The outsider within: obligations of a liberal democratic state towards noncitizens within its territory.
Bloom, Tendayi

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The outsider within: Obligations of a liberal democratic state towards non-citizens within its territory.

Tendayi Bloom
Queen Mary University of London
PhD dissertation
October 2012
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Introduction.

This dissertation provides a way for liberal democratic theorists to discuss obligations towards non-citizens within a state’s borders, and argues that, in fact, there are such obligations. Current theories of justice, even those engaging directly with migration across state borders, have been unable successfully to explain a state’s obligations towards non-citizens who are within its territory. This has two problematic ramifications. First, it indicates that there is a problem with theories of justice in their current form. Second, it means that it is difficult to find a liberal vocabulary to discuss obligations towards non-citizens.

This dissertation addresses this problem directly, through the lens of the Capability Theory of Rights offered by Martha Nussbaum and Amartya Sen (this literature will be introduced at length in Chapter One). It emphasises the importance of understanding society as it is, and people as they are, as well as the state’s role in societal evolution. This dissertation does not advocate a liberal democratic approach over any other, but is intended to speak to an audience that ascribes to liberal democratic principles. The specific liberal approach it adopts is modest cosmopolitan, starting from a society-of-states empirical world view.

This dissertation adopts a normative methodological approach. This can be set against an approach that is legal, social scientific, or political. The core purpose is to establish what should be the obligations of a self-defining liberal democratic state towards non-citizens within its territory, in virtue of people being as they are and the world being as it is. However, although these approaches do not constitute the underlying methodological approach, the dissertation draws upon all of these, as well as contributions from other fields, both in formulating the theory, and in testing it subsequently.

Throughout, this dissertation considers factually what is, and uses this, with normative theorising, to discover what should be. Throughout, real-life examples and cases will be used to help develop and test the theory, as this is intended to be an exercise in practical and applicable philosophy. The adoption of the notion of Capability Rights as an underlying framework enables concrete conclusions to be reached, which are focused on specific state obligations towards non-citizens. Throughout, the intention is to provide a basis for specific policy recommendations. Education, because of its unique role in state-making, provides the focus for this; however, other policy areas are also discussed, in less detail, particularly healthcare provision.
The five chapters of the dissertation play three main roles in the argument. Chapter One sets up the liberal framework and capability approach to be adopted. Chapters Two, Three and Four develop this substantially, with regard to three particular groups within the state. Chapter Five examines this with regard to one particular policy area – that of education. This introductory section sets out the structure of each chapter in more detail and gives some notes on the methodology that is used.

Chapter One presents the theoretical framework that is employed throughout the dissertation. After defending modest cosmopolitan liberalism and explaining the society-of-states starting-point, Chapter One introduces the capability approach to rights which forms the basis for much of this dissertation’s discussion. A move through presentation of the rationale behind the methodological approach of the dissertation is also found here. Part III of Chapter One explains the dynamic notion of justice and prepares the ground for the substantive chapters which follow.

Chapters Two, Three and Four examine in more detail the implications for three categories of people and their relation to the state, considering in particular what each resulting set of obligations means for non-citizens generally in the state. The groups discussed are: citizens (Chapter Two), non-citizens abroad (Chapter Three), and irregular immigrants (Chapter Four).

Chapter Two develops the *jus nexi* approach to citizenship acquisition introduced by Ayelet Shachar, but argues that citizenship itself needs to play a decreasing role, since the special bases for capability rights usually used to justify special treatment for citizens are not only applicable to citizens. It warns that for *jus nexi* to function as it is intended, significant capability rights need to be accessible for non-citizens, thus also weakening the practical importance of the citizenship status, and so the negative effects of non-citizenship. Finally, Chapter Two also examines the situation for citizens when they are in another state’s jurisdiction. This is particularly important for the discussion of non-citizens within the state, since non-citizens present in a state are usually also citizens elsewhere. This chapter argues that the state where a person is present holds the primary responsibility for enabling that person’s capability rights.

Chapter Three looks at the obligations of a state towards those who are outside its borders in two respects: persons who are not its citizens; and persons who are not in its territory. It argues that three sorts of goods from which this group are excluded are enclosed by the state: human/social capital, territory, and resources. I argue that if we assume that these exclusions pertain, then this gives rise to obligations towards those thereby excluded – obligations that, it is argued, are not rescinded if that person becomes physically present.
Chapter Four considers a group that are both internal and external to the state: irregular immigrants. Any obligations the state has towards this group can be based only on their humanity, their presence and their exclusion. As a result, they provide a useful base-case for understanding obligations towards non-citizens more generally. Chapter Four argues that the state in fact has substantial obligations towards irregular immigrants, and that these translate into obligations towards non-citizens more generally. Moreover, some special obligations towards particular groups of non-citizens (e.g. asylum seekers) reinforce obligations towards irregular immigrants, and hence also towards non-citizens more generally.

Chapter Five offers a study of the practical policy area of education. It presents education as being of particular importance in the context of the discussion of obligations towards non-citizens; it also contrasts education with healthcare provision and other policy areas. The examination of education here serves to test the theory, to deepen it, and to develop the practical implications of its implementation.

Some concluding remarks will be offered in a small section after Chapter Five, to bring together the conclusions developed throughout this dissertation. This will bring together the strands of the argument, explain how the project has responded to the problems posed, and suggest directions for further research. It will explain how this dissertation should be seen as part of a larger project of developing understanding of the obligations of a liberal democratic state towards ‘the outsider within’, a group whose rights have so far been significantly under-researched.
Chapter One: Rights, capabilities and justice: developing a theoretical framework for considering non-citizens’ rights.

Contemporary liberalism tends to assume a state in a society-of-states and does not take into account boundaries and cross-boundary problems. This results in a failure successfully to discuss non-citizens, which is problematic for both theoretical and practical reasons. Theoretically, potential state obligations towards non-citizens challenge traditional state self-definitions and justifications. Exploring potential obligations towards non-citizens within the state must be part of developing more accurate and thorough political philosophy through deepening our theoretical understanding of the state and the system of states. On a practical level, a state’s potential obligations towards non-citizens within its borders are vital to the many persons present in states without domestic citizenship. These are often the state’s most vulnerable persons. Without status, non-citizens may lack political representation or participation in national insurance and welfare schemes, frequently despite contributing to the national purse. They may have benefits and protections offered and revoked arbitrarily and may find themselves subject to xenophobia and poverty. That a group within a society may be thus marginalised may also have negative implications for the wider society. The number of non-citizens in states is growing, and it becomes increasingly important to develop a theoretically and practically coherent approach to their protection.

This dissertation adopts a modest cosmopolitan liberal evolutionary approach, starting from a society-of-states world-view, and adopting rights terminology, based upon the notion of capabilities. This chapter presents this theoretical framework, discussing reasons for, arguments against, and implications of, its adoption and concludes by offering a definition of justice for a liberal society. It proceeds in nine sections, divided into three main parts. Part I defends the modest cosmopolitan liberal society-of-states world view. Part II presents this dissertation’s understanding of rights, using Martha Nussbaum’s notion of capabilities and Karl Marx’s view of directed societal evolution. Part III both argues for the necessity of starting from the world as it actually is, and notes that the literature discussed takes the composition of the citizenry for granted, leading to both formal and de facto
violations of non-citizens' rights. Throughout, existing literature is discussed and gaps therein highlighted.

**Part I: Modest cosmopolitan liberal starting from a society-of-states**

**1.1. Underlying normative framework: Liberalism**

This dissertation specifically challenges conclusions arising within liberal theory and, as such, adopts an underlying liberal framework. This is not to argue that liberalism is the only justifiable, or even the best framework available. Simply, this dissertation is intended in particular to address a liberal audience. Liberalism is a broad church, with theorists identifying as liberals holding dramatically divergent conclusions. There are, however, some core elements to liberal notions of justice. This section examines: individualism, equality, and liberty. It also discusses fraternity, which, though not traditionally part of liberal theory, must, I argue, be examined from the outset.

