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National Partiality, Immigration, and the Problem of Double-Jeopardy

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From this moment on, it's going to be America First. Every decision on trade, on taxes, on immigration, on foreign affairs, will be made to benefit American workers and American families. (...) We will seek friendship and goodwill with the nations of the world—but we do so with the understanding that it is the right of all nations to put their own interests first.

Donald Trump, Inaugural Address, January 20, 2017

1. Introduction

A foundational conviction of contemporary liberal thought is that all persons possess equal basic worth.¹ Modern moral philosophy in general takes it as axiomatic that, in the words of Thomas Nagel,

no one is more important than anyone else. (...) [E]veryone counts the same. For a given quantity of whatever it is that's good or bad—suffering or happiness or fulfilment or frustration—its intrinsic impersonal value doesn't depend on whose it is. (Nagel 1991, 14)

In light of this professed belief that, impersonally considered, everyone's interests and well-being matter equally, it is striking that at the same

¹ See, among many others, Dworkin (1977, 180–3).

time most people view their lives as governed by a host of *particularistic attachments*—to family, friends, co-religionists, etc.—all of which, according to common-sense morality, entail the permission, in many cases the duty, to care *especially* for the interests and well-being of these people.

One domain in which such partiality is particularly prominent is the sphere of collective political action. Modern states, as the primary organs of our collective self-governance, frequently pursue policies that strongly favor the interests of compatriots over those of foreigners. Though the degree of priority that states may assign their citizens is, of course, a matter of dispute, the more fundamental thought that states are permitted and often morally required to give some measure of priority to the interests of citizens over non-citizens, is rarely contested.² Let us call this the **Priority for Compatriots Claim**, or **PCC** for short. Being someone's "compatriot", in my sense, designates a legal condition of shared citizenship, not adherence to a shared culture or ethnicity (though these are, of course, characteristics that compatriots often have in common).

The apparent tension between the impartiality of our general moral and political convictions and the particularistic obligations suggested by common-sense moral principles like the PCC calls for a philosophical explanation. By far the most common strategy for justifying the PCC in the literature is to appeal to *associative duties*. Partiality towards our compatriots is justified and even required, it is argued, because we stand with them in special *associative relations*, which give rise to special obligations to promote their interests.³ By contrast, we do not stand in these relations with foreigners.⁴

² Even avowedly cosmopolitan thinkers such as Thomas Pogge, while arguing that the scope of national priority is circumscribed by duties of global justice, hold that some degree of partiality towards our fellow citizens is justified. See Pogge (1998).

³ We shall survey some suggestions from the literature in Section 4.

⁴ Of course, this is not the only way in which one might argue in support of the PCC. In "What is So Special about Our Fellow Countrymen?", Robert Goodin (1988) argues that duties of partiality towards our compatriots are not the result of associative obligations. Rather, they "derive the whole of their moral force from their connections to general duties (p. 679). According to Goodin, "[s]pecial obligations [in general] are (...) merely devices whereby the moral community's general duties get assigned to particular agents (p. 678). These general duties, Goodin maintains, include a duty to ensure that everyone's interests are protected and promoted. For various empirical reasons, including the avoidance of co-ordination problems and the fact that sentiments of closeness may make fellow citizens more disposed to help each other than others (p. 682), Goodin thinks that this general moral obligation will be most

This chapter issues a challenge to such arguments. I will seek to convince you that arguments from associative obligation in support of the PCC are crucially incomplete in the absence of a justification for the restrictions that most contemporary states place on immigration. Only if we can supply an *independent* justification for existing restrictions on immigration can we then appeal to the associative relations that exist among fellow citizens to justify the PCC (or at least certain strong versions of that claim).⁵

This connection is not often drawn. Indeed, to the extent that political philosophers have made links between the PCC and the topic of immigration, they typically view the connection as running in the *reverse* direction: we are justified in restricting immigration, it is suggested, *on grounds* of legitimate partiality towards our compatriots—for example, to protect domestic workers from the competition of would-be immigrants.⁶ Michael Sandel gives an admirably forthright statement of this position:

Why should we protect our most vulnerable workers if it means denying job opportunities to people from Mexico who are even less well-off? From the standpoint of the least advantaged, a case could be

effectively fulfilled by *assigning* special responsibilities to prioritize the interests of their citizens to individual states and their officials.

Though theoretically elegant, Goodin's account seems unpromising as a defense of the PCC in the political here and now. Given the vast disparities of resources between states, Goodin's suggestion that assigning each state a duty to give priority to the interests of its own citizens is the best way of promoting everyone's interests is surely questionable. In the words of David Miller (1988, 652), why should we expect the best results to be achieved by putting "the well-off in charge of the well-off and the badly-off in charge of the badly-off"? Goodin responds that this "is not a critique of [his] model but, instead, a critique of existing international boundaries from within [his] model" (p. 685). This concession, however, robs Goodin's proposal of much of its practical relevance. What we want to know is whether states can justifiably show a measure of partiality towards their own citizens in the *given* international set-up, or something closely resembling it, not in some distant possible world in which international boundaries have been radically redrawn to equalize states' resources.

⁵ See the following section for an elucidation of the kind of *strong* priority for compatriots thesis that, I will argue, would be invalidated by the absence of a successful justification for restrictions on immigration.

⁶ This claim, of course, is also a staple of current *political* debates about immigration, in the United States and elsewhere. The epigraph from Donald Trump's Inaugural Address, with its declaration that "every decision on (...) immigration (...) will be made to benefit American workers and American families", is remarkable only in the bluntness with which it expresses the view that special duties towards compatriots are a legitimate ground for limiting immigration.

made for open immigration. And yet, even people with egalitarian sympathies hesitate to endorse it. Is there a moral basis for this reluctance? Yes, but only if you accept that we have a special obligation for the welfare of our fellow citizens by virtue of the common life and history that we share. (Sandel 2009, 232)

In a similar vein, Stephen Macedo writes:

[W]e ought to take seriously the proposition that recent patterns of immigration to the United States have been bad for distributive justice. Members of political communities have special obligations of distributive justice to one another. There is a *prima facie* case in light of these considerations for the United States to move toward a more restrictive immigration policy, perhaps especially with respect to those low-skilled immigrants who compete with the poorest Americans for jobs. John Rawls, meet Lou Dobbs. (Macedo 2011, 320)

I will argue that, given the present state of play in political philosophy, such arguments put the cart before the horse.⁷ If I am right, then—on pain of circularity—restrictions on immigration cannot *in the first instance* be justified by requirements of national partiality that derive from associative relationships among compatriots. This is because, in order to work, such associative arguments must *presuppose* that existing policies restricting immigration are morally permissible. However, it remains hotly contested among political philosophers whether states (in particular *affluent* states) are morally justified in restricting immigration, and if so, to what extent and by what criteria.⁸ In the absence of a resolution to this debate, any defense of the PCC from associative duties remains at best provisional.

⁷ Another, quite explicit, attempt to derive principled restrictions on immigration from the PCC is David Miller's argument in *National Responsibilities and Global Justice*. See Miller (2007, 223).

