

Selecting Immigrants¹

David Miller

Nuffield College, Oxford

In the developed liberal democracies today, the immigration issue has become intractable as a result of three conflicting pressures. The first is the increasing number of people from developing countries who wish to enter, whether to escape poverty or civil war or simply to improve their material prospects. Polling by Gallup, for example, suggests that 38% of those living in Sub-Saharan Africa and 21% of those living in the Middle East and North Africa would prefer to migrate permanently.² The second is the increasing reluctance of citizens within those societies to accept large numbers of incoming migrants. In the UK, for example, an opinion poll in late 2013 found that 80% of those who were asked thought that current levels of net inward migration were too high, 85% thought that immigration was putting too much pressure on public services such as schools, hospitals and housing, and 64% thought that over the last decade immigration had not been good for British society as a whole.³ Broadly the same picture holds across Europe.⁴ The third is the diminished capacity of governments to control immigration flows by means that are judged acceptable by international law and opinion. Even setting aside the special case of the EU with its principle of internal free movement, the prevailing human rights culture stays the hand of governments who seek peremptorily either to prevent unwanted immigrants from entering or to deport them once they have gained a foothold inside.

Under these circumstances, developing a defensible policy for selecting which immigrants to admit, and on what terms, becomes a priority. In sketching the outlines of such a policy, I make three assumptions, which I shall not defend here (though I have done so elsewhere⁵). The first is that

¹ Paper prepared for the conference on 'The Lampedusa Dilemma: Global Flows and Closed Borders. What should Europe do?' organised by the *EUI Forum on Migration, Demography and Citizenship*, European University Institute, Florence, 17-18 November 2014.

² N. Esipova, J. Ray, and R. Srinivasan, *The World's Potential Migrants: Who They Are, Where They Want to Go, and Why It Matters* (Gallup Inc., 2010-2011). Overall, 40% of those living in the poorest quartile of countries have expressed a wish to migrate – see P. Collier, *Exodus: Immigration and Multiculturalism in the 21st Century* (London: Allen Lane, 2013) p. 167.

³ See http://www.harrisinteractive.com/vault/HI_UK_News_Daily_Mail_Poll-Nov13.pdf.

⁴ See E. Iversflaten, 'Threatened by Diversity: Why restrictive asylum and immigration policies appeal to western Europeans', *Journal of Elections, Public Opinion and Parties*, 15 (2005), 21-45.

there is no human right to immigrate: the simple fact of being refused entry by a state does not, in itself, violate anyone's human rights.⁶ The second is that democratic states can legitimately shape their immigration policies in the light of their overall national goals and priorities, whether these are economic, cultural, environmental, humanitarian etc. An important aspect of national self-determination is deciding who is going to form part of the 'self' in future. The third is that this right of self-determination is nevertheless limited by what I call 'the weak cosmopolitan premise', according to which all human beings are equally entitled to moral consideration when agents (whether states or individual people) decide how to act towards them. This means in particular that a prospective migrant seeking to enter must have her claim considered, and if it is denied she must be presented with reasonable grounds for refusal.⁷

Selecting between potential immigrants is justifiable, therefore, but how should it be done? There are two dimensions that we need to consider: the first is the inherent nature of the claim to enter that the immigrant is making; the second is the nature of the connection (if any) that already exists between the immigrant and the receiving state. On one dimension, we have the familiar distinction between refugees and economic migrants, where refugees are those whose claim is based on the threat to their human rights created by remaining in their current state of residence, and economic migrants are all those who have an interest in moving to a new society, whether to study, to find work, or to pursue some personal project, but who cannot cite a threat to their human rights as grounds for admission. On the second dimension, there are those who qualify as what I call 'particularity claimants' and those who do not. Particularity claimants are people who assert that one particular state owes them admission by virtue of what has happened in the past. A clear case would be one in which a group of people have been led to believe that they had a right to immigrate should their circumstances require it.⁸ Another example would be people who have performed

⁵ For shorter defences, see D. Miller, 'Immigration: the case for limits' in A. Cohen and C. Wellman (eds.), *Contemporary Debates in Applied Ethics* (Oxford: Blackwell, 2005); D. Miller, 'Is there a Human Right to Immigrate?' in S. Fine and L. Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016). My most complete treatment is D. Miller, *Strangers in our Midst: the political philosophy of immigration* (Cambridge, MA: Harvard University Press, 2016).

⁶ In some cases, however, it might *lead to* a violation of that person's human rights: the distinction is important.

