivative of other principles, but it is no less important for that reason. The central point of self-ownership is simply to establish barriers to bodily invasions by others. Because I am concerned with the morality of actual institutional arrangements, I need not address the fancy counterexamples imagined by Kasper Lippert-Rasmussen. Among the counterfactuals used by Lippert-Rasmussen are a world in which half the population is blind and the other half consists of people with two regular eyes as well as a spare pair lodged in their shoulder, and a world where persons are just Cartesian minds with artificial limbs. See Lippert-Rasmussen, *supra* note 39, at 96–99, 110–15. My use of self-ownership in this Article is for real world persons. In that sense, I accept Lippert-Rasmussen’s point that the moral strength of self-ownership is dependent on contingent facts about human life.

57. G. A. Cohen, *Self-Ownership, World-Ownership, and Equality*, in JUSTICE AND EQUALITY HERE AND NOW 108, 109 (Frank S. Lucash ed., 1986).

58. See Lippert-Rasmussen, *supra* note 39, at 98–99.

59. This was demonstrated by Fred Miller, Jr. a long time ago. See Miller, *supra* note 36, at 278–79.

60. GORDON TULLOCK, ARTHUR SELDON & GORDON L. BRADY, GOVERNMENT FAILURE: A PRIMER IN PUBLIC CHOICE 133–34, 149–50 (2002).

premise does not hold in all possible worlds, establishing institutions which deny self-ownership is morally problematic.

It is even strange to talk about one's body as an undeserved body, although we sometimes do it.<sup>61</sup> The claim that my natural assets, as opposed to worldly resources, are mine even if I do not deserve them was uncontroversial in the liberal literature before Rawls, and this may be the reason why classical writers did not think they needed to argue for it; it was self evident. Likewise, modern writers as diverse as Michael Otsuka and G. A. Cohen agree that inequality of talents is far less objectionable than inequality in the access to worldly resources.<sup>62</sup> Rawls's view, then, is a radical departure from the liberal tradition. Robust property in one's person is the better view under a liberal political theory that prizes autonomy and human dignity. The contrary view, that society owns persons' talents, entails a subordination of the individual to the state. Society's ownership of natural assets does not sit well with a liberal conception of society. To be sure, the view that society owns natural assets is not necessarily incompatible with respecting many choices that people make regarding their natural talents. But typically, proponents of the social ownership of talents claim that people are allowed those choices for *instrumental* reasons, namely, that using their talents productively helps others, especially the worse off. In contrast, the view defended here is that self-ownership has intrinsic, and not just instrumental, moral weight, and that using state coercion to interfere with self-ownership requires a much stronger justification than the justification needed to interfere with ownership of external things.

The position taken here therefore contrasts with the view defended by Liam Murphy and Thomas Nagel in their influential treatment of the philosophy of taxation.<sup>63</sup> According to Murphy and Nagel, people do not own anything independently of what justice says their fair share of income should be.<sup>64</sup> Murphy and Nagel especially take issue with the view that government needs a special justification to take what people have earned through their labor.<sup>65</sup> To them, this view presupposes a

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61. For example, "Why does Pavarotti have such a beautiful voice? He does not deserve it! Why not me?"

62. See G. A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 71 (1995); OTSUKA, *supra* note 32, at 21.

63. MURPHY & NAGEL, *supra* note 37, at 66, 68.

64. This is the central argument of the book. See especially *id.* at 74-75 (asserting that property rights are entirely conventional).

65. *Id.* at 75 (explaining that what someone is entitled to through his labor is not a

naive libertarianism: What I have earned is initially and presumptively mine, and the government needs a good reason to tax me. To be sure, Murphy and Nagel do not support an unlimited state power to confiscate people's incomes. But again, their reason for this belief is purely instrumental, as it is for Rawls: Society must establish good incentives for wealth creation, and markets have virtues after all.<sup>66</sup> But if confiscating people's incomes would not affect incentives to create wealth and would allow the government to implement social justice, then there would be no philosophical objection to the confiscation.<sup>67</sup>

In contrast, this Article argues against society's ownership of natural assets through reliance on moral intuitions about personal identity and autonomy—about what it is to be a person. Whatever else I am obligated morally to share with others, I have a stringent moral right to exclude others from my mind and body. Thus, Kant, in his *Doctrine of Right*, takes for granted a man's quality of being his own master without discussing those concepts, perhaps because this could not possibly be controversial: Our natural assets are intimately tied to our personal identity in a way our external possessions, such as land, are not.<sup>68</sup> Accordingly, Kant devotes part of his treatise to explaining acquisition over external things.<sup>69</sup> He argues that there is something problematic about dispossessing

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function of the voluntary agreement between employer and employee, but entirely a function of the legitimacy of the system).

