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Equality without documents: political justice and the right to amnesty

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All modern democratic societies claim to be egalitarian. They do not agree, of course, about what egalitarianism demands; the ideal of equality is hardly transparent, and can be plausibly understood to encompass any number of social arrangements and values. That *some* form of equality is to be prized, though, is uncontroversial. Indeed, it may be true that all political theories that have stood the test of time can be understood as conceptions of equal treatment.¹ Whether or not this is true, I think it is hard to deny that democratic political philosophy can generally be understood as egalitarian in character; to know how to treat people as moral equals, on this account, is to know what justice demands of us. We are all, if this is correct, egalitarians now, however much we argue about what such a label truly demands.

This is not something we should regret. Equality of moral status – which I take to stand at the root of our ideal of treatment as an equal by political institutions – is an attractive, if vague, moral ideal. If it is hard to understand the egalitarian ideal domestically, however, it is downright treacherous to apply it within the wider sphere of international politics. When the moral question to be dealt with includes questions of mobility and membership, it is hard to know what equal treatment would in fact demand.² To take one simple example: how could equal treatment analyze the legitimacy of a prospective immigrant’s right to enter a given society? Equality is transitive, and so requires a set of people against whom some individual’s treatment is to be compared. But which community, here, is the proper comparison set? To insist that equal treatment ranges over the entirety of the world assumes national borders away, so that all persons are likely to be understood as having a right to enter any particular territory; if a French citizen can obtain a job in Paris, what reason can there be to imagine that the same should not hold true for my (non-French, but human) self? This version of equal treatment seems implausible. To insist that equal treatment applies only domestically, however, seems even more implausible – it seems to assume foreign nationals away entirely; we have the right to exclude any individual who is outside of our national community, simply because the scope of equality does not even register their existence. Either way we turn, I think we have a problem.

I have previously suggested that this is at the root of the relative scarcity of philosophical writing on immigration, and I have tried to begin the task of

¹ See Ronald Dworkin, “The Original Position,” 40 *University of Chicago Law Review* 3 (1973) 500, 513.

² On the scope of democratic institutions, see David Miller, “Democracy’s Domain,” 37(3) *Philosophy and Public Affairs* (2009).

developing an egalitarian theory of immigration that makes neither of these moves.³ In the present forum, I want to examine a particularly difficult aspect of immigration, that of undocumented immigration.⁴ This is a difficult area in which to do political philosophy, I think, because it represents an especially difficult version of the problem discussed above: how are we to understand what equality would entail, when the people about whom we are speaking are present within a society without legal right? If immigration in general is a difficult topic for egalitarians, the topic of undocumented immigration is especially thorny: the persons in question are both present in the society and not (legally, at least) *of* that society. How should theories of justice treat the equal moral standing of undocumented immigrants, given this complicated set of facts?

I am going to try to answer this question by dealing with one theory of why at least some undocumented aliens ought to be permitted to remain within their current societies of residence.⁵ This is the argument from civil society, which states that persons who have developed roots within a given civil society – relationships of family, employment, social and commercial association, and the like – acquire, at a certain point, moral title to retain those roots, and to receive legal protection of their continued residence within society. The argument is best worked out in Joseph Carens's recent book *Immigrants and the Right to Stay*, but can be found in a variety of theoretical works.⁶ Put briefly, the argument insists that the costs of deportation

³ See generally Michael Blake, "Immigration," in *The Blackwell Companion to Applied Ethics*, ed. Christopher Wellman and R. G. Frey (Oxford: Blackwell Publishers, 2003); "Discretionary Immigration," 30(2) *Philosophical Topics* (2004) 273-289; and "Immigration and Political Equality," 45(4) *San Diego Law Review* (2008) 963-979.

⁴ I use the term "undocumented immigration" because it seems the least ideologically biased. Other terms frequently seen in the literature are "illegal alien" (generally associated with those hostile to the claims of foreign nationals) and "irregular migrants" (generally associated with those more friendly to such claims). See, for instance, *Amnesty and Joblessness: 14.7 Million Unemployed Americans Shouldn't Have to Compete for Jobs with Today's Illegal Aliens*, Federation for American Immigration Reform, November 2009, available at fairus.org; and *Irregular Migrants: the urgent need for a new approach*, Migrants' Rights Network, May 2009, available at migrantsrights.org.uk.

⁵ I will use the "right to remain" as interchangeable with the concept of "amnesty," although I should note that the latter is often used as a term of abuse by those hostile to the claims of foreigners.

⁶ Joseph H. Carens, *Immigrants and the Right to Stay* (Boston: Boston Review Press, 2010). This is an extended version of Carens, "The Case for Amnesty," *Boston Review*, May/June 2009. See also Joseph H. Carens, "Complex Justice, Cultural Difference, and Political Community," in David Miller and Michael Walzer, ed., *Pluralism, Justice, and Equality* (Oxford: Oxford University Press, 1995). See also Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), 52-61. For related arguments, see Monica Gomez, "Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the United States," 22 *Georgetown Immigration Law Journal* 105 (Fall, 2007) 106-125, and Mae Ngai, *Impossible*

to the undocumented alien increase over time of residence, and that past a certain the costs become so high that the state loses the right to deport. On this analysis, it is simply wrong – unfair and unjust – for a society to expel those who have made lives for themselves within their borders.

