Equal Justice: Comment on Michael Blake's *Immigration and Political Equality*

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What does justice require in regards to immigration policy? This question presses upon us—citizens of developed, Western democracies—with a profound degree of moral urgency. The number of people seeking to immigrate into the world's liberal democracies is only likely to increase in the foreseeable future; immigration due to the impact of global warming, armed conflict, and food shortages—just to name a few precipitous causes—is expected to increase dramatically in the next generation.[1] Add to this the fact that those groups most disadvantaged by global inequality—women in particular—tend to bear the impact of such causes to a greater degree than their male counterparts, and the urgency of developing a fair policy on immigration is all the more clear.

Those fortunate enough to be born into a liberal democracy inherit a position of global first-class citizen with its accompanying rights and privileges denied to the lion's share of the world's population. These respective statuses appear, to many, to come down to simple luck. Liberalism's emphasis on the moral equality of all persons, combined with its antipathy towards bare moral luck as a fair index of life's prospects, suggests that the prima facie liberal position on immigration ought to be

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1. For a discussion of the impact of climate change on migration patterns, see OLI BROWN, INT'L ORG. FOR MIGRATION, IOM MIGRATION RESEARCH SERIES NO. 31, MIGRATION AND CLIMATE CHANGE 11–29 (2008), http://www.iom.int/jahia/Jahia/cache/offonce/pid/1674?entryId=16561.

a policy of open borders.[2] However, some argue that this prima facie case can be overridden by other important liberal values—namely, rights to self-determination, including cultural self-determination.[3] Thus, proponents of open borders often begin with the normative claim that all persons have equal moral worth while opponents of open borders object that, despite our equal moral standing as human beings, we do not have equal political standing in every political community.

Blake's argument here tries to forge a middle path between arguments for open borders on the one hand and closed borders on the other.[4] Blake weaves a middle path through these two opposing starting points by noting that although immigrants do not have equal political standing with citizens within the country of intended migration, they nevertheless do stand in a political relationship vis-à-vis the citizens in the state of destination. In applying for admission, prospective immigrants place themselves under the coercive power of the state. It follows from this fact that immigrants are entitled to some form of equal treatment. Equal treatment in the context of adjudication over immigration applications requires the state of destination to justify immigration decisions on the basis of reasons that such persons could not reasonably reject.[5] This normative principle imposes a duty upon the state of destination to treat prospective immigrants as equal to each other, and so prohibits arbitrary exclusion. The moral equality of prospective immigrants entails political rights of nondiscrimination as grounds for admission. This conclusion preserves the egalitarian liberal principle of universal moral equality among persons, but nonetheless denies that prospective immigrants possess the full panoply of political rights that attach to the status as a citizen within a given nation-state.

Blake argues that to meet the normative requirement, we must offer reasons to others they could not reasonably reject; our principles for exclusion must meet the following criterion: The facts or features of persons to which the state of destination appeals as grounds for exclusion must be "factually valid."[6] Blake offers two potential categories of consideration in adjudicating applications of immigration: the likelihood

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2. *See, e.g.*, Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. OF POL. 251, 251 (1987).

3. *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 61–62 (1983).

4. Blake brackets claims by refugees and other groups that may have an independent moral right to immigrate. He wants to consider simply whether a policy of restriction can be reconciled with the moral equality of all persons. I follow him in considering only the case of those would-be immigrants who have no prior and independent moral claim.

5. *See* T. M. SCANLON, WHAT WE OWE TO EACH OTHER 5, 168–69, 189 (1998).

6. Michael Blake, *Immigration and Political Equality*, 45 SAN DIEGO L. REV. 963, 976 (2008).

for "economic success" and potential "political integration." In this way, he ties together justificatory reasons with empirical validity: "[T]he reasons we cannot reasonably reject have this character, in part, because of their empirical plausibility."[7] Thus, "[the state] may differentiate between persons only when sufficient evidence exists to motivate the distinction; evidence, that is, that the reasonable agent could be expected to interpret as factually sufficient to justify a difference in political treatment."[8]

There are two steps to Blake's argument, and I will consider each in turn. The first step requires acknowledging that it is not a violation of moral equality to have different political rights attached to membership in a particular political society. For example, the United States would violate the equality of its citizens by denying some portion of them the right to political participation, assuming they are similarly situated to those who receive such rights. However, there is no affront to equality when the United States denies citizens of Canada the right to vote in U.S. elections. Membership in a political community entails formal political equality, at least, for all members, but denying such formal political equality to nonmembers is consistent with respecting them as moral equals. As it stands, this argument is convincing. However, it does rest upon the assumption that nation-states themselves, as they currently exist, are legitimate in some sense. Blake's claim, that we must offer reasons to others that they could not reasonably reject as grounds for immigration policy, would seem to include the requirement that we justify nation-states as legitimate entities for enacting such policies in the first place. There may indeed be sufficient reasons for doing so. Nation-states may be the best institutions through which to administer and realize justice.[9] For Blake to fully defend his position, some defense of nation-states is necessary. Of course, his aims in this paper are far more modest, so this does not amount to a criticism of the argument as it stands. Nonetheless, such a defense is necessary for the cogency of his overall argument.