⁷ Someone might ask why, if there is no human right to immigrate, states have to justify their refusal to those they exclude. But compare applicants for a job: no-one has a right to that job, but they are nonetheless entitled to be selected by a fair procedure, and to be given reasons for why they were not chosen.

some service for the state, and claim now that being allowed to immigrate is the appropriate form of recompense.⁹ Particularity claimants might also be refugees or economic migrants, but what distinguishes them (and justifies the rather awkward label I am applying to them) is that their claim is held against *one particular state*, whereas refugees and economic migrants, although they have chosen to apply in one place, might in many cases find that their rights or interests were equally well served by being admitted elsewhere.

The distinctions I have drawn suggest two priority rules that states should follow in selecting immigrants: 1. *Refugees as a category should have priority over economic migrants*; 2. *Within each category, particularity claimants should have priority over others*. The rationale for the first rule is that states have an obligation to admit refugees (the nature and extent of which will be explored shortly) whereas they have no such obligation to admit economic migrants. The rationale for the second rule is that a state has more reason to acknowledge a claim that stems from an existing relationship with the immigrant than one that is general in nature. This, however, does not yet settle whether a refugee without a particularity claim should always get precedence over an economic migrant who has one. Consider the following case: suppose the UK Border Agency has (for some reason) to make a choice between two applicants for admission: a refugee from South Sudan, who can credibly show that her life is in danger because she has been an outspoken critic of the regime, but who has no previous connection to the UK, and a young man from Iraq who worked as a translator for the British Army during the Gulf War, but who can no longer find work (so he is poor but not yet in desperate straits). Who should be taken first? Well, perhaps the Sudanese, since time is of the essence and she needs immediate help. But maybe she can claim less than the Iraqi eventually: if the Agency has made an arrangement for refugees from Sudan to be accommodated in neighbouring Kenya, that may offer sufficient protection for her human rights. The Iraqi man, on the other hand, may have a desert claim that can only be redeemed if he is provided with the opportunities that come with being allowed into Britain.

⁸ For example the Ugandan Asians who held British passports but whose right to immigrate was abruptly removed by the Immigration Act of 1971. When Idi Amin came to power and threatened to expel them at short notice, the British Government recognized its obligation and allowed them to enter. The episode is described in R. Winder, *Bloody Foreigners: the Story of Immigration to Britain* (London: Little Brown, 2004), ch. 22.

⁹ Consider the case of the Nepalese Gurkhas who, after serving in the British Army, have sought the right to reside in Britain after retiring. This right was granted to them by a High Court decision in 2008. According to the actress Joanna Lumley who spearheaded their campaign, 'The whole campaign has been based on the belief that those who have fought and been prepared to die for our country should have the right to live in our country' (<http://www.gurkhajustice.org.uk/>).

In presenting this case as a test of our moral intuitions, I have already assumed that the obligation to accept refugees is not unlimited, and therefore that there may justifiably be selection among those who are claiming refugee status. First, it is a responsibility that falls upon all states able to provide the necessary refuge, and each state, therefore, is only required to discharge its fair share of that responsibility. Ideally this would be done by entering into an international scheme for placing refugees according to each state's capacity to absorb them.¹⁰ In the absence of such a scheme, it is permissible for states to enter into bilateral or multilateral agreements whereby states who receive more asylum applications than they are obliged to accept can pass asylum-seekers on to other places willing to take them into, provided always that their human rights will be adequately safeguarded in those places. Second, the obligation is an obligation to provide temporary sanctuary, and it only becomes an obligation to grant permanent residence in cases where it becomes clear that the refugee has no realistic prospect of returning safely to her own society within a reasonable space of time.

On these assumptions, receiving states may have to select, among those who can prove their claim to refugee status, people they will take in themselves and others who they will pass on under one of the arrangements outlined above. So what grounds for selection are permissible? Consider four possibilities: 1) The refugee's need for permanent settlement; 2) The causal role played by the receiving state in creating the situation from which the refugee is escaping; 3) The likely economic contribution of the refugee to the receiving society; 4) The degree of cultural affinity between refugee and host political community.

1) This seems a relevant consideration. Although the places to which refugees are transferred must be human rights compliant, and this means that they provide all the opportunities that are needed to live a decent human life and not just food, shelter and the other immediate necessities, under the kind of arrangement envisaged (realistically one in which rich developed states pass on a proportion of those who apply for asylum to less developed countries) there will inevitably be less assurance that the same opportunities will continue to be available far into the future. This matters less if the stay is only going to be temporary.

