

# Emigration in a Time of Cholera: Freedom, Brain Drain, and Human Rights<sup>1</sup>

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## ABSTRACT

Can brain drain justify curtailing the right to emigrate? This article presents what might be called an “emergency justification” for emigration restrictions, one that defends the curtailment of a right as a means to prevent a severe cost. The justification presented in this article contrasts with the positions taken by Gillian Brock and Michael Blake in their highly engaging book *Debating Brain Drain*. While both authors mention the possibility of an emergency justification, neither pays it sufficient attention. As a result, both list various conditions for justifying emigration restrictions that prove superfluous. This article thus criticizes Brock and Blake for their treatment of emigration restrictions. But it also criticizes them for failing to condemn the more pressing danger: unjustified immigration restrictions.

**Keywords:** emigration, immigration, freedom, brain drain, human rights, Michael Blake, Gillian Brock.

## INTRODUCTION

Can brain drain justify curtailing the right to emigrate? This article presents what might be called an “emergency justification” for emigration restrictions. An emergency justification defends the curtailment of a right as a means to prevent a severe cost. Given the importance of the right to emigrate in protecting personal liberty, only an emergency justification could succeed in justifying counter-brain-drain emigration restrictions. An emergency justification, moreover, has a firm basis within international

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law. The emergency justification I shall present contrasts with the positions taken by Gillian Brock and Michael Blake in their highly engaging book, *Debating Brain Drain* (2015). While both authors mention the possibility of an emergency justification, neither pays it sufficient attention. Understating the importance of the emergency justification is thus the first point of criticism this article makes of Brock and Blake. The second (closely related) point is that they offer an inaccurate list of conditions for justifying emigration restrictions. The emergency justification presented here involves five conditions: Necessity, Efficacy, Proportionality, Duty to Assist, and Duty to Stay. Brock and Blake offer a variety of further conditions, all of which prove superfluous. This article will thus sort through the possible conditions for justifying emigration restrictions, distinguishing the genuine from the fake.

The article starts by offering an account of the moral foundations of the right to emigrate (section 1). It then outlines the emergency justification for restrictions and the five relevant conditions (sections 2 to 4). Sections 5-7 turn to Brock and Blake. We find some things to admire but also much to disagree with: their misleading framing of the issue (section 5), the phantom conditions they impose on emigration restrictions (section 6), and their failure to condemn the more pressing danger: immigration restrictions (section 7).

So can emigration restrictions be justified on brain drain grounds? Two tasks require separation. First, explicating the conditions under which a right may be curtailed. Second, assessing whether those conditions are fulfilled in the real world. This article focuses predominantly on the first of these tasks. It is only in the final section (section 8), that it turns to the second. The view presented there is that the relevant conditions are unlikely to be fulfilled. Given current empirical uncertainties, there is no compelling case for emigration restrictions to stem the brain drain.

## 1. THE MORAL FOUNDATIONS OF THE RIGHT TO EMIGRATE

When assessing the ethics of emigration, it is helpful to start by considering the position taken in international law. In law, the human right to emigrate comes coupled with the right to free movement. Article 12 of the International Covenant on Civil Political Rights (ICCPR) declares:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

That these rights come coupled together is no accident. The freedom to emigrate extends the freedom to move. Foreigners and citizens can move freely within the borders of a country (Article 12.1) and leave those borders to explore other states (Article 12.2).

But why do people have these rights? Again, international law offers guidance. Among the rights listed in the ICCPR and other human rights documents are a set protecting basic liberties. The set, which I shall term “human freedom rights”, includes freedom of association, expression, religion, occupational choice, and marriage. As a set, human freedom rights allow us to make basic life decisions regarding which (if any) religion we practice, with whom we associate and communicate, whom (if anyone) we marry, and which career we pursue. These rights entitle us to choose among the full range of, what we may call, “life options”: friends, family, civic associations, expressive opportunities, jobs, and marriage partners. When governments restrict our range of life options —banning us from meeting certain people, practicing certain religions, and so on and so forth—they risk violating our human freedom rights. Under ordinary circumstances, we should be allowed to make basic life decisions without government interference.

The human rights to freedom of movement and to emigrate derive their importance from these other human freedom rights. Our range of life options depends on our range of physical space. If one is banned from moving freely within a country or from leaving a country, then one cannot visit friends or family, attend a religious or educational institution, express one’s ideas at a meeting or cultural event, seek employment or pursue a love affair, in the place one wishes to go. Restrictions on free movement and free emigration are, at the same time, restrictions on free association, expression, religion, occupational choice, and marriage.

Since it will prove relevant below, two other rights deserve mention. First, consider the right to immigrate. While this right is unrecognized in international law, the same argument applies. If people are to be free to access the full range of life options, then they must be free to enter other countries. The freedom to emigrate is insufficient to ensure access to exterior options if the borders of other states remain closed. Without the freedom to immigrate, people are unable to meet, associate, communicate, marry, worship, and work with people in those countries. Immigration restrictions, no less than emigration restrictions, trespass on the personal domain.<sup>2</sup>

<sup>2</sup> Clearly much more needs to be said to properly defend the idea of a human right to immigrate. I offer an extended defense in other work; see in particular Oberman (2016).