The second step of Blake's argument defends the claim that reasons for exclusion—to meet the reasonable rejection standard—must rely on factually valid claims about persons or groups of persons to be excluded.

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7. *Id.* at 976–77.
8. *Id.* at 977.
9. Although each of these authors arrives at this conclusion via very different considerations, see DAVID MILLER, PRINCIPLES OF SOCIAL JUSTICE 6, 11 (1999), and Thomas Christiano, *Immigration, Political Community, and Cosmopolitanism*, 45 SAN DIEGO L. REV. 933, 934 (2008).

The purpose of this condition is to prevent pernicious prejudices masked as neutral principles as grounds for exclusion. Preventing invidious discrimination is paramount to respecting the moral equality of all persons. In his defense of the factual-validity requirement, Blake rests his argument on the familiar model of equality that is central to liberal political philosophy and originates in Aristotle—namely, equality demands treating likes alike and unlikes unalike. Thus, to justify a difference in treatment among persons, we must provide a ground of difference that provides a relevant basis for the differential treatment. Thus, any difference in treatment is justified only insofar as that difference is grounded in a reasonable, nonarbitrary difference between the two persons or class of persons being treated differently; in Blake's words, the difference must be empirically grounded.

The problem with this approach to equality, particularly as it requires us to rely on "factually valid" claims of difference among prospective immigrants, is that the "facts" of persons' abilities, skills, affinities to democracy, and so on, are often themselves produced in a context of inequality and injustice. Thus, the facts in question are not produced in morally neutral circumstances; they are produced in a world rife with inequality. In this way, relying on empirically accurate facts does not remove the potential for discrimination and the reproduction of injustice.

To see this, consider the following: Women make up two-thirds of the world's illiterates, a consequence of structural gender inequality the globe over.[10] Thus, it is empirically true that on the whole, women are less educated than men. In the context of making a determination to admit a prospective immigrant over another based on the factual determination of their educational ability as related to economic success, men will fare better than women. The factual validity of any given man's higher educational attainment is a fact that is made possible under conditions of inequality and injustice. Such facts are not only produced in contexts of severe or gross injustice. It is well documented that men are overrepresented in fields related to science, math, and technology even in Western democracies. It is also well known that persons with such skill sets are highly desirable as migrant workers and as prospective immigrants. Thus, in using a seemingly neutral and true fact, we may not discriminate formally at the level of law, but we reproduce the background inequalities that produce such

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10. *See* UNESCO INSTITUTE FOR STATISTICS, GENDER PARITY IN EDUCATION: NOT THERE YET 4 (2008), http://www.uis.unesco.org/template/pdf/EducGeneral/UISFactsheet_2008_No%201_EN.pdf.

disparities through the law.[11] Thus, these apparently neutral and "fair" principles in fact deny substantive, material equality.

To further develop the criticism I make here, let us consider an exemplary use of this approach to equality in U.S. constitutional law. In *Reed v. Reed*, the Court applied the standard "rational relation test" that forms the basis of the factual validity requirement in the equal protection doctrine.[12] Briefly, the facts of the case are as follows. The adoptive parents of Richard Reed, a minor who died without a will, each separately filed a petition with Ada County, Idaho, to be appointed administrator of the son's estate. The probate court appointed the father, Cecil Reed, as the administrator and, as justification, it cited an Idaho statute that stated, "Of several persons claiming and equally entitled to administer, males must be preferred to females . . . ."[13]

The case made its way to the U.S. Supreme Court after the Idaho Supreme Court upheld the probate court's decision that, given the statutory preference for males, Cecil Reed should be appointed administrator of the estate instead of Sally Reed, the deceased's mother. The U.S. Supreme Court overturned that ruling, holding that "a difference in the sex of competing applicants for letters of administration" does not bear a "rational relationship to a state objective that is sought to be advanced" by the statute.[14]

> The objective of § 15–312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.[15]

Where the probate court is faced with two persons equally entitled to administer the estate in question, a hearing must be held on the merits of each person's ability to administer the estate. The statute in question sought to settle the entitlement issue on the basis of gender, in part it

11. This model of equality—equal treatment demands same treatment for those who are similarly situated—is the model of equality that forms the basis for U.S. equal protection doctrine.
12. Reed v. Reed, 404 U.S. 71, 76 (1971).
13. *Id.* at 73.
14. *Id.* at 76.
15. *Id.* at 77 (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

seems, on the assumption that men will likely be more qualified than women to assume the role of administrator of an estate.[16]

What the Court has said, then, is that it is impermissible to use sex as a proxy for competency in estate administration because the Court looked to the society and found that sex does not bear a fair and substantial relation to ability to administer estates. In other words, some women are capable of administering estates and thus a statute that restricts women from doing so "by an accident of birth," as it is commonly put, is thereby sex discriminatory. What is established, then, is that to pass constitutional muster, the Idaho legislature must construct "gender neutral" standards for estate administration. Thus, a state may require specific levels of education or experience of a relevant kind by persons so long as these requirements can be shown to bear a fair and substantial relation to ability to administer estates, but what the state may not do is use sex as a proxy for education or experience.