Carens does not express his argument as an interpretation of equality, but I think this argument must be understood in egalitarian terms for it to do the work we need it to do. It is not simply that the costs to the deported individual are high, but that they are *unjustly* high, that is at the heart of this argument; for us to make this claim, though, the claim of injustice must be defended, and defended through the concept of unequal treatment – *objectionably* unequal treatment, in particular. There must be, in other words, some set of individuals against whom we can say that these deported persons are being treated unjustly. Moral equality requires, implicitly, some notion of equal treatment of persons, and the claim of injustice demands that there be some comparative notion of unequal treatment grounding the assertion of injustice. Can such a comparison set be found?

The answer, I think, is no; the argument from civil society does not ground the claim of injustice as Carens believes it does, and we cannot use these ideas to conclude that undocumented immigrants have a right in justice to remain. The ways in which the argument fails, however, are instructive, and may lead us to an alternative explanation of why it is often ethically impermissible for a society to expel undocumented individuals who have made a life for themselves within the boundaries of a territory. Not all moral duties are duties of justice; our moral vocabulary is more nuanced, and more varied, than such a reduction would suggest. My conclusion will be that states do indeed have a powerful moral reason to refrain from deporting undocumented immigrants who have made lives for themselves within the borders of these states, but that these reasons are better understood as Samaritan reasons of moral decency rather than egalitarian duties of justice. Even if Carens's argument is not enough to establish a claim of injustice, that is, his argument provides us with reason to think that his practical political program is indeed defensible; my current task is only to articulate the ways in which egalitarian political thought must approach the task of understanding and defending such a program.

I will try to develop this argument in three parts. The first will be to articulate how Carens's argument works, and how it might be understood as an egalitarian claim about the residents of a territorial jurisdiction. This section will ultimately be negative; contrary to Carens, we have no reason to think that there is a reason to prize equality between all members of a given territorial community, independently of some account of how these persons came to be resident within that territory. The second section will try to reinterpret Carens as articulating an egalitarian theory whose ambit ranges over the entirety of the human population. This account, I think, fares better, but it is made more complex by the demands of equal treatment for those who would-be immigrants who would have immigrated but for the fact of legal barriers; treating these persons as morally equal to

Subjects: Illegal Aliens and the Making of Modern America (Princeton: Princeton University Press, 2005).

undocumented immigrants makes the analysis more complex, I think, and this complexity will lead us to an argument that the undocumented immigrant has no right in justice to remain in his society of residence. The precise ways in which the argument fails, however, will give us reason to think that the argument itself can be resuscitated as a statement about Samaritanism, and the moral impermissibility of insisting on moral rights under certain conditions. Put briefly, there can be cases in which insisting upon exercising our moral rights marks us out as morally debased creatures. To insist upon the deportation of those who have made lives within our borders, I think, may constitute such a case; we are morally monstrous if we do not extend residency to those for whom it would be of foundational importance, when such residency would be of light or no cost to ourselves. If this is right, then it might be true that consideration of undocumented immigrants is of both theoretical as well as practical importance; our discussion in this section will give us reason to think seriously about what moral reasons other than those of justice might be legitimately asserted as holding true of political entities such as states.

I. The civil society argument and inequality: the local argument

I will begin this analysis by giving a brief summary of the civil society argument. The argument begins with the recognition of a simple fact: individuals form relationships based in part upon their physical location, and these relationships form a large part of what it is to *be* that person. Our identity, understood here as encompassing our plans, projects, values, relationships, and self-conception – everything, in short, that makes us who we are – is largely bound up with the geographic place in which we are situated. Over time, the selves we create are bound up with the possibilities and persons associated with a given location. Carens imagines this in connection with an individual – Hiu Lui Ng - being forcibly removed from a state after fifteen years:

Fifteen years is a long time in a human life. In fifteen years, connections grow: to spouses and partners, sons and daughters, friends and neighbors, people we love and people we hate. Experiences accumulate: birthdays and braces, tones of voice and senses of humor, public parks and corner stores, the shape of streets and the way the sun shines through the leaves, the smell of flowers and the sound of local accents, the look of the stars and the taste of the air – all that gives life its purpose and texture. We sink deep roots over fifteen years, and these roots matter even if we were not authorized to plant ourselves in the first place. The moral importance of Ng's social membership ought to have outweighed the importance of enforcing immigration restrictions.⁷

The argument insists that such deportation is an enormous cost to the one deported, and that such cost must be understood in human terms – the terms of a life wrenched apart, as it were – rather than simple economic value. The act of removal is ethically impermissible, past a certain point; the harm makes the act wrong for its

⁷ Carens, *Immigration and the Right to Stay*, 17.

own sake, and also for the effects it has upon lives lived under the constant threat of deportation. Carens here relies upon the case of (the pseudonymous, but not fictional) Miguel Sanchez, who came to the United States seeking a better life than that available in his family's Mexican hometown. For Sanchez, the fear of deportation pervades and constrains public actions. Routine traffic stops are nightmares; air travel unthinkable. The costs entailed by deportation – the utter severing of all the forms of human relation described above – are so significant that the standing threat of deportation deforms the life he and his family experience.