**1.1.1. Individualism**

Humans are the ultimate units of concern because they are simply the only elements of the political system that are not relevantly divisible. Three points are needed to make this argument:

- (a) Humans are not relevantly divisible;
- (b) Nothing else is relevantly like this; and
- (c) This motivates concern.

The first of these is trivial. There is no way to divide a person, and produce more ultimate units of concern. Individual human organs are not meaningfully self-sustaining, as they cannot act alone. Next, suppose that there was some other element indivisible in this way. Then that would also be of ultimate concern. Such an indivisible element could be of two types:

- (1) An institutional arrangement made up of humans, and so divisible into the constituent humans; or
- (2) Some other being, of the same sort as humans.

The only beings that could feasibly fit in this second category are other animals. However, they are not part of the liberal political system, in which justice is measured (mistreatment of animals may be inhumane, and nasty, but it will not be unjust by this definition which simply excludes animals from considerations of justice). There may be important goods that arise in institutions that are not meaningfully divisible into the goods of individual humans (e.g. a feeling of shared pride). However,
these goods are good insofar as they are good for individual human beings. This argument does not, however, uncover much about the individualism under discussion. Briefly considering three standard arguments can help. While ‘separateness of persons’ and autonomy are important here, I reject self-ownership as a crucial liberal notion.

‘Separateness of persons’ is the assertion that each person, however involved he or she is with others, is a separate person. Attracta Ingram relates this directly to liberty rights (Ingram 1994 9), but she is too quick. A theory could advocate liberty, but argue that the core liberty-receiving unit is a group, or a family, for example. The core element in liberal theory is the individual, so the separateness of persons thesis must be considered under the heading of individualism. Communitarians like Michael Sandal and Alasdair MacIntyre incorrectly see this as dismissing the importance and history of social connections between persons. It is possible to acknowledge that individuals are not alone in the world, and indeed, that fundamental aspects of what humans want and need cannot be understood without seeing them as part of an on-going society, and yet hold that that the fundamental unit of concern is the human individual. This is so even if the individual may be best served, for example, through a second-level commitment to the preservation of societal connections (discussed in Waldron 1993 171,2,390,1).

This leads to, and in part explains, a commitment to autonomy. Whereas the separateness of persons can be seen primarily as a normative-empirical claim – that the best way to describe the situation is to see persons as separate individuals – the more strictly normative claim associated with this is that it must lead to a commitment to promoting individual autonomy; to an individual having decision-making power over his or her own person and its powers. While this resembles ownership, it is supported by a fundamentally different understanding of what it is to be a person, and to be separate. Although implications of these liberal commitments will be explored in due course, note that for some theorists, this element is the most crucial, and grounds a liberal commitment to democratic decision-making. Jeremy Waldron’s ‘fundamentally liberal’ thesis is that: ‘a social and political order is illegitimate unless it is rooted in the consent of all those who have to live under it; the consent or agreement of these people is a condition of its being morally permissible to enforce that order against them’ (Waldron 1987 140).

Self-ownership, discussed particularly by Locke (Locke [1690] 2008 [s.25-51, 123-126]) and Nozick (Nozick 1974 172, 181-189), reflects the idea that ‘each human is the morally rightful owner of her person and powers’ (Ingram 1994 17). What this implies varies between theorists. However, at root, the self-ownership thesis is problematic for personhood, and ownership, in two key ways. First, if something can be owned, presumably its ownership can be changed. Second, suppose a person
could be owned, but only reflexively (only by him or her self). This does not remove the ends/means problem. If a person owns him or her self, then he or she has the power to use his or her powers instrumentally for some end. However, to have an end to put his or her powers to, there must be some element of the self that is not owned, but is solely a producer of ends. This core element of the person seems also to be the element with which the liberal is concerned when it comes to individualism, so it is inappropriate to deny it in the defence of individualism itself. Individualism, then, is the position that individual humans are the core units of concern in liberalism, and that this manifests in the notions of 'separateness of persons' and 'autonomy'.

1.1.2. Liberty

Liberty and individualism, as they pertain to liberalism, are not stand-alone concepts. The above account of individualism represents the importance of both liberty and the individual that should have it. The substantial content of this liberty will be developed in due course, through the notion of rights, but its fundamentality to liberalism is demonstrated here. Liberty can be variously understood. For example, economic liberty is more often associated with political conservatism than liberalism (Waldron 1987 129). For liberals, freedom for the few is problematic when it implies oppression and constraint for the many (Waldron 1987 129). Liberty, then, is necessarily tied up with equality (e.g. Hart makes the point that there should be an equal right of all men to be free, discussed in Frankena 1955). The tension between freedom and equality will be taken up below.

Depending on definition, an appeal to liberty can justify a variety of contradictory arrangements (e.g. Waldron 1987 131). For example, freedom can be seen as submission to, and participation in, good society or freedom can be seen as lost when any rule of social order is enforced. The first of these negates individualism and the second ignores that humans must live in societies. Indeed, liberalism is often criticised for its 'lack of attention to the important practical issues of citizens' attitudes and the way that the long-term viability of political institutions depends upon social structures' (Chen 1996 28). This dissertation addresses this concern, and includes 'fraternity' as an important liberal value.

1.1.3. Equality

For Ronald Dworkin, it is equality of liberty that is crucial, rather than just liberty itself (Dworkin 1991 266), so that there is no general right to liberty in his theory, but instead a fundamental right to equal concern and respect (Mackie 1984 177). However, Dworkin's equality of concern and respect cannot be understood apart from conviction about the importance of liberty (for everyone) (Waldron 1987 130). While some theories are made coherent through combining equality with liberty (Dworkin 1978; Ingram 1994; Hart 1955), the tension between the two has represented a key
problem in liberal theory. This is because, as Nozick has argued: enforcing material equality requires a breach of liberty; and ensuring liberty will almost certainly lead to material and other inequality.

Catherine McKinnon raises a further consideration. Equality, she argues, does not mean ‘sameness’ (McKinnon 1993; 1987). This will be discussed in more detail in Part II’s development of the notion of capabilities. For now, note, however, that McKinnon argues that rather than being about sameness, equality is about removing hierarchy. That is, for example, that women do not have to be like men to obtain human rights. She argues that people are different, but that it is wrong to suggest that this difference justifies hierarchical treatment.

Whatever form of equality is being discussed, it is crucial to establish its scope. For example, whether the liberal sphere of equal concern includes non-citizens. Behind the question of scope is one of grounds (Julius 2005 176). This can be brought out particularly clearly by considering Ancient Greek democratic justice, which was profoundly hierarchical, only applying to citizens, who were selected from a narrow collection of the persons in a state. Aristotle is supportive of this, noting that active citizenship is only possible because menial tasks can be performed by non-citizens (Politics Book III), and that for some persons citizenship would always be inappropriate. Indeed, Aristotle himself, praising Athenian democracy, was a Macedonian, and not a citizen. Equality here, then, means that each individual under the scope of the equality is eligible for equal consideration for equal liberty. The main focus in this dissertation will be to establish the appropriate scope of this equality.

1.1.4. Fraternity
While liberals have undertaken much crucial work reconciling liberty and equality, this dissertation remarks upon a wider problem left unaddressed: balancing liberty and fraternity (e.g. see Ingram 1994 13). This dissertation argues that a failure to acknowledge a sometimes implicit commitment to fraternity, even among radical liberal theorists, is problematic. This is both because it obscures some of the commitments of the theorists themselves, and because there is in fact a general human commitment to fraternity which should not be ignored when developing a theory properly applicable to human society. Failing to acknowledge explicitly the importance of fraternity divests theories of real-world clout.