66. In their discussion of the market economy, see *id.* at 66–73, Murphy and Nagel downplay the *moral* arguments for free markets and conclude that “the most important function of a market economy in any conception of justice is not as an end in itself, but as a means to the encouragement of production and the generation of wealth.” *Id.* at 69.

67. Interestingly, as Nozick shows, scholars who deny individual ownership of natural talents on the grounds that they are morally arbitrary do not object to allowing greater holdings to some for equally arbitrary reasons. See NOZICK, *supra* note 32, at 217.

68. To be sure, Kant is unclear about self-ownership. Kant writes that “someone can be his own master (*sui iuris*) but cannot be the owner of *himself*.” IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 56 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797). No one can be sure, but my reading of this passage is that Kant dislikes talk about ownership of persons. He prefers to describe our command of our natural assets in terms of self-mastery, that is, rational agency. But what he means by *self-mastery* means the same as self-ownership for the purposes in the text, although perhaps not for other issues like self-debasement. I am indebted to Doug Rasmussen for pressing me to solve this puzzle.

69. For an extensive discussion of Kant's theory of property supporting the view in the text, see B. Sharon Byrd & Joachim Hruschka, *The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His Doctrine of Right*, 56 U. TORONTO L.J. 217, 218–29 (2006). Despite textual ambiguity, Kant commentators assume Kant's endorsement of something like Lockean self-ownership—although he refuses to call it that because he rejects the idea of owning persons. Kant scholars assume that Kant accepts self-mastery when they discuss Kant's rejection of Locke's theory of labor. Under this interpretation of Kant, we are our own masters but from that we cannot infer acquisition of external things. See, e.g., KATRIN FLIKSCHUH, *KANT AND*

someone of a thing acquired in accordance with the laws that govern in the “civil condition.”<sup>70</sup> For, as Arthur Ripstein explains, trespassers substitute their ends regarding the thing in question—a house, for example—for the owner’s ends.<sup>71</sup> This Kantian reasoning applies with more force to my person, both physical and mental. For the state to decide what I am supposed to do with my talents is to debase my humanity. I am my own master, even if, for Kant, I cannot possibly own myself. If this is correct, the state’s appropriation of talent-generated income raises a *moral* worry, and not just a worry about incentives.

In conclusion, assuming *arguendo* that world resources were initially owned in common and that the Lockean proviso cannot obtain, there is a colorable argument that society can tax the income generated by the part of those resources that I now hold, on the theory that I owe compensation to the co-owners. My natural assets, however, were never part of the commons. Therefore, I owe nothing to others on account of my natural assets because at no time were others co-owners. As a result, the state cannot legitimately tax my talent-generated income for purposes of compensation or redistribution. The state can only tax talent-generated income to the extent necessary to provide genuine public goods.

#### V. SELF-OWNERSHIP AND BRAIN DRAIN

The consequence of the principle of self-ownership for brain drain is straightforward. If the emigrant owns his talents, the claim by the state that the emigrant is acting objectionably is correspondingly weaker. Unlike property over external things, arguably, ownership over natural assets is *pre-political*. Assuming material things were originally owned in common, property over them is the result of the social contract however conceived, whether one endorses the first-appropriation principle or some other form of initial allocation of resources. In contrast, property over my natural assets is temporally and conceptually linked to personhood. The state has the power, at best, to appropriate part of my external things in order to compensate those who were harmed by my taking those things from the commons. The state may also have the power to appropriate the income-generated talent that would be necessary to pay

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MODERN POLITICAL PHILOSOPHY 118–19 (2000).

70. KANT, *supra* note 68, at 89.

71. See Arthur Ripstein, *Authority and Coercion*, 32 PHIL. & PUB. AFF. 2, 24 (2004).

for the provision of public goods. But the state cannot appropriate that income to compensate others, because I have not taken my natural assets from the commons. And from this it follows that the state has nothing to say, morally, about my decision to take my talents—my decision of taking *myself*, really—elsewhere. Others may perhaps validly object to my taking things from society without paying my dues, but they hardly have a claim against taking my mind and body with me.

Someone may object that although talented persons have a right to exit and the state cannot validly stop them, they *could* choose to stay and share their skills with those of their fellow citizens who need them. Surely that choice is morally better, because their decision to leave—if we follow the economic literature—is motivated by their desire to improve their earnings. The decision to leave is a selfish one, while the decision to stay is altruistic because of the opportunity cost they are incurring.

There is a kernel of truth in this objection.<sup>72</sup> Whether someone acts morally will depend on all the circumstances, and two alternative examples illustrate this point. The first scenario is a typical one. A talented scientist in a developing country receives no support, public or private, for her research. She cannot pursue her scientific interests under those conditions. In addition, the ineffectual populist policies pursued by her native government have plunged the country into poverty and stagnation. Crime is rampant, and the scientist does not feel that her family is safe anymore. She then accepts an offer to work at a British university with good compensation and appropriate working conditions. In my view, far from acting immorally, this person is doing a good deed. She is not only following her self-interest, but she is also making the decision that will enable her to benefit a larger number of people. Once we reject the *political* claim by the state, there is no residual *moral* claim that the state can press.