The second right is the right to stay in one's own country. Like the rights to move, emigrate, and immigrate, the right to stay enables people to access life options; in this case, the options available within their home country. However, the right to stay is of particular importance. To see this, it is worth distinguishing between two kinds of life options: what I term "attachments" and "possibilities". Attachments are those options that a person has chosen and now wishes to pursue. Possibilities are those options that the person has not chosen, although they may come to choose sometime in the future. While our human freedom rights protect our ability to access both attachments and possibilities, it is attachments that tend to be of greatest significance. It is the freedom to be with *our* friends and family, to practice *our* religion, to pursue *our* career, and to be part of *our* community that we cherish the most. The fact that people's attachments tend to be located within their own country lends the right to stay particular weight. Important as it is that people are permitted to migrate to other countries, it is generally more important that people can remain in their own.

The human right to emigrate exists then because of the role it plays within a larger set of human freedom rights. It protects our ability to communicate, associate, worship, work, and marry with people living abroad. Human freedom rights, as a whole, entitle us to make basic life decisions free from government restriction on the options available to us. If we are prevented from migrating, our range of life options is significantly curtailed.

## 2. THE EMERGENCY JUSTIFICATION

Is the human right to emigrate absolute? Not according to international law. Article 12.2 of the ICCPR proclaims the right. Article 12.3 immediately qualifies it. Restrictions on the human right to emigrate may be justified if they "are provided by law" and "necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

The right to emigrate is not the only right regarded as non-absolute in international law. Most of the rights the ICCPR lists are subject to limitations or may be derogated from in times of emergency. Interestingly, however, there are some rights that are treated as absolute. These include the right to life (Article 6), the right not to be tortured (Article 7), and the right not to be enslaved (Article 8).

I think the position taken in international law is eminently sensible. The right to emigrate and other human freedom rights are important, but it would be a mistake to insist that they always be respected. Sometimes, in emergency situations, human rights can justifiably be curtailed. Thus a political demonstration might be justifiably banned, thereby restricting freedom of speech, if it would result in widespread rioting. Or people might be justifiably subject to quarantine, thereby restricting their freedom of movement, to prevent an epidemic.

International law is also wise to distinguish between different rights. While many rights can be overridden, some should be treated as absolute. Consider the right not to be tortured. Philosophers and TV shows can dream up scenarios involving ticking time bombs and the like in which torture seems permissible. But in the real world, such instances are so rare and the danger of institutionalizing torture so grave, that it would be a mistake to incorporate exemptions into law. Torture marks such a severe infraction of a person's basic interests that it is incomparable to measured restrictions of free speech, movement, and other basic liberties. As far as the law is concerned, the right not to be tortured should be regarded as absolute even though human freedom rights need not.

We have then a possible justification for counter-brain-drain emigration restrictions that is compatible with international law. Restrictions might be justified because the costs of brain drain are so severe. If, for instance, the flight of medical professionals from poor countries leaves needy people without care, then that might provide adequate reason for restrictions. Public health, after all, is one ground for emigration restrictions that the ICCPR explicitly cites. Countenancing restrictions on such occasions does not involve denying the existence of a right to emigrate. Rather it involves recognizing that the right is sometimes in tension with other human rights, such as the right to health. As we saw from the quarantine case, the right to health sometimes takes precedence.

Emigration restrictions cannot be justified, however, unless a series of demanding conditions are fulfilled. Three of these conditions apply in the case of any non-absolute human right. These I discuss in the next section. Two further conditions apply specifically to restrictions on migration for the sake of preventing brain drain. These I discuss in section 4.

### 3. NECESSITY, EFFICACY, PROPORTIONALITY

There are three standard conditions on the permissibility of human rights

curtailment. One finds such conditions stipulated in various places in international law, but here I offer my own formulation:

1. Necessity: there must be convincing evidence that the proposed curtailment is necessary to prevent a severe cost.
2. Efficacy: there must be convincing evidence that the proposed curtailment will be effective in preventing the severe cost.
3. Proportionality: the curtailment of the right must be proportionate to the severity of the cost.

A comment on each. Necessity ensures that human rights are not curtailed when reasonable alternative measures are available. A government is not justified in banning a demonstration to stop a riot, for instance, if enhanced policing would work just as well. This example involves a ready alternative, but Necessity can require us to consider radical change. Many corrupt and repressive governments may find it necessary to curtail rights to prevent severe costs because their corruption and repression has caused such harm. On such occasions, the curtailment of human rights is, in fact, unnecessary. The governments have a reasonable alternative: to end their corruption and repression. This explains, incidentally, why the Berlin Wall —the most famous example of an emigration restriction —was unnecessary. Given the many failings of the GDR regime, the wall may well have been necessary for the maintenance of a functioning society in East Germany, but since that regime was itself unnecessary, so was the wall. It is no accident that the two fell together.

Little need be said concerning Efficacy. Clearly, governments cannot justify curtailing rights when doing so is ineffective. But notice the phrasing of Necessity and Efficacy: “there must be strong evidence”. When government seeks to curtail rights to prevent costs, the burden is on government to provide the evidence that the proposed curtailment is necessary and effective. Restrictions of human rights cannot be justified when the empirical case for them is weak.