It is important to develop this further, for three reasons:

(1) Concentrated discussion of fraternity is absent from the literature.

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1 This point is made also by Gregory Vlastos at (Vlastos 1984 41).
2 A discussion of common criticisms with this aspect of Aristotle’s ideal constitution is reviewed interestingly in Fred Miller’s contribution, at (Miller 2009 551).
Normative cosmopolitans often omit to discuss the importance of fraternity, or else give it too little weight. An important exception is Kwame Anthony Appiah, who promotes a theory of 'cosmopolitan patriotism'. However, its normative force is unclear (Appiah 2005, 2007).

(2) Fraternity is important to people and cannot be ignored.

(3) It is fraternity that will be particularly problematic for this dissertation.

A main reason why discussion of fraternity is absent from the literature may be precisely that it causes problems for liberal theory. This is, however, a further reason why it needs to be addressed. Edward Page, in his examination of justice relations in the case of climate change, notes also that social components of well-being are often down-played in discussions of justice. He writes: ‘[t]he idea is that a person’s ‘social capital’ can be as important to their living a decent life, as their possession of resources, basic capabilities or access to advantage’ (Page 2006 95). This idea will be discussed further, particularly in Chapter Two.

1.2. World View.

This dissertation defends a normative cosmopolitanism, but a political empirical society-of-states world view. There are four key types of world view: Cosmopolitan, Statist/Realist, Society-of-states, and Nationalist (suggested by Caney 2005). These are not mutually exclusive, in terms of either the empirical theory (what really pertains, or could pertain, in the world), or the interaction between empirical and normative aspects of different theories on an ideological level. While cosmopolitanism emphasises individuals and universality, communitarianism values community (in various forms). These are, then, ideological opponents. Contrasting cosmopolitanism with statist, society-of-states, and nationalist views, makes an empirical distinction, in terms of what really is, or could be in the world. For example, while asserting the view that there is at root no morally relevant distinction between persons in the world, it is possible simultaneously to hold that currently, subgroups of humans do hold (inappropriately) differential power. This dissertation, then, asserts that there is in fact no morally relevant value distinction between persons in the world, while holding that subgroups of humans currently hold some (possibly inappropriate) power that must be recognised.

This section begins by considering normative cosmopolitan theorising, which characterises well what should be but has little useful to say about what is. It then examines empirical society-of-states theorising as a way to describe the world as it actually is, and finally brings them together.
1.2.1. Normative cosmopolitanism

'Cosmopolitanism' describes a family of normative theories advocating at least three key elements (Caney 2005 3,4; Widdows 2011 76):

- Individualism (humans are the ultimate units of concern),
- Universality (Concern is for every living human equally), and
- Generality (humans are units of concern for everyone).

Despite first appearances, liberalism's core commitments (discussed earlier) neither entail nor are entailed by cosmopolitanism. This is a matter of 'scope'; the set of persons to whom the liberal principles apply. Some find this problematic (e.g. Cole 2000 154), while for others this is trivial (e.g. Rawls 1999). Political cosmopolitanism argues that, as a result, it is necessary to promote a world state. Empirical cosmopolitanism, meanwhile, argues that the world in fact is (or could be) run as a world state. This dissertation promotes a normative cosmopolitan stance, rejecting the political and empirical aspects of cosmopolitanism.

A good reason for normative cosmopolitanism need not translate to either political or empirical cosmopolitanism. A brief discussion of open borders shows this particularly clearly. In 1987, Joseph Carens argued that, if people are seen as universally, and undifferentially, important, this makes existing state borders, and the protectionisms associated with them, unjustifiable in an ideal world (Carens 1987). However, the open borders argument, despite its theoretical simplicity and ethical appeal, is not unanimously adopted, even among cosmopolitans (e.g. Brock 2009). This is because, as has been noted by one theorist, '[i]t appears simultaneously to be the only logical solution and – at least at present – a political impossibility' (Ansley 2005 210). Carens himself distinguishes between ideal theory which requires open borders, and real theory, in which he admits that this is not possible or desirable at present (e.g. Carens 1996). A world state, then, or even open borders between states, need not follow from a commitment to normative cosmopolitanism.

A world state is neither desirable nor feasible. Some have argued that world government in some form already, almost, or could, exist, in the organs of the UN. For example, James Nickel argues that 'the international human rights system is moving in the direction of becoming a global governance system. But it is not there yet' (Nickel 2002 371). However, this is not really a world state. The institutions of the UN, and the mechanisms of human rights, are still (as Nickel acknowledges) channelled through states, and there is little indication of this changing in the near future. Similarly, Luis Cabrera advocates increasing global governance, that is, 'purposive and continuing coordination among actors in the global system to address specific problems' (Cabrera 2011 2) which, as Cabrera argues, should not be confused with a global government.
It is important to note here the world, as described by Alexander Wendt, who argues that there are five stages to an inevitable world state (along Weberian lines, as an organisation with monopoly on legitimate use of organised violence within society) (Wendt 2011 43-51):

1. System of states
2. Society-of-states
3. World Society
4. Collective security
5. World state

However, though there are currently areas of regional integration, and aspects in which points (1)-(4) are met, it is not clear that this is part of a trajectory, nor that it is global.

An argument for normative cosmopolitanism must demonstrate that the three key elements (individualism, universality and generality) are consistent and normatively important. Individualism has already been discussed above, but universality and the generality conditions must be clarified. 'Universality' could mean different things, depending on whether the emphasis is on justification or application. That is, it may mean either (1) the moral principles are *justifiable* universally, or (2) it is sufficient that these principles *apply* universally, within the normative view under discussion (Caney 2005 169). While the latter is a fundamental aspect of the cosmopolitan approach, the former will be part of some cosmopolitan perspectives (e.g. Cohen 2004; and, in a different way, Ignatieff) and not others (e.g. Beitz). Theorists of this former sort risk the accusation of neo-colonialism or paternalism (consider, for example, discussion in Matua 2008). Theorists of the latter sort have to make troublingly large commitments on others’ behalves.

One may argue that adopting normative cosmopolitanism, whilst rejecting its political and empirical elements, renders the theory vacuous, hiding the need to justify what is, in the end, an anti-cosmopolitan view. This criticism could, for example, be levelled against professed cosmopolitan, Gillian Brock, who, despite affirming a cosmopolitan world-view alongside preferential obligations for compatriots, does not explain the ramifications of this for non-citizens. If the gratitude, participation and shared history arguments she adopts work on a state level, it is unclear why they would not work on a global level, nor why the state should be prioritised among sub-global groupings (e.g. Brassington 2011). The affiliation and what-makes-political-life-work arguments she offers, meanwhile, are based on something which is both transient and in fact actively created and recreated so cannot stand alone as an argument. This will be examined further below, for example in Sections 1.6 and 5.4.
This dissertation takes normative cosmopolitanism as the basis for consideration, but builds upon a world as it actually is. This is different from what Brock does, as it advocates trying to move the world incrementally and iteratively away from currently presumed norms. To do this, normative cosmopolitan theory must be empirically honest and accurate about how the world is now.

1.2.2. Empirical society-of-states theory

Having defended a normative cosmopolitanism, but rejected its empirical aspects, a theory is needed that can provide a more accurate picture of the world as it is, and a more realistic picture of how it could be. This section argues for a society-of-states account, presenting it in contrast to a realist or a nationalist approach.

The classic statist account, that all states should pursue their national interests (normative view) (e.g. Frost 1996), and that in fact political actors do pursue their own interest (empirical view) (e.g. Machiavelli), is unsatisfactory and is also factually inaccurate. Rather than a collection of purely self-interested states, there is a society-of-states which interact, and may even see themselves as having moral duties to each other. This empirical claim is made in international legal instruments, for example. Ian Brownlie and Guy Goodwin-Gill open their International Refugee Law Reader with the statement:

A major achievement of the drafters of the Charter of the United Nations was the emphasis of the provisions on the importance of social justice and human rights as a foundation for stable international order (Brownlie and Goodwin-Gill 2006 1).