I do not want to dispute the idea that deportation is deeply disruptive to the deported; Carens seems to have captured, in quite accurate terms, the ways in which humans relate to the places in which their lives are constructed. I will accept, then, the idea that the act of deportation is a cost to the deported, and a significant one. Carens wants the reader to believe more, however; the argument only works if deportation is not only a cost, but a cost that would constitute an *injustice* if it were imposed upon individuals like Miguel Sanchez. Carens's argument, for it to be understood as a claim about the rights individuals have under justice, must not simply describe how wrenching a deportation would be, but make the case that this cost is somehow being imposed in an unjust manner – in a manner, to rephrase the argument in egalitarian terms, that fails to treat individuals with equal concern and respect. That Carens wants us to think of his argument in this way is clear; he equates the deportation of an individual after long tenure within a community to racial or ethnic discrimination – wrongs which clearly involve not simply costs, but distinctly unequal treatment in the allocation of social goods.⁸ How, though, can we make the argument complete? What is it about these costs, as experienced by the deported, that make those who incur them able to make the charge of injustice stick?

There would seem, to my thinking, to be two ways of making this case. The first is to invoke an absolute set of interests, akin perhaps to the basic human rights ascribable to humans simply in virtue of humanity. It might seem that Carens is, here, arguing that we have a right to preserve the social relations we currently have, because to be asked to give these up is to give up something necessary for our continued functioning as a human.⁹ This is an egalitarian argument, I think, insofar as it makes this claim: all humans have an equal right to have their basic human interests protected – and these forms of identity-generating relationships are basic human interests. To be forced to give up these relationships is to be made to give up too much; there is a point at which we are being asked to alienate our very humanity, and egalitarians have reason to reject such objectionable disrespect of our most human attributes.

This interpretation though, seems wildly overstated as a description of the costs associated with deportation. I accept Carens's argument about the deeply unwelcome nature of deportation; I think, though, that it is hard to think of deportation as making a human life so beastly that it is beneath some threshold of

⁸ Carens, *Immigration and the Right to Stay*, 19.

⁹ See Michael Blake, "Distributive Justice, State Coercion, and Autonomy," 30(3) *Philosophy and Public Affairs* (2001).

decent human functioning. Take Miguel Sanchez, who has fled his Mexican hometown to make a life for himself in the United States. Deportation to Mexico would mean a great deal of disruption; it would entail the loss of many relationships of value, of social rituals developed over time, of a social world and a shared vocabulary. Sanchez would be forced to rebuild his life with the materials available to him in Mexico – materials which, I think, might be significantly more restrictive than those available to him in the United States. All this is granted. But can it be said, for Sanchez and all those like him, that the process involves falling below some threshold of basic human rights? I think this is implausible; there may be some cases in which the life that could be rebuilt in the country to which a person is deported is so blighted as to be unlivable – but that would seem to argue for a revision of asylum law, rather than a right to remain for all persons that grows over time. It seems relevant, further, that we regularly insist that people will build social worlds for themselves that we expect them to give up: foreign baseball players come to the United States (or to Japan, or to Korea); diplomats are posted abroad; students seek education at foreign universities; corporations transfer individuals to foreign subsidiaries. All of these practices involve the expectation that individuals will build lives for themselves during their stay in a foreign society. These stays may be rather lengthy; graduate students may, for instance, spend decades in a foreign country finishing their dissertations.¹⁰ Making such people return home, however, seems rather hard to understand as a violation of human rights. People may be harmed by being made to give up what they have built, but we have no reason to think that this harm is always, or even usually, so great that it always violates basic human rights for us to insist that people bear such costs. All of this may seem rather bloodless when applied to Miguel Sanchez, but the point is to understand the logical structure of the argument; if Sanchez has a claim to remain in the country, it will have to be something specific about *his* circumstances, rather than a point that relies upon a blanket prohibition upon the removal of those who have build a life for themselves within a given society.¹¹

It seems, then, difficult to say that deportation is always so costly to the deported that its use is precluded as a matter of basic human rights. Indeed, I think our different reaction to the case of the long-time graduate student told to leave the country and the impoverished laborer deported to his homeland tells us not that removal of long-time residents is *always* wrong, but that removal of *some* such residents is *sometimes* ethically problematic. If this is right, though, then what we are looking for is not an absolute wrong involved in such deportation, but a sense

¹⁰ See Michael Blake, “Discretionary immigration.”

¹¹ We could, of course, try to drive a wedge between the undocumented laborer and (say) the foreign baseball player by noting that the latter, but not the former, expects his stay to be temporary. I do not think this works, though; as a matter of law, both are subject to removal – the undocumented laborer right now, and the foreign baseball player eventually – such that they both have equal reason to regard their stay within the society as potentially curtailed by law. The real difference between the two cases seems, to my thinking, to be the social marginality of the laborer as compared to the baseball player.

that some forms of deportation betray objectionable disrespect to the interests of some persons as compared to others. What we are looking for, then, is a relative notion of inequality, and I think this notion is more likely than an absolute one to give us interesting results in this discussion. The question we are asking is the following: is it the case that the costs of deportation are wrongly imposed on individuals like Miguel Sanchez, because they are being treated unfairly as regards some other set of individuals?

