

Border Ethics: Philosophy and Recent Immigration Policies

Recent populist sentiment has swung violently towards highly restrictive immigration controls. State-led immigration laws like Arizona's SB 1070 and political movements to repeal the Fourteenth Amendment (like that endorsed by Senators John Kyl, Lindsey Graham¹, and Texas's own Lamar Smith) are troubling for those who believe that equal citizenship is an important aspect of ensuring that American immigration and citizenship policies are just. And though philosophers have been reticent to publish on either of these specific political developments, if they are to be an effective voice in preserving our nation's value of a one-class citizen status, philosophers must draw attention to the moral difficulties posed by these trends in immigration and citizenship policy.

This paper argues that philosophers should address policy issues relating to immigration generally, as well as specific regulations like Arizona-style immigration laws and the repeal of the Fourteenth Amendment. Laws like SB 1070 and the Kyl/Graham/Smith repeal make unequal citizenship categories (especially for Latin American citizens) by demanding more of those citizens for their rights, and so they are unjust and immoral policies. To use race to enforce a law just is to subordinate the value of equal citizenship to a potential worry about immigration control. When equal citizenship is subordinate to potential immigration control worries, moral considerations are made inferior to the state's pragmatic concern over security.

The philosopher is well-suited to navigate the state's real obligation to ensure the safety of its citizens with the moral interest it should have in the equitable application of its laws.

¹ Andy Barr, Graham Eyes "Birthright Citizenship", Politico, July 29, 2010, <http://www.politico.com/news/stories/0710/40395.html>

Philosophy as a discipline can lead the way in applying normative theory to ethical issues surrounding our borders and citizens, and indeed, should work to influence specific policy decisions like SB 1070 and the Kyl/Graham repeal of the Fourteenth Amendment. Philosophy must engage in border ethics.

The Nature of Border Ethics²

The issues surrounding the border have not been ignored by academia, or even by philosophy specifically. Since the inception of Gloria Anzaldúa's work in 1987, the US/Mexico border has been the focus of intense inter-disciplinary scholarly investigation. The primary focus of much of this inquiry has been on description: the border produces alternate cultural, social and economic forms which are targeted by convergent multi-disciplinary approaches. Philosophers have written almost singularly on immigration generally.

Those who live outside the proximity of the border can misunderstand the border's impact on culture and society, and also what the border actually represents. Culturally, the border is not an agent of separation, but is an actively creative force that has given rise to a unique set of ethnic, ethnographic, linguistic, folkloric, literary and aesthetic forms that owe their originality to the border itself rather than to one side or the other of the border. But the US-Mexico also has a fully global import, primarily because it is the only spatial region in the world in which the global North is in extensive physical proximity with the global South. As a result, the effects of corporate globalization are crystallized along the length of this one border, which therefore acquires an analytical privilege beyond its ready accessibility for US scholars. The

² Dr. Alistair Welchman and I co-wrote an NEH grant proposal for the future development of Border Ethics. The narrative of that proposal aids in the development of this section.

study of other borders may indeed be enriched by knowledge about the US/Mexican border, but beyond its cultural specificity, the US/Mexican border is also a genuine microcosm of global change.

The result for philosophy is that issues surrounding the border (the theoretical, textual, bicultural, bilingual, and often multiracial communities surrounding the legal boundary of the US-Mexico border) demand more than its arguments in favor or against the topic of immigration. Just as it would be erroneous to reduce the significance of feminism to a question of the equal rights of men and women, it would analogously be erroneous to reduce the significance of the border to the question of immigration. Although the wealth of empirical and interpretive information is important to philosophical analysis of the border, philosophy as a discipline can underscore an explicitly humanistic, normative project for border studies: a Border Ethics.

This paper takes it for granted that an imperative use of philosophy is to mitigate against injustices in the world, wherever possible. The practice of philosophy can underscore and obviate systemic problems and also can help make clear convoluted reasoning that is used by those in power to continue oppressive policies. Some professional philosophers view philosophy in the contemporary world outside of academia with a degree of disdain, especially if philosophy has to give up rigor for the sake of access. But if philosophy is to extend past its own constructed borders and join with other methods of analysis to eradicate oppression, it will risk something. But the careful philosopher can engage in these topics without actually sacrificing what philosophy values.

There are, then, at least three main philosophical branches through which Border Ethics and the philosopher can effectuate discussion and influence policy change: disparities in health, voting, and security; moral considerability and immigration; and welfarism and care. Each of these issues marries a political, social, or economic injustice with contemporary moral theory. Health disparities is a topic that has received some amount of attention from bioethicists in philosophy (including recent papers in *Monist*³, *Theoria*⁴, and—of course—*Bioethics*⁵); whereas disparities in voting and security are almost non-existent in philosophical discourse⁶. Welfarism, on the other hand, is a popular normative and political view in philosophical research, although just a small bit of recent work applies welfarism to issues on the border.⁷

Immigration and moral considerability are the areas that most prominently come to mind when the term 'border ethics' is invoked, but even in the area of immigration generally, relatively little work has been done by philosophers. Joseph Carens is arguably the most

³ Jonathan Kaplan, "When Socially Determined Categories Make Biological Realities: Understanding Black/White Health Disparities in the US." *Monist* 93(2), 281-297. 17 p. April 2010.