⁸ For a powerful statement of the case for largely open borders, see Joseph Carens (1987). For an updated and expanded discussion of these issues, see Carens (2013).

2. The Effects of Acquiring an Associative Duty

Let us begin by reviewing the notion of an “associative duty”. Over and above the *general duties* that we owe to everyone in virtue of their simple humanity, it is often claimed that participation in significant social groups or personal relationships may, in addition, give rise to *associative duties*, which act to strengthen our existing (positive) duties vis-à-vis members of these groups or take the form of new (positive) duties not included in the set of our general duties.⁹ Thus, our (positive) associative duties go beyond our general (positive) duties, in the sense that they are either more extensive in content or more stringent, or both. There are certain kinds of *prima facie* duties that I have towards my friend that I don’t have towards strangers, for instance to act as their confidant. (This is an example of my duties to associates being more extensive than my general duties.) And although I can be expected to bear some personal cost in order to provide assistance to strangers, I am required to bear *greater* costs to provide comparable assistance to my friend. (This is an example of my duties to associates being more stringent.) Thus, one effect of acquiring an associative duty towards person A is that there are now things I have a duty to do for A that I didn’t previously have a general duty to do.¹⁰

But acquiring an associative duty towards A may also affect how I can permissibly treat *non-associates*. Besides those persons to whom the special duties are owed—what Samuel Scheffler (2001a) has called the “In Group”—there are typically other persons who fall outside the scope of our particularistic concern. Call these the “Out Group”. Sometimes, these persons do so by their own choosing, but in other instances they are *excluded* from joining those special associative relationships,

⁹ For some influential discussions of the notion of associative duty, see Waldron (1993), Brink (2001), Scheffler (2001a) and (2001b), and Kolodny (2010).

¹⁰ All my claims about associative duties in the following are claims about *positive* associative duties. Whether associative ties can also strengthen my existing *negative* duties vis-à-vis associates or give rise to new kinds of negative duties towards associates is much more controversial. As Robert Goodin observes, in some cases, the *opposite* appears to be the case: we have certain negative duties towards non-associates that we do not have towards associates. For instance, we can deprive our compatriots of liberty by conscripting them into the army, while we are not permitted to do this to foreigners (Goodin 1988, 667–71).

membership of which would allow them, too, to lay claim to our special concern.

According to common-sense morality, positive duties to one's associates in the In Group sometimes *take precedence* over one's positive general duties vis-à-vis people in the Out Group, in cases where the two conflict.¹¹ As a result, having an associative duty to members of the In Group can license doing *less* for people in the Out Group than one would otherwise have been required to do by general duty. For instance, special duties towards my children may make it permissible for me to do less to fight world poverty than I would have been morally required to do, had I remained childless.

Seeing this allows us to distinguish two versions of the PCC. According to the

Strong PCC: States are permitted and often morally required to give some measure of priority to the interests of citizens over non-citizens, even when doing so would mean overriding *prima facie* general duties vis-à-vis non-citizens.

By contrast, according to the

Weak PCC: States are permitted and often morally required to give some measure of priority to the interests of citizens over non-citizens, but only when doing so does not lead us to override *prima facie* general duties vis-à-vis non-citizens.¹²

Correspondingly, we can distinguish two ways in which non-citizens might be affected by the existence of associative duties to our compatriots. If the Weak PCC is true, the existence of associative duties would

¹¹ In the following, I am only concerned with cases where positive duties to associates may override one's *positive prima facie* duties vis-à-vis non-associates. I will not address the question whether the existence of special duties to associates could ever make it permissible to override *negative* general duties to non-associates. I will henceforth take this qualification as read.

¹² Notice that if the Weak but not the Strong PCC is correct, associative relations with our compatriots do not give us new moral *permissions* (they do give us new *duties*). Rather, whatever duties or permissions we have to be partial towards our compatriots under the Weak PCC must be compatible with meeting all our *prima facie* general duties vis-à-vis non-citizens. By contrast, if the Strong PCC is true, associative relations with compatriots *do* generate new moral permissions, since *prima facie* general duties vis-à-vis non-citizens can sometimes be permissibly overridden by associative duties to compatriots.

lead non-citizens to be ‘disadvantaged’ compared to citizens, but only in a *relative* sense: the existence of associative duties makes it the case that our duties to citizens go beyond our duties vis-à-vis non-citizens. But this is not because we owe non-citizens absolutely less than we would have in the absence of associative duties to our compatriots—we just owe absolutely more to our compatriots. By contrast, if the Strong PCC is true, non-citizens would be ‘disadvantaged’ in an *absolute* sense. Since associative duties to our compatriots can sometimes override *prima facie* general duties to non-citizens, we may be permitted to do absolutely less for non-citizens than would have been the case, had associative duties to our compatriots not been a factor.

I believe that most people who are attracted to the PCC would embrace the Strong PCC. Consider the following case:

Two Natural Disasters: A larger and a smaller natural disaster occur at the same time. The smaller natural disaster takes place at home and affects compatriots. The larger disaster takes place abroad and affects foreigners. Our state could either direct our resources to help at home or abroad (at the same low cost), but it cannot do both. Our state could save more lives by helping abroad.

Now, in the absence of special associative obligations, I take it that our state ought to have helped where it can save more lives. To see this, imagine a variation on this case in which *both* disasters happen in foreign countries. Intuitively, our state ought to help in that country where our help will save more lives, all else equal.¹³ That is our *prima facie* general duty. But I believe that most people who endorse the PCC would hold that, since in *Two Natural Disasters* the lives threatened by the smaller disaster are actually those of our compatriots with whom we have various associative ties, our state may, all things considered, have a duty to help at home, where it will save fewer lives.¹⁴ This is consistent with the Strong but not the Weak PCC.

¹³ This, at least, is the majority view in the literature on the so-called “numbers problem” in normative ethics. For a dissenting view, see Taurek (1977). For a convincing rejoinder, see Parfit (1978).

¹⁴ Thus, David Miller maintains that whereas our *negative* duty not to violate the human rights of foreigners is no weaker than our negative duty not to violate the human rights of compatriots, “the picture changes quite radically [when we turn to] the duty to provide resources

In this chapter, I will focus on the Strong PCC. Thus, when I say in what follows that the presence of associative duties is thought to make it permissible to “give priority” to the interests of compatriots over non-compatriots, I will have in mind situations, like *Two Natural Disasters*, where the presence of an associative duty to compatriots is thought to make it permissible to treat non-compatriots in a way that overrides a *prima facie* general duty.

3. Two Worries about the Appeal to Associative Duties

Let me distinguish two sources of resistance to associative arguments in support of the PCC.