2) Consider next situations in which the state to which the asylum-seeker applies is at least in part responsible for making her into a refugee. These will typically be cases in which it has intervened in her country of origin, creating conflicts between national or ethnic groups that expose her to threats

¹⁰ There is a substantial literature on refugee burden-sharing schemes, and the criteria that might be used to judge each state's quota. For a helpful review, see T. Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law', *Brooklyn Journal of International Law*, 34 (2009), Part III.

of persecution – for example the position of some Iraqi Kurds after the Iraq war. The granting of asylum may then be viewed as a form of reparation.¹¹ This makes the refugee into particularity claimant, and provides grounds why she should be admitted to the state in question rather than to some other place – her reparative claim is a claim against that state in particular, and may not be satisfied by a promise of refuge somewhere else (this will depend on the extent of her loss). As Souter argues, refugees' choices about where to claim asylum gain additional significance in these circumstances: 'after causing or contributing to their displacement, heeding refugees' wishes is the least that responsible states can do'.¹² Indeed they may be able to claim not just temporary asylum but permanent residence on reparative grounds.

3) Many states choose which immigrants to accept by examining whether they bring special skills that will contribute to the economy. But can this criterion also be used, legitimately, when deciding which asylum-seekers to admit? Keeping in mind that the refugee's claim is based on the threat to his human rights, not on his potential contribution, it might seem arbitrary to give him any kind of priority on this basis. Certainly it would be unacceptable if the asylum claim itself were to be assessed more generously in the case of those who were seen as having valuable skills. But assume that the latter claim is assessed strictly on the grounds of the seriousness of the threat to the asylum-seeker's human rights, could productive skill nevertheless count at the second stage, when deciding whether asylum is offered in the state of first entry or somewhere else? I believe this would be legitimate only in cases where the state is offering something more than asylum to the refugee – when it is offering permanent resettlement to someone who does not automatically qualify for it. States are surely permitted to do this, in the same way that they can offer resettlement to refugees who have been granted asylum elsewhere, and when they do so it is reasonable to take account of the refugee's prospective contribution.¹³

4) Can states select in favour of their cultural kin when deciding who to admit as refugees? The rationale for this is set out clearly by Carens, though it is not so clear whether he accepts it himself:

¹¹ See J. Souter, 'Towards a Theory of Asylum as Reparation for Past Injustice', *Political Studies*, 62 (2014), 326-42 who provides a detailed analysis of the conditions under which asylum claims of this kind are valid.

¹² Souter, 'Asylum as Reparation for Past Injustice', pp. 335-6.

¹³ Could those who are moved elsewhere under a burden-sharing arrangement complain about the unequal treatment they are receiving? I do not think so. The important point is that they are treated equally at the point at which their claim to asylum is assessed, and thereafter in ways that respect their human rights. That the state does more for some refugees than it is obliged to do is not an injustice to the others.

As an empirical matter, it is almost certainly the case that a state's willingness to take in refugees will depend in part on the extent to which the current population identifies with the refugees and their plight. Moreover, other things being equal, it will be easier for the refugees themselves to adapt to the new society and for the receiving society to include them, the more the refugees resemble the existing population with respect to language, culture, religion, history, and so on.¹⁴

To take a concrete example, the wars in Syria and Iraq in 2014 led to calls in some quarters for traditionally Christian countries such as the UK to give priority to Christian refugees escaping from these countries. This was justified in part on the grounds that Christian families were undergoing particularly severe persecution, but also on the grounds that Christian states had special obligations to people who shared their national religion. The first part of this claim is clearly relevant, but what about the second?

Such an argument from common culture seems hard to defend, unless it can be presented as a way of dividing responsibilities between states. In the Iraq/Syria case it was claimed that Muslim refugees would be more likely to be offered sanctuary by neighbouring Islamic states such as Jordan. Assuming this is true, and that states more generally are inclined to give precedence to those who share their citizens' cultural or religious values, then it would be justifiable for each state to take this into account. But without such a background, and considering the nature of the obligation towards refugees, cultural selection does not seem defensible.