This emphasis on social justice reflects an emphasis in the global order as it exists today, not merely on state self-interest, but also on a society-of-states, making a collaborative effort towards a world in which people's lives are better. This empirical society-of-states view makes the most sense when combined with a cosmopolitan normative view. This section briefly discusses Rawls' account, as one of the most influential, and perhaps also most rejected, society-of-states accounts. It then looks at how cosmopolitan theorist, Beitz, most recently builds on Rawls' work, to propose what is, essentially, a society-of-states framework (differing from his earlier critique of Rawls).

In A Theory of Justice, Rawls introduces his idea of a domestic ‘veil of ignorance’, behind which individual heads of households assume ignorance of the particulars of their situation. Arguably, this was first suggested by Harsanyi, who criticises Rawls' use of the maximin principle from the veil of ignorance (Harsanyi 1975).
principle'). Elsewhere, he examines in more detail the problem of ‘[h]ow it is possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines’ (Rawls 2005 p.xxv). Indeed, as his work develops, the same basic principles are justified from different perspectives, from an elaborate contract argument, to a more sociological-political account (Klosko 1994). Following much criticism of his failure to discuss justice beyond the state, in The Law of Peoples, Rawls develops an international theory. According to this, representatives of liberal and decent-but-not-liberal (the unsatisfactory definition of decency will be discussed in due course) peoples withdraw behind a veil, ignorant of which people they represent. Rawls recognises that state borders are morally arbitrary, but argues that this does not render them meaningless, and uses this to legitimise assuming them (Rawls 1999 252). From behind an international veil of ignorance, Rawls believes that representatives would reach a consensus for duties only of mutual aid between liberal and decent peoples, and a duty of assistance between them and illiberal, not ‘decent’ peoples.

Crucial to the current study, this made it impossible to consider justice for those already marginalised by, or not obviously attached to, any particular state. Feminist critiques of Rawls’ domestic level veil of ignorance help to demonstrate this difficulty. They disagree with the assumption of the family, represented by a head of household, as the fundamental unit of justice within a state, which ignores the differing needs of different family members and excludes the family from the critical scope of the theory (e.g. Moller Okin 1989 92). Similarly, deciding global justice according to states ignores the complexity and diversity of need and opinion within the state, perpetuating unjustified power relations. It also excludes from consideration citizens of states that are not ‘liberal’ or ‘decent’. To resolve this, Seyla Benhabib advocates starting from Kant’s Cosmopolitan statement that if actions can affect the actions of another, they must be regulated (Benhabib 2004 104). This resembles Beitz’s stance of the 1970s (which changes in his 2009 work).

In Political Theory and International Relations, Charles Beitz applied the Rawlsian difference principle on a global level, taking nationality as yet another arbitrary factor in questions of justice (Beitz 1979). This lead to a global system of justice, which he then restricted to states in key ways. From

\[\text{The full text of Rawls' 'two principles of justice' is:}\]
1. ‘[E]ach person is to have an equal right to the most extensive liberty compatible with a similar liberty for others.’ (Rawls 1972 60)
2. ‘Social and economic inequalities are to be arranged so that they are both:
   a. to the greatest benefit of the least advantaged; and
   b. attached to offices and positions open to all under conditions of fair opportunity’ (Rawls 1972 93).

\[\text{Rawls responds to this at (Rawls 1999 156-164) but does not really engage with this concern, merely}\]
\[\text{conceding that he had been insufficiently ‘explicit’ about the equality of justice for women and men in A}\]
\[\text{Theory of Justice.}\]
the start of *The Idea of Human Rights*, however, he presents a clear two-level model of human rights, reflecting much of the discussion in the rights literature between the 1970s and 2000s (to be explored in Part II). His ‘two-level model’ presents a:

‘division of labour between states as the bearers of the primary responsibilities to respect and protect human rights and the international community and those acting as its agents as the guarantors of these responsibilities’ (Beitz 2009 108).

This picture relates to what really pertains in the world, and reflects a society-of-states rather than a cosmopolitan ideal, since it encourages states to act unilaterally, but with the interests of other states (and the citizens of other states) in mind. Beitz himself notes that this seems closer to what was intended by the framers of the Universal Declaration of Human Rights (Beitz 2009 116). Indeed, the attempts to form conventions and treaties supporting human rights and other humanitarian considerations show states do not always act in self-interest. A cynic could argue that these are all part of a regime of dominance, rather than ethics (e.g. Matua 2002). However, it would still represent a more nuanced form of self interest than is implied by the realist account.

Whatever we may think about the actual or desired actions of states, it is in states that power lies. Onora O’Neill retells the story of a bank robber who, asked why he robbed banks, replied ‘that’s where the money is’ (O’Neill 2005). Assigning obligations to secure rights (she says human rights) to states is similarly pragmatic – quite simply, because that is where the power is. Antony Appiah, on the other hand, argues that states are important, and seems sometimes to float from this to the conclusion that, since they are important, states should be important, without being explicit about why this follows (e.g. Appiah 2007, 2005). However, he explains that, while states matter because they regulate our lives, and have enormous power, nations matter because they are important to people. It is to nations that we now turn.

1.2.3. **Flagging up nationalism**

Nationalism is distinct from statism/realism because its units of concern are nations, which may or may not divide along state lines, and their supposed importance differs from the importance that realists afford the state. Nationalism falls to several of statism’s problems, but nationalist arguments also fail in another way, with discrepancy regarding what they define to be the ‘nation’. Ambiguity of core terminology is a major problem with nationalist views, and this is a reason to be careful about defining terms, rather than to reject nationalism outright. Indeed, terminological ambiguity is a problem shared with liberalism.
Some nationalist theorists can seem to conflate ‘nation’ and ‘state’. Key ‘liberal nationalists’, Yael Tamir and David Miller, define the nation culturally. Kok-Chor Tan adds that it is ok to restrict immigration, just so long as this is not based on ethnicity, and is to protect national culture, defined according to political and public institutions and a common language (Tan 2005 54). However, this seems dishonest about what is really meant by ‘nation’ and the possible contribution of ethnic definitions.

Gillian Brock offers a taxonomy of Liberal Nationalism, based on three major issues that the Nationalist must justify (Brock 2002 308). David Miller raises the same issues (Miller 2006 239-30). The below table presents these side-by-side, showing a paradigmatic difference between nationalism and the pseudo-cosmopolitanism of Gillian Brock. The final column sketches problems arising with each of the three claims.

Table 1: Key nationalist claims

<table>
<thead>
<tr>
<th>Gillian Brock’s list of what a nationalist must defend</th>
<th>David Miller’s list of what a nationalist must defend</th>
<th>Problems raised with nationalism</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 National belonging has value.</td>
<td>Nations are real.</td>
<td>Not everyone values nationhood.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Even if nations are real, persons</td>
</tr>
<tr>
<td></td>
<td></td>
<td>typically have multiple identities.</td>
</tr>
<tr>
<td>2 Partiality to co-nationals is acceptable, especially in distributing benefits.</td>
<td>National membership has practical implications.</td>
<td>The partiality described need not</td>
</tr>
<tr>
<td></td>
<td></td>
<td>relate to co-nationals in particular.</td>
</tr>
<tr>
<td>3 The group is entitled to run its affairs relatively autonomously.</td>
<td>Nationhood is politically significant.</td>
<td>Other groupings are also important, and these may be prejudiced if the nation is given preferential treatment.</td>
</tr>
</tbody>
</table>

This dissertation disagrees with nationalism as either a normative or an empirical world view for two reasons:

(1) Even if the nation could be satisfactorily defined, it would not present a morally relevant structure on which to ground obligations and rights (normative problem).

