Migration, Legitimacy, and International Society: A Reply to Thomas Christiano[1]

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ABSTRACT

Thomas Christiano's vision of international migration asserts that democratic states are morally required to work together with other democratic states to create transnational institutions that can develop appropriate principles to govern such migration. I argue that Christiano's analysis faces two key difficulties: first, it ascribes legitimate content-independent authority to transnational bodies, and we have no reason to think that such bodies actually possess such authority; and, second, it asserts that such bodies would be likely to arrive at justifiable principles to govern migration, and we have no reason to think that these bodies will actually do so.

Keywords: Migration, justice, Christiano, legitimacy, authority, international law.

INTRODUCTION

I sometimes think that philosophy, not nationalism, is the real home of the narcissism of small differences. Thomas Christiano's analysis of migration has all the virtues I most prize: it is philosophically rigorous, informed by empirical reality without being unduly deferential to current circumstance, and most of all it seems largely *right*. It starts from where we are – in a world carved up into separate states – and asks where we ought to go from here; the answers it gives us seem, to me, *almost* perfect. So, naturally, I am going to spend my time discussing that *almost*. I want, in this commentary, to make it clear why someone who accepts so much of Christiano's view can disagree with one central bit of that view. Christiano's analysis places the authority for migration decision-making in the collective institutional

1 This is a commentary on Thomas Christiano's "Democracy, Migration and International Institutions" (Christiano 2017). I am grateful to José Martí, as well as two anonymous reviewers for this journal, for helpful suggestions and criticisms.

dialogue of democratic states speaking with (and building treaties with) one another, rather than within the individual decision-making of a single state. On his view, a state is not morally permitted to go it alone, working out the migration policy it thinks best reflects justice. The legitimate agent to be charged with migration policy is collective, not individual, and a state does wrong when it fails to recognize the content-independent authority of a transnational community of like-minded states to work out together those specific treaties that might fulfill the cosmopolitan duties of each individual state. I think this isn't right – or, rather, that it isn't quite right; treaties and collective decision-making can be useful tools, and perhaps correctives to the blindness of individual states, but they are no more than that.

Why, though, does Christiano think that this international society has legitimate authority to determine the contours of a global migration regime? The argument begins with the simple thought that there are some global goals that any individual state is morally bound to promote. Christiano's example is migration – he imagines a situation in which one state has great labor-force needs, while another has an ample supply of laborers who suffer from relatively impoverished economic circumstances. These circumstances, he argues, do not look like an opportunity for beneficence or charity; they look like a global problem, one whose solution places moral demands on both state parties. These state parties are, in other words, morally required to work together to solve this global problem – a fact that is not limited to this particular sort of one-off problem. Instead, there are a great many moral obligations whose best solution involves some form of collective reasoning about how to work together at the global level. This fact, for Christiano, demands that states regard the process of working together as a moral imperative. This means, though, that the proper agent setting the terms of cooperation cannot be an individual state; it must, instead, be the global community itself. There is, then, no right for an individual state to break away, and rely upon its own sense of how to respond to the challenge of global justice; the right to determine final responses to global problems is held by the collective of like-minded states, rather than by any individual global agent.

This description, of course, flattens a great deal in Christiano's complex and subtle reasoning, but I do not think it is a wholly unjust description. Christiano is, in particular, emphatic that states do not have the right to "go it alone" in international politics; they are obliged to enter into agreements with other states, and to live up to the demands placed on them by the bodies created by those treaties – even when they think those demands are wrong-headed or inefficient. It is with this last part, though, that I want to begin my disagreement. I want to make two particular claims

against Christiano's view: the first is that we have comparatively less reason than he thinks to ascribe content-independent authority to international bodies. The second is that we have less reason than he believes to think that the decision-making of such bodies is likely to lead to good results. I will discuss these claims in order.

We can start with this central question, then: why should we regard some other agent than ourselves as having the right to determine our moral duties? What makes some other agent, in other words, rightly understood to legitimate authority over us? I can think of three possibilities:

(1) **Elucidation.** The dialogue produced by some discursive body might enable us to better understand our own pre-existing moral obligations.