Proportionality is separate to both Necessity and Efficacy. Even when there are no other means to prevent a severe cost and the proposed curtailment is effective, we might still judge it disproportionate. Much will depend on the degree to which the right is restricted as well as the severity of the cost to be prevented. Rights can be restricted to a greater or lesser degree. The complete prohibition of free speech within a country is clearly different to a ban on a particular demonstration in a particular city. The greater the restriction the less likely it is to prove proportionate.

#### 4. THE DUTY CONDITIONS

The above three conditions apply in the case of all human rights curtailments. There are two conditions, however, which are more specific to the brain drain case. To see this, note that counter-brain-drain emigration restrictions represent the curtailment of a human right by a certain means and for a certain purpose. They operate through the use of coercion to try to get one group of people to stay and assist another group of people. When one coerces one group of people to try to get them to assist another group of people, one must do more than show that the coercion used is necessary, effective, and proportionate. One must show that those who are being coerced have a duty to do what they are being coerced to do. To fail to do this is to come much too close to treating the coerced party merely as a means. Each person has her own life to lead. One cannot treat people as mere tools to be used in the service of others.<sup>3</sup>

When applied to the brain drain case, this latest condition on justified coercion can be broken down into two parts.

4. Duty to Assist: Skilled workers must have a duty to assist their compatriots.
5. Duty to Stay: Skilled workers must have a duty to stay in the country to provide the assistance they owe.

Let us consider each of these conditions in turn. Why would skilled workers have a duty to assist their poor compatriots? There are at least two reasons. First, many skilled workers received their training at government expense. They may therefore be obligated to assist their compatriots in some way as a form of reciprocation. It would seem wrong to consume resources that belong to poor people, knowing that they expect to benefit as a result and yet do nothing to help them. Second, there is arguably a general duty upon people to help those in need simply because they are in need. This duty falls on everyone, skilled workers included.<sup>4</sup>

A duty to assist does not necessarily translate into a duty to stay. For one thing, skilled workers may be able to provide the necessary assistance from abroad by way of international transfers. For another, the burdens of

<sup>3</sup> It is worth distinguishing the claim made here from two more ambitious claims. First, I am not arguing that coercion can only be applied to enforce a pre-existing duty. The concern here is specifically with the use of coercion to force one group of people to assist others. Nor am I holding that to coerce people to get them to assist others is, in itself, to treat them merely as a means. One does not treat others merely as a means if one enforces a duty they owe to others. Here I am at odds with Blake; see section 6.3 below.

<sup>4</sup> I develop both these points at greater length in Oberman (2013: 434-9). See also sections 6.5 and 6.6 below.

staying might be unacceptably high. Here, I assume a conception of morality under which there are limits to the level of altruistic sacrifice people can be asked to bear. It is reasonable for people to refuse to provide assistance when doing so involves particular hardship. For this reason, skilled workers who are subject to persecution, separated from their family, living in dire poverty or working in dangerous conditions do not have a duty to stay. It is only when a skilled worker cannot provide sufficient assistance from abroad and is enjoying a decent life at home that skilled workers have a duty to stay.

Let me sum up. We have seen that the human right to emigrate is important since it enables people to pursue life options beyond borders. We have also seen that it is non-absolute. Like many other human rights, there are occasions in which the potential costs are so high that restrictions might be justified. Restrictions could only be justified, however, if a series of demanding conditions has first been satisfied: Necessity, Efficacy, Proportionality, Duty to Assist, and Duty to Stay.

## 5. CURTAILMENT, FACILITATION, VIOLATION

Central to the above discussion has been the concept of a human rights curtailment, so this is worth defining more exactly. When a government curtails a right it prevents people from doing something that falls squarely within the right's scope. Rights curtailments constitute a non-trivial frustration of the underlying interest or value. A government that curtails a right cannot claim that its actions are consistent with the right's fulfillment. The two are in conflict and this must be recognized. The curtailment might still be justified, but to justify it, one must point to competing considerations of overriding importance. An emergency justification seeks to do just that.

With this in mind, let us turn to Brock and Blake's treatment of the brain drain issue. Both acknowledge the possibility of an emergency justification (more on that below). Unfortunately, both tend to muddle the curtailment of a human right with other ways rights might be circumscribed. This muddling occurs in their eagerness to make emigration restrictions seem easier (Brock) or harder (Blake) to justify.

Brock's aim is to defend compulsory service programs. Under these programs, skilled workers would be required to fulfill some years of service before being permitted to emigrate. Brock's mistake, when defending these programs, is to muddle *curtailing* a human right with *facilitating* its exercise. Thus she compares preventing a skilled worker from emigrating

for a number of years with the requirement that people wait their turn when exiting a plane or car park (Brock and Blake 2015: 248). One can see how such comparisons could work to make compulsory service programs seem more attractive. It would be foolish to kick up a fuss about exit queues, so perhaps it is foolish to worry too much about temporary emigration restrictions.