In his paper “Families, Nations, and Strangers”, Samuel Scheffler discusses an objection which, if successful, would support a general skepticism about associative duties. For Scheffler, associative duties arise out of relationships that one has reason to value non-instrumentally. On Scheffler’s account, one cannot value a relationship non-instrumentally without seeing it as a source of special responsibilities. To see a relationship with another person as a source of special responsibilities means to be disposed to see that person’s needs, interests, and desires as, in themselves, providing presumptively decisive reasons for action which would not have existed in absence of the relationship.¹⁵

But what functions as an *explanation* of associative duties at the same time gives rise to a potent worry about the notion of associative duty itself: Can there really be associative duties, this so-called “Distributive Objection” asks, given their often highly *inegalitarian* implications? Associative duties, coming on top of the intrinsic rewards that standing in valuable relationships with other members of the In Group often brings, seem to *compound* one kind of inequality with another. As Scheffler writes:

of various kinds (...). In this case most people would accept a fairly strong version of priority for compatriots: if because of potential shortages we have to choose between securing the subsistence rights of compatriots and the equivalent rights of others, we should favour our compatriots... [H]ere perhaps we should apply a weighing model, and think of partiality towards compatriots as a matter of giving their rights-claims greater (though not absolute) weight when deciding how to use scarce resources” (Miller 2005, 75).

¹⁵ See Scheffler (2001a and 2001b).

If (...) A and B have associative duties to each other, then, in addition to enjoying the rewards of Group membership, which C lacks, A and B also get the benefit of having stronger claims on each other's services than C has. Why should this be? Why should the fact that A and B are in a position to enjoy the first sort of advantage give rise to a moral requirement that they should also get the second, and that C, who has already lost out with respect to the former, should now lose out with respect to the latter? (Scheffler 2001a, 57)

In what follows, I will not attempt to assess the merits of Scheffler's Distributive Objection to associative duties.¹⁶ Instead, I want to press a distinct but related worry. Even supposing that Scheffler's skeptical worry about associative duties can be overcome, is it licit to appeal to associative duties to justify giving lesser priority to members of the Out Group, given that we may have deliberately *excluded* these people from becoming members of the In Group?

Let me motivate this abstract concern with a concrete illustration: Suppose it was claimed—perhaps not very plausibly—that membership of a certain educational institution, such as Princeton University, gave rise to associative duties of partiality vis-à-vis other members or alumni of this institution.

Now, it seems to me that even if this type of associative relation were *in principle* apt to give rise to associative duties, partiality would in fact be justified only if the *boundaries* of the In Group were themselves drawn in a justifiable manner. If, for instance, membership of Princeton University were unjustifiably restricted on the basis of race or gender or religion (as, of course, it was for much of its history), this would invalidate claims to permissible partiality from the get-go.

This, I take it, is part of the explanation why we find “old-boy networks” morally odious: It isn't just that the members show partiality or favoritism to other members on the basis of a kind of associative tie—having gone to the same school or university—that, even in the best case, is *probably* not apt to give rise to permissible partiality. Setting aside this first worry, there is a second and independent source of concern: Partiality towards fellow “old boys” is often practiced in conditions where eligibility for

¹⁶ For a cogent critique of the distributive objection, see Lazar (2009).

membership of these very schools or universities was unjustly restricted in the first place, for example on the basis of race or gender or religion. But, the thought goes, if we *impermissibly* exclude a person from attending our university, then we cannot licitly appeal to the fact that she does not stand in this special associative relation with us to justify giving less weight to her interests than to those of our associates—at least not in a way that absolutely disadvantages her.¹⁷

I propose, then, the following minimal necessary condition that associative relationships must meet, if they are to give rise to justifiable partiality. I call it the

Boundary Principle: If we are deliberately and avoidably preventing another person from becoming one of our associates (either by directly refusing to stand in the relevant associative relation with her, or by otherwise making it impossible for her to enter into the relevant associative relation with us), then we cannot appeal to the fact that she *isn't* one of our associates in order to justify giving her interests less priority (in a way that absolutely disadvantages her), unless we act *permissibly* in preventing her from becoming one of our associates.

Let us familiarize ourselves with this principle by thinking through its implications for a variety of cases.

There are two types of cases in which the Boundary Principle is trivially satisfied. The first easy case is one in which the relevant associative duties, if they exist, arise out of relational ties which are *in principle unextendable* to other people. Take, for instance, the *genetic* relation between progenitor and offspring, or the involuntary *historical* relation of having been through a shared experience of involuntary suffering, such as being interned together in a labor camp under a dictatorship. Ethnic and racial ties also belong into this category. *If* relations of these kinds are apt to give rise to associative duties—which of course will only be plausible for *some* relations in this category—there is no *separate* problem of justifying the make-up of the relevant In Group, and the fact that it does not include certain people. The Boundary Principle is trivially

¹⁷ I do not mean to rule out that members of even an unjustly delimited educational institution might have various associative duties to one another whose performance does not absolutely disadvantage outsiders, for instance duties to support one another's academic work.

satisfied, since its antecedent is false. We are not *deliberately and avoidably preventing* another person from becoming one of our associates, in the relevant sense. Rather, the relevant associative relation is in principle unextendable to them.

In the second easy case, justifying the boundaries of the In Group poses no difficulty either, because membership of the In Group is open to anyone who desires it. This is true, for instance, in the case of some religions, such as Islam or Christianity. Anyone can become a Muslim by pronouncing the *Shahada* or join the community of Christians by being baptized. Since membership in the In Group is open to anyone who wants it, the Boundary Principle is again trivially satisfied.

By contrast, the types of associative relations that exist between citizens, and which are thought by some to give rise to legitimate partiality, belong to a harder class of cases. Duties of partiality towards compatriots, if they exist, do not supervene on a natural relation, but are the result of these persons occupying the legal status of citizen. Citizenship is *conferred*—typically at birth, but in some cases later in life, as in the case of naturalized immigrants. Unlike in the first easy case, the scope of the relevant In Group is fixed, not by natural or historic ties that are in principle unextendable to members of the Out Group, but by the policies of the state in question. Unlike religious communities, however, states typically exercise their ability to confer membership in the In Group with extreme discretion. At present, citizenship, or even residency, especially in the affluent societies, is denied to most foreigners who would want it.¹⁸

These two factors combine to make it the case that for the kinds of associative ties that exist between compatriots, the Boundary Principle gives rise to a *non-trivial* justificatory demand.

Before I say more about the associative relations between compatriots, let me pause to address a question that may be forming in your mind: There is a structural similarity between the associative relations among compatriots and the intimate associative relations among friends or

¹⁸ Consider the figures for the annual U.S. Diversity Visa Lottery (“Green Card Lottery”), which allocates permanent resident visas to persons from countries with low rates of immigration to the United States—primarily developing countries: For the fiscal year 2018, this lottery received 14,692,258 qualified entries for 50,000 visas, or almost 294 applications per slot. <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2017/visa-bulletin-for-july-2017.html>

spouses. In all these cases, membership of the In Group is not open to everyone who may want it, and, in addition, it is, *de facto*, left to members of the In Group to determine who is eligible for membership. Thus, it is up to me to decide who I want to be friends with or marry, and moreover, this is a power I exercise with great discretion: I am married to only one woman, and am close friends with no more than a few dozen people. And yet, we think of friendship and spousal relations as paradigmatic instances where partiality towards one's associates is justified. Do these cases, then, raise a challenge to the Boundary Principle?

