

Zoltán Miklósi

Association, property, territory: what is at stake in immigration?

Abstract It is often claimed that states have territorial rights, and that these rights include the right to exclude people who seek admission to their territory. In this paper I will examine whether the most defensible account of territorial rights can provide support to the right to exclude. I will discuss three types of theories of territorial rights. The first account links the right of states to exclude to the prior right of individuals to freedom of association, which is said to include the right not to associate and to dissociate. The second is a Lockean theory that grounds the territorial rights of states, and hence their right to exclude, in the prior right of individuals to private property in the land that constitutes the territory of the state. I argue that these accounts have independently implausible implications, regardless of their implications for the immigration debate. The third account is a Kantian theory that bases the territorial jurisdiction of states on individuals' duty to create, sustain and submit themselves to a shared system of law that is a necessary condition of guaranteeing their rights and of discharging their duties towards one another. I will argue that the Kantian account is superior to its current alternatives. However, I also suggest that it cannot ground a broad right to exclude.

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The ground and extent of the right of states, if any, to exclude unwanted potential immigrants from their territory on discretionary grounds is one of the most hotly contested issues in contemporary normative political theory, as well as one that has immediate and urgent practical relevance. There are many millions of transnational migrants each year, and the likelihood of this number significantly diminishing in the foreseeable future is quite low. Current international legal practice holds that as a general rule, states have the right to exclude noncitizens who seek admission into their territory with the exception of refugees as defined by the Geneva Convention on Refugees (1951). The right to exclude is generally understood to be one among several aspects of the territorial rights of states, which also include, most importantly, the right to exercise exclusive jurisdiction over a particular territory, and control over the natural resources to be found in that territory. However, there is disagreement in political theory both about the purported grounds of territorial rights, and their precise limits, including

whether or not they involve the right to exclude noncitizens.¹ In this paper I will engage with some of the most prominent accounts of territorial rights. My goal is to see how plausible these accounts are as theories of territorial rights *in general*, and to explore what they imply regarding the existence and extent of the right to exclude.

Before presenting these theories, a number of clarifications and stipulations are in order. First, I only discuss such conceptions of territorial rights here that are, broadly speaking, individualistic in the sense that they do not derive territorial rights from the claims or interests of groups *qua* groups (i.e. as distinct from the claims and rights of their individual members). Hence, I exclude nationalist accounts of territory, including liberal nationalist ones.² The reason for this exclusion is that I am assuming, without providing arguments here, that at the fundamental level, political morality is constituted by principles that have individualistic justification, i.e. they are justified in virtue of the manner in which they relate to the valid claims of individuals. Furthermore, the political institutions and practices of liberal democracies are in general justified on individualist grounds, and it is an issue of special interest whether their routinely asserted right to exclude potential immigrants is consistent with the principles to which they claim allegiance. Second, I will frame the debate between those who think that states in general have a discretionary right not to admit noncitizens, on the one hand, and those who are skeptical of such a right, in terms of the existence or absence of a “right to exclude,” rather than in the more familiar terms of “open borders” versus “closed borders”. This choice of terminology is justified given that the main issue under discussion here does not concern the substantive reasons that may exist that argue in favor of restrictive immigration controls or against them, i.e. the kinds of considerations that may be taken into account by decision-makers when they determine border policy. The issue, rather, is whether state officials have a *moral right* to allow these various considerations to determine border controls. To illustrate, some theorists argue that there is some particular good, such as the maintenance of a distinctive culture, or social trust and solidarity, the promotion of which depends on restricting immigration.³ In a similar vein, others might argue that some other goods, such as cultural diversity, are best promoted by permissive immigration policies. Regardless of their substantive merits or lack thereof, however, these suggestions are silent on whether it is morally permissible to promote the particular goods or interests that they invoke through coercive border controls. It may be coherently suggested,

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1 For important discussions of territorial rights, see Simmons 2001; Stilz 2009; Nine 2008; Miller 2012.

2 See e.g. Miller 2007; for criticism, see Stilz 2011.

3 See e.g. Walzer 1983; Miller 1997.

for instance, that even though social trust is an important good, and that the promotion of this good depends on limiting immigration, states do not have the right to promote this good in this manner because that would violate the rights of others. Likewise, the fact that diversity is good does not entail that its pursuit makes border controls impermissible. If we assume that political morality incorporates at least some nonconsequentialist constraints, then we ought not to rule out the possibility that certain ways of promoting the good are impermissible. As Michael Blake writes, “From the fact that we have an interest in a particular set of policies, we cannot infer that we have a right to it—particularly if other people may have interests, or even rights, in the absence of those policies.” (Blake 2013) Therefore, the issue at stake here is not whether there are some good reasons for restricting immigration, but whether or not states have a moral right to act on those reasons. (It is not usually in doubt that they have a *legal* right to do so, with the exception of the admission of refugees, which signatories of the Geneva Convention are legally required to do. The question is whether that legal right has any sound basis in political morality). Third, I will use the term ‘admission-seekers’ for all categories of people that seek to enter the territory of a state, to capture all possible grounds of claiming admission. I use this term instead of “immigrant” or “migrant” because many in the theoretical literature and especially outside the academic discourse have come to use “immigrant” in contrast with “refugee” as mutually exclusive terms, to refer to people who seek admission not because their human rights have been violated, but for other, typically economic reasons. The term “admission-seeker” is intended to be neutral with respect to different types of admission claims.

I will engage with three types of theories of territorial rights. The first account links the right of states to exclude to the prior right of individuals to freedom of association, which is said to include the right not to associate and to dissociate. The second is a Lockean theory that grounds the territorial rights of states, and hence their right to exclude, in the prior right of individuals to private property in the land that constitutes the territory of the state. I argue that these accounts have independently implausible implications, regardless of their implications for the immigration debate. Some of these are sufficient to exclude them from consideration. The third account is a Kantian theory that bases the territorial jurisdiction of states on individuals’ duty to create, sustain and submit themselves to a shared system of law that is a necessary condition of guaranteeing their rights and of discharging their duties towards one another. I will argue that the Kantian account is superior to its current alternatives. However, I also suggest that it cannot ground a broad right to exclude.