But these comparisons fail. One difference is the severity of restriction. Being prevented from living where one wishes for a number of years is a severe restriction on one's autonomy. A five-minute wait while the plane or car park empties is not. There is another difference however. The restrictions in the plane and car park cases represent solutions to coordination problems. If everyone attempts to exit a plane or car park at once, the result is deadlock. On such occasions, a strong argument for intervention is to enable people to better exercise their right to free movement. In the emigration case, no similar argument applies. The aim of compulsory service programs is not to facilitate emigration but to counter the suffering of one group of people by forcing another group to stay and assist them. A restriction on the freedom to emigrate that was truly analogous to Brock's cases would be the requirement that when people leave a country they queue patiently at the border. A compulsory service program is not a form of queuing.

To be fair to Brock, her more general point is that rights to basic liberties should not be treated as absolute and that the temporary nature of a restriction can aid in its justification. This is correct. But the danger of her comparisons is that they make the task of justifying compulsory service programs seem much easier than it is.

Blake's mistake is to muddle the idea of *curtailing* a human right with *violating* it. He does this when denying Brock's claim that the temporary nature of compulsory service programs makes them easier to justify. Replying to Brock, Blake argues that "[w]e cannot think that the violation of a human right is legitimized merely because it is brief" (Brock and Blake 2015: 291). After all, he reasons, it is unjust to wrongfully incarcerate someone for a day, even if it is only a day (Brock and Blake 2015: 290). "A temporary violation of human rights is a violation nonetheless" (Brock and Blake 2015: 291).

Now it is certainly true that human rights violations remain unjust even when temporary. But this point proves much less than Blake thinks. The claim that Brock is making is that the brevity of a restriction can help justify the *curtailment* of the right to emigrate; she is not defending the *violation* of the right. A rights violation is unjustified by definition. Once we know that the right is violated, matters are clear. The difficult part is

discerning the circumstances in which the right to emigrate is violated from the circumstances in which it may be justifiably curtailed. And it is on the question of justifiable curtailment that the brevity of a restriction proves relevant.

As we have seen, the degree to which a right is restricted is an important factor in deciding whether Proportionality is fulfilled. A compulsory service program that lasts a lifetime is much less likely to be proportionate than one that lasts a year. Brevity cannot expunge the injustice of a right's violations, but it can help to show that no human rights violation has occurred. This is the fact that Brock emphasizes, but Blake, in failing to distinguish violation from curtailment, manages to disregard.

Blake's failure to distinguish the two concepts is actually symptomatic of two wider problems with his part of the book: a tendency to mischaracterize international human rights law and to make hyperbolic comparisons between emigration restrictions and other forms of coercion. Blake styles himself as a defender of "liberal orthodoxy" and the "status quo", a position he identifies with the Universal Declaration of Human Rights (UDHR) and its inclusion of a right to emigrate (Brock and Blake 2015: 111-112). Strangely, however, he never mentions the fact that the UDHR, like the ICCPR, lists circumstances under which the right to emigrate may be justifiably overridden (see UDHR Article 28). Nor does he acknowledge the distinction between different kinds of rights. While the ICCPR characterizes the right to emigrate as non-absolute, Blake's favorite comparisons are to rights it treats as absolute. To restrict migration is, in his view, akin to torture, kidnapping, and slavery (Brock and Blake 2015: 120-121, 183). It requires people to "sacrifice their own lives in the name of others" (Brock and Blake 2015: 169). This hyperbolic language contrasts markedly with the orthodoxy that Blake claims to defend. While for Blake, it seems, all rights are on par and all restrictions equally egregious, international law is careful to distinguish different rights and different levels of restriction.

The result of all this muddling of concepts and misleading comparisons is that what should be brought to the fore is pushed to back: the emergency justification for emigration restrictions. While Blake and Brock both recognize the possibility of a justification of this form, neither offers it much space. Brock believes she "can make the central case needed without resorting to this line of argument" (Brock and Blake 2015: 285). Her eschewal of an emergency justification is in keeping with her misplaced identification of compulsory service programs with trivial restrictions to solve coordination problems. One need not argue that a rush to leave a plane or a car park would cause catastrophe to justify the demand that

passengers and drivers wait their turn. If emigration restrictions were a form of queuing, an emergency justification would be unnecessary.

Blake says more than Brock regarding emergencies and much of what he says makes good sense. He believes an emergency justification can succeed given certain conditions and his list includes Necessity and Efficacy (Brock and Blake 2015: 211). Still his blunt approach to human rights makes the emergency justification seem much more extreme than it is. In Blake's description, it is as if there are two possible worlds: an ordinary world, in which human rights law and liberal principles apply, and a brutal world, where matters have got so bad that "liberalism's demands must be suspended" (Brock and Blake 2015: 209). In the latter world, no holds are barred. Kidnapping of foreign skilled workers is permissible. The right to emigrate can be entirely suspended. All moral rights, in fact, are to be set aside (Brock and Blake 2015: 210).

Blake's characterization of the emergency justification is more dramatic than accurate. When we curtail certain rights to prevent severe costs, we are not tossing law aside, but drawing on relevant clauses in international law. When we place some restrictions on some rights for some period, we are not suspending all rights entirely. Indeed, it is telling that Blake does not include Proportionality among his list of conditions. Had he done so, he may have been encouraged to abandon his all-or-nothing approach to human rights and recognize that the brevity of a restriction can aid in its justification.