I turn now to selection criteria for immigrants who make no claim to refugee status – 'economic migrants' in the broad sense. Since states have discretion over whether to admit such immigrants in the first place, it might seem that they have *carte blanche* as to whom they select, even if this means choosing on grounds of race or national origin (such as occurred with the notorious 'White Australia' policy of the 1920s and 1930s). How can we show that this does not follow? It might appear to be ruled out by the human right against discrimination. But on closer inspection this turns out to be too weak an instrument, since there are contexts in which it seems perfectly permissible to discriminate on grounds, for example, of gender, language, or religion. It isn't a breach of human rights if a political party decides to draw up an all-women short list to select its candidate in a particular constituency, if a public broadcaster chooses only among those able to read the news in Welsh, or a church confines membership to those who belong to its own faith. So the human right against discrimination must be interpreted as prohibiting discrimination on grounds *that are irrelevant to*

¹⁴ J. Carens, *The Ethics of Immigration* (New York: Oxford University Press, 2013), p. 214.

the right or benefit being allocated. Those who in the past defended selecting immigrants by race or national origin thought that they could justify using these criteria by appeal to the need to preserve the ‘character’ or ‘moral health’ of their societies. To defeat these arguments requires showing that such claims are either false, or irrelevant, for substantive reasons.

An initially more promising avenue is to argue that selecting immigrants on grounds such as race or religion is an injustice to some existing citizens, namely those who belong to the group or groups that the immigration policy disfavours.¹⁵ By discriminating in this way, the state appears to be labelling these people as second-class citizens. As Michael Blake has put the point, ‘the state making a statement of racial preference in immigration necessarily makes a statement of racial preference domestically as well’.¹⁶ This will often provide states with strong reasons not to pursue discriminatory admissions policies, but a limitation of this approach is that it would not apply to a state that was already religiously or ethnically homogeneous and whose members wished it to remain so.¹⁷ Notice also that the argument hinges upon the injustice that is done to existing citizens whose status is lowered by the discriminatory policy, not on any wrong that is done specifically to the excluded candidates for admission, and this seems to put the emphasis in the wrong place.

Although an economic migrant cannot assert a right to be admitted, she does typically have a strong *claim*, based on how her interests will be advanced by moving – for example through working in a different kind of job, or for a much higher wage, than she could hope to obtain at home. According to the weak cosmopolitan premise stipulated above, to turn down such a claim without giving relevant reasons for the refusal is to show disrespect for the person making it. It is to treat her as though she were of no moral significance. This extends also to the selection of immigrants from the pool of applicants. It is not sufficient merely to put forward the general reasons in favour of immigration controls. If John is going to be granted entry while Jaime is turned away, the latter must be offered relevant reasons for his unequal treatment.

¹⁵ It is followed in J. Carens, ‘Who Should Get In? The Ethics of Immigration Admissions’, *Ethics and International Affairs*, 17 (2003), 95-110, and at greater length in M. Blake ‘Discretionary Immigration’, *Philosophical Topics* 30 (2002), 273-89 and M. Blake ‘Immigration’ in R. Frey and C. Wellman (eds.) *A Companion to Applied Ethics* (Oxford: Blackwell, 2003). I also used the argument in an earlier discussion: D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 8.

¹⁶ M. Blake ‘Discretionary Immigration’, p. 284.

¹⁷ This is conceded by Blake in Blake, ‘Discretionary Immigration’, p. 285. See also M. Walzer, *Spheres of Justice* (Oxford: Martin Robertson, 1983, pp. 35-51 and the discussion in Blake, ‘Immigration’.

This appeal to weak cosmopolitanism explains why the state is not entitled to use merely arbitrary methods in choosing which immigrants to admit, but it does not yet settle which reasons should count in making the selection, and so far, therefore, does not explain what is wrong about using race, ethnicity, and other such criteria. One way to narrow down the list is to say that the reasons must be ones that the immigrants themselves can accept. It is obvious enough that no immigrant will regard her own skin colour as legitimate grounds for exclusion. But a problem then arises in cases where the receiving state and the prospective immigrant hold different views about what should count as relevant. Suppose, for example, that a state decides to admit only high-skilled immigrants on the grounds that it has a greater economic need for these than for low-skilled workers. An immigrant without the relevant skills might reject this on the grounds that he (and others like him) deserves a chance to improve his condition. So it is asking too much to say that the reasons the state gives must also be ones that the immigrants can accept (if ‘can accept’ means ‘will in fact accept once these reasons are explained’). Instead the relevant condition is that the reasons the state gives for its selective admissions policy must be good reasons, reasons that the immigrants *ought* to accept given the general aims of the policy.¹⁸