The first thing we must do, in answering this question, is to identify the set of individuals against which equal treatment will be evaluated. Let us start with the more local jurisdiction as our comparison set; Sanchez is being treated unjustly because he is being asked to bear more costs than those that are ascribed to those with whom he shares a civil society. The civil society, bounded by the territorial jurisdiction within which Sanchez has made a life for himself, includes a set of persons, and it is against those persons that we must evaluate what equal treatment for Sanchez would entail. The other residents of the society – the citizenry, let us say, although the set would surely include individuals with a variety of legal statuses – have a right to remain, and to be secure in their lives as constructed within the jurisdiction. Sanchez lives in a more shadowy legal realm, and is subject to a significant harm – deportation – that is not a risk for the citizenry. Does this not show that Sanchez is being treated unequally, which is to say, unjustly?

The argument, though, begs the question. Equal treatment means treatment *as a moral equal*, which is to say that like cases must be treated alike. It does not entail that all persons must receive the same package of rights and duties. To return to an earlier example, my inability to move to Paris is not a betrayal of equal treatment; it would demonstrate objectionable disrespect to French citizens to prevent them from moving to Paris, but it does not demonstrate such disrespect to *me*. So we cannot say that Sanchez's unequal treatment constitutes objectionable disrespect until we first establish that he is part of that set of people who are *entitled* to keep the lives they have built for themselves within the territory of this state. This, I think, is problematic. Why should we think that all those who are currently within the territory are entitled, once they have built a life within the territory, to stay?

We might respond with Carens's argument that, after a certain amount of time, the relevance of the *origin* of a person's membership within civil society ceases to be relevant.¹² A state is obliged, on this account, to take seriously the interests and goods of all those within its territorial jurisdiction, and the state is not permitted to cite the lack of legal status of an individual who is long resident within that territory in refusing to take his or her interests as of central moral importance. If a person is a member of the civil society, that person should be taken as equal in standing to any other fellow national – regardless of whether or not that person had the right to become such a member.

This argument, though, is circular. The reason we have to take this person as equal in standing to the other territorial residents seems to be the great pain that would be caused by the individual's deportation. Our obligation to take this pain

¹² Carens, *Immigration and the Right to Stay*, 11-12.

seriously, though, depends upon our assertion that the person is and should be taken as equivalent to the other territorial members in the state's deliberations. Our only reason to think that this cost is *unjustly* imposed on the deported is that the deported are members of our community; and the only reason we have to think that they are full members of our community is that they would experience great pain upon deportation from it. The argument does not provide us with any independent reason to think that the origin of a person's standing within civil society becomes irrelevant after a certain point. All the passage of time does is to insist that the act of deportation shall be exceptionally unpleasant and disruptive to the plans of the individual deported; we cannot use this fact to ground the assertion that we *therefore* have an obligation to take that individual as a full member of society, with the sort of equal standing that will preclude causing individuals such pain.

To make this more vivid, consider a (real) counterpoint case to Miguel Sanchez. Morgan (no last name given) is a Canadian artist, who chose to live illegally in Portland, Oregon; he was attracted to Portland by the art scene and the slightly higher hourly wages for manual labor. He is, however, up front about the fact that the difference is only marginal between the United States and Canada; deportation, for him, would not be deportation *to* a particularly bad set of circumstances.¹³ It might, however, be deportation *away from* something he had grown to love and cherish as part of the framework of his life: his relationships with other artists, his relationships at work, the physical layout and social ambiance of Portland. Assume, for the moment, that Morgan spends several years – perhaps the three to five suggested by Carens – in Portland. Does the manner by which he entered into the United States cease, at this point, to be relevant in our considerations of justice?

The answer seems, to me, to be no. It seems, again, that the only reason we have to think that we cannot consider the origin of the person's membership in the territory is the size of the pain he would experience upon deportation, and the only reason to take such pain as a dispositive reason to avoid deportation is his membership in society. More specifically, though, I suspect our reaction to Morgan's vulnerability to the pain of deportation is that he has, in a way, made *himself* vulnerable to these pains, and therefore bears the risk of experiencing them. We can use, I think, Ronald Dworkin's distinction between brute luck and option luck as a way of analyzing this.¹⁴ Being struck by lightning is bad brute luck; the victim experiences pain, but neither invited this pain nor did anything negligent that led to that pain's existence. Losing at blackjack, in contrast, is bad option luck; the person who so loses actually chose to engage in a risky activity, and so has chosen to accept the risk that a certain amount of pain might be the result. The distinction between the two isn't always clear, of course, but as a rough distinction it seems to be a way of making sense of our initial reactions to the fact that an individual is facing a

¹³ This case is derived from one discussed in the article "He's an . . . Illegal Eh-lien: he's stealing our jobs and women – plus he talks funny," *The Willamette Weekly*, Beth Stovic, Feb. 20, 2008.