(2) The nation is not well defined (empirical problem). For example, people disagree about national membership (e.g. a Cornishman in England) and have multiple national
memberships (e.g. an Italian Irish person living in America). This makes it unclear how
nation-based obligations could be meted.

First, a confusion in Benedict Anderson’s book, *Imagined Communities* highlights a key confusion in
nationalist literature. In one place, he writes that nationalism differs from racism, since one can
change nation, but cannot change race (Anderson 2006 150). However, when explaining why people
feel the need to die for the nation and not for other associations, he suggests that it is because the
nation is not chosen (Anderson 2006 53, 144). This reaches the heart of the confusion about nation
and nationalism. Nationalism's danger and its power comes from its murky combination of being
both ephemeral and eternal, both arbitrary and essentialist. If the nation is chosen, then nationalism
starts to look indistinguishable from patriotism, for example. However, if the nation is unchosen,
then it becomes a problematic basis on which to ground liberal rights and obligations.

For Miller, the tensions between liberalism and nationalism do not render them incompatible (Miller
2006 193-5). Tamir’s claim is stronger. She argues that these are not, in fact, tensions at all (Tamir
1995). She writes:

Liberals can acknowledge the importance of belonging, membership, and cultural affiliations,
as well as the particular moral commitments that follow from them. Nationalists can
appreciate the value of personal autonomy and individual rights and freedoms, and sustain a
commitment for social justice both between and within nations (Tamir 1995 6).

That is, for Tamir (and Miller), not only are they not in conflict, but liberalism requires nationalism.
Indeed, the standard liberal nationalist argument is that the things a liberal wants (autonomy,
democracy, social justice) do best when citizens share a common nationality (Tan 2005 51).
However, the key problem resurfaces when Kok-Chor Tan writes: ‘for liberal nationalists, the moral
standing of a nation depends on how it contributes to the well-being of its individual members’ (Tan
2005 54). For the normative cosmopolitan, this is just wrong.

1.2.3. **Normative cosmopolitanism and a society-of-states world view**

However arbitrary, national states are emotionally important to people. National flag-waving at
football matches and ‘national’ events, interest in state politics, all demonstrate that many people
care about a national state, and often associate themselves emotionally with it, and fight for it when
it is threatened or still to form. It is the state’s emotional salience that in fact invests it with its other
relevances. For example, it is the emotional attachment to, and identification with, the state that

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6[N]othing in the theory of liberal nationalism presupposes an account of conational partiality that is
antithetical to the ideal of global equal concern’ (Tan 2005 52). This is because the partiality of nationals is not
the sort of partiality that is problematic.
leads to the symbolic borders around who may be called members. A failure to engage with this emotional aspect of the state will render any theory weak. Elsewhere in this dissertation (particularly in Chapter Five), I discuss how this emotional connection is made and sustained, and examine how it can be altered for the better.

The world just is currently divided into states. Resources, political representation, social services, currently just are organised along state lines. Based on this fact about the world, any attempt to develop a just society will need to make use of state and interstate institutions, or else start from anarchical chaos. States have already been used to build up international organisations, like the UN, which try to mitigate the ill-effects of having states and to ameliorate human life globally. Such organisations, indeed, function because of a fundamental respect for the institution of the state. Therefore, irrespective of whether states are ideally beneficial, theory must take them into account because they are so important to people and to existing arrangements. Moving away from state-centrism is only possible if the state is first acknowledged and respected. This is why this dissertation adopts a cosmopolitan normative account, but a society-of-states empirical account. I will call the view presented here 'modest cosmopolitanism', that is, it does not support a world state conception, but holds that the world as it currently is, is most usefully and most accurately modelled as a world of states. This will form a basis for this dissertation's model of how justice can function.

Part II: Rights deriving from capabilities

1.3. Introducing rights

Even theorists like Jeremy Bentham, who is famous for declaring that rights are nonsense and human rights are nonsense on stilts (Bentham 1843) agree that on an individual level, liberalism is experienced in terms of the sorts of obligations deriving from a state’s justification. Bentham’s concern is that expressing things as rights seems to presume that claims will be met. This dissertation offers arguments for the fulfilment of rights based on the ‘capabilities approach’ and suggests ways in terms of societal evolution of making this increasingly possible. Capabilities offer the best way to respond to the problems besetting most theories involving rights. This section argues that rights form one element in a complicated picture of a just society, and that, while theories treating right-holders and burden-bearers separately provide useful insight, in fact rights should be seen as part of a more complex relationship.
1.3.1. **Natural rights, human rights, citizen rights and rights**

This dissertation uses simply the term 'rights', for three reasons: first, the phrase 'human rights' carries too much baggage; second, the naturalistic elements of the human and natural rights literatures are of limited use in the context of a theory fundamentally driven by its assumption of the initial conditions of a society-of-states; third, this allows lessons to be derived from a variety of sources, unconstrained by any particular tradition. The scope of rights developed here is precisely the scope of value in normative cosmopolitanism: all humans, no groups. Crucial to being able to hold rights is the status of being 'an object of moral concern' (Jones 1994: 69). There are two main ways this has been understood: having some special mythical property, and being in need. This dissertation rejects the former.

Although the rights considered here apply to all persons, irrespective of citizenship, it must be acknowledged that all persons today are involved in a world of states and citizenries (including through exclusion from it). This means that rights are most likely to be distributed among citizens. It is necessary then to ensure that those with different citizenships are not prejudiced in the assignment of rights, and that where states are tasked with rights distribution, non-citizens are not left rights-less. Thus, although this conception of rights seems a little like HLA Hart’s general rights (Hart 1955; Beitz 2003: 342), they will also be, to an extent, 'special', since all persons are in fact in states. This is about more than the incidental overlap between human and citizen rights noted by (Jones 1994: 88). Some rights are basic and general but pertain because of the supposed universality of citizenship regimes. This makes it particularly crucial to recognise that rights also arise as a result of exclusion from a political community.

1.3.2. **Two taxonomies of rights**

No particular taxonomy of rights is correct, but each provides a useful tool for bringing out otherwise obscured aspects of rights. The two rights taxonomies considered here are selected for their powerful influence, both in philosophical rights literature, and in real-world policy-making: a Hohfeldian-style taxonomy; and the first-generation/second-generation rights distinction.

**Hohfeld**

Wesley Hohfeld’s now classic taxonomy puts rights into four categories: claim-rights, liberty-rights, powers, and immunities (Hohfeld 1917: 710). These can be illustrated by examples (adapted from Jones 1994: 12):

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7 Peter Jones (Jones 1994 ch1), and Hillel Steiner (Steiner 1994 59-61) offer some useful discussions of Hohfeld’s taxonomy.
Claim-rights: A and B enter into a contract where B will pay A £X. Then A has a right to £X and B has a reciprocal duty to pay A £X.

Liberty-rights: A has a right to dress as A pleases, which means that A has no obligation to dress or not to dress in any particular way and others owe A no obligation.

Powers: A has the right to make a will. While this could be seen as a claim-right (others are duty-bound not to prevent A), or liberty-right (A is under no obligation to either make a will or not), it is most appropriately viewed as a power, since there is a legal facility empowering A.

Immunities: A is immune from another’s power, and not subject to it.

For Hohfeld, a right is a relation between two parties: a beneficiary, and the correlative burden-holder. A ‘correlative’, then, is the relation put on the burden-holder, and the ‘opposite’ is what would happen if the right was negated. Hohfeld derives correlatives and opposites of each right:

Table 2: Hohfeld's taxonomy of rights and duties

<table>
<thead>
<tr>
<th>Type</th>
<th>Claim-right</th>
<th>Liberty-right</th>
<th>Power</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Correlative</td>
<td>Duty</td>
<td>No-right</td>
<td>Liability</td>
<td>Disability</td>
</tr>
<tr>
<td>Opposite</td>
<td>No-right</td>
<td>Duty</td>
<td>Disability</td>
<td>Liability</td>
</tr>
</tbody>
</table>

For Hohfeld, only a Claim-right is a right in the truest sense, but this is contested. For example, for JL Mackie, a right is a conjunction of a liberty-right and a claim-right (Mackie 1984 169):

A has a right to X if A is entitled to do X and is protected in doing X (that is, others are not able to interfere).