Association and the right to exclude

It has been prominently argued by Christopher Wellman that the right of states to exclude admission-seekers is grounded in their citizens' individual right to freedom of association (Wellman 2008). The freedom to associate with others that one wants to associate with is usually understood to be of paramount moral significance. It is rarely disputed that this freedom is a crucial aspect of personal autonomy, of being able to take charge of our lives and to give it a direction of our own determination. Living our lives in association with people whom we want to share it (provided that they have the same wish) is essential to being the authors of our lives. We need only to think of the examples of marriage, of friendship and of religious worship to appreciate the importance of the right to associate freely. By the same token, not having to share our lives with people we don't want to share it with is an equally essential element of personal autonomy. Therefore, so the argument goes, the collective of citizens of a state has the right, derived from the rights of its individual members, to make collective decisions through their political institutions about whom they want to admit into the territory of their state and whom not (Wellman 2008: 109-114).

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The argument from association, as I will call it, is a deontological argument insofar that it does not rest on the thought that restricting immigration is necessary to promote some good. In fact, Wellman states that personally, he is in favor of fairly open borders, and would presumably support them if the issue came up for vote (Wellman 2008: 116-117). His claim is simply that the community of citizens has the *moral* right to opt in favor of closed borders if the appropriate majority so decides. How should one evaluate the argument from association as an account of the right of states to exclude? I will make two types of arguments against this account. First, I will draw out some very implausible, indeed unpalatable implication of understanding the community of citizens on the basis of associational freedom. Second, I will advance a more fundamental challenge that raises doubts regarding this manner of construing the right of association.

The first point that should be noted is that understanding political community on the basis of associational freedom in the manner Wellman suggests has much more far-reaching implications than he seems to realize. He suggests that the right of free association involves not simply the right not to associate (i.e. not to enter into associational relations with people whom one does not *already* share an association) but also the right to dissociate, i.e. to sever *existing* associational ties with persons with whom one shares certain associations. This seems certainly right as far as some associations are concerned: people have the right to divorce their partners or end friendships essentially on any ground that they personally see as sufficient, even if doing so

is a terrible choice under the circumstances. However, the issue is somewhat murkier in the case of associations that have a stated, specific goal or dominating ideal. Consider the case of religious communities or churches. Churches certainly have the right to establish their own official doctrine and system of behavioral norms, and also to exclude or not to admit anyone whose stated views and beliefs are inconsistent with the official views of that church, or whose behavior violate clearly established norms of the community. It is far less clear to me whether churches have the right to refuse to admit or to exclude people who fully comply with those doctrines and norms. Consider the following example: does a church have the right to exclude or refuse to admit people on the basis of racial criteria even though the stated doctrine and goals of the church make no reference to race? I doubt that it does.⁴ I think this example is importantly different from a real life case, in which the issue was whether the Boy Scouts of America may refuse to admit gay members at a time when the organization's code clearly prohibited gays from being members.⁵ This is so because in the hypothetical example race is wholly irrelevant to the church's mission, while the Boy Scouts' at the time of the legal challenge officially held that engaging in homosexual acts or even the desire to do so is contrary to the ideals of the group. However, let us grant, for the sake of argument, that in the case of typical associations, the right to exclude, i.e. to sever existing relational ties, is broad and nearly unlimited. The obvious implication of understanding the political community of citizens as an instance of associational freedom is that the right to exclude is not limited to current noncitizens but extends to *current citizens* as well. By Wellman's own lights, we would have to say that states have the right to strip current citizens of their citizenship on just about any grounds that an appropriately specified majority deems fit. This is surely an absurd consequence. No existing liberal democracy claims to have that *discretionary* right; typically, stripping citizens of their citizenship is restricted to cases of treason, desertion from the military during wartime, or when citizenship was fraudulently acquired in the first place (Herzog 2011)⁶. The Universal Declaration of Human Rights (Article 15 (2)) prohibits the arbitrary revocation of nationality (i.e. citizenship), without specifying, however, what counts as arbitrary. The European Convention on

4 Even though I believe it does have the right to incorporate racial criteria in its doctrines, and then, as despicable as such a practice may be, it will have the right to exclude people belonging to the specified racial group.

5 The case is discussed in Wellman 2008: 111. The United States Supreme Court decided in favour of the Boy Scouts' right to exclude gays in *Boy Scouts of America et al. vs. Dale*, 530 U.S., 640 (2000). Recently, the group have decided on its own to accept gay members.

6 Some countries don't recognize dual citizenship and thus those of their citizens who acquire citizenship in another state lose their original citizenship. In others, permanent residence in another country or service in a foreign army may lead to loss of citizenship. These practices, however, may be seen as ones in which loss of citizenship is chosen voluntarily by the affected individuals.

Nationality (1997) goes further by providing an exhaustive list of grounds for revocation.⁷ If we tend to think, after reflection, that there is no *discretionary* right to revoke the citizenship status of current citizens, then that judgment should be taken as a strike against understanding political community as an instance of associational freedom. Both current international legal practice and common moral intuition suggests that states don't have the right to revoke citizenship on arbitrary grounds. If that practice and that intuition tracks valid moral principles, then this suggests that there is no such right. But if so, and if the right to dissociate is part and parcel of the right to associate, then we have very good reason to doubt that the acquisition and loss of citizenship is to be understood on the basis of the freedom of association.