¹⁴ See generally Ronald Dworkin, *Sovereign Virtue* (Cambridge: Harvard University Press, 2000).

burden that others do not face. If the burden results from bad brute luck, I think our moral intuitions are that the individual may have some form of claim on the rest of us. I do not want to take this claim too far; I do not think that our intuitions here necessarily reflect our best worked-out political philosophy.¹⁵ As a way of understanding and classifying our moral reactions to individuals' experiences of burdens, however, the distinction seems exactly right. Morgan, moreover, seems to have chosen rather freely to take a gamble. If he succeeds, he will gain slightly higher wages, a slightly better arts scene, and a life for himself he thoroughly enjoys. If he fails, he will lose all of this, and be forced to return to British Columbia (where, again, he will suffer only the agonies of a slightly worse arts scene and slightly lower wages.) My own reaction, here, is that Morgan is making a bet, and that he is not being treated objectionably if he is made to bear the costs of a bet gone wrong. At the very least, the fact that the pain of deportation rises over time is not enough to show that such deportation eventually becomes illegitimate. All such rising costs show is that the costs of bad option luck might, for Morgan, eventually become rather steep; it does not show that we treat Morgan unequally by making him bear it.

I think we might, at this point, have the sensation that the goalposts have been moved a bit. It is, I think, true that the typical undocumented immigrant looks much more like Sanchez than Morgan. If we are not, in principle, hostile to people bearing the costs of their own bad option luck, we are nonetheless rather worried about the *circumstances* under which such risky gambles are made. Put simply, we might think that the bet made by a Sanchez is made under such rotten circumstances – poverty, lack of employment, and so forth – that it is simply unfair of us to insist that Sanchez must bear all of the costs of his gamble. Even if Morgan has no complaint in justice against deportation, could Sanchez complain that *he* should not be treated in the same way?

This argument seems to me more plausible, although it comes (for Carens) at a price. The price, of course, is that the right to remain is no longer derived simply from the fact that deportation is burdensome, but from the fact that this burden is laid on people as a result of a risk taken under unfair circumstances. Carens's view, on this account, might be saved – but only at the cost of rendering his central argument invalid, at least when taken as an independent argument.

Still, let us assume for the moment that something like this is the most plausible reading we have of the right to remain. Assume that the injustice we are talking about reflects not simply local injustice, but global injustice. How, then, should we think about the right to remain? If it is unjust for a state to expel undocumented aliens, how is this injustice to be understood?

II. The civil society argument and inequality: the global argument

We might begin with the simple intuition described above: that Sanchez is being made to make a choice under illegitimately impoverished conditions. Malign

¹⁵ See, on this point, Michael Blake and Mathias Risse. "Two Models of Equality and Responsibility," 38(2) *Canadian Journal of Philosophy* (2008): 165-199

circumstances can, of course, undermine the freedom of choice. If I consent to giving you my kidney, for example, it matters crucially whether the donation is made against a backdrop of freedom – I could easily have kept my kidney, say, but give it to you out of respect – or a backdrop of illegitimate poverty: I cannot feed my family unless I sell you my kidney for money. The distinction does not immediately tell us anything about policy; it tells us only that the moral force of consent varies with the justice of the circumstances under which consent is made. In the present context, we should notice that the individuals who are undocumented in developed countries are, most often, individuals from less developed countries, who have made the choice to leave their own societies under the financial and social pressures generated by illegitimate poverty and underdevelopment.

I will simply stipulate to the following facts in what follows. Our theory of justice is global in scope, and the set of people within which equal treatment is demanded includes the entirety of humanity. Much modern underdevelopment violates what such a theory would demand. Sanchez is fleeing poverty that, in a just world, he would not encounter. (I am, in the present context, going to be agnostic about what theory we could use to establish this fact, as well as what a just world would actually entail.) He – and all undocumented immigrants like him – is pushed by objectionable poverty to acquire a tenuous status in a wealthier society like the United States. I think we might, here, begin to develop an argument about why it might be wrong to deport individuals such as Sanchez. The argument would, as I say above, be somewhat distinct from Carens's own; the injustice in question would depend upon the existence of a prior injustice – namely, the unjust economic circumstances under which Sanchez makes his decision to leave. Deporting Sanchez, then, would not begin the injustice he faces, but it would potentially exacerbate it: Sanchez is here being asked to bear enormous costs, despite not freely consenting to the risk of such costs against a backdrop of reasonable alternatives. Does this not give us reason, then, to think that Sanchez is treated unjustly when he is deported and made to bear the enormous costs such deportation entails? It would seem to be unjust to use state power in such a way; it would seem to involve pushing a burden onto precisely those individuals who have title to having their burdens alleviated instead.