Hohfeld’s taxonomy of rights, in a sense, is more of a taxonomy of duties, as he is not discussing types of rights, but ways rights impact upon burden-holders. There are three possible responses. First, Jeremy Waldron suggests that the relationship between rights and duties is not really homomorphic, but is complex and overlapping (e.g. see Waldron 1993). Second, one can reject the focus on rights. Onora O’Neill agrees that we normally see rights as one side of a normative relationship involving both rights-holders and obligations-bearers (O’Neill 2005 427). Third, perhaps the story begins with obligations. This approach is taken by Immanuel Kant, particularly in his *Groundwork of the Metaphysics of Morals*. To conclude, Hohfeld’s taxonomy offers a useful way to see the relationship between rights and duties, offering a way to categorise four types of relationship found between rights and obligations. It is particularly useful in that it emphasises the

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8 O’Neill’s more recent work seems to reject this in favour of a view that rights and obligations arise together.
lack of correlation between rights and duties, and allows, for example, for the scenario where one right gives rise to two duties.

*First generation/Second generation*

Consider three early international human rights instruments: the Universal Declaration of Human Rights (UDHR), the International Covenant of Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). While UDHR was developed at the conclusion to the Second World War by the victorious allied forces, ICESCR and ICCPR followed in the 1960s, clarifying UDHR, and carrying stronger legal status. Whereas UDHR promised a comprehensive list of rights considered fundamentally important, ICCPR and ICESCR divided rights into two categories, often presented as ‘first-generation rights’ and ‘second-generation rights’. These also represented differences between two powerful ideological world-views of the 1960s. For the socialist bloc, economic and social rights were more fundamental, while the liberal bloc prioritised civil and political rights. Current discussions of first-generation and second-generation rights must be seen against this historical backdrop, with its ideological baggage. Two main arguments given by liberal theorists to support this distinction are discussed here.

Liberal theorists draw upon the maxim ‘ought implies can’ as part of their justification for the distinction. That is, while civil and political rights are achievable, economic and social rights are more aspirational. Consider, for example, Jeremy Bentham’s declaration that ‘hunger is not bread’ (quoted in Clapham 2007 11). This is problematic for two main reasons. First, that rights are difficult to meet demonstrates a need to work harder to meet them, rather than a violation of ‘ought implies can’ (e.g. Waldron 1993 23). It is defeatist (and a case of adaptive preferences – see Section 1.6) to constrain rights to those available in the current arrangement. Further, although obligations may be ‘loosely specified’, or initially difficult to allocate, this ‘must not be confused with no obligations at all’ (Sen 2009 374). Second, this does not represent any genuine distinction between types of rights, since similar problems arise also for civil and political rights. Consider the right not to be attacked, usually included among civil/political rights. The existence of legal and penal systems demonstrates that the right not to be raped or murdered is frequently violated. Whilst impossible to ensure that this right is not violated, it is possible to promote its less frequent violation. This is similar to the situation for so-called social and economic rights.

A second liberal reason given for the distinction is that civil and political rights are the more basic. However, this is hard to support, since economic and social rights can also seem basic. For example,

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9 Similar famous formulations are given for example by Maurice Cranston, John Finnis and Michael Ignatieff (see my notes p70).
Isaiah Berlin argues that: ‘to offer political rights ... to men who are half-naked, illiterate, underfed, and diseased is to mock their condition’ he continues, ‘without adequate conditions for the use of freedom, what is the value of freedom?’ (Berlin 1958 n5). Thus, for Berlin, economic and social rights are necessarily more fundamental than civil and political rights because it is not possible to actualise the latter without the former. Shared by many theorists and policy makers, this is a version of the ‘full belly thesis’ (subsistence rights must be secured before civil and political rights), and summed up powerfully by former Senegalese President, Leopold Senghor: ‘Human rights begin with breakfast’ (quoted in Clapham 2007 119). The problem, however, is that there is no such simple distinction, since having a political voice is also important to being able to secure subsistent rights and vice versa.

First- and second-generation rights are not, then, usefully distinguishable. This is affirmed in a fourth international agreement. The 1993 Vienna Conference concluded that: ‘all human rights are universal, indivisible and interdependent and interrelated’ (quoted in Beitz 2001 271), demonstrating a renewed (perhaps a post-cold-war) appreciation of the complexity of rights. The first-generation/second-generation distinction, while not providing a useful way to categorise rights, is still of some use, providing a means of examining the various roles rights play.

1.3.3. Supply, demand, and waves of duty

These taxonomies are useful, but cannot wholly characterise rights, since rights are not discretely listable and do not map easily onto duties. This section argues that instead, each right generates ‘successive waves of duty’ (Waldron 1993 25). Consider, for example, the right to vote, which generates duties to ensure there are ballot boxes and voting slips, but also to enable a person to access information about candidates and to have a sufficient range of candidates to choose between. It also generates duties to ensure a person can get to a polling station, and that they can read/know/understand the candidates’ arguments. Individuals must be protected from coercion over their vote, and be sufficiently fed and healthy to make full use of it.

This solves some of the difficulties raised by the taxonomies of rights. It recognises the crucial but complicated connection between rights and duties, and acknowledges the complex nature of the interrelation between rights themselves. Meanwhile, it avoids the need to rank rights rigidly. The question of whether to begin with rights or duties remains.

Bringing together supply and demand into the same concept is found in interest theories like Shue’s:
A moral right provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats (Shue 1980 13).

To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of (quoted in Jones 1994 42).

Although this may seem to get the relationship between rights and sanctions the wrong way around, it uncovers something important about how rights should be seen – as part of a relationship. In this dissertation, rights are to be understood in terms of the obligation to ensure certain capabilities, and as part of a complex picture of social justice.

1.3.4. Human weakness

In developing a picture of what this means, it is necessary to examine human weakness. For example: ‘For everyone healthy adulthood is bordered on both sides by helplessness, and it is vulnerable to interruption by helplessness, temporary or permanent, at any time’ (Shue 1980 19) and moreover, when it comes to the elderly and infants, it is not only assault that can stop them enjoying a full life, that is, ‘[t]o be helpless they need only to be left alone’ (Shue 1980 19; Nussbaum 2003 5). This discussion explores two ways of motivating a ‘capability approach’ to rights: a recognition of human weakness, and the notion that people’s own perceptions of their interests are complex and evolving. Martha Nussbaum’s contrast between Stoic and Aristotelian influences helps to illuminate a key difference in accounts of rights. According to the Stoic, every human has dignity and is worthy of reverence merely by being human (Nussbaum 2011 129). This notion still drives much contemporary theorising. However, it is important in going forward to emphasise human weakness.

First, the emphasis in stoic-inspired theorising upon ‘free, equal and independent’ parties ignores the fact that humans are dependent upon each other (this draws upon Locke’s phrase; Locke [1690] 2008 s.95-99). It is a major limitation of theories like Rawls’ that they omit relations of extreme dependency. Indeed, Rawls even states that the ‘fundamental problem of social justice arises between those who are full and active and morally conscientious participants in society’ (Rawls 1980 546; Nussbaum 2003 53). This offers a clue as to why traditional theory cannot explain how to include outsiders, and particularly, needy outsiders, into the metric.

