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COMMENTARY

Vulnerable populations and the duty to exclude[§]

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Is it morally permissible for developing states to impose conditions on the departure of their skilled citizens in order to prevent the negative effects associated with their departure? In *Debating Brain Drain*, Gillian Brock and Michael Blake provide different answers to this question (Blake and Brock 2015). Both authors are convinced that some forms of emigration hinder developmental efforts, but they disagree about what developing states can do in response to the loss of talented citizens. Brock argues that legitimate developing states are permitted to impose financial and labor conditions prior to emigration, while Blake argues that the brain drain presents states with a genuine moral tragedy, and that no effective measure can be morally justified.

In this essay, I argue that neither Brock nor Blake adequately take into account the interests of all persons affected by skill-based migration. I also argue that a successful account of the morality of the brain drain cannot be arrived at without a prior understanding of which migration regime is best able to protect those persons whose basic human rights are under threat. In what follows, I defend these claims in three steps. In part I, I motivate two desiderata for an account of the ethics of emigration. In part II, I show that Brock and Blake each fail to meet one of them. In part III, I defend a solution to the brain drain problem that not only meets these desiderata but also is in line with what morality requires in the area of international migration.

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PART I

In this section, I motivate two desiderata that a successful account on the ethics of emigration must meet. I call them human rights fulfillment and liberal adequacy. But first, a few points are in order.

First, like Brock and Blake, I don't deny that there is convincing empirical evidence in support of the claim that some south-to-north skilled-based migration leads to a number of benefits that can increase human development prospects in poor parts of the world (i.e. increased savings, lower unemployment rates, remittances, knowledge transferal) (Blake and Brock 2015: 160–167). At the same time, however, I believe that there is also compelling evidence in support of the claim that some south-to-north skill-based migration leads to negative effects that are not adequately compensated for, or outweighed, by its counter-veiling benefits. More specifically, some skill-based migration renders vulnerable populations unable to enjoy secure access to their fundamental human rights. This is true of migration that leads to a ratio of skilled worker (i.e. doctor, nurse, educator) per population that is insufficient for the adequate provision of *essential* services. Brock has this sort of migration in mind when she reports that in the year 2000 alone, Ghana trained 250 nurses but lost 500 nurses to emigration (Blake and Brock 2015: 2). In this paper, I am only interested in this 'harmful' subset of international migration, which I will refer to as 'harmful brain drain'.

Second, like Brock and Blake, I am primarily interested in the political question of whether the coercive power of existing states can be legitimately employed to tackle the vulnerabilities that arise as a result of south-to-north skill-based migration. This is important for two reasons. First, the political dimension of this question reminds us that it is beside the point that we can conceive of highly artificial scenarios where the abuse of state power can be justified (as when we can justify the use of state-led torture in order to prevent a war). But another reason why we must keep the political aspect of this question in mind is that migration programs do not take place in isolation, and any action we entertain as a potential solution to harmful brain drain must be in line with the creation of a migration regime that protects and promotes the basic human rights of all persons. This means, for instance, that a state's response to harmful forms of emigration cannot make it harder for refugees to seek a safe haven outside their country of citizenship (I return to this point later).

Finally, and connected to the previous points, I shall remain agnostic on whether developing states can tax prospective emigrants prior or subsequent to their departure, and focus only on the narrower question of whether they can prevent their movement. I therefore partially depart from Brock and Blake's discussion by separating the questions of permissible border control and permissible exit taxation, for two reasons. First, the use of state coercion for the purposes of preventing movement seems to require a different justification than that required for the purposes of exit taxation, for while the latter involves government intervention with 'the proceeds of our talents', the former involves the government's use 'of our person and our talents' (Blake and Brock 2015: 174). Second, financial resources, no matter how great,

cannot fully substitute human resources in a situation where the ratio of workers per population is insufficient for the adequate provision of essential services.

With these points in mind, I now spell out the desiderata for an account on the ethics of emigration.

Human rights fulfillment

An account of the ethics of emigration must be in line with the pursuit of a world where all persons have secure access to their most basic human rights. The core idea here is that quite apart from whatever else justice may require at the global level, justice certainly demands that domestic and international institutions and arrangements be shaped so as to ensure that all persons, regardless of their citizenship status, have their most basic human rights protected and promoted.

Liberal adequacy

An account of the ethics of emigration must be in line with securing relations of freedom and equality for members of all societies, irrespective of their level of development. In particular, states should not undermine the basic interests of some of its members in order to secure the basic interests of others. (That is, they must respect the separateness of persons). A successful account of the ethics of emigration must also distribute the burdens of securing domestic justice in a way that acknowledges the basic interest that *all citizens* have to pursue the projects and relationships that they care deeply about.