There is, I think, enormous power in this idea, and I think it can eventually be developed into a set of reasons that can show why we are frequently morally monstrous when we propose to deport Sanchez and those like him. I think, however, that the reasons we have here cannot properly be understood as reasons of justice. Justice, as discussed above, demands equal treatment; and it is not clear that simply granting Sanchez the right to remain in the United States respects this demand for equality. Let us imagine that the domain of equality flows over all individuals, such that all persons – at home and abroad – have a claim to some form of equal concern and respect in decisions such as those at issue here. We should notice, however, that this set of individuals includes some individuals – equally impoverished as Sanchez – who would have acquired residency within the United States if that were a possibility, but who were not able to do so. Perhaps they were not sufficiently able-bodied to make the trek across the border; perhaps they were sufficiently scared of law enforcement to be deterred from trying; perhaps they

were sufficiently impressed with the moral gravity of law to think it would be wrong to even make the attempt. Imagine, now, that the set of persons to whom equal treatment is extended includes such individuals – call them would-be immigrants – and that they ask about the how the action of the United States in granting Sanchez the right to stay treats them and their interests. Such individuals, I think, are likely to complain that *their* interests – their burdens, which include the lack of employment and available options that led Sanchez to leave – are being ignored in any program that gives Sanchez the right to stay in the United States as a matter of global justice. This does not mean, I should emphasize, that the United States should not let Sanchez stay, nor that the United States does not show itself to be morally deficient when it insists that Sanchez must return to Mexico. I want, here, only to say that we should not regard the right to remain as itself mandated by egalitarian concern. Such a putative right fails to treat like cases as like, demanding that Sanchez (who already, we might think, has the advantages of being young and strong enough to cross the border) obtain a right to remain in the United States that the would-be immigrant does not obtain. The would-be immigrant, after all, has equal moral standing; her pain matters as much as that of Sanchez. It is only Sanchez, however, who obtains the right to remain – even if his pain in deportation might be significantly less than some would-be immigrants experience in remaining where they are.

I want to be very careful here to distinguish the argument I am making from the related (and too oft-heard) argument that granting something akin to amnesty rewards lawbreaking. I do not think anything I am saying here depends upon viewing the act of crossing borders without legal right as itself deserving of our moral censure.¹⁶ I want only to make the case that considerations of global egalitarianism, if they are invoked to give a right to the undocumented, may well turn out to give us a rather shaky foundation for such a right. Equality means equality for all those similarly situated, and equality here means treating would-be immigrants and undocumented aliens as morally equivalent. When we grant the right to remain, but refuse to open borders to all who want to enter, we treat like cases in a decidedly unequal manner.

There is, of course, a simple response to this: open the borders. I think this is neither philosophically mandated nor politically feasible, despite Carens's excellent work in defense of the opposite proposition.¹⁷ But let us assume for the moment only that open borders are unlikely to be introduced at any time in the near future, and then ask what we must do. Surely, we must *at the very least* allow those who have made a home for themselves within a society the right to remain within that society. If perfect treatment as equals is not possible, should we not attempt to get as close as we could? This would seem to argue that a program of amnesty might be demanded not directly by justice, but as the closest politically feasible program that might bring us closer to what justice demands. These considerations have force, I

¹⁶ Indeed, I am not even sure that there is an obligation to obey the law just because it is the law, but I won't belabor the point here.

¹⁷ Joseph Carens, "Aliens and Citizens: The Case for Open Borders," 49(2) *The Review of Politics* (1987).

think, when we reflect that the would-be immigrants would be unlikely to relish the sort of equality that would consist in deporting Sanchez back to Mexico. This looks like the wrong sort of egalitarianism; why should the would-be immigrant welcome the return of Sanchez to a miserable equality below what all individuals have a right to expect? More importantly, of course, is the fact that the would-be immigrants benefit from the presence of Sanchez in the United States. Remittances of money from undocumented aliens are a significant source of income and wealth in countries producing such aliens; the would-be immigrants are likely wealthier in a world in which Sanchez ventures abroad than in a world in which he does not.¹⁸ If all this is right, then it would appear that the right to remain would bring both Sanchez and the would-be immigrant closer to those circumstances they would enjoy in a just world. It is not just that they would each prefer the world with amnesty to the world without it; we can in fact say that such a world represents a Pareto improvement with regards to justice, if by that we mean that the program of amnesty brings both parties closer to their just shares, and makes no one worse off as regards their just allocation of goods.¹⁹ Can we not just say, then, that Sanchez has the right in justice to a program of amnesty? Such a program would, after all, bring the world closer to what we think a just world would entail.

We can call this the Paretian argument for the right to remain. It insists that we have a right to those political programs and rights that would produce a Pareto improvement in the satisfaction of rights. Under conditions in which underdevelopment exists as a root cause of undocumented immigration, and such underdevelopment is identified as unjust, the Paretian argument would assert that a right to remain would exist if such a right would increase the rights-satisfaction of both individuals (the immigrant granted the right to remain, and the would-be immigrant who gains valuable money from remittances) while making no-one's rights less respected. There are, of course, any number of issues with such an argument; in the present context, however, I will ignore most of them, and ask only if the Paretian argument succeeds on its own terms. If a given policy or program would have the effect of producing a Pareto increase in the protection of rights, can we thereby infer that we have a right in justice to that policy?