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Another wildly implausible implication of linking the purported right to exclude to the right of free association can be seen if we consider the issue of reproductive freedom. It is nearly universally agreed that, barring special circumstances, people have the right to procreate and decide to have children. Moreover, couples (or individuals) may exercise this right without the consent of their fellow citizens. However, the children that are born as a result of such decisions have the right to stay in the territory of the state and normally become members not only of their families but also of the political community. This is not dependent on the positive decision of the political community as a whole. If we approve of this practice, as most people believe we should, then those who ground the right to exclude on the freedom of association face a dilemma. On one horn of the dilemma, they may claim that in the cases of exercises of reproductive freedom the rights of *individuals* to associate (in this case with their prospective children) defeats the right of the *political community* to exercise its right not to associate. But if the individual right to associate can override the collective's similar right, then the door is wide open for individuals to invite noncitizens to the territory of their state and offer them permanent residence as an instance of their associational freedom. In other words, if the individual right of association can typically override the collective's similar right, then the latter is not a very strong right and cannot justify current immigration practices. On the other horn of the dilemma, they may admit that admission to the political community is not governed by the principles of associational freedom. While the first horn of the dilemma only weakens the theory, the second horn is fatal.

To see why the problem of reproductive freedom is so thorny for the argument from association, we may notice that children do not, as a matter of general principle, become members of whatever associations their parents are the members of. Take the case of Christian churches, for instance. Sure, most religious parents raise their children to adopt the same religious beliefs. But

7 For discussion, see De Groot – Vink, internet and Bauböck – Perchinig – Sievers: 2009.

typically, children do not become members of their parents' church simply in virtue of birth but through baptism or some similar practice. There is no analogy of baptism for children to become citizens—they acquire it in virtue of birth itself. This points to an important disanalogy with typical exercises of associational freedom. Needless to say, the same holds for the various other voluntary organizations to which parents belong; their kids don't become members automatically by birth. To be sure, these practices are not determinative. The associational theorist may respond that it is not her theory but these practices that are in need of revision. However, these practices as they currently exist are much more in line with the way freedom of association is typically understood. In the standard view, the voluntary choice of the individual to become a member (rather than her parents' decision) is a necessary condition of acquiring membership. Therefore, it stands to reason that the same should hold for citizenship, were it a case of associational freedom.⁸

Now, the proponent of the argument from association may counter the above objections by suggesting that they can be neutered once we consider that the right to freedom of association is not absolute, and that it competes with other moral considerations. For instance, she may suggest that revocation of citizenship on arbitrary grounds would be such a severe blow to the personal autonomy of current citizens, whose projects and relationships are typically attached to continued presence in the territory of the state of their current citizenship, that is incomparable to what is at stake in terms of autonomy for current noncitizen admission-seekers. So in the case of current citizens, individual autonomy defeats freedom of association. This may also explain some of our contemporary practices, such as the easier naturalization of the spouses or other family members of current citizens. Perhaps the argument might be extended to reproductive freedom: individuals' autonomy-based interest in being able to make reproductive choices on their own outweighs the importance of freedom of association. Less plausibly, it may be suggested that this interest also explains why newborns automatically become citizens as well. I am not sure whether this strategy is very promising, because it opens up the way for a potentially broad range of claims to override the collective right of freedom of association, which will then look less firm as a basis of the nearly blanket right to exclude that is the justificatory target. However, for the sake of discussion I would like to entertain the possibility that this rebuttal might succeed. I therefore put forward two separate considerations that suggest that associational freedom is an altogether misguided suggestion as the basis of the right to exclude and of membership in the political community, respectively. These considerations represent a more fundamental challenge than the previous ones insofar that they do not simply point out implausible implications.

8 For discussion of these and similar problems, see also Fine 2010.

The first consideration is the following. What is at stake in granting or withholding admission from admission-seekers is not membership in the political community, but rather entry into and (extended) stay in the state's territory. Those who are admitted to the territory need not be granted citizenship (Sandelind 2015: 498). However, the freedom of association is naturally understood in this context as applying to citizenship, not to residence. It is wildly implausible to construe residence in the same geographical territory as sharing an association in the relevant sense. To begin with, that would imply that it would be necessary to get the approval of current residents before one could move into a neighborhood in order to live there. That would be grossly objectionable, for obvious reasons. Equally obviously, access to physical space to reside and live and simply to move around is a vital good that everyone crucially depends on to have any kind of life; everyone must be able to occupy some space. Freedom of association cannot extend to the exclusive control of, and the right to deny access to, goods that are vital even for mere subsistence. (I will return to this claim below). Finally, if sharing the same territory counts as sharing an association in the relevant sense, then the whole of humanity may be seen as constituting one single association in virtue of sharing the surface of the Earth. But then, by associational logic humanity as a whole would have the collective right to exclude persons from the territory of the Earth, which is absurd. The proponent of the argument from association faces a fatal dilemma yet again. It is either the case that sharing residence in the same territory is not an instance of sharing an association. In that case, the state's right to exclude admission-seekers from its territory cannot be defended on associational grounds. Alternatively, sharing residence in a given territory is a form of association, but then the right to exclude is defeated by the claims of members to access to vital goods. Either way, the blanket right of states to exclude admission-seekers from its territory cannot be justified on associational grounds.

Now, the following rebuttal to the preceding argument may be considered. It is true that admission to and residence in territory is logically distinct from membership in the political community (i.e. citizenship), but they are normatively inseparable, at least in the longer term. Long-term residents are permanently subject to the authority of the state; their relation to it is, for normative purposes, not different from that of citizens. Therefore, they ought to be able to *acquire* citizenship at request after a certain period of time, as a matter of democratic right.⁹ Therefore, admittance to territory with the purpose of residence is tantamount to a conditional offer of citizenship (See Sandelind 2015: 498 and Fine 2008: 344). Therefore, *insofar*

9 This claim is admitted even by theorists who uphold the right to exclude. Walzer 1983: 31-63.

that membership in the political community is a matter of associational freedom, states do have the right to exclude admission-seekers from their territory because admission to territory morally commits them to admission to the political community. Let us call this the “bundling argument” (the term “bundling” is borrowed from Fine 2008: 344). Abstractly, the bundling argument states that if X has the right to refuse to give A to Y, and if giving B to Y would commit X to giving A to Y as well, then X has the right to refuse to give B, too, even though X does not have the right to refuse B *per se*, i.e. when considered independently of the commitments that giving B would create.