Now consider a very different and arguably less typical scenario. A talented surgeon in a developing country affected by an epidemic is practicing as part of a program for the alleviation and eradication of the disease. He is not at risk, and his compensation, while not particularly high, is adequate for him and his family. His team's contribution to the eradication of the epidemic is significant, and he would be hard to replace in the short term. He then accepts a lucrative offer from a clinic in Beverly Hills that specializes in cosmetic plastic surgery. Arguably, this person is morally blameworthy. Yet the important point here is that while the person may be acting objectionably, the state has nothing to say about his behavior. He is, at worst, morally at fault toward other

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72. On this point I am indebted to Matt Zwolinski.

persons, namely his patients. But the principles of justice that the state is entitled to enforce do not include making his exit harder or impossible.

These two examples show that whether the emigrant acts objectionably cannot be established in general terms. We need to look at all the circumstances. What we can say is that the fact that the emigrant owns her talents raises the bar for moral criticism. It is her life, after all. Even so, sometimes an emigrant's decision to leave will be morally neutral, other times it will be morally blameworthy, and yet other times it will be morally praiseworthy. But the important point here is that any moral evaluation of the emigrant's behavior will draw on common morality, and not on the supposed collective ownership of talents.

Moreover, under a plausible theory of justice, it is far from clear that the emigrant is failing to help those who deserve help by going to greener pastures, rather than by staying. Although this is an empirical question, common sense tells us that the talented person will perform better under better conditions, and thus will be more likely to maximize whatever benefits he provides to others. And the fact that the emigrant acts in self-interest does not blight the correctness of the action. If one's leaving is beneficial to most people, especially the world's poor, then it is a good decision regardless of intent.<sup>73</sup> Likewise, if the brain drain phenomenon is beneficial to most people, especially the world's poor, then it is desirable, regardless of private motivations.

## VI. LEAVING HOME

Thus far, this Article has argued that the state does not own a person's talents, and that there is a significant moral difference between society's claim to someone else's external things and society's claim to someone's talents. It has suggested that the state may, at most, tax people's talent-generated income to pay for the provision of genuine public goods, and no more. However, for the sake of argument, let us concede that the state has a power to tax the income generated by natural assets in order to realize social justice, and not just to pay for the provision of public goods. Even then there is no plausible moral argument for criticizing

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73. Thus, free trade is morally defensible because it is good for people, including the poor, notwithstanding the fact that agents are self-interested. See Fernando R. Tesón & Jonathan Klick, *Global Justice and Trade: A Puzzling Omission* 2–4 (FSU College of Law, Law and Economics Paper No. 07-24, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022996](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022996).

emigrants or for taxing the income that they earn abroad from using their skills. Assuming distributive principles of justice, emigrants simply decide to break ties with their political society and join another political society. They will discharge their distributive duties in that new society. Assuming a right to exit, those left behind cannot claim that the emigrants are breaching their duty to share with them the talent-generated income, because the emigrants will from now on be taxed *elsewhere*. They will be sharing their talent-generated income with their new compatriots, and with the world at large, assuming that cosmopolitan duties are discharged through foreign aid and other similar avenues.<sup>74</sup>

In conclusion, the claim of the state to income-generated talent is much weaker than the claim it has over external things because the right of self-ownership is much more stringent than the right to own external things. And even if the state has a justice-based power to tax talent-generated income, it has no application when citizens decide to leave, because the citizens will be discharging their distributive duties elsewhere.

## VII. THE QUESTION OF HARM

The claim that the talented emigrant harms those left behind is central to the worry about brain drain. Two questions must be addressed. First, are those left behind really harmed? Second, even if those left behind are harmed in some sense, is it an *unjust* harm that requires redress through legal means?

Whatever *harm* means, it has to include the setting back of someone's interest.<sup>75</sup> Critics of the brain drain assume that it harms those left behind. Although this is an empirical question and judgments will vary in each case, even this premise is questionable. As previously discussed, the possibility of emigration raises the returns on education in the source country and in many cases produces a brain gain. In addition, those left behind can benefit from the contributions made by the emigrant elsewhere. More importantly, from a cosmopolitan perspective, we must weigh the benefits and harms that the brain drain causes to the world at large and especially to the world's poor. Once we avoid a narrow nationalist focus and expand the scope of justice, the assumption that the brain drain is harmful is even less plausible.

Moreover, whatever harm is caused by emigration is not an *unjust* harm. The most serious forms of harm that the state must prevent are

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74. See *infra* regarding the cosmopolitan view.