The answer is, I think, no. To see this, note that the program of amnesty is only one means by which a society like the United States might seek to fulfill its duties to the global poor. There are any number of alternative policy levers

¹⁸ See, for example, Claudia M. Buch and Anja Kuckulenz, "Worker Remittances and Capital Flows to Developing Countries," 48(5) *International Migration* (2010) 89-117. Such development may in fact involve non-financial benefits as well. See Jose-Ignacio Anton, "The Impact of Remittances on the Nutritional Status of Children in Ecuador," 44 *International Migration Review* 2 (Summer 2010): 269-299.

¹⁹ I am ignoring, here, the possibility that a program of amnesty might make some people already citizens of the state in question worse off *as regards* their shares under justice. I do not discount the possibility that this might in fact occur, but would note that many cases in which this is claimed actually seem instead to involve simple claims of negative economic effects, rather than claims that these negative effects are violations of rights.

available by which these pressing duties might be fulfilled. This fact means that the individuals who would be benefitted by this program do not have a particular right to the benefits they receive from that program. They have, to be sure, the right to *some* sort of program. They have a right to have their claims heard by the institutions of democratic politics, and to have their rights in justice taken as of fundamental importance in the design of policy. But they do not have the right to any *particular* program simply because that program happens to respect their right better than the baseline of expectations prior to that program. To say otherwise seems to be to confuse token and type; it is to insist that, because we have a right to some sort of political action taken with our needs in mind, we have a right to the particular action imagined at present. The two are not the same.

Examine, here, the case of a democratic society with an illegitimately large gap between the wealthy and the poor. Imagine further that the government of the society keeps a large stash of gold bars in the back yard of its statehouse; it has decided to simply store up gold as a (peculiar, but perhaps not insane) fiscal policy. The back yard is largely unguarded, although stealing the gold is (naturally) illegal. Imagine now that Robin Hood comes to the yard, takes a bag full of gold, and distributes it to a handful of the unjustly impoverished. The individuals who receive the gold were not in danger of falling below a threshold of decent functioning, but they are unquestionably better off now, and their objectionable poverty is certainly reduced. Do the individuals who have received the gold have a right, in justice, to keep it?

While I suspect reasonable people may disagree on this point, I confess that I cannot see why they would have such a right. There are certainly moral reasons to let the poor keep the money, as I will shortly discuss. But I cannot see how the claim of justice – considered here as entailing a claim to treatment as a moral equal to others similarly situated – could be made out. The society in question might have taken any number of means towards the alleviation of injustice. They might have chosen to sell the gold to foreign investors, and use the profits to increase educational funding for the worse-off segments of society. They might have chosen to increase progressive income taxation, or reduce the sales tax burden on the poor, or any number of other options. They might have done any number of things, each of them potentially a democratically available means to bring the society closer to the demands of justice. The individuals who receive the gold cannot claim that all of these options are forestalled, and that they must be allowed to keep the gold; to say that they are is to insist that only one policy lever is open to us, and there is no legitimate reason for us to think this is so. All that such individuals deserve is status as one of the many people who deserve *some* program or other; they cannot claim that they deserve *this* program, even if it happens to provide them with the most benefits. Individuals cannot claim that they are being treated unjustly, I think, if they are made to return the money; similarly, they are not treated *unjustly* if they are made to return to their own societies, if they are present without right.

I should note that this does *not* mean that the state that returns such individuals to their own states does not do a wrong thing, nor that the state that insists upon retrieving its gold does not show itself to be morally deficient. I want only to say that the concept of *justice* does not give us the space within which to

make the assertion of wrongness. The individuals in question have the right to *some* form of amelioration, but not this *particular* program, when the case is seen through the lens of justice. This lens, however, is not the only one we might use.

I would end this section by noting one final objection to what I have said here. The individual in question, I have argued, is not treated unjustly if he does not receive the benefits of this particular political program. What should we say, though, if it is clear that this particular program is the only live political possibility? If it is this or nothing, and if this program represents a clear improvement from the standpoint of justice, does that not give us a reason to think that the program is mandatory from the standpoint of justice? I do not think so; we have a right in justice to *some* form of policy, but we cannot make the claim that this *particular* policy is mandated, even if we think it is likely to be the only one available to us in the immediate future. The individual who gets the money in the Robin Hood case is not entitled in justice to keep it – even if he can say that he is unlikely to live long enough for his circumstances to be improved by any other democratically chosen means. The case is similar, I think, to that of undocumented immigration. Even if the world with the amnesty is better from the standpoint of justice, it does not thereby become true that it is the only just world open to us.

The objection, though, could be rephrased: is it not true that it is *wrong*, even if not technically *unjust*, to insist upon Sanchez's return to the country of his birth? It would seem to be rather deeply worrying, to say the least, that an individual such as Sanchez – who has, we may think, done very little harm to the United States, but who would be greatly harmed by his deportation – can be deported without any ethical scruples on the part of the United States. This instinct, I believe, is entirely correct; this idea, however, calls us to examine an alternative idea of what moral reasons apply to a political community. In particular, I want to articulate the idea that the proper response to the case of Sanchez is to think that, while he has no right in justice to be free of deportation, we show ourselves to be morally deficient by insisting upon the exercise of our rights under these circumstances. I will close this paper by providing a brief sketch of what this moral idea might look like.