I do not think they do. It is not that, when I appeal to the fact that I am friends with Peter but not with Paul in order to justify giving priority to the interests of Peter over Paul, I *escape* a requirement, under the Boundary Principle, to show that withholding my friendship from Paul but not from Peter is permissible. Rather, it is that such a justification is readily to hand: it is generally accepted that we have a broad *personal prerogative* to determine the make-up of our elective intimate associations, which I exercise when I decide to be friends with Peter but not with Paul. And, as a general matter, a demand to show that one's φ -ing is permissible is conclusively met by citing a valid moral prerogative to φ .¹⁹

¹⁹ The claim that (1) S has a moral *prerogative* to φ is distinct both from the claim that (2) S has a *moral right* to φ and the claim that (3) S is *not making a moral mistake* in φ -ing. (1) and (2) are not equivalent, since having a moral right to φ does not entail that one's φ -ing is morally permissible. Rather, if S has a moral right to φ , this entails that it is typically impermissible for *third parties* to *prevent* S from φ -ing. We can have rights to do what is wrong. See Waldron (1981). (1) and (3) are not equivalent, since it being morally permissible for S to φ does not entail that this is the option that S has *most* moral reason to choose, or that S's *motivating* reasons for φ -ing aren't morally bad ones. Doing φ could involve what Elizabeth Harman calls a "morally permissible moral mistake". See Harman (2016).

These distinctions matter, because they help us make sense of the common intuition that even friendships among bigots can be a source of permissible partiality. Suppose that I readily form friendships or intimate relationships with members of my own ethnic or religious group, but, due to bias, I avoid intimate bonds with members of other groups. Plausibly, although I am not morally *required* to be friends or lovers with anyone in particular, nor to give everyone a "fair chance" of being my friend or lover, I am nonetheless morally criticizable for the bigoted way in which I choose my intimate associates. It is a moral mistake to discount someone as a potential friend or lover because of their ethnicity or religion. Yet, as long as such morally questionable behavior still falls under a broad *personal prerogative* to determine the make-up of my intimate associations (and isn't just protected by a right to do *wrong*), I am not behaving *impermissibly* by being friends with the people I am friends with, and not with others. Hence, even under these circumstances, there would be no objection from the Boundary Principle to giving priority to my intimates over non-associates. I thank Doug Portmore and an anonymous referee for helpful discussion of these issues.

Of course, philosophers will want to ask further questions, for instance about what *explains* the fact that we have such a personal prerogative to determine the make-up of our elective intimate associations. I don't here have the space to go very deep into this question, but a satisfying answer might appeal, *inter alia*, (a) to the costs of maintaining friendships and intimate partnerships; and (b) to conditions on the value of friendships and intimate partnerships.

Relationships take *work*. They require lots of time, and emotional and mental energy. Moreover, at least when it comes to the most intimate ones, their value is diluted when one has more tokens of the type. My relationship with my friend Peter, or my wife Ekédi, would not be quite so valuable if I had very numerous friends or multiple intimate partners. (I don't want to make this claim in too sweeping a fashion; other people, and perhaps people in other social forms, might be able to avoid this dilution.) Friendships and intimate partnerships are also less valuable when at least one party's heart isn't in it, so to speak. Put together, these facts might help explain the prerogative to choose the friendships and intimate partnerships that one wants.²⁰ Of course, not every instance in which I *exercise* this personal prerogative and permissibly decline to enter into an intimate association with another person need be one where taking on another relationship would be too much work or where the value of my other relationships would be diluted. In general, to claim that some set of considerations *C* explains why I have a prerogative to perform actions of type *X* is not to claim that every instance in which I exercise my prerogative and permissibly perform a token of type *X* is one in which considerations *C* apply.²¹

What is more important for my argument than these cursory attempts to *explain* the personal prerogative in question is the fact that few

²⁰ I am indebted to Adam Kern for helpful discussions of these points.

²¹ Compare: according to interest theories of rights, the function of a right is to further the right-holder's interests. (The *locus classicus* is Raz (1986)). Thus, a promisee has a claim-right in the performance of the promised action because, in general, promisees have an interest in the performance of the promise which is a sufficient reason for holding the promisor to be under a duty to perform the promised action. But this is not to say that every instance in which a promisee asserts her right to the performance of the promise is one where the promised action furthers the right-holder's interests. I can have a right that you keep your promise to return my borrowed bicycle *tonight* rather than tomorrow, even though I won't need the bicycle until next week and, in fact, it is less convenient for me to receive the bicycle tonight rather than tomorrow.

philosophers deny that we do indeed *possess* such a prerogative, whatever its exact explanation may be.²² Hence, relationships between friends and spouses are not counter-examples to the Boundary Principle, but rather cases where it is not *trivially* but nonetheless *uncontroversially* satisfied.

Let us return now to the main line of the argument.

4. The Argument from the Boundary Principle and the Problem of Double-Jeopardy

If the Boundary Principle is correct, it follows that in order to justify the PCC by giving an associative argument, we must not only identify a feature of the relationship between compatriots that might ground an associative duty. In addition, we must also explain why outsiders are permissibly excluded from entering those relationships which give rise to associative obligations between compatriots. The argument for this could be stated as follows:

Argument from the Boundary Principle

- (1) If we are deliberately and avoidably preventing another person from becoming one of our associates (either by directly refusing to stand in the relevant associative relation with her, or by otherwise making it impossible for her to enter into the relevant associative relation with us), then we cannot appeal to the fact that she *isn't* one of our associates in order to justify giving her interests less priority (in a way that absolutely disadvantages her), *unless* we act *permissibly* in preventing her from becoming one of our associates.

²² For an interesting dissenting view, see Brownlee (2015). Brownlee contends that at least in certain cases, where a person's 'fundamental associative needs' cannot be met by others, we have a duty to associate with her, for example by being friends. Hence, our permission not to associate with others is at most conditional. While I do not have the space to discuss Brownlee's argument, suffice it to say that if Brownlee is correct, this would in no way undermine the case for the Boundary Principle; rather, it would give it more bite, in the case of intimate relationships. Far from showing that we *escape* a justificatory demand when it comes to partiality towards our intimates, Brownlee's view suggests that this demand may be less easy to satisfy than most philosophers assume. I thank Kimberley Brownlee and Laura Valentini for a helpful discussion of this issue.

- (2) We are deliberately and avoidably preventing many would-be immigrants from settling in our country and becoming our fellow citizens.
- (3) By preventing would-be immigrants from settling in our country and becoming our fellow citizens, we make it impossible for them to enter into the relevant associative relations with us.

Therefore, we cannot appeal to the fact that would-be immigrants do not stand in the relevant associative relations with us to justify giving their interests less priority *unless* it is permissible for us to prevent them from settling in our country and becoming our fellow citizens.

However, as we shall now see, most attempted justifications of the PCC from associative duties in the literature do not meet this justificatory demand, and hence cannot provide a complete justification of the PCC.

Let us consider two representative examples from the literature. They stand in for many other discussions with a similar structure.