75. See 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 33–34 (1984).

those with which the criminal law is concerned.<sup>76</sup> But, of course, it does not follow that the state's job is to redress as many harms as possible.<sup>77</sup> This position is absurd because most of what people do in their everyday lives affects and often harms others. For example, if Joe decides to marry Kirsten instead of Meredith, and Meredith loves Joe, Meredith will be harmed because her interests would be set back. If enough consumers decide to buy Apple computers because they judge them better, makers of PCs will be harmed. If two persons compete for the same job, the one who is not chosen will be harmed. Perhaps a necessary condition for legitimate state intervention is that the setting back of an interest be wrongful. That is, *A* harms *B* when (1) *A* sets back *B*'s interest, and (2) *A* does this in a manner that violates *B*'s rights.<sup>78</sup> If we apply this formula to emigration, there is no harm, because when a doctor emigrates from Peru she is not violating the *rights* of those left behind, even assuming that she is setting back the interests of those left behind.

However, this argument is not an adequate reply to brain drain critics because the definition of harm is noticeably narrow and intended only for the criminal law.<sup>79</sup> This definition of harm, the wrongful setting back of someone's interest, is perhaps appropriate to reject exit visas, but not necessarily other forms of control that the state may use, such as taxation of foreign-earned income. Brain drain critics will insist that measures to curb the brain drain, short of force, fall within permissible state policy, such as commercial and trade policy. In order for the measure to be justified, no strong notion of harm is needed. The government simply judges, in good faith, that something harmful is happening and decides to reduce the harm.

To see what is wrong with this claim, we must examine it closely. The argument for some measure of state control, such as taxation of foreign-earned income, would proceed in several steps. People in a developing country presumably are not harmed if a few doctors leave. But, if a sufficiently high number of doctors emigrate, then those left behind are harmed. There will not be enough doctors to provide health care in the country. The responsibility of the government is to address precisely

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76. For a classic treatment, see *id.* at 31, 61–62.

77. Harm is understood as the setting back of an interest.

78. FEINBERG, *supra* note 75, at 65.

79. Feinberg expressly limits his analysis of harm to the criminal law and avoids discussing more "subtle uses of state power" such as taxation. *Id.* at 3.



these kinds of unintended consequences of otherwise permissible behavior. Although it would not be acceptable for the state to directly interfere with the doctors' right to leave because that would be too intrusive of liberty, it is surely permissible for the state to raise the cost of leaving by warning prospective emigrants that they will have to pay taxes to their native country.

The problem with this argument is that it eviscerates an important individual right, namely, the freedom of movement. People have a human right to leave their country. While acknowledging freedom of movement as a human right, the state cannot simultaneously say that the emigration of, for example, ten percent of doctors gives society just the right amount of freedom of movement it needs, so that the government can subsequently make the exercise of the right much harder.<sup>80</sup> In other words, critics of the brain drain treat it as an *aggregative* harm: Only when emigration reaches a certain volume do they think the state should intervene to stem it. Yet *each* person holds a right to leave. The aggregative approach wrongly assumes that persons are *resources* of the state and that the state is therefore free to regulate their behavior when it is deemed convenient from the standpoint of public policy. Whatever the merits of this reasoning might be with regard to other social and economic issues, it is not applicable to behavior that constitutes an exercise of a fundamental right. The question boils down, then, to whether the state can permissibly interfere with freedom of movement by making its exercise harder. Given the importance of freedom of movement—and for the same reasons we are suspicious of the government raising the cost of exercising our other constitutional rights—the answer should be no.<sup>81</sup>

#### VIII. THE ARGUMENT FROM RECIPROCITY

Critics of the brain drain may make a different kind of argument. Without necessarily assuming that the state owns—in the derivative sense previously explained—a person's talents, they may claim that emigrants owe a duty to those left behind because of benefits that the state has bestowed upon them. This argument, in turn, has two versions. The specific-reciprocity argument claims that the talented citizen has

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80. I borrow the example, *mutatis mutandi*, from RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 92 (1978).

81. I would go further. Imagine that *everyone* wants to leave a country. Can the government validly stop them, or dissuade them from leaving by threatening them with future taxation? I would not think so. Rulers are mere agents of the people, and in a sense, their legitimacy is impugned if people do not want to stay and endure their governance.

received *specific* benefits from the state, such as education.<sup>82</sup> The general-reciprocity argument claims that citizens owe associative, non-voluntary obligations to their country.<sup>83</sup> Under this view, citizens' talents are the inevitable outcome of social and political institutions. People could not develop whatever natural talents they have without those institutions in place. This fact rebuts, they think, the atomistic premise of self-ownership: There is nothing that an adult person can exhibit as a purely *natural* asset. If this view is correct, then the prospective emigrant owes something to those left behind.

According to the specific-reciprocity argument, society has invested in the person's education and therefore the skilled citizen owes a corresponding moral duty to society to use her talents for society's benefit. She needs to give back part of what she received. The argument is quasi-contractual in nature: The skilled citizen has received something from her fellow citizens who paid for her education; therefore, she has a moral duty to use her talents for their benefit.