(2) **Efficiency.** The dialogue produced by some discursive body might enable us to more effectively pursue our own pre-existing moral obligations.

(3) **Establishment.** The dialogue produced by some discursive body might, in itself, produce novel moral obligations (whose normative force may, of course, be dependent upon some pre-existing form of moral obligation).

I think that *elucidation* and *efficiency* should strike us as radically different sorts of things than *establishment*. For an example of *elucidation* and *efficiency*, we might look to the Sierra Club. I accept that we have some moral duty to protect the natural spaces of the planet, although I have some difficulty in explaining how that duty is to be defended. That duty, though, is best pursued with other agents; it's comparatively difficult to preserve wetlands as a single agent, after all, and the Sierra Club acts as a sort of force multiplier to my own meager efforts. That seems, to me, to say that there is some moral force in the *efficiency* of pursuing my pre-existing obligation to preserve wetlands by means of a membership in the Sierra Club. The Sierra Club, too, has people who have thought more about wetlands than I have, and they focus the attention of the Sierra Club on those places and policies where it would do the most good. That, of course, is *elucidation*. I don't know much about wetlands, apart from the fact that they should be wet and that there should be more of them. The Sierra Club allows me to fulfill my pre-existing duty in an efficient, informed way.

My duty to pay taxes, in contrast, seems somewhat different. I think the creation of the political society of the United States gave rise to novel obligations – including, notably, the obligation to pay my taxes to the federal government of the United States. It is not as if I had a pre-existing duty to pay taxes, and the good people of the Internal Revenue Service

sprang up to help me live a more dutiful life. They are, instead, insisting upon their *authority* to determine the appropriate level of taxation – a duty that *would not exist*, but for the creation of the institutions of government that demand resources. If we want to translate this into discursive terms, I think the dialogue of the United States Congress when it determines the marginal tax rate is simply a different animal than the dialogue between the Sierra Club and the various stakeholders working together to preserve wetlands. I am obligated, I think, to regard the dialogue of the United States Congress as imposing moral duties on me. (If I insist upon the moral right to determine the proper level of income tax, I am wrong at both the moral and legal levels.) These duties might have, lurking in the background, something like the Kantian duty to leave the state of nature and join political society; nevertheless, they are genuinely novel duties, established simply because the United States Congress has created (and the President signed) a Constitutionally-valid law. The Sierra Club, in contrast, simply offers me a home within which I can best pursue duties that were not created by the Sierra Club. It offers efficiency and elucidation; it does not, in itself establish any particular duty.

This is important, I think, because it shows that the "legitimacy" of the Sierra Club is rather unlike the legitimacy of the United States. The Sierra Club might be a good thing to belong to – but I do not think I do anything particularly wrong if I cease to become a member of that society, and focus my attention on the plight of the homeless, or nuclear disarmament, or some other worthy cause. I might, indeed, decide that the Sierra Club has lost its way, and withdraw for reasons of policy. I have, in short, no content-independent reasons to think that I *have* to listen to the Sierra Club, even if it does help me do the things I believe are morally valuable for me to do. It is useful; it is not legitimate, in the manner of a legitimate government.

Which of these, though, should we take as the best analogue to international society? Christiano wants international society to have content-independent authority; states have some limited freedom to withdraw, but in most cases states are bound to listen to the determinations and conclusions of multilateral decision-making, even when they think those bodies have made moral mistakes. International society, on this analysis, should be able to create new duties for us, simply because international society decides that we ought to do (or refrain from doing) a particular thing. I do not think, though, that we have any reason to think that international society does anything like that at all. At most, international society as a discursive site provides a given state with the ability to *elucidate* its pre-existing moral duties, and an *efficient* means of pursuing these duties. It does not, however, create new duties itself.