## 6. PHANTOM CONDITIONS

I've listed five conditions. Blake and Brock list others. To my mind, their additional conditions are unnecessary. Let me consider each in turn.

### *6.1 Legitimacy: Governments can only restrict emigration if they are legitimate*

Both Brock and Blake are rightly concerned not to license tyrannical regimes to further oppress their people. Their solution is the Legitimacy condition. On Brock's definition, a government is legitimate if it comes to power through a democratic process, shows a concern for justice, and makes good faith efforts to respect human rights (Brock and Blake 2015: 85-86).

I sympathize with the motivation behind Brock and Blake's inclusion of Legitimacy but I think it unnecessary. A state that is seriously misgoverned is unlikely to fulfill the five conditions outlined above. Corrupt and

repressive governments could do much to improve the lives of their citizens by embarking upon reforms. Being corrupt and repressive, they are also less likely to make effective use of the skilled workers they retain. (As economists often note, “brain waste” is as grave a problem as brain drain.) So emigration restrictions imposed by such governments are likely to fail both Necessity and Efficacy. They may also fail Duty to Stay. If skilled workers are themselves persecuted or living in desperate poverty they are morally free to leave. In short, the five conditions I listed offer sufficient protection against the misuse of the emergency justification by a tyrannical regime.

But is it not possible that at least some illegitimate governments might fulfill the five conditions? Yes and this is not a problem. Imagine the following scenario. A government fails to hold democratic elections, represents a dominant ethnicity, and violates the rights of minorities. The government is, nevertheless, reasonably competent and is making great strides in eradicating poverty. (Vietnam and China are possible real world examples.) Now, suppose the government seeks to impose counter-brain-drain emigration restrictions against well-off skilled workers from the dominant ethnic group. As long as the five conditions are fulfilled, I do not think this objectionable. What Blake and Brock refer to under the label of legitimacy is, in my view, nothing but a stand in for other concerns.

Note, I am not claiming here that illegitimate governments are permissible. Illegitimate governments, being illegitimate, should step down. But the question we are asking is not whether illegitimate governments should hold power but whether, when they do hold power, they perform a further wrong by imposing emigration restrictions. Brock and Blake say, “Definitely yes”; I say, “It depends whether the five conditions are fulfilled”.

### *6.2 Contractual Agreements: Only skilled workers who have signed a contract can be prevented from leaving*

Under Brock’s compulsory service programs, governments would invite skilled workers to agree to stay for a number of years in exchange for training. Brock stresses this fact in reply to Blake’s objections. Skilled workers are not like the victims of kidnapping, as Blake suggests, since what they are being forced to do is simply fulfill a contract they consented to (Brock and Blake 2015: 253).

I can see how the existence of a contract can aid in justifying restrictions. Emigration restrictions are much more likely to be proportionate if agreed to in advance. Nevertheless, there could be occasions, when the costs are

particularly high, in which a government could justifiably restrict emigration without prior agreement. The idea that human rights curtailments always require prior agreement is clearly false. When a government bans a demonstration to prevent a riot, it does not require the prior agreement of the demonstrators. When a government restricts the movements of infected people during an epidemic, it does not require the prior agreement of those it quarantines. In short, contractual agreements may be a contributory factor in the process of justifying emigration restrictions but not a necessary condition.

### *6.3. Benefiting the Coerced Party: Coercion is not permissible unless it benefits those subjected to it*

This is an important element in Blake's critique of compulsory service programs. Blake argues that society cannot "coerce the individual except when we can, in some specific way, say, 'We do this for *your* benefit, and not simply that of others'" (Brock and Blake 2015: 205). He associates this condition with Rawlsian liberalism and its critique of utilitarianism. A utilitarian would permit the coercion of one group of people merely because it is useful to others. A Rawlsian, Blake argues, finds this unacceptable. Each person has her own life to lead. One cannot treat people as mere tools to be used in the service of others.

If Benefiting the Coerced Party were a genuine condition, compulsory servicerequirements would be wrong. These programs are not implemented for the sake of the skilled workers themselves but their compatriots. Benefiting the Coerced Party is, however, a phantom condition. To see this, note that the motivation behind most laws is to benefit people besides the coerced party. Laws against rape are not imposed for the sake of rapists but their victims. Laws requiring dentists to be qualified are not imposed for the sake of dentists but their patients. Laws preventing mining corporations from operating on native reservations are not imposed for the sake of the corporations but the natives —and so on and so forth. One of the basic things we want governments to do is to ensure that other people treat us decently, even when —one might say, especially when —it is in their interests to treat us otherwise.

Despite leaning on the Benefiting the Coerced Party at various stages, Blake himself raises doubts. He notes that something as benign as redistributive taxation would seem to violate the condition. His response is to argue that redistributive taxation is nevertheless justified because wealthy people have their properties and persons protected by their state and will go on to benefit in this way into the future. Emigrants, on the other hand, will not experience this benefit after emigrating (Brock and Blake

2015: 205-207).

This response involves refashioning the condition in ways that might be questioned. But suffice to note here that even with this refashioning, Blake is still unable to distinguish redistributive taxation from emigration restrictions. For the desired distinction is not, in fact, between wealthy taxpayers and emigrants but between wealthy taxpayers and those subject to emigration restrictions. While emigrants do not enjoy the protection of property and person after leaving, those subject to emigration restrictions do not leave. They will thus enjoy the protection of person and property into the future no less than wealthy taxpayers. If protection of property and person is sufficient to fulfill Blake's condition in the case of redistributive taxation, then that same benefit is sufficient in the case of emigration restrictions.