No doubt the outcome of this case seems intuitively fair. Women should not be denied the right to administer estates simply because they are women. As Catharine MacKinnon points out, this rationality test relies upon what she calls the mirror method: A law that relies upon group classification is rational if it can be shown that it accurately mirrors society.[17] That is, if the classification relied upon by the law can be shown to accurately describe the members of the group it aims to classify, then the classification can be given a rational basis. However, "the rational relationship test" will only generate an equal outcome given the actual "similarly situatedness" of men and women as an input. In other words, it looks to produce equality as an output only when given equality as an input, or the supposition of equality as an input. Were the differences between women and men in regards to estate administration more real, as they certainly historically have been and as they clearly are now, globally—for example, because of insufficient education and experience by women in "business affairs"—then the argument that the sex-based classification bears a "fair and substantial relation" to the purpose of the law in using sex as a proxy for competence in estate administration is much more plausible.[18] It is important to note that a significant degree of actual sex inequality is consistent with this ruling and left unaddressed by it. If it turns out that, due to background inequalities, the class of men is more or less coextensive with the class of competent persons and the class of women is coextensive with the class of incompetent persons, an equality rule that says "treat all

16. *Id.* at 75–76 (citing Reed v. Reed, 465 P.2d 635, 638 (1970)).
17. *See* CATHARINE A. MACKINNON, SEX EQUALITY 220–21 (2d ed. 2007).
18. *Id.*

similarly situated persons alike" will have nothing to say about that degree of sex inequality or the background conditions that produced the "difference" between men and women. Moreover, even if we rule out using sex as a proxy for ability—that is, we rule out the use of sex-based categories on the face of the law—this is far from sufficient to guarantee genuine sex equality. In the *Reed* decision, the fact that some women were competent to administer estates benefited all women to the extent that sex alone was found to be an illegitimate basis upon which to classify potential administrators. However, the real substance of sex inequality is that men, judged by neutral standards of education and business competence, will nonetheless still benefit in a world in which such goods and access to them are distributed on the basis of sex.

Thus, the incorporation of a factual validity requirement alone is not sufficient to rule out the kind of group-based discrimination Blake tries to eliminate by this principle. Two questions arise for us as liberals in assessing Blake's argument. The first is whether the principle of moral justification—reasons that cannot be reasonably rejected—entails only a formal model of equality, or in other words, a model that treats likes alike and unlikes unalike. The second is whether we can accept Blake's suggestion that the reasons we cannot reasonably reject are sufficient reasons, in part, because of their empirical plausibility while nonetheless recognizing that true, empirical generalizations are sometimes the product of injustice.

The answer to the first question is clearly yes. Many liberals and feminist liberals, in particular, argue that liberal principles require a substantive model of equality.[19] As to the second question, I think the answer is yes, but it requires us to move away from the standard liberal model of discrimination which views social and political distinctions as justified insofar as they are rationally justified, where *rationally justified* entails accurately mapping the world. This model of discrimination rests on the thought that political—or legal—classifications of persons are legitimate, and hence nondiscriminatory, insofar as they accurately reflect "the world out there." This model of discrimination is limited insofar as it does not ask how the world out there came to be. Thus, it allows for the reproduction of social inequality at the level of legal classification

19. Martha Nussbaum's work is essential reading on this point, especially for those interested in sex equality. *See* MARTHA C. NUSSBAUM, SEX AND SOCIAL JUSTICE 55–56 (1999).

because it does not critically examine how the facts—in particular, the facts of social hierarchy and inequality—came to be. Thus, rather than seeing discrimination solely as arbitrary treatment, we must shift to a model of discrimination that recognizes subordination, not simply differential treatment, as unequal treatment. Subordination is understood, in part, as having an inferior status. Social hierarchy and subordination stratify individuals as members of groups. Where a particular woman or female child is denied the right to an education, she is so denied because she is a member of the group *female*. Thus, group-based inequalities that constitute the "facts" of individuals' lives are not morally neutral.

The emphasis on reasons we could not reasonably reject as the standard of moral justification requires us to recognize that such reasons have the character they do, in part, because they are reasons we can share—as moral equals. Acknowledging that immigrants stand in a political relationship vis-à-vis the state of intended migration requires acknowledging that the state is obligated to offer justifications that could not be reasonably rejected for its principles. This, however, also requires acknowledging the immigrant as a reason-giver in this context, and as an equal. The normative force of admitting that persons stand in a political relationship in the contractarian model is that they stand in an equal, reciprocal relationship in terms of the authority of their reasons. This entails that those to whom we offer reasons for the justification of the use of collective power can reasonably accept those reasons from a position of equality. It follows from this that principles which depend upon or perpetuate the subordinate status of those with whom we are in a political relationship are ruled out as just principles. Further, it follows from this that as liberals—committed to finding shared justifications—we must work to end social inequalities that rest upon social hierarchies grounded in group differences. This commitment is not something that is an addition to our commitment to equality; it must form the core of our commitment to equality.