Second, an ethical theory relying upon a particular metaphysics – that there is some transcendent good in humanity – must first convince us of this good’s existence, and its role in motivating action. Deriving such a good from observations of human behaviour (rather than religion, for example) is
problematic when some humans do not display the necessary attributes. The explanation of the root human dignity of humans that are not able to reason in the way required has motivated much literature (e.g. discussion of ability to vote in Karlawish et al. 2004 1346, Hurme and Appelbaum 2007 934, Raadet al 2009 625). While there is something to the idea of a fundamental importance of being human, it is more likely driven by an appropriate co-species fellow-feeling, than anything else. Human agency/will is one of the most intractable problems of metaphysics (Waldron 1987 131), so it is understandable that rights-theorists might not be able to solve it.

Third, and related, if rights are based upon some strange property of humans, then it is too easy to be blind to violations of what rights should really be about. This is seen most clearly in Seneca’s defence of slavery on the grounds that the human inner life remains free (Seneca [41AD] 1969 letter XLVII; Nussbaum 2011 131). A theory which asks repeatedly, ‘what can a person do or be?’ will avoid such conclusions.

Aristotle understood human vulnerability and argued that ‘the job of government is to make all citizens capable of leading a flourishing life in accordance with their choice’ (Aristotle[384] 1992 IV; quoted in Nussbaum 2011 128). He believed that government needed to address issues like the purity of water supply and air, as well as education (Nussbaum 2011 127,8). The problematically narrow scope of Aristotle’s theory has already been discussed. However, it is key to note that Aristotle’s theory begins with banal human needs, only bringing in choice/rationality/will later. It is important, then, to ensure access to food primarily because people get hungry, and only secondly because hunger may in some way violate human dignity.

Nussbaum does not reject outright the Stoic value of human dignity. Instead, her list of capabilities are developed in view of enabling a human being to live a life worthy of that dignity, a life with ‘truly human functioning’ (Nussbaum 2003 40). An appreciation of human weakness and the reality of human life will be crucial to developing this notion of capabilities.

1.4 Capabilities approach

The modern version of the ‘capabilities’ approach is developed primarily by Martha Nussbaum and Amartya Sen, strongly influenced by their advocacy for women who are denied key capabilities. Crucially, it is unnecessary for their theory that the persons themselves recognise their lack of capability, but merely that these capability rights are recognised in the absence of their fulfilment. Law and Widdows note that the Capability approach captures best theoretical and conceptual work, while also being applicable to real life cases and actual practice. They note: ‘with roots in development ethics and economics, the capability approach is well-suited to policy-making and
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health-promotion in a global context’ (they summarise the Capability approach particularly at Law and Widdows 2008 308-311).

1.4.1. Introducing capabilities

The core premise of the capabilities approach is that how well rights are secured cannot be measured by the specific achievements or functionings people end up with, nor by the tangible resources that they have. Instead, it is about putting people in a position of capability to function in crucial areas. What this means varies from person to person. For example, Milo the wrestler needs more food than other people, while someone without the use of their legs will need equipment unnecessary for someone else. Moreover, the amount of functioning a person can derive from any particular resource differs from person to person. Capability also requires that people have the means to make use of certain material goods. That is, giving a person a raw potato and a dead fish is useless unless you give him or her the wherewithal to make them edible. Finally, different people will want to use their capability differently. Law and Widdows note that in the capability approach, choices about functionings have to be made by individuals and groups in particular contexts (Law and Widdows 2008 310). They note that this pluralism is an advantage (Law and Widdows 2008 311). It allows for ‘competing conceptions’ of what is important, whilst still providing an overall idea of what these can include (this takes Hursthouse’s turn of phrase, Hursthouse 1991 221 n4)

There are two main ways to measure capability. Sen looks at comparison:

[a] person’s advantage in terms of opportunities is judged to be lower than that of another if she has less capability – less real opportunity – to achieve those things that she has reason to value (Sen 2009 231).

Meanwhile, Nussbaum focuses on securing a specific list of capabilities for each person above some threshold, based upon the idea of each person as an end (Nussbaum 2000 5, Nussbaum 2003 37). Sen argues that Nussbaum’s list requires that there always be a ranking of situations and choices of action, which he believes will be impossible in ‘tragic’ situations (where ‘any course we select involves doing wrong to someone’), making her ordering incomplete (Nussbaum 2011 37). More pragmatic, Nussbaum argues that it is possible to rank in these situations, but that the ranking is itself tragic, and the wider aim is for a society where tragic choices do not arise (Nussbaum 2011 38).

Other theorists also reject a ‘canonical list of rights’ (e.g. Beitz 2009 212; Waldron 1993; phrase from Sen 2005 158). However, setting these against Nussbaum reflects a misunderstanding of what Nussbaum is doing. The capabilities she lists are seen as both separate and connected. They are separate components insofar as it is not acceptable to satisfy more of one and neglect another
(Nussbaum 2000 81), but they are closely interrelated, so that promoting one may well promote another, for example. Nussbaum sees the list, not as a completed project, but as open to revision. The capabilities she lists are abstract to a certain extent, to allow for deliberation and interpretation. She also requires that these be seen purely as capabilities – that persons would not be required to make use of them if they chose to constrain themselves, for example, on the basis of religion. She also requires that this be seen as a basis for persuading others of the view, rather than for enforcing this view on others. This dissertation agrees with Nussbaum, that it is useful to develop a list of capabilities, though emphasizing that the list is to be nothing more than a tool. It also agrees with Sen that comparison is important.

1.4.2. Nussbaum’s list of capabilities

Presented here is Nussbaum’s most recent list of 10 capabilities (taken from her 2011 book), which has stayed pretty constant for most of the past decade. Changes she has made over the years are given in footnotes:

The Central Human Capabilities

1. **Life.** Being able to live to the end of a human life of normal length; not dying prematurely, or before one’s life is so reduced as to be not worth living.

2. **Bodily Health.** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. **Bodily Integrity.** Being able to move freely from place to place; to be secure against violent assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. **Senses, Imagination, and Thought.** Being able to use the senses, to imagine, think, and reason – and to do these things in a ‘truly human’ way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of

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10 Versions of this list are found e.g. at (Nussbaum 2000 78-80), (Nussbaum 2003 40-42), (Nussbaum 2011 33-5).

11 In her 2000 listing, this reads: ‘Being able to move freely from place to place; having one’s bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction’ (Nussbaum 2000 78)
religious exercise. Being able to have pleasurable experiences and to avoid non beneficial pain.\(^{12}\)

5. **Emotions.** Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by\(^{13}\) fear and anxiety.\(^{14}\) (Supporting this capability means supporting forms of human association that can be shown to be crucial to their development.)

6. **Practical Reason.** Being able to form a conception of the good and to engage in critical reflection about the planning of one’s life. (This entails protection for the liberty of conscience and religious observance.)

7. **Affiliation.** A. Being able to live with and toward others, to recognise and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another.\(^{15}\) (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.) B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails\(^{16}\) provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.\(^{17}\)

8. **Other Species.** Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. **Play.** Being able to laugh, to play, to enjoy recreational activities.

10. **Control over One’s Environment.** A. **Political.** Being able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association. B. **Material.** Being able to hold property (both land and moveable goods\(^{18}\)), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search

12\(^{12}\) In (Nussbaum 2000 78), she specifies ‘self-expressive’ works, and in the version given above, a penultimate sentence has been removed from older versions: ‘Being able to search for the ultimate meaning of life in one’s own way’ (Nussbaum 2000 78).

13\(^{13}\) Removed: ‘overwhelming’ (Nussbaum 2000 79).

14\(^{14}\) Removed: ‘or by traumatic events of abuse or neglect’ (Nussbaum 2000 79).

15\(^{15}\) Removed: ‘and to have compassion for that situation; to have the capacity for both justice and friendship’ (Nussbaum 2000 79).

16\(^{16}\) Removed: ‘at a minimum’ (Nussbaum 2000 79).

17\(^{17}\) Removed: ‘In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers’ (Nussbaum 2000 79). This has now been added to the end of point 10.