A more difficult question is whether it can be justifiable to select in favour of those who already have the political or cultural attributes that will enable them to fit more easily into the society they are joining. Consider political attributes first: can liberal democracies choose immigrants who have already demonstrated their democratic credentials as opposed to those who espouse other political values, assuming that this can be reliably established? Most commentators, including strong liberals such as Carens, agree that states may exclude people who pose a threat to national security by virtue of the beliefs that they hold, such as those liable to engage in terrorist acts.¹⁹ But in such cases it is the disposition to act, rather than the beliefs themselves, that forms the reason for exclusion. What about those whose political beliefs are such that they do not acknowledge the authority of the state they wish to join, even though they have no intention of sabotaging it by violent or other means? All states, not least liberal states, depend on their members complying voluntarily with their laws most of the time, and presumably a belief in the state’s legitimacy is one of the main sources of compliance. Someone who lacks that belief may keep the law for other reasons (prudence, respect for the rights of others) but is likely to be less reliable in carrying out her duties as a citizen. So there is some reason for favouring already committed democrats when choosing immigrants. On the other hand, liberal democracies do not require all of their existing

¹⁸ A rather similar position is taken in Blake, ‘Immigration and Political Equality’, where it is formulated in the language of ‘reasons that immigrants could not reasonably reject’ (p. 971).

¹⁹ Carens, *The Ethics of Immigration*, ch. 9.

citizens to sign up personally to their founding principles: they are prepared to tolerate anarchists, fascists and others, leaving them free to express their beliefs and to attempt to persuade others of their correctness within the limits of the law. On balance, then, selection on political grounds would be justifiable only in cases where illiberal or anti-democratic immigrants were applying in sufficient numbers that their presence would create social conflicts or disrupt the working of democratic institutions.²⁰

The argument that can be made for cultural selection raises different questions. We are contemplating here immigrant groups whose cultural affiliations are different from those of the majority of existing citizens – though we should also distinguish between cases where the existing state is already multicultural and has enacted multicultural policies (e.g. Canada), and cases in which it is more culturally homogeneous (e.g. Japan): the issue becomes more pressing in the latter circumstances. Immigrants who speak a different language, practise a different religion, or have a different lifestyle from the majority may pose two kinds of problem. The first is simply the cost of incorporating them into the host society on terms of equality. There will, for example, be the cost of translating public documents into a new language or of providing translators in courts and social service agencies; or if religion is the source of the division, the cost of accommodating religious practices where these impose different requirements on believers outside of the mainstream. Some of these costs can be passed to the immigrants themselves, but others will be borne by the state, and indirectly, therefore, by citizens at large.

There are of course likely to be compensating benefits that come with increasing cultural diversity. The point is simply that if we look at (economic) immigration as a practice that is governed by the logic of mutual advantage, both costs and benefits need to be factored in when considering selection policy. Some of the costs may only be apparent with hindsight, as it becomes clear what the equal treatment of minority cultures actually requires. This also applies to the second potential problem. Culture is not only a matter of belief or of practice, but also of personal identity. This raises a concern about the way in which culture can come to constitute a line of fracture within a political community, possibly leading to the formation of ‘parallel societies’, whose members have very little contact with those beyond their own community; and also a concern about the effects of cultural diversity on social trust, and through that on people’s willingness to support welfare states and other instruments of social justice. These are by no means inevitable consequences of admitting immigrants with cultural backgrounds different from those of the majority, but they are *possible*

²⁰ As Carens puts it ‘the problem is not with any single immigrant’s views, but with the collective effect of ideas hostile to democracy’. (Carens, *The Ethics of Immigration*, p. 176).

consequences, and avoiding them may again prove to be somewhat costly, this time in the form of support for active integration programmes. This is the point at which the state's existing cultural character becomes important: a state that is already well-equipped with multicultural policies can more easily tackle these problems than one that is not. There is, however, no independent requirement that a state should embrace multiculturalism prior to deciding upon its admission policy. Democracies are entitled to decide how far they wish to protect their inherited national cultures, and how far to encourage cultural diversity within their borders.

To sum up, selective immigration requires that states give reasons for the policies they apply, and these reasons must relate to the legitimate purposes of the state itself, as manifested in its other policy decisions. Selection on economic grounds is the least controversial example, but other forms of positive discrimination cannot be ruled out: if a society wants to enhance its sporting reputation, for example, I cannot see why it should not seek to attract immigrants who will later qualify for the national teams. Giving reasons of this kind shows sufficient respect for those who are refused entry, disappointed though they may be. Recall that the later part of the discussion relates only to *economic migrants*. Where refugees are concerned, there is much less scope for selecting on grounds other than the refugee's own need for sanctuary and the opportunity for a decent life.