One way of seeing this is to imagine what would happen were the institutions in question to disappear. If the Sierra Club were to go out of business, I take it my moral duties would be unchanged; I would have the same reason to value wetlands I always did. If the United States Government were to go out of business, though, I do not think I would have any reason to pay my taxes. The United States Government does not simply offer us a means through which pre-existing duties might be fulfilled; it generates new duties, and the Government has legitimate authority to insist that those duties ought to be fulfilled. International society, to my eyes, looks more like the Sierra Club than anything state-like. If the rest of the world, except for one lonely democracy, were to tip over into fascism or terror, the duty of that democracy to promote a just world through its migration policy would not disappear.[2] It did not begin with the world's institutions, and the end of those institutions would not be the end of the duty. If anything, the duty would be felt more keenly in that benighted world.

There is, of course, a good response to this, which I think Christiano finds plausible: we might simply say that there is a duty to pursue one's mandatory aims in the best way possible. Where something offers an effective and intelligible means to a mandatory end, perhaps that means is itself mandatory. This idea, though, should be resisted. In the first place, it is not clear that we are required – as people or as polities – to maximize efficiency in our pursuit of mandatory goals. I take it as being true, for instance, that we are obligated to give up some of our treasure and some of our time to ensure the survival of needy people living abroad. I do not believe, though, that this goal demands that we choose that form of life most effective at the maximal pursuit of this goal. Some do, of course; Peter Singer's "effective altruism" begins precisely with the thought that one ought to develop that course of life that is best positioned to save as many human lives as possible. Most of us, though, recoil from this conclusion; those of us with a Kantian disposition might argue that we are entitled to build lives for ourselves that we find meaningful, even if the lives of others might be made vastly less horrifying were we to become

2 An anonymous referee for this journal has suggested to me that, if we interpret the United States as simply interpreting pre-existing moral duties, then the distinction between global and domestic political institutions is exaggerated. I agree with this; I do not, though, think that any domestic political agency is best understood only as offering interpretations of pre-existing moral duties. To take one simple example: the United States has rules, as does every society, about how to run a fair election – how, for instance, to balance fairness and formal freedom in the rules of electoral communication. It is perhaps possible to interpret these rules as specifying pre-existing moral duties, but I think it is best to understand the authority of these rules as emerging from the content-independent authority of the political community itself.

altruistically-minded financiers. The duty of beneficence, we might say, does not demand that we live on the Pareto frontier. If this is true for individuals, though, then why should it not be similarly true for societies? Christiano presents a series of considerations, in which the ability of a state to promote the interests of its members is weighed against the needs of prospective migrants. Many of us, though, think that this is a bit premature; why, exactly, must a state regard itself as obligated to take only that pathway which would be most justifiable at the global level? Is there no national equivalent to the agent-centered prerogative?

This is made more complex, I think, from the fact that the world has no shortage of morally obligatory goals – many of which, it seems, live in tension with the others. Take, for example, the goals of economic development, the preservation of cultural heritage, and global environmental protection. That these do not all point in the same direction should be obvious; a society that focuses on economic development will likely cause some damage to the environment along the way, and will likely undermine some parts of its cultural heritage; we can see both of these, for instance, in the process of South Korea's industrialization in the 1980s. A society that focuses on cultural heritage, though, will have to forego some forms of economic development, and might find itself unable to accept some innovations that might reduce the overall environmental footprint of its form of life. (A traditionalist society that bans wind energy and solar farms is likely going to end up stuck with some carbon-intensive forms of transportation infrastructure.) I raise these points not just to be depressing, but because I think we might accept that there is something like value pluralism at the collective level as well as the individual one. There are some things, Christiano and I agree, that a society cannot do. Within these bounds, though, I think I am more worried than he is that there is a plurality of valuable goals, each of which might justify some forms of state action – and which cannot be pursued simultaneously. This means, though, that there is something lost in the sacrifice of national sovereignty to a transnational body. A state that wants to do something "idiosyncratic", I think, might not always be simply selfish; it might simply disagree with its fellow members of international society about which good ought to be foremost, here and now, for it.[3]

3 An anonymous reviewer for this journal has suggested that there is no space for states to be "idiosyncratic" in this way, since agent-centered prerogatives apply (if at all) to individuals, not to states. For my part, I am not sure that something like such prerogatives could not apply to collections of persons, as much as to individual persons; there is nothing in liberalism, I believe, that prevents a state from identifying some particular good as having particular importance in the history and self-understanding of a particular society.