I am not sure if this is a generally valid form of argument. Suppose you have the right to refuse to let me into your house (even if letting me in would not impose more than modest costs on you). Suppose also that you have no right to refuse vital assistance to me if you can do so at little cost to yourself. Suppose further that the only way you can give me vital assistance under the circumstances is to take me into your house and provide it there. Other things being equal (i.e. if the costs to you of having to admit me into your house are not excessive), it would seem to me that you cannot refuse to admit me into your house under the circumstances. Now, it *might* be argued that the “other things being equal” clause does not apply to the immigration case: it may be suggested that admitting people into the political community imposes much larger burden on current members than simply admitting people into the territory of their state. It is hard to believe that this could be so. Sharing public space and the material and cultural environment looks like more immediately consequential than sharing political membership. But one reason why it *could* be seen differently is suggested by Wellman. Members (citizens) have the right to participate in decisions regarding the formal political structure of the group itself, i.e. about its very collective self (see Wellman 2008: 115). Therefore, I will entertain the thought that this rebuttal is successful.

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What the rebuttal shows if it succeeds is this. Even though states do not have an *associational* right to exclude admission-seekers from their territory, the right to exclude from territory is a necessary condition of exercising their right to associational freedom. Therefore, they have the right to that which is a necessary condition of the exercise of their right to associate because otherwise the latter would be vacuous.¹⁰ This rebuttal preserves as one of its premises the assumption that political membership is based on associational

10 I think this argument runs into the obvious problem that in many cases, the admission-seekers' admission to territory is also a necessary condition of the exercise of many of *their* fundamental rights. Therefore, in order to show that the current members' right to exclude prevails it is not sufficient to show that that right is a necessary condition of the exercise of their associational rights. It also has to be shown that that right enjoys priority over the fundamental rights of admission-seekers. However, I will not pursue this argument here.

freedom. Now, I will challenge this thought directly. Let me start by pointing out an obvious fact: political communities and states are not voluntary organizations. The overwhelming majority of members become citizens by birth rather than by choice, as is the case with voluntary associations falling under the scope of associational freedom. Moreover, it is not simply the manner of acquiring membership that marks a sharp contrast between states and voluntary associations. Voluntary associations have morally optional goals, i.e. such goals that their members do not typically have a prior and independent duty to pursue (or do not have a duty to pursue it in an associational form).¹¹ Voluntary associations are typically about the pursuit of projects and goals that persons are free to adopt and also not to adopt—religious worship, artistic, scholarly, professional or athletic advancement, and so on. They are, at a fundamental level, about what people do with their lives as far as their exercise of personal autonomy is concerned. As part of their personal autonomy, they may decide to pursue certain goals or activities or relationships in a collective, associational setting rather than on their own. By contrast, states are non-voluntary in a second, crucially important sense as well. Their goal, or point of existing, is constituted by morally required rather than optional ends. States by hypothesis make rules that are binding for all those subject to them and can be enforced through the use or threat of force even against those who disagree with them. This right to rule and use force can be justified only because it is a necessary condition of their members' and residents' discharging such duties that they have towards each other prior to and independent of the existence of the state. They have a fundamental duty to live in peace and justice with each other, which is not possible without submitting themselves to and sustaining a shared system of just laws.¹² If they cannot honor their duty to live in justice with each other without submitting themselves to the authority of the state, then they have a duty to submit themselves to it. This is not optional but morally required of them.

What is the import of this difference? I think it helps us clarifying the ground and limits of freedom of association. The moral significance of the freedom to associate is related to the moral significance of personal autonomy, i.e. of being able to pursue our self-chosen projects and relationships that we adopt in light of our own reasons. Even though we may think (as I do) that the values in light of which we decide which projects and relationships to pursue are objective, it is still the case that the reasons provided by these objective

11 I added the qualification in within the brackets to acknowledge that some voluntary associations pursue goals that plausibly all of us have a humanitarian duty to contribute to (think of Amnesty International, for instance). But we do not have a duty to pursue it *by* becoming members of AI or donating to it, or in any way contributing to it.

12 I am assuming here a Kantian theory of the basis of political authority and obligation. For details, see e.g. Arthur Ripstein, Anna Stilz, Jeremy Waldron, etc.

values alone underdetermine what projects we have most reason to adopt (see Raz 1986: 385-390). We are morally free to choose among the available projects, and we are also morally free to decide with whom, if anyone, we intend to pursue these projects. This is a crucial aspect of autonomy. But of course our personal autonomy extends only to the use of goods and resources that we rightfully possess. I cannot pursue my self-chosen projects by taking what is yours or, which amounts to the same thing, by excluding your access to that which you have a rightful claim to. The pursuit of personal autonomy is constrained by justice (which is not to deny that part of the point of justice may be to enable people to pursue their autonomous projects). It cannot be exercised in such a manner that results in the violation of the justice-based claims of others to access to vital goods. For that reason, insofar as access to territory is itself a vital good or a necessary condition of the exercise of fundamental rights grounded in justice, associational freedom does not include the right to exclude admission-seekers from a particular territory, provided that they depend on access to that territory in order to be able to exercise their fundamental rights.¹³