III. Conclusion: Samaritan duties and undocumented immigration

John Rawls noted, in *A Theory of Justice*, that justice was the primary virtue of social institutions.²⁰ He did not make the claim that it was the *only* such virtue. The wider set of virtues that might be applied to political agents and political bodies is a relatively underexplored area of political philosophy, and in the present context I cannot succeed in remedying this lack. I want, in the space that remains, only to make the case that our distaste at the deportation of undocumented immigrants is better understood as reflecting Samaritan ideals, rather than the more usual concept of political justice.

Samaritanism, of course, has any number of definitions and analyses, but at present I will simply take the following as an intuitive core idea: that there can be cases in which we have rights – not simply legally, but morally too – which we

²⁰ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971) p. 7.

cannot in good conscience exercise. We are familiar with this in the context of individual decision-making. If you need my hand upon your brow, and will in fact die if I fail to touch your brow, you do not thereby acquire a right in justice to the use of my hand.²¹ My hand is my own; you do not gain a property right over it simply because you require that hand to continue living. I have, here, a right to keep my hand to myself. Most of us accept this as a description of the case, although we are disquieted by it. The source of our disquiet, I think, is the simultaneous judgment that we have a right to keep our hand free from contact with your brow, and that we would reveal our ourselves as morally reprehensible persons for exercising this right in this way. The two judgments both seem correct; the person has no right to take our hand without our consent, and we cannot withhold this consent without being properly viewed as morally disreputable.

I think some story like this might be the best description we have of the case of undocumented immigration. If what I have said above is correct, I do not think the immigrants in question have rights in justice to remain in a society they entered without right. They have a right to some set of policies designed to make their unjustifiably bad countries of origin better, but not to the particular policy that allows them to remain *in situ*. The action of deportation, though, seems here to be an unreasonable exercise of the state's collective rights. It has the same indicia as the case of the hand and the brow. In both cases, the individual in question is subject to enormous – indeed, catastrophic – harms should the right be exercised. In both cases, the benefit being asked for can be provided with little or no harm to the agent granting it. (Touching your brow does not hurt my hand, and we might think that allowing Sanchez to stay provides few, if any, harms to the society in which he now lives.) It would be, I think, morally obscene for us to refuse our permission, in either case. Part of this obscenity, of course, reflects exactly the facts about which Carens has written so eloquently; the cost to the deported is exceptional. These costs, however, do not give rise to a demand in justice, but to something rather different. It is not that we wrong Sanchez if we deport him; I do not think we do, any more than we wrong the afflicted individual if we fail to provide him with our hand upon his brow. We should, however, provide this hand, and we should provide Sanchez with amnesty.

I can, here, only gesture at these conclusions. I would close by responding to one final skeptical question: if it turns out that we have good moral reasons to think that we must provide Sanchez with amnesty, then what have we gained by the previous discussion? If my policy conclusions are rather similar to those given by Carens,²² what have we gained by discovering that the duties we have are not ultimately comprehensible as duties of justice? The answer, I think, is threefold.

²¹ Judith Jarvis Thomson, "A Defense of Abortion," 1(1) *Philosophy and Public Affairs* (1971).

²² I do not think that they would necessarily be the same; I might place more emphasis than Carens upon the net harm to the individual of deportation, which would argue that individuals such as Sanchez might be more entitled to remain than individuals such as Morgan, even if each has spent the same amount of time in the society in question. I do not pursue this here, though.

The first is that the answer I give here can allow us to hold the conflicting judgments most of us have about undocumented immigration – namely, that the individuals who are present without documents in our society have no right in justice to remain, and that we would be wrong to deport them. The method I sketch here allows us to do justice to the complex nature of our own ethical intuitions here, by allowing for a similarly complex set of ethical reasons to apply to the case. The second is to say that there is something ethically important in the fact that we are directly *confronted* by Sanchez, and that our attention is focused upon him and his circumstances – in a way it is not so focused upon the would-be immigrant who does not leave her home country.²³ Justice, by its very nature, insists upon equal treatment, and equal concern and respect. Samaritan ideals, on the other hand, often insist that we start with what is at hand, with what we directly experience; the puzzling ethical relevance of *proximity* is a core part of the experience of Samaritanism for individuals, and it should be a similarly basic part of how such ideals are experienced by collective entities such as states. Again, I cannot defend the idea here, but I believe that ethical reasons such as Samaritanism apply with equal force to states as they do to persons, and that such phenomena as the ethical relevance of proximity will apply with equal force in both cases. This leads us to our final reason to believe that the previous discussion has been of some philosophical use: we are accustomed to thinking that all ethical reasons applicable to political entities must ultimately be duties of political justice. If what I have said here is right, then this is not true of undocumented immigration; I believe I have given some reasons to think we need a more nuanced set of ethical tools to adequately analyze this phenomenon. Even if I am wrong about this, however, I am convinced that the general idea that we would benefit generally from such an expanded ethical toolkit; if this is true, then even my failure here might ultimately prove to be of some benefit.

²³ The ethical relevance of this confrontation is defended by Jeremy Waldron in “Who is my Neighbor? Humanity and Proximity,” 86 *The Monist* (2003).