Of course, sometimes the state might not be doing anything so noble; it might just be selfish. Christiano suggests that the need to justify state action to international society might undermine this sort of selfishness, as democratic societies get in the practice of justifying themselves to fellow democracies. I think, though, that even the best transnational body will probably not do anything this beneficial; instead, for structural reasons, I think Christiano's international society will probably be considerably less benevolent than he imagines. The problem, in brief, is that the elites of each society gain their power by appealing to the citizens of their own societies, who – we can imagine – are ordinary humans of limited benevolence and compassion. This means, though, that the success of democratic peace offers us no reason to think that the collective decision-making of international society will be anything other than selfish and xenophobic. Democratic peace is comprehensible; states in which the elites gain power from the consent of (some of) the voters are less able to throw those voters into an unwanted war. Why, though, should we think that the discussions of democratic states will tend towards benevolence towards *non-citizens?* This is one of the striking facts about democracy as a procedure: it offers no voice *at all* to those outside the ambit of the domestic law. It offers the alien, at best, some procedural safeguards in the application of law against his person; it offers him, though, no voice in the creation of that law. That means, in other words, that the elites of any given society have no reason at all, apart from virtue, to care about the interests of the destitute who are non-members; these impoverished people are not voters, and existing voters can be counted on to be frequently hostile to the interests of these impoverished newcomers. The result, though, is that a dialogue between the elites of a set of democratic states will often end up defending justice for current citizens, whose voting power gives them enough power to make things awkward for elites – and an iron bar placed against the outsider, who has no voice or power with which to contest. Having a group of democratic states in negotiation with one another, in short, is likely to produce some morally defensible treaties between these democracies, but it is also likely to be vicious and cruel towards out-group members. The Schengen accords, for instance, made travel within the Schengen Area easier – but also mandated crackdowns on asylum and refugee law for those coming from outside that Area. Democracies, in short, are not necessarily inclined to be friendly towards those who cannot already vote, and having those democracies in conversation with one another may not produce any more defensible results than those that would have emerged from individual state agency. The recent history of the European Union in face of African migration, finally, offers us a sobering reminder that even the most internally just democracies are not

inclined to be gentle to outsiders; as I write this, over three thousand would-be migrants to the European Union have perished in the Mediterranean. These deaths are not a result of natural facts; they result from the choices of the European Union, in the 2000s, to institute carrier sanctions on air carriers, which pushed undocumented migrants towards boats, rather than aircraft. When democracies come together to build treaties, they are as likely to reinforce vice as virtue.

It is, of course, also true that Christiano intends his argument as an ideal theory, building on but not reducible to current global reality. This makes it difficult for us to conclude that any of what I have just said would necessarily be true of a world run on Christiano's principles. Nevertheless, I am skeptical. Virtue, as Kant said very long ago, is an unstable basis for political right. To the extent that Christiano's view demands that democracies spontaneously exhibit virtue, it might be true that the view is unstable in the long run. If what I have said is true, then, we might have occasion to rethink how we ought to evaluate the legitimacy of migration policy. On my view, we need not think that multilateral institutions are the rightful home for legitimate policy; individual states have more freedom, to define and pursue their goals, than that. The world, I think, is messier than Christiano would allow. I have argued that Christiano's multilateralism might not give us the results we desire; I have not, of course, said anything at all about what sort of institutions could do the job. I cannot, of course, hope to remedy this lack here. I would end, instead, by reiterating that all this disagreement must be placed against a backdrop of deep admiration and agreement; if I depart from Christiano, it is only with a due recognition that these few small differences pale before the wider spaces within which I believe his view to be elegant, defensible, and right.

BIBLIOGRAPHY

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