What about Blake's claim that Benefiting the Coerced Party is entailed by Rawlsian liberalism? Here, Blake gets things precisely wrong. Rawlsians have no problem with some people being forced to make sacrifices for others. That is exactly what Rawls's two principles of justice require. It is the use of coercion to benefit the coerced party —paternalism —that Rawlsians have the most trouble justifying.

Blake is right that we should oppose using people merely as tools for others. But this opposition to mere using need not require us to adopt Benefiting the Coerced Party. Consider three purposes to which coercion may be applied against party A:

- (1) To use A as a means to benefit some other party, B.
- (2) To enforce moral duties that A owes B.
- (3) To benefit A.

Blake is right to find (1) troubling. Where he errs is in assuming coercion can therefore only be justified when purpose (3) is (also) being pursued. The possibility of (2) seems to have escaped him. While coercing people merely because it benefits others is rarely justified, enforcing people's moral duties to others is the bread and butter of the law. In short, the solution to the concern that compulsory service programs involve mere using is not Benefiting the Coerced Party but the two duty conditions outlined above: Duty to Assist and Duty to Stay.

#### *6.4 Compensation: One cannot curtail someone's human rights without compensation*

This is another of Blake's conditions; one that he believes it is difficult to fulfill. He wonders whether "we will ever be in a position to adequately

compensate ... the prevented emigrant for what we have done to them” (Brock and Blake 2015: 211).

But no such condition applies. The idea that human rights curtailments require compensation seems reasonable when copious resources are available. But in the brain drain case, resources are scarce. We know this because any country that is justified in imposing emigration restrictions fulfills Necessity: it lacks the funds to raise salaries, improve working conditions, or pursue any other non-coercive solution to the brain drain problem. Given this lack of resources, it will often be unreasonable to expect poor countries to use limited funds for compensation.

The stance taken here applies to other human rights curtailments. If a poor country is trying to cope with an epidemic, it may be justified in quarantining. Ideally, those quarantined would be compensated, but it would be a mistake to insist that compensation always be dispensed. In a poor country, every penny that is spent on compensation could be spent on meeting more urgent needs.<sup>5</sup>

The stance also fits the logic of emergency justifications. In recognizing the possibility of emergency justifications, we acknowledge that sometimes a person’s rights may be curtailed to prevent a severe cost. In rejecting Compensation, we likewise acknowledge that sometimes a person’s claim for compensation can be overridden to prevent a severe cost. If a person’s human freedom rights are not absolute, there seems no reason to treat their claim to compensation as such. Blake’s combination of an emergency justification with Compensation is morally contradictory.

### *6.5 Fairness: No one should be forced to provide more than her fair share of assistance*

I have claimed that everyone is obliged to assist the global poor. If we take this point seriously, we must radically re-conceptualize the brain drain problem. In rich countries, brain drain is not an acute problem. They have the resources to train and retain skilled workers. Now, the world as a whole is a rich place. Were resources to be shared out globally, there is no reason why sufficient numbers of skilled workers could not be trained and retained to run adequate public services for everybody everywhere. From this perspective, brain drain does not represent a migration problem but a problem of global inequality.

<sup>5</sup> Recall, once more, that we are discussing here compensation for the curtailment of a human right. The case for compensation when a human right is violated might be stronger. This is another place in which the distinction between curtailment and violation proves important.

Anticipating a view of this kind, Blake asks how it can be fair to force skilled workers from poor countries to stay and assist their compatriots. Is this not forcing one group of people to make up for the unfairness of others? Is that not unjust (Brock and Blake 2015:169-173)? The correct answer, to my mind, is yes, counter-brain-drain emigration restrictions involve forcing skilled workers to make an unfairly large contribution, but no, this does not make restrictions unjust.

Governments routinely force people to bear unfair costs. Consider the criminal justice system. If it is unfair to fail to pay one's share of the costs of meeting some need, then it is also unfair to unjustly create a need that others must meet. This is what criminals do. In a perfectly just society, there would be no crime, so there would be no need for the police, the courts, and the prison service. Criminals unfairly create this need. Nevertheless, it is much better that governments force citizens to bear the costs of criminal justice, than leave people unprotected.<sup>6</sup>

Indeed, talk of unfairness in such cases can itself be misleading for there are actually two forms of unfairness here. There is the unfairness of forcing some to correct for the failings of others (the unfairness Blake highlights) and there is the unfairness that would result were nothing done (an unfairness Blake neglects). In both cases, people suffer due to the failings of others. Where the difference lies is in who suffers and by how much. Unfair as it may be if skilled workers are forced to stay, a world in which the poorest people lack basic services is the least fair of all.