⁴ Andrew Courtwright, "Justice, Health, and Status", *Theoria: A Journal of Social and Political Theory*, 112, 1-24, 24 p. April 2007.

⁵ Rosemarie Tong, "Gender-Based Disparities East/West: Rethinking the Burden of Care in the US and Taiwan," *Bioethics* 21 (9), 488-499, November 2007; Robert Woolfolk and John Doris, "Rationing Mental Health Care: Parity, Disparity and Justice," *Bioethics* 16 (5) 469-485, September 2002; Andrew Courtwright, "Justice, Stigma, and the New Epidemiology of Health Disparities", *Bioethics* 23 (2), 90-96, February 2009; "Health Disparities and Autonomy," *Bioethics* 22 (8), 431-439, October 2008.

⁶ Two papers were published in 2005 on voting disenfranchisement. Issues of security are very new to philosophy; some philosophical papers have come from the International Intelligence Ethics Association's journal.

⁷ Amartya Sen, "Justice Across Borders," *Global Justice and Transnational Politics*. (Cambridge, MA: MIT Press), 2002. I also use welfarism in the forthcoming, "The Border Wall as a Failed Moral Project from a Second-Personal Standpoint", in *Global Virtue Ethics Review*.

prolific scholar working on philosophical (rather than strictly political) issues in immigration, and his work is well-known for its justification of an open-border policy. Carens has done for immigration what Singer did for animal-rights: his study has helped obviate the need for philosophical discourse on a topic by adopting a unique and often unpopular position. The analogy between Carens and Singer evaporates, however, when we look at the philosophical research motivated by the two. Singer's work has perpetuated extremely important responses in other, indirectly related philosophical areas (most significantly, probably, is research on the scope of moral considerability). But, response to Carens has focused instead on the open-border question, and philosophers thus far have not used Carens' success to push border ethics into other public-policy issues in immigration and border ethics. Philosophers have an opportunity, however, to obviate those other features of the immigration problem that better represent the daily obstacles faced by border communities and that are real future burdens on their civil liberties.

The best chance of success for border ethics (by which I mean altering the course of thinking, dialogue, and potential policy), resides with philosophical focus on the impact current policy and the duties we each share in eradicating injustice and preserving human dignity. More specifically, if philosophers are obligated to effectuate change whenever injustice occurs, then they ought to respond to two of the most pernicious border ethical issues in the public policy arena today: SB 1070 and the repeal of the 14th Amendment.

Philosophy and SB 1070

It should be surprising to learn that there is currently no professional philosophical response to the recently passed Arizona immigration law, SB 1070, even though no argument

that has been given in the public sphere against such laws has been sufficient to demonstrate why such laws are actually morally flawed. (The racial profiling worry comes closest, since racial profiling is an immoral violation of civil rights, but if Arizona could show that the law does not depend upon the use of racial profiling, then it might escape the racial profiling criticism.)

The public arguments both in favor and against SB 1070 to date have underscored morally relevant considerations of immigration policy (even though they have not actually provided moral arguments for or against such a policy), and the philosopher can point out how these considerations should form our moral judgments about those policies. On its best face, the law is meant to aid the state's moral interest in protecting its citizens. Also morally significant is the view held by lawmakers that SB 1070 functions in lieu of sufficient federal action to properly enforce immigration statutes. Conversely, the success of the law depends on the ability of law enforcement personnel to detain 'when practicable' people they believe are in the country without authorization.⁸ Since it is reasonable to suspect that police would only ask people of color for proof of their legal status, a moral consideration is whether the enforcement of this law relies upon racial profiling—something the state typically ought to avoid.

The philosopher is best suited to show that these morally relevant considerations together produce at least two conflicting moral results for even non-minority American citizens impacted by laws like SB 1070. The first is that applying SB 1070 uniformly will alter the meaning of 'law enforcement'. The overarching goal of the immigration law is to provide for

⁸ Randall C. Archibold, "Arizona Effort to Bolster Local Immigration Authority Divides Law Enforcement," *New York Times*, A16, April 22, 2010.

the proper enforcement of laws, but the mistrust that is bred between communities and police results in a skewed conception of law enforcement. Any person who witnesses a crime, for example, but might not have access to a birth certificate would have reason not to report the crime, and this is to say nothing of the backlog that would be created for police who would be required to check the citizenship papers of every non-minority person they apprehend.