These desiderata are not meant to be exhaustive and are compatible with more demanding accounts of domestic and global justice. In what follows, I will argue that Brock and Black each fail to meet one of these.

PART II

Consider first Brock's account of the brain drain. In her discussion, Brock defends two controversial responses to the brain drain: compulsory temporary service and exit taxation. She argues that the negative effects of the brain drain on service provision and public institutions in developing countries are so dire that they warrant such coercive measures on the part of states that are making a genuine effort to create strong institutions and protect the basic human rights of their citizens.

Following Blake in thinking that such proposals have illiberal implications, the first thing to note is that compulsory temporary service involves the imposition of severe (but temporary) restrictions on both freedom of movement and freedom of occupation. That is, compulsory temporary service programs constrain, for a non-trivial period of time, the right of a skilled person to freely disassociate from his or her country of citizenship and choose a career that best fits his or her current life plans and ambitions.

Brock denies that the charge of illiberalism necessarily applies to her proposal. She argues that compulsory temporary service programs can be designed in such a way that the degree of coercion involved will be similar in kind to other restrictions of basic freedom that legitimately and routinely take place in liberal societies. As she

explains: '[freedom of movement] always has various limits attached to it, even within the most well-functioning communities. I may not freely move about in ways that conflict with people's property rights. For instance, I may not freely move into your house without your permission' (Blake and Brock 2015: 87–88). She believes that such limits can be justified by reference to the 'harms or setbacks to others' important interests' that will necessarily arise or be left unaddressed in a society where the state treats basic liberties as absolute (Blake and Brock 2015: 87–88).

Brock is correct that basic liberties, including freedom of movement and occupation, can sometimes be restricted in order to protect the basic interests of all members of society. The measures Brock defends, however, involve unduly severe restrictions of freedom. To illustrate this point, consider the following case offered by Blake.

Kidnapped local: Malawi forces one of its citizens, who has scarce medical training, to spend a year working for the health of Malawian citizens. The individual was trained in a publically funded university but has signed no contract accepting the duty to use her training. She has discovered she dislikes medicine and wants to spend her time working in her father's restaurant. The doctor is talented and well trained, and will preserve the lives of untold numbers of Malawian citizens. These Malawian citizens have the right to medical care, and the doctor will help protect that right. (Blake and Brock 2015: 130)

When presented with such a case, those with liberal dispositions will respond by claiming that Malawi is acting wrongly in forcing this person to work as a doctor, instead of allowing her to pursue an alternative life plan outside medicine. Surprisingly though, Brock accepts this implication of her view and concedes that her defense of compulsory temporary service prior to emigrations also commits her to compulsory temporary service prior to change of occupation. As she puts it, '(1)f people take up one of the scarce tertiary training positions they would be contractually obliged to fulfill their service terms before they could move in a new direction, be it restauranting in Malawi or practicing medicine in a foreign country' (Blake and Brock 2015: 256–257).

As already mentioned, I remain agnostic on the permissibility of taxation prior to departure, and so will remain similarly agnostic on the permissibility of taxation prior to change of occupation. However, I believe that Brock's response here shows that her account does involve restrictions of freedom that are distinct in kind from the restrictions of freedom that liberals typically deem appropriate. A modified version of the case makes this even clearer.

Prevented Local: Malawi prevents a citizen of 26 years of age to work in her father's restaurant by sending government officials to guard the restaurant's doors. It justifies this decision by claiming that this citizen is required to first work as a doctor for a year because she was trained in a publically funded university and has signed a contract when she was 18 committing to work as a doctor at the end of her studies.

Whilst Blake's *Kidnapped Local* was meant to show that if Brock is committed to compulsory service prior to emigration, she must also be committed to compulsory

service prior to change of profession, *Prevented Local* makes explicit the degree of state force that might be required to run the latter program as well as the problem of expecting young people to know what sort of life project they will be attracted to at the end of their university studies. Indeed, effective compulsory temporary service programs, whether to halt emigration or change of profession, could mean that a state would use force against its citizens with the explicit intent of preventing them from pursuing morally benign core life projects when these are not sufficiently beneficial to their fellow citizens. This is perverse. It pays no attention to the fact that the degree of costs citizens must bear for the sake of domestic justice cannot be so high so as to jeopardize, for a non-trivial period of time, their pursuit of morally benign core projects and relationships. And of course, the morally benign qualifier matters here because working in a restaurant is very different from entering your house without your permission, to use the example Brock employs to show that restrictions of freedom are part and parcel of life in any decent society.

So where does this leave us? Although Brock's proposal takes human rights seriously by focusing on the necessity of essential service provision for the enjoyment of basic human rights such as the right to health care and education, it does so by violating basic liberal standards. We must therefore look for an alternative account that is able to take both human rights and liberal requirements seriously.