### *6.6 Coercing Foreigners: Poor country skilled workers cannot be forced to stay unless rich country skilled workers can be forced to migrate*

The cosmopolitan view just outlined entails that skilled workers in rich countries have as significant duties towards the global poor as skilled workers in poor countries. But this view generates what might be called the "foreign worker problem". If emigration restrictions forcing skilled workers from poor countries to stay were permissible, why would it not be permissible to force skilled workers in rich countries to migrate to poor countries to apply their skills? For many, this forced migration proposal will seem intuitively objectionable. But if it is objectionable, must we not also condemn emigration restrictions?

Blake raises the foreign worker problem using the example of a foreign

<sup>6</sup> In response, Blake might try to distinguish between costs that have been unfairly created (the criminal justice case) and costs that have been unfairly shirked (the brain drain case) and argue that governments are permitted to force third parties to bear the former but not the latter. But the problem with this response is that there seems no relevant moral distinction between shirking and creating to be found here (see Murphy 2000: 124-126).

worker kidnapped by poor state's government (Brock and Blake 2015:130). Like Brock, I find this analogy unhelpful (Brock and Blake 2015: 253-254). It suggests the sudden capture and confinement of a person, by a foreign state, without legal oversight. To my mind a much better analogy would be this: rich countries pass a law that enables the conscription of their own skilled workers into a program that sends them to poor countries to fulfill some period of service. This is not kidnapping but it is controversial, so the foreign worker problem remains.

Two responses. First, I do not think we can deny the possibility that forced migration might, in some extreme occasions, be justified. Not even Blake denies it. He accepts that global poverty constitutes an ethical emergency and that emergencies call for extraordinary measures. His claim is that emigration restrictions cannot be justified except when forced migration is justified: the Coercing Foreigners condition. If the conscription proposal still sounds radical this is because cosmopolitanism is radical. The dominant view has long been that people are obliged to make significant sacrifices only for their own compatriots. Cosmopolitanism challenges this view. We should not be surprised if a radical approach to global ethics has some surprising implications when applied to real world problems.

Second, Coercing Foreigners is a phantom condition. It is, in fact, much harder to justify forced migration than emigration restrictions even assuming a cosmopolitan perspective. This is because forced migration is less likely to satisfy the relevant conditions. Consider Necessity. Rich countries, unlike poor countries, have the resources to provide powerful financial incentives. This is how they retain their own skilled workers. If they used these resources to raise salaries and improve conditions in poor countries, sufficient numbers of workers could be retained without need for coercion. The conscription proposal seems unnecessary. When unnecessary, it is unjust.

Next consider Proportionality. Recall the distinction between the right to stay and the right to emigrate. The right to stay is typically much more important because it protects people's abilities to access their attachments (life options already committed to) not just mere possibilities (as yet unchosen options). Because people's strongest attachments, such as their friends, family, and community, tend to be situated within their home country, forcing people to leave is less likely to prove a proportionate response to brain drain than forcing people to remain. For the same reason, foreign skilled workers are less likely to have a duty to migrate than citizen skilled workers are to have a duty to stay. People do not have duties to undergo particular hardship for the sake of those in need and separation

from one's strongest attachments often involves such hardship.

I have made the Proportionality point in previous work (Oberman 2013: 438). In this book, Blake responds. He notes that rich country skilled workers would have the resources to enjoy a decent quality of life in poor countries. Many poor country skilled workers, by contrast, live in severe poverty. Separation from attachments is, in this way, balanced out by material advantage (Brock and Blake 2015: 133).

There is something true in this response but also something misleading. What is true is that emigration restrictions are difficult to justify when skilled workers themselves live in severe poverty. Severe poverty is one factor that can negate a Duty to Stay. What is misleading is the suggestion that among people who are not severely poor, those separated from attachments have no special complaint when they enjoy greater material advantages. People have basic interests in not being forcibly removed from their families, friends, and communities. People have no basic interests in the perks of an expat lifestyle. Governments cannot act then as if the one balances out the other.

Since it is less likely that forced migration will satisfy the five conditions than emigration restrictions, Coercing Foreigners is a phantom condition. Emigration restrictions can be justified even when forced migration is not.

## 7. THE ELEPHANT IN THE ROOM

In the contemporary world, few states impose emigration restrictions. Almost all states impose immigration restrictions. In section 1, we found that the same freedom is at stake in each case: the freedom of individuals to make basic decisions about their lives. It is surprising then that Brock has nothing to say regarding immigration restrictions and even more surprising that Blake defends them.

Compare the following:

1. Hasma lives in a poor country and wants to migrate abroad. She possesses scarce skills. If she migrates, her compatriots will suffer severe costs. To prevent these costs, Hasma's state subjects her to emigration restrictions for two years. Since it is poor, it is unable to compensate her.
2. Nazma lives in a poor country and wants to migrate abroad. She does not possess scarce skills. If she migrates, no one will suffer in either host or home countries. Unfortunately, every state Nazma wishes to migrate to subjects her to immigration restrictions for her

entire life. Although they are rich, they refuse to compensate her.

Which of these two women has the stronger complaint? Surely Nazma. She is barred for life, without compensation, for no good reason. But on Blake's account, it is Hasma who suffers injustice. How can this be? Blake offers two kinds of argument. In other work, he presents a justification for immigration restrictions (Blake 2013). In this book, he presents an alternative foundation of the right to emigrate. The former argument has already been subject to criticism (see for instance Brezger and Cassee 2016); so let me here consider the latter.