But this argument wrongly transposes principles of private contract into the political relationship between government and citizens. Because developing countries have few private schools and universities, the typical person is educated in the public schools and public universities. Usually the person who wants to learn in a developing country has only one option, namely, public education. Because the government forces taxpayers to subsidize public education, the transaction is involuntary with regard to *both* parties. The student does not have a choice about where to get an education, and the taxpayers do not have a choice either. It is dubious, to say the least, that these facts generate an obligation to give back to the country. More generally, the argument that a person has a duty of reciprocity only because they have received a *benefit* is open to question. To be sure, some political theorists do take that view. They suggest that even if a social contract never took place, the acceptance of benefits generates an obligation to do one's part.<sup>84</sup> Others,

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82. This is the core of the so-called "nationalist perspective" regarding the brain drain. See, e.g., Don Patinkin, A "Nationalist" Model, in *THE BRAIN DRAIN* 92, 92–108 (Walter Adams ed., 1968).

83. Thus, for example, John Horton claims that political obligations are largely nonvoluntary, much like family obligations. JOHN HORTON, *POLITICAL OBLIGATION* 146, 150 (1992). Under this view, the citizen owes, perhaps, a duty to give back to her country which is not grounded in any specific benefits she may have received.

84. Most famous is H. L. A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185 (1955). See also RAWLS, *supra* note 45, at 97.

however, have replied that “it is wrong to feel obliged to those who foist upon us benefits for which we have not asked.”<sup>85</sup> In fact, this principle—sometimes called the “principle of fairness”—is highly objectionable, as Robert Nozick has shown.<sup>86</sup> The fact that others have, without my consent, engaged in activities from which I benefit surely does not create an obligation on me, especially if I have not agreed, if I have no say on what others decide to do, and if I sometimes even have no control over whether I receive the benefit or not.<sup>87</sup> And to think about such obligation as *enforceable*, perhaps in the name of preventing free riding, is even more objectionable.<sup>88</sup>

The general-reciprocity argument holds that we are who we are, not because we possess pristine natural assets, but because social and political institutions have shaped us into our present beings.<sup>89</sup> For example, a medical doctor benefited from the fact that her parents, also distinguished professionals, thrived under the political status and social recognition accorded to professionals; that social advantage accrued to their child. The medical doctor cannot, then, claim that her talents are natural. Therefore, she owes something to the society that nurtured her.

On one level, this argument is tautological. We are all born into *some* social and political context. Does this mean that we always owe something to society, such as taxes, simply because that society was in place when we came to the world?<sup>90</sup> The more appropriate question hinges on what normative consequences follow from the fact that we are born into a pre-existing political setting. The answer to this question by those who endorse the “socially-constituted” argument is never clear, but presumably they would endorse strong taxation of talent-generated income without worrying that the person has earned that income with his natural assets, because the assets are not really his but are socially-constituted. Presumably, under this view, there is no difference between worldly goods and natural assets. I own land only thanks to the political institutions in place,<sup>91</sup> and I play the piano well *also* thanks to the political institutions in place.

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85. Jean Hampton, *Social Contract*, in THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 745, 746 (Robert Audi ed., 1995).

86. See NOZICK, *supra* note 32, at 90–95.

87. One may lack control over receiving the benefit either because one cannot help getting the benefit or because one faces dire alternatives.

88. See NOZICK, *supra* note 32, at 95.

89. Sometimes this view is described as “social constructionism.” For a review of that position, see Ian Hacking, *Are you a Social Constructionist?*, LINGUA FRANCA, May/June 1999, at 65–72.

90. When I say *something*, I am not thinking about owing obedience to the law and similar duties. Instead, I mean something *extra* for the fact that the state nurtured me.

91. Notice that this is Murphy and Nagel’s claim. See MURPHY & NAGEL, *supra* note 37, at 8.

This argument attaches no significance to the fact that one's talents attached to one's body and were never taken from the commons.

To the extent that the argument is not just an empty tautology, it must be rejected. Using the example of a medical doctor again, let us concede that what she has now is in part the result of benefits she received from society. She could not be who she is but for those benefits. If this is so, either she received those benefits from public institutions or from private institutions. If the former is true, Nozick's argument, discussed above, applies: She does not incur obligation for benefits that were foisted on her by the state.<sup>92</sup> If, on the other hand, she received those benefits from a private institution, either she paid for those or she did not. If she did, there is no residual obligation to society. Political institutions are set up in part to regulate and enforce contracts, including the provision of services such as private medical education. If I bought something from you, I owe you the price. I do not owe you the price *plus* something else to society. Someone may object at this point that I owe something else to society, namely, a tax to finance the cost of those institutions that facilitate exchange.<sup>93</sup> But this is not the argument made here. The argument is that I owe that, *plus* an *extra* obligation arising from the fact that the state nurtured me. In particular, I have to pay those left behind if I decide to leave. As previously argued, that extra compensation is inappropriate because—assuming the relevant causal connection—the benefits were bestowed coercively.