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Two conclusions emerge from this discussion. First, the goals and function of political community (understood as an institutionally organized society exercising control over a particular territory) are crucially different from those of voluntary associations that fall within the purview of associational freedom. The latter are instances of collective exercises of personal autonomy in the pursuit of optional projects, while the former is the collective pursuit of a morally required project, the establishment of justice over a given territory, which is a necessary condition of the fair pursuit of autonomy for all. Therefore, the former is morally prior to and constrains the latter. Individuals' right to pursue their autonomy, individually or in voluntary association with others, is limited to the use of goods and resources that they rightfully possess. One of the chief goals of political community, by contrast, is exactly to make sure that each person possesses the goods that they have a rightful claim to. Second, and relatedly, people may not exercise their autonomy in such ways as to exclude others from what they have a rightful claim to. Therefore, whether admission-seekers may be excluded from the territory of the state they seek admission to depends not on the associational freedom of current members and residents, but on whether their admission is necessary for them (the admission-seekers) to have their valid claims met, and whether their admission would threaten the valid claims of current residents to a fair share of resources, etc. An account of the fair

13 To be sure, admission-seekers hold this claim not against particular states but against the international community of states. Therefore, their claim to territory is not a claim to be admitted to the territory of a particular state.

shares that each – both admission-seekers and current residents – are entitled to is both logically and normatively prior to a proper account of freedom of association. It is logically prior because we can specify what counts as a morally protected exercise of associational freedom only once we have determined who is entitled to what resources, and whether a particular exercise involves only those resources that the persons engaging in it rightfully possess. And it is normatively prior just because only those exercises are morally protected that involve only such resources that are rightfully held by those engaging in them. In sum, the right to freedom of association cannot ground the right to exclude.

Property and the right to exclude

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Another influential, Lockean theory of the territorial rights of states claims that states' right to exercise exclusive jurisdiction over a particular territory is derived from the prior right of ownership of their individual residents of the land that makes up that territory. The idea is that first, individuals gain ownership rights of pieces of land, and subsequently they decide to form a political community, in the process transferring (at least some aspects of) their ownership rights to the state.¹⁴ The state's territorial rights are simply an aggregation of prior individual rights of property in land, deriving from delegation by each individual who had such property rights. And since property right over a particular territory is usually understood to include the right to control entry into that territory, there is a simple and straightforward inference from property rights through territorial rights to the right to exclude admission-seekers.

It seems to me that the problems with the proposal based on individual property rights are glaringly obvious and should make this account a non-starter.¹⁵ First of all, it rests on a very controversial and implausible theory of political authority based on individual consent. It is widely recognized that consent cannot be the basis of the general authority of the state, since most people do not by an act of voluntary and deliberate consent submit themselves to the authority of the state. As for delegation of property rights to the state, this is even more implausible in the case of later generations who acquire property rights already under the circumstances of political rule. It is very hard to see which of their acts could be seen as a moral equivalent of delegating their property rights to the state. Secondly and independently,

14 See Steiner, 1996. Cara Nine's account in Nine 2008 represents another Lockean view, but one that does not rely on individual ownership. Therefore, the criticisms that follow do not apply to her view.

15 For a thorough criticism, see e.g. Stilz 2009. My objections listed below are adopted from her work.

if the ultimate basis of the territorial rights of states is individual property rights in land, then it should be possible, morally speaking, for individuals to withdraw their delegation and secede from the state with their land. The fact that such a right is neither recognized in legal practice nor claimed by many as plausible suggests that there is no such individual right to secede.¹⁶ I take the fact that the Lockean property-based theory implies an individual right to secede as a *reductio*, and therefore will not further discuss this account.¹⁷ Instead, I turn to the third, Kantian account.

Occupancy and Territorial Rights

In this section I will outline what I take to be the most plausible basis of state's territorial rights, and then turn to examine whether this account supports the robust right to exclude that is generally asserted both by national governments and many theorists. This account relies on individuals' dependence on secure access to and occupancy of *some* territory for their ability to pursue their projects and relationships in an autonomous manner.¹⁸ Its starting point is the rather simple and straightforward observation that it is true of almost all people that being able to pursue their long-term projects and relationships that occupy central roles in their life-plans – studies, careers, romantic relationships and friendships, family, etc. – require that they have secure access to the particular places to which these projects and relationships are attached. By 'secure' access I mean that by and large, they can enter these places and stay within them at will, without having to depend on the discretionary decision of some other party, be it a private actor or some official. It is important to notice that the pursuit of individual autonomy is dependent on having secure access to *particular* places in a way that guaranteeing more basic rights such as subsistence, freedom from torture, inhuman punishment or persecution is *not*. In principle, it is possible for one's most basic human rights to be safely protected while continuously being transported from one place to another, all the while being well-fed and well-housed, and safe from physical or psychological suffering. The same is not true (at least for the overwhelming majority of people) for the pursuit of more complex, medium- and long-term plans that involve the investment of effort, time, the development of skills, working on complex tasks, associating and building

16 Of course, this is just an appeal to intuition rather than an argument. Steiner does in fact insist, heroically, that this seemingly implausible implication of the property-based theory is one that we should accept. See Steiner 2008.

17 There are other, similarly fatal objections to this view, such as its failure to distinguish between property rights, jurisdictional rights, and meta-jurisdictional rights, amply discussed in Stilz and Nine.

18 The account broadly follows Kantian theories of territorial rights, e.g. the works by Stilz referred to above and Ypi 2014.

relationships with *particular* others, etc. These plans typically depend on being regularly present in the same locations. And since people have a very strong moral claim to the conditions of autonomy (the latter understood as the pursuit of projects chosen or endorsed in light of one's own convictions about value), they have a very strong moral claim to securely access and stay in the locations where they have already ongoing projects.