A common strategy for justifying the PCC starts from the assumption that states are, essentially, cooperative social enterprises for mutual advantage. Our membership in these joint cooperative ventures, in the words of Charles Taylor, is a means “to obtain benefits through common action that [we] could not secure individually” (Taylor 1989, 16). The most prominent modern proponent of this conception of the state is, of course, John Rawls (1971). In this chapter, however, I shall focus on an article by Richard Dagger (1985).

In “Rights, Boundaries, and the Bonds of Community”, Dagger develops an account of our special obligations towards compatriots as grounded in the principle of fair play. Participating as equals in such cooperative enterprises for mutual advantage, which typically include welfare provisions, such as health insurance and unemployment benefits, gives us reciprocal duties to accept the burdens that maintaining these social institutions and caring for needy compatriots places on us. If we refused to take the burdens of cooperation with the benefits, we would be treating our co-nationals “merely as means not as ends”, and would thereby violate their right to autonomy. Given that like relations of cooperation do not exist between us and non-nationals, Dagger argues, we are justified in assigning considerably lower priority to their interests.

This strategy for justifying the PCC faces some well-known objections. Thus, as Robert Goodin (1988) and Andrew Mason (1997) point out, if the PCC is grounded in a duty of fair play, this fails to explain why special duties of partiality are not equally owed to resident aliens who contribute to the cooperative social enterprise of their host-nations. On the other hand, we should give little if any special weight to promoting the well-being of co-nationals permanently living abroad, or to those fellow citizens who have not been able to significantly contribute to the social product of our country, for instance due to a severe congenital handicap.

The Argument from the Boundary Principle raises a different worry about Dagger's argument: Modern states severely limit the scope of economic migration, and thereby *prevent* many would-be contributors to the collective enterprises of our affluent societies from ever entering into relations of reciprocal cooperation with us that would give rise to special duties of partiality on our part. Not only are potential immigrants excluded from the benefits that participation in these schemes would *itself* confer on them.²³ In addition, the fact that we so exclude them is indirectly regarded as justifying us in assigning significantly lesser weight to their interest in the formulation of state policy. But, in the absence of a valid moral justification for our restrictive immigration policies, this would be implausible.²⁴

A similar problem besets Andrew Mason's civic republican case for national partiality in "Special Obligations to Compatriots". Mason's argument draws inspiration from Joseph Raz's (1989) account of why friendship justifies special obligations. Raz makes three main claims: (1)

²³ Stephen Macedo cites work by the economist Mark Rosenzweig, which estimates that Mexican high school graduates can, by leaving Mexico and finding a job in the United States, increase their income sevenfold; Mexican college graduates can increase their income ninefold (Macedo 2011, 317). For less developed countries than Mexico, this figure must be higher still.

Moreover, the consequences of exclusion are not only felt by those who are excluded. It is estimated that worldwide about 200 million migrants help to support about 800 million family members in their home countries through regular remittances from their wages. The amount of money involved is more than the total amount of bi- and multi-lateral foreign aid. Hence, excluding one person from entry into the labor market of a developed country excludes several from the benefits of participation in the labor market. For more data, see World Bank Group, *Migration and Development Brief 27* (April 2017). My thanks to Chuck Beitz for discussion of these issues.

²⁴ For a broadly similar critique of Dagger's argument, albeit one that does not explicitly articulate the Boundary Principle, see Abizadeh (2016).

friendship is an intrinsically valuable relationship, that is, it is properly valued for its own sake; (2) part of what it is for two people to be friends is for each to be under certain obligations to the other, and these obligations are justified by the moral good of friendship; (3) these special obligations are internally related to the good of friendship, that is, they are part of that good.

Mason suggests that the most promising argument in support of special obligations among compatriots takes an analogous form:

Citizenship has intrinsic value because in virtue of being a citizen a person is a member of a collective body in which they enjoy equal status with its other members and are thereby provided with recognition. This collective body exercises significant control over its members' conditions of existence (a degree of control which none of its members individually possesses). It offers them the opportunity to contribute to the cultural environment in which its laws and policies are determined, and opportunities to participate directly and indirectly in the formation of these laws and policies. Part of what it is to be a citizen is to incur special obligations: these obligations give content to what it is to be committed or loyal to fellow citizens and are justified by the good of the wider relationship to which they contribute. In particular, citizens have an obligation to each other to participate fully in public life and an obligation to give priority to the needs of fellow citizens. A good citizen is, in part, someone who complies with these various obligations and responsibilities, and in doing so realizes the good of citizenship. (Mason 1997, 442)

Like Dagger's argument from fair play, Mason's civic republican argument for partiality fails to account for the Boundary Principle. According to Mason, the normative basis for giving priority to the interests of our compatriots is simply that we stand with them in a valuable relationship—that of shared citizenship—which constitutively entails certain special obligations towards them. *Vis-à-vis* foreigners, we lack this relationship. But, of course, it is true of many foreigners that the only reason why they don't stand with us in this valuable relationship is precisely that we are deliberately *preventing* them from doing so, by stopping them from immigrating to our

country and becoming our fellow citizens. Surely, some independent argument is needed to justify *this* fact in order for Mason's argument to get off the ground.

The general problem that Dagger's and Mason's arguments have in common is one that infects many other associative arguments for the PCC.²⁵ It is this: All these arguments take the boundaries of citizenship as *given*, and then seek to derive an account of the PCC from certain features of the relationship among fellow citizens. What this overlooks, as we have seen, is the fact that most modern states severely limit the scope of migration, and thereby *prevent* many would-be immigrants from ever entering into the relevant associative relations that would give rise to associative duties on our part. Not only are would-be immigrants excluded from the benefits that settling in our country would itself confer on them. In addition, the fact that we so exclude them, and thus prevent them from standing in the relevant associative relations with us, is regarded as justifying us in giving significantly less weight to their interests.

However, in the absence of a moral *justification* for placing restrictions on migration, this inference is implausible. To see this, suppose there was no adequate justification for the ways in which we limit migration. In attempting to justify the priority we give to the interests of compatriots, we would, in effect, be saying to would-be immigrants: "Given that we are *impermissibly excluding* you from entering into certain valuable relationships with us, we are justified in giving less weight to your interests, in a way that absolutely disadvantages you, *because* you do not stand in these relationships with us." This, I believe, is a justification that they could reasonably reject. By adding partiality to impermissible exclusion, we would simply be compounding one injustice by another. Call this the *Double-Jeopardy Problem* for the PCC.

The Double-Jeopardy Problem should be distinguished from a superficially similar argument presented by Javier Hidalgo (2013) in "Associative Duties and Immigration". Like Scheffler, Hidalgo believes that associative duties arise only from relationships that are intrinsically valuable. In addition, however, Hidalgo maintains that only relationships that do not reliably cause injustice to outsiders can be intrinsically

²⁵ See, for instance, Nathanson (1989), Simmons (1996), Miller (2005), and Seglow (2010).

valuable. By contrast, if a special relationship systematically involves injustice to outsiders, then we have no reason to value this relationship, and hence it necessarily fails to ground any associative duties. Hidalgo then suggests that the relationship between compatriots may be just such a relationship, given the way in which restrictions on immigration limit membership in the In Group of compatriots: "Immigration restrictions may in general be impermissible. The explanation is that immigration restrictions impinge on important liberties and our reasons to refrain from interfering with these liberties defeat the reasons in favor of these restrictions" (Hidalgo 2013, 719).