If, on the other hand, one has received private benefits for which one has not paid, then one owes that money to the benefit provider. Thus, the doctor owes medical school loans. But again, the general-reciprocity argument claims that one owes that, plus something *else* on account of political institutions, and there is no justification for such a duplication of debts. The same objection holds if the successful person, as is often the case, has received most of the relevant benefits—those that arguably determine her present success—from her family. Here, it is even harder to argue that she owes something to society above and beyond her filial obligations.<sup>94</sup>

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92. See *supra* text accompanying notes 86–88.

93. I have already conceded this by recognizing the taxing power of the state to finance genuine public goods.

94. The general-reciprocity argument here is particularly weak given the “natural” quality of family, but I do not pursue that line of argument here.

Moreover, the argument that prospective emigrants owe something to those left behind because the emigrants benefited from political institutions sounds strange when applied to the brain drain phenomenon. It is well established that good institutions are crucial for growth and prosperity.<sup>95</sup> If this is correct, under the view we are discussing, the emigrants owe something to their society if it provided reasonable institutions. Yet people often leave because their native institutions are deficient. Arguably, in many of those countries, people develop their talents *despite* the political institutions, not because of them, as the argument assumes. The argument we are considering is forced to hold that the better the institutions left behind, the stronger the emigrants' duties. Thus, a German doctor who emigrates to the United States is allegedly doing something worse than the Ghanaian doctor who emigrates to the United States because the German doctor, unlike the Ghanaian doctor, is leaving good political institutions who nurtured the doctor well. Notably, this claim clashes with the intuition that brain drain from *poor* countries is objectionable. The paradox is this: If the general-reciprocity argument is sound, then it should *praise* people who leave societies with bad institutions. Because if many countries are poor as the result of bad institutions, then there is nothing wrong with leaving those countries. However, this conclusion is precisely the opposite corollary to the one that the argument was supposed to endorse. This dissonance occurs because the criticism of the brain drain trades on some vague notion of international justice that regrets the loss of human capital that poor countries suffer for the benefit of rich countries. This notion, right or wrong, is at odds with the general-reciprocity argument.

Another problem with this argument, in any of its forms, is that it is hard to see why it applies only across national borders. No one objects if a doctor educated at Florida State University moves to California. Yet, under the reciprocity rationale, the doctor would have a duty to practice medicine in Florida because his education was subsidized by Floridians, and Florida has its own political institutions that nurtured the doctor's talents. Someone could object that the doctor's move is acceptable because he does not harm the people of Florida. But there is often harm

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95. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990); HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 186 (June Abbott trans., 1989); Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1369 (2001); Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131, 132 (2004). See also The World Bank, Documents and Reports, <http://go.worldbank.org/GOKQ7UO9B0/>, for the works of leading governance and development researcher Daniel Kaufmann.

in the relevant sense. People leave economically depressed areas to move to other parts of the country, and although those left behind deplore it, no one claims that the local authorities should make emigration hard or impossible, as some claim for international migration of talent. Also, the argument's rationale is reciprocity, not harm. Under this rationale, the doctor owes Floridians a debt. Although relevant, harm beyond the harm of breach is not central to the argument.

Finally, there is a sad truth about brain drain, already anticipated in the foregoing discussion, which makes reciprocity inapplicable in many cases. All too often, the governments of developing countries do not discharge their justice-based duties with the taxes they collect.<sup>96</sup> Some of those regimes are outright oppressive, others are simply "kleptocracies" without being otherwise oppressive, and others are just disorganized, corrupt, and inefficient.<sup>97</sup> More often than not, governments in developing countries *mistreat* their talented citizens in various ways.<sup>98</sup> Wage differential is certainly a major reason for the brain drain, but wage differential exists for a reason. Government failure should not be overlooked as major cause. Poor political and social conditions diminish the returns that talented persons can expect, and those facts are hardly facts of nature. This stagnation is often the result of vicious circles of economic and political depredation.<sup>99</sup> If this is true, at least sometimes, then emigrants' present skills can hardly be credited to their political environment. In fact, they often perform a *good deed* by leaving, not only because they are escaping mistreatment, but also because they will be more likely to make valuable contributions with their talents in a society that does not

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96. For a full picture of the gravity of the issue, see the statistics compiled by Transparency International, which are available at <http://www.transparency.org/>. According to this global coalition against corruption, "[p]ersistently high corruption in low-income countries amounts to an 'ongoing humanitarian disaster.'" Press Release, Transparency International, Persistently High Corruption in Low-Income Countries Amounts to an "Ongoing Humanitarian Disaster" (Sept. 23, 2008), *available at* [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases/2008/2008\\_09\\_23\\_cpi\\_2008\\_en](http://www.transparency.org/news_room/latest_news/press_releases/2008/2008_09_23_cpi_2008_en).