According to Blake, the primary purpose of the right to emigrate is to uphold our interest in forming consensual relationships with states (Brock and Blake 2015: 198-199). Suppose Nazma is from India and wishes to go to Belgium to join friends and pursue her career. Once there, she would also like to make new friends, attend university, join a religious congregation, and find a partner. For Blake, Nazma has a right to leave India because she has an interest in forming a consensual relationship with Belgium. Since relationships are two-way things, Belgium is free not to enter into a relationship with her. It can spurn her if it wishes by imposing immigration restrictions. But as a third party, India has no right to stop a Nazma-Belgium relationship from developing. This explains the immigration/emigration asymmetry. The interest that grounds the right to emigrate is an interest in forming consensual relationships with states, and that interest is frustrated only by emigration restrictions not immigration restrictions (203).

How plausible is this as a foundational argument for the right to emigrate? Not very. It is strikingly at odds with the reasons why people migrate. People do not migrate to have relationships with states, but with the people who live in states. This is reflected in my account of the right to emigrate. Nazma has a right to emigrate, I would argue, so that she can have the consensual relationships with friends, employers, teachers, co-worshippers, and partners she desires. She has an essential interest in having relationships with people in Belgium, not with Belgium itself. Someone who is passionate about forming new relationships with states is a bit of a crackpot. Someone who is passionate about enjoying relationships with other people is a typical human being.

Blake seeks to motivate his account by noting that migrants often feel emotional when undergoing naturalization. This emotion, he claims, indicates the strength of interest we have in forming relationships with states (Brock and Blake 2015: 199). What he fails to mention is that migrants are naturalized after years of living in a country. If some migrants are teary eyed at citizenship ceremonies, it is because they have made their new

state their home. This sense of belonging might ground a right to citizenship, but it cannot ground a right to emigrate. An interest in being recognized as a member of a state does not entail an interest in becoming a member.

Note further that if we really were worried about making our relationships with states consensual, the right to emigrate would be insufficient. Three points bring this out. (1) We are born into a state and would find it difficult to leave our state, due to financial, linguistic, and cultural ties, even if the borders were open. (2) Since states have taken over the earth's surface, we cannot leave the state system altogether. (3) Because of (2), a person who is prevented from entering other states is prevented from leaving their own. Together, these points make states very different to clubs, religions, or marriages, in which consent is crucial. States, as John Rawls emphasizes, are not consensual associations (Rawls 1993: 222). This lack of consent does not particularly bother us as long as states treat us justly. Just states, after all, do not require us to have recreational, spiritual, or romantic relationships with them, but allow us to pursue our own.

The people of Planet Earth live inside states. When states prevent us from migrating, they interfere with our relationships. States have taken over the earth's inhabitable land; the least they can do is allow us to freely interact.

## 8. EMPIRICAL UNCERTAINTIES

This article has specified five conditions for justifying emigration restrictions on brain drain grounds. Since I have rejected conditions that Brock and Blake defend, it might appear that I believe that emigration restrictions are easy to justify. But this is not so. We cannot assume that a set of conditions are easily fulfilled simply because they are fewer in number.

To judge whether the conditions are fulfilled requires an extensive examination of the empirical literature. I will not undertake this here. Having investigated the issue elsewhere, however, I am confident of three points (Oberman 2015). First, many skilled workers in countries experiencing brain drain suffer particular hardship due to poverty, persecution, unsafe working conditions, or some other misfortune. Second, there are many things governments of poor countries could be doing to improve the lives of their citizens besides restricting emigration. These two points lend us reason to doubt the fulfillment of Necessity, Proportionality, and Duty to Stay.

The third point is that there is significant empirical uncertainty as to the effects of skilled worker migration on poor countries. Skilled worker migration has a number of positive effects, including the receipt of remittances and the incentivizing of education, which might outweigh the negative. The fact of uncertainty here is important. Brock draws upon various sources to question the positive effects of skilled worker migration. But to justify the curtailment of a human right one must do more than show that some journal articles suggest that there is a genuine problem. One must be able to find wide agreement among experts that skilled migration is causing severe costs.

Among migration economists there seems to be only one point of agreement: migration, as a general rule, benefits the global poor. There is no agreement as to when or where exceptions occur. Indeed, it is telling that some of empirical sources Brock uses to support her pessimistic view ill fit the role. For instance, while Brock makes frequent reference to a survey article by economists Frédéric Docquier and Hillel Rapoport, the article concludes that, “many developing countries appear to actually benefit from high-skill emigration”, that “skilled emigration need not deplete a country’s human capital stock”, and that the conditions for success “depend on [non-coercive] public policies” such as the creation of diaspora networks (Docquier and Rapoport 2012: 725). One can tell the extent of empirical uncertainties when witnesses called for the prosecution speak up for the defense.

What stands then in the way of justifying emigration restrictions is not a lack of government legitimacy, contractual agreements, compensation, fairness, benefits for the coerced party, or the need to justify the coercion of foreigners. It is something much more mundane. Counter-brain-drain emigration restrictions are hard to justify because the empirical data fails to provide a convincing case for them. While we can imagine a world in which emigration restrictions could be justified to prevent skilled migration, it is probably not our own.

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