One obvious difference between Hidalgo's argument and my own is that since Hidalgo affirms that existing restrictions on immigration are unjust, in virtue of impinging on the liberties of would-be immigrants, his conclusion is an *unconditional* one: the relations between compatriots cannot give rise to justified partiality. By contrast, the conclusion of the Argument from the Boundary Principle has a *conditional* form: *if* existing restrictions on immigration are impermissible, then the associative relations among compatriots could not support the Strong PCC.

Beyond this, Hidalgo's argument strikes me as too procrustean, for two reasons. First, it relies on the axiological premise that a relationship which involves systematic injustice to outsiders (e.g. by involving morally indefensible restrictions on membership) must for that reason be devoid of intrinsic value. This seems too strong. For instance, even at a time when women and religious and ethnic minorities were unjustifiably excluded from Princeton University, I believe that the relationships within the community of scholars and students at Princeton possessed some intrinsic value. It was something they had non-instrumental reason to value as such (though, all else equal, they would of course have had stronger reasons to value a relationship not marred by this kind of injustice). The same may be true, on an account like Mason's, of the relationships of equal citizenship among citizens in a democratic polity, even if we assume that membership in their political community is unjustly closed off to outsiders.

Second, Hidalgo's account suggests that *all* associative duties among citizens are lost, if their relationship involves systematic injustice to outsiders, for example by operating a morally indefensible immigration policy. This, again, seems false. There is no reason to assume that

associative duties which do not absolutely disadvantage outsiders need lose their force, just because the boundaries of their political community are unjustly drawn. With regard to such associative duties, there is no problem of *double-jeopardy*. Although some would-be members of our community are impermissibly excluded, it is not the case that, as a result, we do less for them than we are required to by general duty.

The Argument from the Boundary Principle avoids both these shortcomings. The argument does not rely on the axiological claim that, if a state unjustly excludes would-be immigrants from citizenship, the relations between citizens necessarily lose all intrinsic value. Rather, the Boundary Principle makes a purely *deontic* claim: it is a necessary condition on us having justified partiality towards our compatriots, in a way that absolutely disadvantages foreigners, that foreigners not be unjustly excluded from citizenship. If this necessary condition is not satisfied, then *even if* the associative relations between compatriots possess intrinsic value, they do not give rise to legitimate partiality in the strong sense.

Second, my argument is compatible with the claim that citizens may have some associative duties to one another even if the boundaries of their political community are not justly drawn. The Boundary Principle makes a more limited claim: if some foreigners are being unjustly excluded from citizenship, then we may not be partial towards our citizens in a way that *absolutely* disadvantages these foreigners, by overriding a *prima facie* general duty. But this is consistent with us having other associative duties towards our compatriots that we lack vis-à-vis foreigners. A failure to satisfy the Boundary Principles rules out *strong*, but not *weak*, priority for compatriots.

What types of policies weak priority for compatriots might license in practice will depend both on the correct substantive theory of states' general duties to non-citizens and the correct substantive theory of states' associative duties to citizens. In general we can say: the more extensive and stringent a states' general duties towards non-citizens, the less room this will leave for associative duties towards citizens under the Weak PCC, since fulfilling these duties is more likely to *conflict* with fulfilling our demanding general duties. Suppose, for instance, that the correct account of our general duties was a Singerian account, on which we have extensive and stringent general duties of beneficence towards

non-compatriots.²⁶ If the Weak PCC is true, then such a demanding view of our general duties would leave little room for associative duties towards compatriots, since acting on our associative duties would often mean doing less for non-compatriots than we owe them as a matter of general duty. Likewise, if we had extensive and stringent duties of *cosmopolitan justice vis-à-vis* foreigners.²⁷

By contrast, if our general duties towards non-compatriots are relatively undemanding (for instance: very basic duties of humanitarian assistance, but no more), then it will often be possible for states to fully meet their general duties towards foreigners and, in addition, to comply with quite robust associative duties towards compatriots.²⁸

5. Two Kinds of Double-Jeopardy Argument

I have labeled my worry about associative arguments for the PCC the problem of “Double-Jeopardy”. This is not so much a reference to the legal doctrine prohibiting double trial and double conviction as a nod to a famous argument in bioethics with a structure similar to my own: John Harris’s (1987) “Double-Jeopardy Objection” to the use of so-called QALY (or “Quality-Adjusted Life-Year”) maximization in bioethics and health economics in Harris (1987). Since I believe Harris’s argument to be subject to forceful objections, it will be instructive to compare and contrast our two Double-Jeopardy arguments, to see how they differ.

QALY maximization (or some variant thereof) is a widely-employed method for the allocation of scarce health resources. The basic idea behind QALY maximization is that, in deciding who should receive a scarce health resource (such as an organ transplant or an expensive

²⁶ See Singer (1972) and Singer (2009).

²⁷ See, for instance, Beitz (1979).

²⁸ An example of this type of view may be Thomas Nagel’s (2005) position in “The Problem of Global Justice”. In that paper, Nagel defends an anti-cosmopolitan “political conception” of justice, according to which robust demands of distributive justice arise only among citizens of the same state, and have their source in features of their political association—in particular, the fact that the state organizes coercive authority over its citizens (in a way that claims their active cooperation). By contrast, according to Nagel, our *general* positive duties to foreigners are limited to “humanitarian” duties to assist foreigners threatened with starvation or death. However, lest his view violate the Boundary Principle, Nagel would have to maintain that, if the boundaries of our state are unjustly drawn then, if our political duties of justice vis-à-vis compatriots were ever to conflict with our general duties towards foreigners, the latter would have to take precedence.

medical procedure) or which of two medical programs we should finance, it is not enough to attend only to how many lives will be saved through either option, or even to how many *life-years* will be preserved. Both these measures ignore an important factor: *quality* of life. The QALY is a measure of the effectiveness of health interventions that takes into account both *length* of life and *quality* of life. A year of completely healthy life is assigned the numerical value 1. A year of life at *less* than full health is assigned a value between 1 and 0. The size of the discount factor depends on the severity of the health problem (e.g. a year as a paraplegic might be assigned a score of 0.5). QALY *maximization* is the consequentialist notion that, for a given input of money or resources, we ought to select that medical intervention which maximizes the number of quality-adjusted life-years that are lived.

Harris points out that QALY maximization renders intuitively troubling verdicts in cases like the following:

Choice of Life-Extension: Hannah and Sally are two 55-year-old patients who have both contracted a deadly virus. Either patient will die within days unless she receives a dose of some scarce drug. Unfortunately, we have only one dose of the drug. Whoever receives the drug will be expected to live another twenty years. There is only one difference between the patients: Hannah has a congenital spinal problem which forces her to use a wheel-chair. Assume that an additional year of life for Hannah would have a QALY score of 0.8. By contrast, other than having contracted the virus, Sally is completely healthy. An additional year of life would for Sally would have a QALY score of 1.