97. A "kleptocracy" is a government that, while it does not politically oppress its citizens, it *steals* from them. For the case of Argentina, see CARLOS S. NINO, UN PAÍS AL MARGEN DE LA LEY: ESTUDIO DE LA ANOMIA COMO COMPONENTE DEL SUBDESARROLLO ARGENTINO (1992).

98. For political mistreatment, see the statistics and rankings in Freedom House, Freedom in the World (2008), <http://www.freedomhouse.org/template.cfm?page=363&year=2008>.

99. See, e.g., NORTH, *supra* note 95, at 3 (supporting the widely held view that economic stagnation is mainly due to bad institutions).

exploit them. Moreover, emigrants will often make a better contribution to *their country of origin* working in a better place.<sup>100</sup>

There is, then, a curious paradox here: Critics of the brain drain purport to support developing countries, but they overlook the fact that the governments of those countries are often the most oppressive, corrupt, and inept. The assumption in literature critical of the brain drain is that governments in developing countries are acting in good faith, trying to get ahead. Yet, in actuality, many of those governments are among the worst violators of human rights and they also often adopt populist and demagogic policies with disastrous results. *That* is what causes the brain drain, not predatory practices from the rich countries. Developing countries need to improve their institutions and practices if they aspire to keep their talented citizens. Certainly any complaint about brain drain requires them to have clean hands in the first place.

#### IX. NATIONALIST OR COSMOPOLITAN DUTIES?

Even assuming that talented persons have a duty to share their income-generated talent with others, especially the least fortunate, critics of the brain drain adopt a strangely nationalist position: The talented citizens have a duty to stay in order to benefit their fellow citizens with their skills. But this position collapses if one instead adopts a global perspective. Under principles of global justice, the talented citizens have a duty to benefit the distributively qualified *world*, and not just their compatriots.<sup>101</sup> If the duty is to help the world's least fortunate, then whether or not the rightful beneficiaries are their compatriots is entirely contingent. In fact, it is likely that the rightful beneficiaries will not be their compatriots.

This nationalist position is conjoined with the dubious empirical assumption that the emigrant's work helps *only* the receiving country. Again, this is a corollary of the flawed view that skilled citizens are the human capital of the state. If some of this capital migrates from state *A* to state *B*, then that represents *B*'s gain, because *B* has increased its human capital. To be sure, there is a sense in which this is true, because the immigrant will pay taxes in the immigrant's adoptive land. But, this is not necessarily true of the *benefits* accrued from the immigrant's talents. Take, for example, a typical case of someone who studies physics in a developing country. He then earns a Fulbright Scholarship to pursue his Ph.D. at a prestigious American university. After that, he

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100. See *supra* note 16 and accompanying text.

101. For purposes of this argument I assume, but do not argue for, principles of global justice.

decides to take an academic position in the United States, where he settles permanently. During his career, he will teach many students and publish academic papers. This output will not benefit just the United States. Instead, he has contributed to knowledge that goes in the global public domain, improves scientific understanding, and improves the technologies based on that understanding. If one considers that, due to lack of adequate working conditions, he could not possibly have produced this knowledge had he stayed in his home country, then under principles of global justice, leaving was the right thing to do. He will be contributing to universal knowledge, not just to the local economy. He may even end up contributing more to his home country than if he had stayed there. Certainly, Amartya Sen's work on famines has done much more for India than anything he could have done had he stayed there instead of emigrating to the West to study economics with the top people in the field.<sup>102</sup>

#### X. THE RECEIVING STATE

In light of the foregoing considerations, it is hard to see why rich countries that are hospitable to talented immigrants are acting wrongly. First, although this is not the place to discuss a general theory of immigration, it can be argued that any cosmopolitan theory of justice must recommend the liberalization of immigration generally, regardless of whether it is the immigration of skilled or unskilled workers.<sup>103</sup> The receiving country is providing opportunity to the nationals of a poor country to fully develop their talents. The possibility of emigration increases the chances that persons, who would otherwise be trapped in a closed society, will realize their life plans. Any liberal should be sympathetic to that prospect. Second, as previously observed, chances are that the talented persons will help the largest number of people, including the world's poor, if they are allowed to work in optimal conditions. The

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102. Amartya Sen, an Indian economist and philosopher, is the 1998 winner of the Nobel Prize in Economic Sciences. He has taught at the universities of Harvard, Oxford, and Cambridge, among others. For a telling autobiography, see Amartya Sen, *Autobiography* (1998) [http://nobelprize.org/nobel\\_prizes/economics/laureates/1998/sen-autobio.html](http://nobelprize.org/nobel_prizes/economics/laureates/1998/sen-autobio.html). His major work on famines is AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981).