Blake's account of the ethics of emigration meets basic liberal requirements. Blake begins by rightly noting that we cannot eradicate everything that is bad in the world. He appeals to the fact of heartbreak to show that it would be extremely problematic for the state to employ coercive measures to protect individuals from having their hearts broken by their fellow citizens. He then assesses a number of potential solutions to the brain drain and concludes that although some measures could turn out to be mildly effective (i.e. ethical recruitment and higher investment in health care and education in the global north), harmful brain drain presents us with a genuine moral tragedy, since there is no highly effective permissible path we can undertake to bring about a world where a sufficient number of skilled citizens work in their country of citizenship.

To begin with, I agree that any illiberal path leading to the eradication of harmful brain drain is a path we are not permitted to take. However, harmful brain drain is unlike heartbreak in a morally relevant sense. Indeed, even in a perfectly just world, human beings are doomed to suffer emotional disappointment since no adult has a claim that others love them in return.¹ However, in a perfectly just world, human beings do enjoy their basic human rights, which necessarily means that they enjoy secure access to essential services. The important moral difference between heartbreak and brain drain then is that while no one has a moral claim to be in a fulfilling romantic relationship, everyone has a moral claim to enjoy the essential services that are required for the fulfillment of their basic human rights. Brain drain does not therefore necessarily belong to the class of bad things that are tragically part of the human condition. Rather, harmful brain drain is a political problem that may admit of political solutions.

To be fair, Blake does carefully consider the question of whether skilled citizens have greater responsibilities with regards to human rights fulfillment in their country of citizenship, and so he does take the political aspect of this question seriously. He engages with Kieran Oberman's arguments that it is less costly for skilled workers to stay in their country of citizenship than it is for a skilled foreigner to immigrate there, and that at times, having a greater capacity to assist others comes at a price of having to bear higher burdens for their benefit.² Blake responds to Oberman by noting that the first argument is empirically controversial, and that the second fails to meet liberal standards. As he puts it,

We cannot balance our moral ledgers by placing such a strong duty precisely on those people who have the least protection, the worst institutions, and the lowest prospects. They would be, perhaps, noble for choosing to remain; they would be saints, who sacrifice their own lives in the name of others. But we cannot force sainthood upon them. Their governments, more to the point, should not think that liberalism gives them a pass to demand such sacrifices. Even if the goal is noble, the path is prohibited. (Blake and Brock 2015: 169–170)

I agree that the path of compulsory temporary service is forbidden, and that it is very hard to ground an enforceable duty to stay on the part of skilled workers simply because they are typically more familiar with the local norms and institutions, and simply because they have a greater capacity to assist their fellow citizens. Showing that we cannot ground such a stringent duty on the part of skilled workers does not show that another stringent duty does not fall on some other agent. And the search for an alternative duty-bearer in response to harmful brain drain matters because to do nothing is to effectively condemn vulnerable populations to bear the effects of illiteracy, lack of basic education, avoidable suffering and illness, as well as easily preventable disability and death.

But are there alternative duty bearers whose duty to prevent harmful brain drain is both stringent and directly correlatable with the basic human rights of vulnerable populations in developing countries? Given that recipient states implement *discretionary* skill-based migration programs that contribute directly to the brain drain, they have a negative duty not to open their borders to skilled workers when doing so enables a situation whereby vulnerable populations are unable to enjoy secure access to their basic human rights.³ And of course, such duty of exclusion does not violate liberal requirements if one starts with the assumption, as Blake does, that legitimate states have a *prima facie* right to exclude prospective immigrants (Blake and Brock 2015: 113). Because Blake fails to see that an alternative duty-bearer exists, his account fails to meet the desideratum of human rights fulfillment.⁴

PART III

In this section, I spell out in more detail the conditions under which a duty to exclude prospective skilled immigrants is triggered, as well as the benefits of approaching the brain drain as an issue that must be tackled at the point of entry into a recipient country and not at the point of exiting one's country of citizenship.

Let me start by putting forth the two conditions that trigger a duty of exclusion on the part of a recipient state: (1) it is foreseen (or should be foreseen) that skill-based migration will bring about or exacerbate harm in the form of human rights deficits (when the ratio of professionals to the overall population is such that migration will render vulnerable populations less able to access an adequate level of essential services) and (2) when there are decently paid jobs that are sufficiently attractive to prospective skilled immigrants so that they can adequately employ their professional skills if they do not emigrate.^{5,6}

Apart from appropriately pinpointing a duty-bearer whose action will otherwise be causally implicated in harmful brain drain, the duty to exclude has several additional advantages. One advantage is that it does not impose undue restrictions on the right to freedom of occupation.⁷ After all, prospective emigrants are simply denied entry into a recipient country, and not forced to temporarily labor for their country of citizenship. To be sure, most of those who will be excluded will in fact work as educators and health care workers in their own country of citizenship. But given that they will *choose* to employ their skills at home rather than be forced to do so, I take that this is exactly the result we want.