I am assuming that the claim to access locations to which existing projects are linked is stronger than the claim to access locations where one wishes to engage in future projects not yet started, other things being equal.¹⁹ This is so for the following reason. The fact that one has already been engaged with a project, that she already invested significant effort, time, resources and thought to it, creates new and stronger reasons to *go on* with these projects than the reasons that there are to *start* these projects in the first place. There are many valuable projects that one may engage with, the objective value of which provides reasons to pursue them. However, given value pluralism and a reasonable degree of incommensurability of values, these reasons alone do not determine which projects one has most reason to pursue, or more reason than some others. By contrast, the fact of having chosen a particular project and of having pursued it to a non-trivial degree singles that project out as salient and provides one with special reasons to continue with them.²⁰ (This is not to say that these special reasons cannot be defeated by other considerations. One may always come to see that chosen projects are not good fits for one's personality, even as she continues to see them as objectively valuable). Therefore, other things being equal, there is more at stake for someone in being able to *continue* to pursue projects that one has developed a commitment to than for someone in being able to *start* a particular project that one has not yet invested significantly emotionally, intellectually and otherwise.

If this is so, then people with existing projects tied to particular locations have (defeasible) priority in access to those locations over people with no existing projects tied to the locations, should it be the case that their claims to access conflict, other things being equal. And since current residents typically have more ongoing projects tied to a location than current non-residents, residents have some priority, other things being equal. However, other things are often not equal and it is now time to unpack the conditions under which the suggested priority holds. First, it should be noted that the priority claim just introduced grounds a (defeasible) right to exclude people from a location who lack existing projects tied to it only when their claims to access *conflict* with the claims to access of people with existing projects

19 However, other things are usually not equal, as I discuss below.

20 See Raz 1986: 385-90.

tied to the location. When their claims do *not* conflict, or when the formers' access would merely make it slightly more onerous for the latter's to pursue their existing projects, then there is no such presumptive right. Second, the priority holds only if there are no other interests, *more fundamental* than autonomy, at stake for those without current projects tied to the location. If their basic human rights of subsistence and freedom from inhuman treatment, etc. can be secured only if they can access those locations, then the autonomy-based priority of people with current projects in the location can be defeated. Third, the priority holds only if those without current projects in the location have equivalent (or at least adequate) opportunities for similar projects in other locations, either at the place of their current residence or at other places such that their access to them does not conflict with the autonomy-based claims of *their* current residents. If a particular project can be pursued in a single country, and it has no equivalents elsewhere either, then the priority of current residents strikes me as significantly weaker.

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I will return to the issue of the relative strength of claims of different categories of people to access a particular location shortly. But how do we get from the claims of individuals to access particular locations to the territorial right of states to exercise exclusive jurisdiction over a particular territory? It is this transition that gives this account of territorial rights a distinctly Kantian flavor. The general idea is that individuals can enjoy their "external" freedom of property and autonomy only under a shared system of laws, because without such, it is impossible to impartially and peacefully resolve disagreements regarding the precise boundaries of the rights of each. Moreover, since there is a conventional aspect to how the specific boundaries are drawn, i.e. morality alone underspecifies the content of these rights, there are several different but equivalent or at least acceptable ways of drawing them. However, a scheme of rights can operate only if a single system of legal rules are in place to specify the boundaries for all. This is why it is necessary not only that *some* system of rules is implemented in a territory, but that a single system is implemented exclusively. This is why states need *exclusive* jurisdiction over a particular territory, since exclusivity is a necessary condition of their being able to realize their overarching goal, the establishment of a system of rights and justice among persons. The right of states to exercise exclusive jurisdiction over a particular territory is thus grounded in the fact that this right is necessary to establish justice among persons in that territory.

The general point can also be made without reference to the specifics of Kantian political theory. The basic idea is that the state – the maker and enforcer of binding rules – is a necessary condition of establishing justice among persons residing in a given territory. Among other things, one of the main functions of states is to resolve coordination problems among persons

– problems arising from the fact that many goals are such that there are multiple and roughly equivalent alternative ways of achieving them but they can be achieved only if all or at least most people adopt the *same* alternative course of action. Traffic is the textbook example: it is plausibly a shared goal of all drivers to be able to reach their destinations safely and without causing harm to or imposing undue risk on others. They can achieve their shared goal only if they follow the same traffic conventions. However, there are multiple and equally good alternative conventions – there is nothing morally or practically salient about driving either on the left or on the right – and thus mere commitment to the same goal by each traffic participant will not be sufficient to achieve it. One convention has to be selected authoritatively and enforced against all. The need to establish coordination explains both the necessity of political authority for achieving justice *and* that one single authority has to exercise exclusive jurisdiction over a territory. This is so because if there are multiple (and independent)²¹ authorities, they may select and enforce different coordination points for the same coordination problems. The bottom line is the same. The state's right to exclusive jurisdiction over a given territory is grounded in such exclusivity being a necessary condition of establishing justice in that territory.

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Territorial rights and the right to exclude

It is sometimes taken as self-evident that the territorial rights of states include the robust moral right to exclude admission-seekers on discretionary grounds. However, the right to exclude, if any, must be shown to be following from the same considerations that ground the right of exclusive jurisdiction itself. The link between the two is not conceptual – it is possible to imagine states having the right of exclusive jurisdiction without possessing the right to exclude whoever they want. If there is a right to exclude, there must be a substantive argument that shows it to be linked with the same considerations that justify territorial rights in general. In this section, the task is to explore whether the particular account of territorial rights that was outlined in the previous section provides any support for the right to exclude, and if so, how much.

The account outlined above was grounded in people's dependence on secure access to the use of territory for provision of their human rights as well as the pursuit of their autonomous projects. The individual claim to territory is a universal one; it is true of every individual, regardless of where they live

21 I add this qualifier to acknowledge the possibility of multiple authorities that are not strictly independent of each other in that they divide up the jurisdiction in functional terms, such that one may make rules in some domains and the other in different ones. Arguably, the European Union represents such a functional division of jurisdiction.

or of the institutional, cultural or associational ties that may exist between them, that they depend on access to territory for their human rights and autonomy. Therefore, only such an international legal system can be morally justified from this perspective that secures this access to each person, universally. The putative right to exclude must be examined in this light.