The problem with QALY maximization, Harris points out, is that in cases involving life-extending treatment, the use of QALYs produces a systematic ‘bias’ against the disabled and sick. Fewer QALYs will be produced by extending their lives than by extending the lives of the otherwise fully healthy, all else equal. (In the present case, Hannah will receive only 16 QALYs to Sally’s 20). So QALY maximization recommends against giving them the life-extending treatment.

But this, Harris argues, is unfair. It imposes on the sick and disabled a form of “double-jeopardy”:

QALYs dictate that because an individual is unfortunate, because she has once become a victim of disaster, we are required to visit upon her a second and perhaps graver misfortune. The first disaster leaves her with a poor quality of life and QALYs then require that in virtue of this she be ruled out as a candidate for life-saving treatment (...). Her first disaster leaves her with a poor quality of life and when she presents herself for help, along come QALYs and finish her off! (Harris 1987, 120)

Harris's objection and my own Double-Jeopardy Problem have the following structure in common: Both concern cases where some agent *A* seeks to appeal to a fact *p*, the obtaining of which is *independently* a set-back to the interests of some subject *S*, in order to justify treating *S* in a way that *further* disadvantages *S* in an absolute sense. In Harris's case, the relevant fact *p* is that the patient in question enjoys a lower quality of life due to her congenital disability; in the context of associative arguments for the PCC, it is the fact that a would-be immigrant does not stand in the same, independently valuable, relationships with us as do our compatriots.

These surface similarities notwithstanding, there is an important difference between the two cases: The fact *p* that the QALY maximizing agent appeals to is true *independently* of this agent. That Sally suffers from a congenital disability which gives her a lower quality of life is in no way owed to the behavior of the deliberating agent. By contrast, in the context of national partiality, the relevant fact *p* (that *S*, a would-be immigrant, does not stand in the relevant associative relations with us) is a fact that the relevant agent—our state—*makes* true through its choice of immigration policy. I believe that this empirical difference makes for an important moral disanalogy between the two cases.

Harris's Double-Jeopardy Objection to QALY maximization seems to implicitly appeal to what Frances Kamm has called the

Non-Linkage Principle: “The fact that some undeserved bad thing has happened to you [ought] not make it more likely that another bad thing will happen” (Kamm 2004, 240).²⁹

²⁹ For further discussion, see also Kamm (2013).

However, despite its *prima facie* attractiveness, this principle does not in fact appear to be valid, as Kamm herself points out. Suppose we must choose whether to give a life-saving heart transplant to a quadriplegic or a non-disabled person. The non-disabled person is expected to live for another twenty years, whereas the quadriplegic, because she is unable to exercise, is unlikely to survive for more than eighteen months with the transplanted heart.³⁰ Surely, *pace* the Non-Linkage Principle, it is *not* wrong to appeal to the fact that some undeserved bad thing (quadriplegia) has happened to a person as a ground for imposing on them a further disadvantage (not receiving the heart transplant), given how the fact that the patient is quadriplegic will affect her ability to benefit from the heart transplant. But, if this is true, it appears to undermine the central normative principle underpinning Harris's Double-Jeopardy Objection to QALY maximization.³¹

My own Double-Jeopardy Worry does not rely on the flawed Non-Linkage Principle. According to my argument, if the exclusion of would-be immigrants is morally permissible, then we *could* appeal to the fact that foreigners do not stand in the relevant associate relations with us to justify giving their interests lesser priority. This would be true *even though* the fact of their exclusion would constitute an *undeserved* disadvantage. (That we are permitted to exclude them, after all, does not mean that they *deserve* to be excluded.)

My argument relies not on the simple "anti-compounding" idea of the Non-Linkage Principle, but instead on the Boundary Principle from Section 3. What this principle picks up on is not just the fact that foreigners do not stand in the relevant associative relations with us, but moreover that this fact is *of our own making*, indeed the deliberate result of our state's immigration policies. That we ourselves *cause* this fact to obtain, I argued, places us under a justificatory demand, which we fail to satisfy if our state's immigration policies are morally impermissible.

Consider the following analogy from distributive desert: A father has a policy of giving his children pocket-money for little extra tasks they perform around the house. However, although all his three children are

³⁰ The case is Kamm's.

³¹ This is not to say that QALY maximization isn't subject to other, more successful objections. These are explored with great subtlety by Frances Kamm in the two articles cited above.

eager, the available tasks are always assigned to the same favorite child, who as a result has lots of pocket-money while his siblings have none. When challenged about the resulting inequalities among his children, it would be preposterous for the father to reply that the other two children “just aren’t doing anything to deserve pocket-money”. This, after all, is a fact which the father himself deliberately and avoidably *causes to obtain* (by only giving opportunities to earn pocket money to his favorite child) and which he therefore can be called on to justify. But, of course, the father has no good justification for his behavior—his blatant favoritism is morally wrong.

I maintain that the fundamental normative idea underlying both this example and the Boundary Principle is captured the following principle:

Cohen’s Principle: If an agent is making it the case that some fact p obtains by deliberately and avoidably doing ϕ , then she cannot appeal to p to justify performing some other action ψ , unless she is morally *permitted* to do ϕ .³²

Elsewhere, I argue that Cohen’s Principle is a corollary of a plausible account of interpersonal justification, according to which A succeeds in justifying to B her action(s) X in circumstances c just in case B cannot make a successful normative “counter-proposal” concerning how A should act in c .³³ By a successful normative counter-proposal, I mean a proposed course of action for A in c , whereby (i) A does not do X , but instead performs some other action(s) Y and (ii) doing Y is a more plausible answer to the question “How ought A to act in c ?” than doing X .

In the class of cases to which Cohen’s Principle applies, A ’s actions in c consist in doing ϕ (thereby making it the case that p obtains) and doing ψ . A can successfully justify her actions to B just in case B cannot make a successful normative counter-proposal concerning A ’s actions in c . But if A is not morally permitted to do ϕ in c , then we know that B must be able to offer a successful normative counter-proposal. For, given that doing ϕ is impermissible in c , there must be a more plausible answer to

³² The principle is named in honor of G.A. Cohen, who was the first to explore principles of this general kind. See Cohen (1991) and Cohen (2008), ch. 1.

³³ See Frick (2016), especially sections 5 and 6.

the question “How ought *A* to act in *c*?” than a course of action that involves *A* doing ϕ (and ψ).³⁴ Hence, if doing ϕ is impermissible, the fact that *A* does ϕ (and thereby makes *p* true) can play no role in justifying *A*’s doing ψ ; for we already know that any course of action that involves *A* doing ϕ is subject to a successful normative counter-proposal. This gives us Cohen’s Principle.