103. See Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *REV. POL.* 251, 251 (1987). One need not endorse open borders to conclude, as most scholars do, that current immigration restrictions in rich countries are problematic.



receiving country is thus providing a valuable global service by taking these talented immigrants and allowing them to develop their potential and provide general publicly available benefits. Moreover, quite often, the immigrants' work will differentially benefit their home country, especially if they are scientists. In some cases, the receiving country will even be saving the immigrants from oppression, corruption, and stagnation. Surely the fact that many Filipino nurses in Britain have been able to improve themselves and their families counts in any evaluation of the brain drain.<sup>104</sup> Furthermore, any argument that those nurses *owe* something to their compatriots collapses in light of the main argument in this Article that people own their talents in an intimate and personal way. Others have a very limited claim on them. The charge that rich countries prey on the poor countries' human capital is just nationalist rhetoric. Countries do not own persons, and the supposed "preying" is a free, voluntary transaction. To the extent that it produces a negative externality—a harm—it is not one that should be branded as unfair. It is the same externality that a new business causes for a competitor.<sup>105</sup>

## XI. EVALUATION OF PROPOSALS

As this Article demonstrates, much can be said about the various proposals that have been advanced to stem the brain drain phenomenon. As an initial matter, all *coercive* measures should be rejected. Exit visas are inconsistent with liberty for obvious reasons and should be emphatically rejected. Other less intrusive proposals of control, such as requiring lengthy years of medical residence before allowing doctors to leave, are highly objectionable as well, because they grossly intrude upon individual liberty. Bhagwati's milder proposal to tax the foreign-earned income of the emigrant should likewise be rejected for several reasons.<sup>106</sup> First, if we are right that society does not own the citizen's talents because self-ownership is pre-political, then society does not have the power to tax the citizen's talent-generated income. And the public goods exception does not even apply when the person leaves the country. Second, whatever tax obligations the emigrant had in accordance with justice will from now on be discharged in the emigrant's adoptive country, so Bhagwati's proposal amounts to unjust double taxation. And third, the rationale for the tax collapses together with the argument from reciprocity. If the fact

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104. For an overview of this issue, see James Buchan, *New Opportunities: United Kingdom Recruitment of Filipino Nurses*, in *THE INTERNATIONAL MIGRATION OF HEALTH WORKERS* 47 (John Connell ed., 2008).

105. Of course, the receiving country may follow objectionable practices, such as promising immigrants amnesty for crimes such as an enticement.

106. See *supra* note 10 and accompanying text.

that the government subsidized a person's education does not generate a duty of reciprocity, then collecting foreign-earned income cannot be justified.

On the other hand, measures that are not coercive are, for that very reason, more acceptable. Rather than trying to keep people against their will, it is much better for the source state to address the causes of brain drain. This can be done by pursuing better economic policies and creating appropriate incentives for people to stay, such as providing better salaries and better working conditions. A potentially more problematic practice is for a state to attach *conditions* to the provision of education, such as a commitment to stay or to return after state-subsidized foreign studies. On one hand, these conditions are acceptable if genuinely voluntary. However, the conditions are unacceptable if the state is *extorting* the person, as is the case when the person has no option but to study at a public university. Similar factors apply when a state pays for the person's education on the condition that he return the money if he decides to leave. If these conditions are voluntary, they may be acceptable. If they are extortive because the person has no other place to study, they are more questionable. Thus, whether these conditions are defensible will depend on context.

Finally, for the reasons given in the previous section, poor countries do not have a legitimate claim to compensation from rich countries. Poor countries do not own their nationals and they cannot accuse rich countries of stealing their investment. Surely the fact that rich countries have better universities, better institutions, and better economies is not something for which those countries should apologize. The claim that successful countries built good institutions at the expense of the poor countries was once fashionable, but it is generally false. There are reasons why people seek opportunity elsewhere. Poor countries would do well in addressing those reasons instead of blaming others for the exodus of their disgruntled nationals.

## XII. SUMMARY AND CONCLUSIONS

Ultimately, there is nothing objectionable about the brain drain. Societies do not own their talented citizens. One rationale for redistributing wealth for reasons of justice is that things were unduly appropriated from the commons. However, this rationale does not apply to natural assets because they were not taken from the commons. The modern liberal-egalitarian position, according to which natural assets are collectively

owned, must be rejected as incompatible with a liberal conception of personhood. Additionally, global justice should favor liberalized immigration generally. The assumption that someone who emigrates only benefits the receiving country is simplistic and often mistaken. Liberals should welcome the brain drain for the same reasons that they should welcome all voluntary transnational exchange: Because it is consistent with personal freedom, and because in the long run, it improves the lives of more people, including those who, under an appropriate theory of justice, we should care about.