A second advantage of the duty to exclude is that it does not violate the right to exit one's country of citizenship or residence, which must be treated as virtually unconditional by *all states* in order to help sustain an effective refugee protection regime. In fact, to argue that there is a duty to exclude, when some conditions are met, is not to deny that there is a separate duty to include, which is triggered by refugees and equally vulnerable individuals. The duty to exclude then is wholly compatible with states having quite stringent duties of inclusion to those persons who only can have their basic human rights protected and promoted by exiting their country of citizenship and joining a new political community (Note that inclusion and exclusion are even compatible when skilled workers themselves qualify for asylum since they would have a moral claim for inclusion which they otherwise lack).

Most importantly, the duty to exclude does not impose different burdens on skilled workers. After all, in a world of closed borders, recipient states already reserve the right to deny entry to citizens of developing countries, unless they qualify for asylum or family reunification schemes. So whilst compulsory temporary services would impose an unfair burden on skilled workers, current migration arrangements provide skilled workers with a privilege that is generally unavailable to ordinary citizens in developing countries and that contribute to harm in those countries. The duty to exclude, then, simply leads to a situation where recipient states are not allowed to provide the privilege of migration to skilled workers when the provision of this privilege enables harm in their country of origin.⁸

CONCLUSION

In this essay, I have responded to both Brock's and Blake's account of the ethics of emigration. Contrary to Brock, I have argued that harmful brain drain does not warrant severe restrictions of freedom in the developing world. Contrary to Blake,

I have argued that harmful brain drain is not a moral tragedy and that there in fact is a way of addressing this phenomenon that is both desirable and feasible. More specifically, I argued that recipient states have a duty to exclude prospective skilled immigrants when their inclusion contributes to human rights deficits in the developing world.

NOTES

1. Children might actually have a right to be loved. See S. Matthew Liao, 'The Right of Children to Be Loved', *The Journal of Political Philosophy* 14 (2006): 420–40; and Luara Ferracioli, 'The State's Duty to Ensure Children Are Loved', *Journal of Ethics and Social Philosophy* 8 (2014): 1–19.
2. Kieran Oberman, 'Can Brain Drain Justify Immigration Restrictions?' *Ethics* 123 (2013): 427–55.
3. Blake thinks that exclusion would have a problematic expressive dimension because it would involve a recipient state 'saying to a would-be immigrant: stay where you are, for the sake of social justice', in Blake and Brock (2015: 220). He adds that there is something disturbing about a wealthy society saying this to a citizen of a developing country. As I see it, though, what states would be saying is: 'You are not invited because we do not want to implement a migration regime that benefits us at the expense of your fellow citizens'.
4. Note that none of the responses to the brain drain that Blake finds permissible give rise to a duty that is likely to be effective. As he acknowledges: 'the brain drain is an example of what might be rightly called a morally tragic result. There can be occasions on which we face significant injustice, and yet we cannot move away from that injustice without deploying means that are themselves unjust', in Blake and Brock 2015: 226.
5. This second condition addresses Blake's concern that immigration restriction in the area of skill-based migration may produce under-employment and undocumented migration on the part of skilled workers (Blake and Brock 2015: 220).
6. I have defended the duty to exclude in more detail in my previous work. See Luara Ferracioli, 'Morality in Migration: A Review Essay', *Global Justice Theory Practice Rhetoric* 5 (2012): 120–9; and Luara Ferracioli, 'Immigration, Self-Determination and the Brain Drain', *Review of International Studies* 41 (2015): 99–115. For an alternative account that also focuses on immigration restrictions, see Peter Higgins, *Immigration Justice* (Edinburgh: Edinburgh University Press, 2013).
7. Note too that by shifting the burden to recipient states, we can avoid the question of what (if anything) can ground moral obligations on the part of skilled citizens to provide services to her fellow citizens. This is because recipient states would be denying skilled workers a privilege and not imposing a duty on them. For a defense of the claim that health care workers have a duty to stay, see Luara Ferracioli and Pablo de Lora, 'Primum Nocere: Medical Brain Drain and the Duty to Stay', *Journal of Medicine and Philosophy* 40 (2015): 601–19.
8. One could believe that justice requires open borders and so deny that skilled workers do not have a claim to immigrate. However, such a response is not available to Block and Blake since both of them theorize under the assumption that states do have a *prima facie* right to control their borders.