The Boundary Principle, in turn, is a straightforward corollary of Cohen’s Principle: In the Boundary Principle, the fact *p* is the fact that non-citizens do not stand with us in the relevant associative relationships. The act ϕ which makes *p* obtain is the state’s deliberate and avoidable act of excluding would-be immigrants from coming to our country and becoming our compatriots. And the act ψ , which according to associative arguments for national partiality is justified by *p*, is the act of giving priority to the interests of our compatriots, even in a way that disadvantages non-citizens in an absolute sense.³⁵

³⁴ I am assuming that there are no moral dilemmas, that is, situations where all courses of action available to *A* are morally impermissible. For an argument in support of this assumption, see my “Dilemmas, Luck, and the Two Faces of Morality” (ms).

³⁵ Note that the antecedent of Cohen’s Principle (as well as that of the Boundary Principle, which it underpins) is stated in the present progressive tense. As Kimberley Brownlee’s contribution to this volume makes clear, there are cases where having acted wrongly *in the past* can give an agent moral permissions in the present which she otherwise would have lacked. See Brownlee (2020). Cohen’s Principle does not exclude this possibility. What it rules out is that an agent, seeking to justify some action of hers, can appeal to a fact *p* which is made to obtain by her deliberate and avoidable wrongdoing *in the present*. Likewise, the Boundary Principle is violated if the state gives less priority to the interests of would-be immigrants on the basis of some fact *p* that obtains only because of our state’s *current* immigration policies, and in addition these policies are morally wrong. For Dagger and Mason the relevant facts which are thought to justify priority for compatriots are, respectively, the fact that foreigners do not participate in the cooperative enterprise for mutual advantage that is our society, or the fact that they do stand with us in the intrinsically valuable relationship of shared citizenship. For many would-be immigrants, I submit, these facts are indeed true only because of policies of immigration-restriction that our state *currently* engages in. If our immigration policies changed, many would-be immigrants would seek citizenship virtually overnight, and would become contributors to the collective enterprise of our society. So if our present immigration policies are morally indefensible, then Dagger’s and Mason’s arguments for partiality violate the Boundary Principle. (The same, I believe is true of the other accounts listed in note 25.)

By contrast, some writers, notably Tom Hurka (1997), claim that the relevant fact which licenses partiality towards our compatriots is the obtaining of *historical* associative ties, such as having a *history* of doing good together. However, that such *historical* relations obtain among us, but not vis-à-vis foreigners, is a function, not of our state’s *present* immigration policies, but of its immigration policies in the past. Even if those policies *unjustly* excluded some would-be immigrants at the time, there is nothing we can do *now* to make it the case that a history of shared good-doing exists between us and these individuals. (The relation is “in principle unextendable”, as I put it in Section 3.) Hence, arguments from *historical* associative ties, such as Hurka’s, do not fall within the scope of the Argument from the Boundary Principle.

Despite their surface similarities, my Double-Jeopardy Problem thus differs in its deeper moral underpinnings from Harris's Double-Jeopardy Objection to QALY maximization. At the most fundamental level, my Argument from the Boundary Principle is grounded in Cohen's Principle, a plausible moral principle which itself is a corollary of an attractive account of interpersonal justification, not in the flawed Non-Linkage Principle that underlies Harris's argument. My argument therefore does not suffer from the problems that beset Harris's argument.

6. Responding to the Problem of Double-Jeopardy: Justifying Limits on Immigration

If the Argument from the Boundary Principle is sound, then much of the published literature on the PCC is flawed. It is flawed insofar as it presupposes that we can provide a *free-standing* defense of the PCC, based only on the associative relations in which we stand to our fellow citizens. This, I have argued, is not the case. Lest we confront the Double-Jeopardy Problem, we must *first* be able to give a principled moral justification for the restrictions that virtually all contemporary states place on immigration. Moreover, on pain of circularity, this justification cannot *itself* appeal to the idea of permissible partiality to compatriots.

This is not to maintain that the PCC can play no role in justifying limitations on immigration. Suppose it could be shown, on *independent* grounds, that the state has a right to exclude would-be immigrants from becoming members of our political community. We could *then*, in a second step, appeal to the associative relations that exist among the members of our *justly delimited* political community to vindicate the PCC. And the PCC, in turn, could then give us *further* reasons to limit immigration, for example reasons of the kind sketched by Sandel and Macedo in the passages quoted at the outset of this chapter. By contrast, in the absence of a free-standing defense of the right to exclude, appealing to the PCC to justify restrictions on immigration would be to put the cart before the horse.

What would such a free-standing defense of existing immigration restrictions involve? First and foremost, it would have to successfully rebut the powerful case mounted in recent years by cosmopolitan and

libertarian political philosophers to the effect that justice requires largely open borders.³⁶ Even successfully clearing that hurdle, however, would not ensure that the Problem of Double-Jeopardy is avoided. Showing that some restrictions on immigration are permissible in principle does not entail that the *extent* of such restrictions in practice, or the particular *criteria* for exclusion, are also permissible.³⁷ So a fuller response to the Problem of Double-Jeopardy would in addition have to investigate, in a more fine-grained fashion, the various actual policies of immigration restriction practiced by contemporary states.

Of course, political philosophers have risen to this challenge, and recent years have seen a wealth of sophisticated and credible defenses of some form of ‘right to exclude.’³⁸ Assessing which side has the better of this debate is beyond the scope of the present chapter. However, given the quality of interventions on *both* sides, the question whether existing practices of immigration, or something resembling them, can be morally justified certainly strikes me as one on which reasonable people can disagree for the time being. Unlike the claim that we have a personal prerogative to determine the make-up of our *intimate* associations, which is rarely challenged, we are still quite far from a reasonable consensus on the question of immigration.

7. Conclusion

The upshot of my discussion is not that a defense of national partiality in terms of associative obligations cannot succeed. I do not deny that *if* we can give an independent justification for the way in which existing limits on immigration restrict eligibility for membership in the In

³⁶ See Joseph Carens (1987) and (2013). See also Huemer (2010), Caplan and Naik (2015), Oberman (2016), and Hidalgo (2017). For an argument from democratic theory against a state’s right to unilaterally exclude outsiders, see Abizadeh (2008).

³⁷ Indeed, even supposing that a state was permitted to exclude *all* would-be immigrants—that is, to have a policy of entirely closed borders—this would not imply that all grounds for *less comprehensive* practices of exclusion would *ipso facto* be permissible. There could be *conditional* obligations restricting the grounds on which a state may permissibly choose among would-be immigrants, *if* it decides to allow any immigration, for example, not to discriminate on the basis of race or ethnicity or religion, or, more controversially, on the basis of education or professional qualifications. Thus even the permissibility of entirely closed borders would not entail the permissibility of full discretionary control over immigration.

³⁸ Some of the most important contributions to this literature include Walzer (1983), Wellman (2008), Pevnick (2011), Blake (2013), Miller (2016), and Stilz (forthcoming).

Group, we might *then* appeal to associative accounts like Dagger's or Mason's to ground the Strong PCC. What I have argued is that a successful defense of national partiality in these terms is more closely tied to issues concerning the ethics of immigration than most political philosophers have hitherto acknowledged. An associationist defense of the Strong PCC cannot be free-standing. Rather, it depends for its success on questions concerning the state's right to exclude that must, for the time being, be considered unresolved.³⁹

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