Consider that even Texas Governor Rick Perry, who fashions himself as a Tea Party-like Republican, has said that the Arizona immigration law would not be right for Texas because it would impede police from properly protecting their communities.⁹ If enforcing SB 1070 alters the meaning of legal and police protection, the philosopher must demonstrate this inconsistency and the injustice of using SB 1070 as a tool for policy change on immigration.

Philosophers cannot always appeal to the detriment of a majority group to show a policy's injustice. But the philosopher can use her considerable skill set to show that a policy will create an oppressed class of people if enforced. The current calls for the repeal of the 14th Amendment provide an excellent example of such a policy.

Philosophy and the Repeal of the 14th Amendment

Three primary reasons are given for the repeal of the 14th Amendment, and it is quite clear that proponents of the repeal do not understand that two of them directly contradict each other. The first is that birthright citizenship provides an incentive for illegal aliens to enter America to give birth. In July, Senator Graham said in a Fox News interview that aliens, "like

⁹ Nathan Thornburgh, "Arizona Police Split on Immigration Crackdown," *Time*, April 30, 2010, <http://www.time.com/time/nation/article/0,8599,1986080,00.html>

livestock, come here to drop a child. It's called 'drop and leave'."¹⁰ But Graham's second point, which was echoed by Rep. Smith this week,¹¹ is that the cost of citizen children born to illegal aliens is too burdensome on the overall US system. Although many have disputed the figures used by Graham and Smith, it should be obvious that "dropping and leaving" would have a different economic impact than the one they concurrently claim for the cost of immigrant children on the education and welfare system.

The third reason given is an originalist argument which says that the Framers never intended what they actually wrote, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The first statutory definition of citizenship in the US came when the 39th Congress passed the Civil Rights Act of 1866.¹² The 14th amendment lifted wording from that Civil Rights Act, but did not incorporate the CRA's exclusion of citizenship for those who were subject to foreign powers. Smith argues that authors of the Amendment never intended to include as citizens those who were subject to foreign powers, though even non-philosophers understand the logical difference between the qualifiers "all" and "some". But the philosopher can point out that the relevant question is not what the "original intent" of the Framers was, but rather whether those who make originalist claims to have deduced it have borne their burden of proof.¹³

¹⁰ (Epps, 3; Andy Barr, Graham Eyes "Birthright Citizenship", Politico, July 29, 2010, <http://www.politico.com/news/stories/0710/40395.html>).

¹¹ "Your Turn: Reply to Pitt," *San Antonio Express-News*, February 19, 2011.

¹² Richard Aynes, "The 39th Congress and the 14th Amendment: Some Preliminary Perspectives," *Akron Law Review*, 42 Rev. 1003, 2009.

¹³ Garrett Epps, "The Citizenship Clause: A 'Legislative History'," *American University Law Review*, 60 Rev. 331, 2010, page 5.

Although philosophers have not published on the repeal of the 14th Amendment, a few have written on social trust, national identity, and immigration. Sam Scheffler noted that the philosopher must frame the challenges presented by a multi-cultural America in order to enable the general public to keep the real challenges in view, given that their real solutions require judgment and resolve at least as much as they require philosophical analysis.¹⁴ If Scheffler is right, the philosopher's response to the repeal of the 14th Amendment is similar to her response to SB 1070: the philosopher avoids oversimplification and recognizes that the most divisiveness comes in making the issue about liberalism and conservatism. The philosopher can define the issue more moderately, and can show (for example) that the immigration crisis that we now have has been fueled to a large extent by economic upheaval in the nations to our south, in part because of our trade policies.¹⁵ Even more, the philosopher can highlight that our public policies must always presume against restricting the freedom of individuals, and that the burden is on those who would restrict movement to demonstrate that such limitations are justified.¹⁶

Conclusion

It is true that the philosopher's ability to frame the civil rights challenges that are produced in border ethics policies does not itself alleviate those challenges. But without the input of philosophy on important border ethical issues like SB 1070 and the repeal of the 14th Amendment, the public is left with incomplete and unsatisfactory descriptions of immigration

¹⁴ Samuel Scheffler, "Immigration and the Significance of Culture," *Philosophy and Public Affairs* 35, no 2, 2007, page 125.

¹⁵ Robert Gittleson, "The Centrists Against the Ideologues: What are the falsehoods that divide Americans on the issue of comprehensive immigration reform?" *Notre Dame Journal of Law, Ethics & Public Policy* volume 115, 2009.

¹⁶ Ryan Pevnick, "Social Trust and the Ethics of Immigration Policy," *The Journal of Political Philosophy*: Volume 17, Number 2, 2009, 146.

problems. The philosopher should engage in research on border ethics as a way of creating understanding, fostering dialogue, navigating through obstacles, and helping to obviate just solutions to the difficulties surrounding the border.