It is not immediately self-evident that the right to exclude is incompatible with providing everyone secure access to territory. The individual claim to territory, as formulated above, does not make reference to access to any particular territory. Plausibly and with the exception of uninhabited and uninhabitable places, just about any territory is capable of supporting people's human rights and autonomous projects. In other words, their human rights and autonomy can be protected even if they do not have access to the specific destinations of their preference, as long as they have access to *some* places that offer protection of these interests. Therefore, it might be suggested that a world consisting only of internally just states (or at least states that pass a threshold of decency in terms of human rights fulfillment) with the right to exclude could satisfy everyone's claim to territory, universally. To be sure, the right to exclude would not be unlimited. Specifically, under current circumstances, where a large number of states fall short of providing basic human rights and the conditions of autonomy for many of their citizens, the claim to territory of many persons can be guaranteed only if they are admitted to the territory of some state that does offer such protections. Therefore, the account of territorial rights outlined in this paper does not provide support for the exclusion of refugees subject to persecution in their source country or of destitute admission-seekers lacking the conditions of autonomy. Their claims count no less than the claims of current residents. This is, in and of itself, a significant result that crucially constrains the scope of the putative right to exclude under current and foreseeable conditions.

However, I want to show that the basis of the right to exclude is dubious even assuming that every person's relevant interests are protected by some minimally just state. In an important respect, whether there is a limited right to exclude under those highly idealized conditions depends on where the burden of proof is in this matter. It has been argued above that the territorial rights of states are grounded in their being a necessary condition of establishing justice among persons over a given territory. The form of the argument suggests that territorial rights are justified *only* to the extent that they are *necessary* for protecting persons' relevant rights. Now, it was suggested in the previous paragraph that under some special, highly favorable conditions, satisfying individuals' underlying claims is compatible with states' right to exclude. But this putative right being *compatible* with the relevant rights of individuals does not in any way entail that it is *necessary* for the

state to discharge its basic protective function. And then, if it is not necessary for that function, then it cannot be justified on this basis. The fact that the right to exclude is compatible (under some conditions) with the relevant individual rights is not sufficient for its justification. The burden of proof is on the proponents of the right to exclude that it is also necessary to protect the relevant individual rights. Nothing has been suggested so far that would support that much stronger claim.

At this point, the proponent of the right to exclude may choose one of two strategies. First, he may try to show that the right is indeed necessary in general for the state to discharge its justice-related functions. This would entail showing that states that lack the right to exclude cannot discharge their basic justice-related functions. Alternatively, he may try to shift the burden of proof back on his opponent by arguing that states can exercise whatever rights that are *consistent* with (even if not necessary for) their basic justice-related functions, and that it is the opponent of the right to exclude that must point to the wrongs that would be entailed by exercising the right to exclude. And, by hypothesis, the putative wrongs cannot be related to basic human rights and autonomy, since the latter were shown to be compatible (under the right circumstances) with the right to exclude. Therefore, the question boils down to where the burden of proof is: under the right circumstances, the right to exclude is assumed to be neither necessary for, nor incompatible with, guaranteeing those rights of individuals that ultimately ground the territorial rights of states. If those individual rights do not, by themselves, decide the matter one way or another, then the question is this: which side holds the presumption in its favor that has to be defeated by the other side?

To clarify, if one side has a right to do something and no fundamental interests of others are at stake, then the right is undefeated even if the right-holder does not have a fundamental interest in exercising that right, either. We are now assuming, for the sake of argument, that under favorable but conceivable conditions there are no fundamental, justice-related interests at stake in states' exercising exclusion. Exclusion is compatible with everyone having their relevant rights protected, but at the same time lacking the power to exclude does not undermine states' ability to discharge their justice-related functions. Then, whether exercising exclusion is morally defensible depends on whether states have a presumptive right to exclude or individuals have a presumptive right to be admitted to whatever territory of their choice. If viewed in this light, the case appears to tilt in favor of the presumptive right of individuals. States do not have interests of their own that are independent of the interests of those over whom they exercise authority. By contrast, it is easy to see what interests individuals may have to be admitted to the territory of states of their choices. They may find countries different

from that of their current citizenship or legal residence more congenial for themselves for a number of different reasons: they may prefer their culture, climate, or professional opportunities to those of their own current home, they may have intimate relationships tied to those countries, and so on. Now, to be sure, admitting non-residents to the territory of a state does implicate the interests of its current residents. While it does not in general hold that immigrants are a drag on the economy or on the host country's social services, there may be all types of adjustment costs that are borne and sometimes painfully felt by specific individuals even if the host society is made better off (or not made worse off) *on the whole*. Moreover, the sudden influx of a very large number of admission-seekers may indeed disrupt the normal operation of particular state functions.²²

This raises the problem of burden-sharing in two distinct ways. First, what counts as a fair distribution of burdens of immigration's adjustment costs *among states*? And second, what counts as a fair distribution of adjustment costs *among individuals* within a particular state? The answers to these questions depend, of course on the content and scope of the principles of distributive justice that there are good reasons to accept. This is too large a topic to address here in any detail. However, a couple of points may be suggested tentatively. First, to the extent that are particular individuals or groups within a society that experience special costs related to immigration, then the host society has a collective responsibility of justice to compensate them for those costs. Second, to the extent that particular societies face immigration on such a scale that places significant costs on them beyond the short term, the international community can be reasonable expected to either share the costs or to redirect some of the admission-seekers to other societies. After all, the interests of admission-seekers in being admitted are frequently not tied to unique destinations but to destinations with particular characteristics that are usually shared by some other states as well, and their claims to be admitted are not held against specific states but against all states that share those characteristics, collectively.

To sum up, considerations of costs beyond the short term, and of burden-sharing, do not appear to support a robust right to exclude even in an idealized

22 It is easy to exaggerate this point. I am not aware of a single example of a reasonably well-functioning, developed society whose public institutions experienced long-term, significant disruption as a *direct* result of immigration. Short-term shocks are another matter, but they are, after all, short-term. More often, disruption is not the direct result of immigration but of the public's reaction to it. But then it may be suggested that the public's attitudes ought to be sensitive to considerations of justice, rather than the other way around. The expected reactions of the public certainly constitute relevant considerations for political decision-makers, but they are not directly relevant for the morality of the right to exclude.

world where such a right would be consistent with protecting all the relevant rights of all individuals universally. Such considerations may justify compensation and even limited temporary restrictions on admission, but nothing like the wholesale discretionary right to exclude that is routinely claimed by currently existing states.

Conclusion

I have argued in this paper that the territorial rights of states cannot be understood as being grounded either in the associational rights of their current citizens or in their property rights in land as transferred to the state. I suggested that the Kantian conception of territorial rights as developed in recent years by a number of theorists provides a more plausible basis. On this account, the territorial rights of states are ultimately grounded in individuals' claim to territory as part of the necessary conditions of protecting their basic human rights and the conditions of their autonomy. However, I have argued that if the basis of territorial rights is to be found in this direction, then those rights do not include a broad right to exclude admission-seekers. Even though the putative right to exclude may, under very favorable conditions, be *compatible* with the individual rights that ground the territorial rights of states, it is not *necessary* for the state to discharge its basic justice-related functions. Therefore, to the extent that the content of territorial rights is specified with reference to the necessary conditions of fulfilling basic human rights and providing for the conditions of autonomy, the practice of excluding admission-seekers cannot be justified on that basis.

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Bibliography

- Bauböck, Rainer –Perchinig, Bernhard –Wiebke, Sievers (2009), *Citizenship Policies in the New Europe: Expanded and Updated Edition*. Amsterdam: Amsterdam University Press.
- Blake, Michael (2013), "Immigration, Jurisdiction, and Exclusion", *Philosophy and Public Affairs* 41 (2): 103-130.
- De Groot, Gerard-René –Vink, Maarten P., "Loss of citizenship: Trends and regulations in Europe", (internet) available at http://eudo-citizenship.eu/docs/loss_paper_updated_14102010.pdf (viewed 23 January, 2017)
- Fine, Sarah (2008), "Freedom of Association is not the Answer", *Ethics* 120: 338-356.
- Herzog, Ben (2011), "Revocation of Citizenship in the United States", *European journal of sociology* 52 (1): 77-109.
- Miller, David (1997). *On Nationality* Oxford: Oxford University Press.
- Miller, David (2007). *National Responsibility and Global Justice*. Oxford: Oxford University Press.
- Miller, David (2012), "Territorial rights: concept and justification", *Political Studies* 60 (2): 252-268.
- Nine, Cara (2008) "A Lockean Theory of Territory", *Political Studies* 56 (1): 148-165.
- Raz, Joseph (1986), *The Morality of Freedom*. Oxford: Clarendon.

- Sandelind, Clara (2015), "Territorial Rights and Open Borders", *Critical Review of International Social and Political Philosophy* 18 (5): 487-507.
- Simmons, John A. (2001), "On the territorial rights of states", *Noûs* 35 (1): 300-326.
- Steiner, Hillel (1996), "Territorial Justice," in Simon Caney, D. George and P. Jones (eds.), *National Right, International Obligations*, Boulder, Co.: Westview Press, pp. 139-148.
- Steiner, Hillel (2008), "May Lockean Doughnuts Have Holes? The Geometry of Territorial Jurisdiction: a Response to Nine", *Political Studies* 56 (4): 949-956.
- Stilz, Anna (2009), "Why do states have territorial rights?", *International Theory* 1 (2): 185-213.
- Stilz, Anna (2011), "Nations, States and Territory", *Ethics* 121 (3): 572-601.
- Walzer, Michael (1983), *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.
- Wellman, C. H. (2008), "Immigration and Freedom of Association," *Ethics* 119 (1): 109-141.
- Ypi, Lea (2014), "A permissive theory of territorial rights", *European Journal of philosophy* 22 (2): 288-312.

Zoltan Mikloši

Udruživanje, svojina i teritorija: o čemu govorimo kada govorimo o imigraciji?

Apstrakt

Često se tvrdi da države imaju teritorijalna prava, odnosno da ta prava podrazumevaju i pravo na isključivanje ljudi koji bi želeli da budu primljeni u teritorije pojedinih država. U ovom članku ćemo proučavati pitanje da li najviše odbranjiva teza o teritorijalnim pravima može da pruži podršku isključivanju. Analiziraću tri tipa teorije o teritorijalnim pravima. Prva teorija povezuje pravo država na isključivanje sa osnovnijem pravom pojedinaca na udruživanje. Druga teorija je lokovska teorija u kojoj se teritorijalna prava država, uključujući pravo na isključivanje, baziraju na osnovnijem pravu pojedinaca na privatnu svojину na zemlji koja konstituše teritoriju države. Tvrdim da ove teorije imaju posledice koje nisu plauzibilne, bez obzira na njihove implikacije u odnosu na rasprave o imigraciji. Treća teorija je kantijanska teorija koja se zasniva na teritorijalnoj jurisdikciji država, imajući u vidu obaveze pojedinaca u stvaranju i održavanju pravnog sistema koji je nužni uslov u garantovanju njihovih prava, odnosno u pogledu izvršavanja njihovih obaveza. Moja teza je da je kantijanska teorija superiorna u odnosu na njene alternative, zatim da se pomoću nje ne može zasnivati šire pravo na isključivanje.

Ključne reči: pravo na isključivanje, sloboda udruživanja, svojina, teritorijalna prava