18\(^{18}\) Removed: ‘not just formally but in terms of real opportunity’ (Nussbaum 2000 80).
and seizure. In work, being able to work as a human being, exercising practical reason, and entering into a meaningful relationship of mutual recognition with other workers.

1.4.3. Capabilities and responsibilities: burden bearers
Having capabilities brings responsibilities, making individuals accountable for what they do. Sen expresses this using Hohfeld’s notion of power (see Section 1.3):

\[
\text{[s]ince a capability is the power to do something, the accountability that emanates from that ability – that power – is a part of the capability perspective, and this can make room for demands of duty – what can broadly be called deontological demands (Sen 2009 19).}
\]

Elsewhere, he puts it in another way: if someone has power to make a change that he or she can see will reduce injustice in the world, then there is a strong social argument for doing that (Sen 2009 205). Indeed, although sometimes the capabilities approach is presented solely as a moral theory, this is inappropriate. As used in this dissertation, it is a normative political theory.

For Raz, ‘any moral theory allows for the existence of rights if it regards the interests of some individuals to be sufficient for holding others to be subject to duties’ (Raz 1984 182). The position here runs also in the other direction: that being held to duties arises on the basis of the meeting of capabilities. This can be seen, perhaps, through the strong words of Jeremy Waldron, who writes that arguments for basic rights satisfaction should be put in terms of ‘How dare you’ rather than ‘Please may I’ (Waldron 1993 21). That is, so long as someone has basic capabilities, he or she is part of enabling others to secure basic capabilities. This is also reflected in Shue’s priority principle (cited above) (Shue 1980 115). Where this is not done, it should be seen as a fundamentally unjustified trampling. A person is, then, required to contribute to meeting others’ capabilities insofar as his or her own capabilities allow, and society would need to be so-designed as to allow for this.

Charles Beitz criticises the Capabilities approach. He believes that the focus on the beneficiary of the rights limits what can be said in three key areas (Beitz 2009 65):

- Extent of failure or default domestically that would trigger protective or remedial action by outside agents;
- Selection of which agents should act; and
- Nature and demandingness of reasons for action for these agents.

However, a capability approach does not focus solely on the beneficiary of the rights in the relevant sense. Capabilities are considered insofar as these are available for people, considered as both
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burden-bearers and rights-holders. In this sense, the focus is on something more like social capability (though this does not stop it being about individuals).

1.4.4. Capabilities motivating rights

Capabilities motivate rights in two ways, based on the content of the capabilities for the rights-holders, and for the burden-bearers. Indeed, the capabilities approach offers a useful means of developing rights, in the more complex way suggested by Waldron, (rather than mere pair-wise related listings of rights/duties). There are a number of advantages with this approach: (1) it allows a theory of rights and duties to be intertwined in capability, (2) it avoids the neo-colonial/cultural relativism challenge (discussed below), (3) it responds to ‘adaptive preferences’ (also discussed below).

The UNDP describes human development as a process of enlarging people’s choices (Law and Widdows 2008 312). That the capability approach avoids culturally relativistic criticisms can be seen by considering (and rejecting) Daryl Mollendorf’s argument for opportunity. He argues that equality of opportunity would be reached if ‘a child born in rural Mozambique would be statistically as likely to become an investment banker as the child of a Swiss banker’ (discussed in Brock 2009 59). However, this is too culturally specific. One way to remedy the situation is to focus on high status positions more generally. This leads to Simon Caney’s suggestion that ‘global equality of opportunity requires that persons (of equal ability and motivation) have equal opportunities to attain an equal number of positions of a commensurate standard of living’ (as referred to in Brock 2009 59). Gillian Brock is concerned with the implication that A and B would have sufficient equality of opportunity, with the following opportunity sets:

A could be: {doctor with WHO, reporter for CNN, banker for IMF}

B could be: {witch-doctor, story-teller, circus performer}

She argues that, even if both of these lists are valued equally, they are different in terms of their power to influence the public policy and global institutions that shape their lives. That said, if obligations arise from capabilities, from powers, then this should eventually cancel out. The way current institutions exist, the threshold is low, and comparison is stark. However, those with much capability have power in Sen’s sense, and so have responsibility to ensure capabilities for those without. This would be necessary to move people above Nussbaum’s threshold. Thus both senses of capability are important.

The Capability Approach also deals with the paternalism problem, because it allows that people choose what to do with their capabilities (e.g. Nussbaum 2011 107). Meanwhile, it responds to the
criticism of neo-colonialism. First, the current literature started in India and developed internationally (Nussbaum 2011 106). Second, it does not base itself on a theoretical concept like ‘human rights’, which arises from a particular tradition. Instead, it asks a question that real people ask themselves: ‘what am I able to do and be? What are my real options?’ Proponents of the view argue that it is implausible to suggest that there are people that never asked themselves these questions (Nussbaum 2011 106). Finally, capability theory is able to overcome adaptive preferences, by asking ‘what am I able to do and be’, rather than evaluating the options available, in terms of desert or indeed anything but capability.

1.5. Problematising rights

Some common problems in developing a rights-based theory can be addressed more easily using the capabilities approach introduced above. This section discusses this for some key areas. It demonstrates that the capabilities approach can answer the difficult questions relating to which rights are basic, and who has obligations to secure those rights. It can also respond to standard criticisms of rights theory.

1.5.1. Which rights?: interest, basic functioning, and ruining lives

Joseph Raz's interest-based account states:

‘X has a right’ iff (1) X can have rights, and (2) other things being equal, an aspect of X’s well-being (his interest) is sufficient reason for holding some other person(s) to be under a duty’ (Caney 2005 73, referencing Raz’s Morality of Freedom).

As it stands, this is too vague, including diverse interests, leading to different sorts of obligations. This dissertation is interested in the most basic of these. Basic functioning theories root this interest-based account in what is needed to facilitate a right to life, broadly understood. One way to see this is as what is needed for performing four basic social roles: citizen, parent, householder, and worker (Brock 2009 64). However, the basic functionings can also derive from more basic aspects of merely being human. On this basis, securing rights is about enabling functionings. A key problem with this is that the focus on well-being or interest requires an unambiguous way of expressing interest: either that persons can express what they see as in their interest, or that third parties can paternalistically promote interests. However, there is no universal agreement about which needs are basic, and indeed this may change as general levels of functioning alter.

For this reason, it is better to focus on what humans need to put them in a position of capability to function (Nussbaum 2003 37). However, the resulting definition of basic human needs depends upon the definition of human adopted, and answering the question: how basic is basic? (Jones 1994
That said, just as the fact of dusk does not stop day being different to night, this does not deny that some rights are basic and others not. That is:

'A right to subsistence would not mean, at one extreme, that every baby born with a need for open heart surgery has a right to have it, but it also would not count as adequate food a diet that produces life expectancy of 35 years of fever-laden, parasite-ridden listlessness' (Shue 1980 23)

A second problem with interest-based accounts is that they are question-begging so that the importance of interest (and of someone else's interest) itself needs justification. A third, related, problem is that, since interests clearly conflict (e.g. when resources are scarce or where I need you to do something for me that you do not want to do), an account built on interests as discrete elements like this must inevitably conflict (Waldron 1993 203). And fourth, this interest-based account is unable to specify who should meet the interests described. These problems did not arise in the case of capabilities, since the requirement to meet capabilities is based partly on having the capability to do so.

Henry Shue's discussion of duties associated with basic subsistence is useful:

‘[T]he basic right to subsistence involves at least the following kinds of duties:

I. To avoid depriving

II. To protect from deprivation
   1. By enforcing duty (I) and
   2. By designing institutions that avoid strong incentives to violate duty (I).

III. To aid the deprived
   1. Who are one’s special responsibility,
   2. Who are victims of social failures in the performance of duties (I), (II-1), (II-2)
   and
   3. Who are victims of natural disasters’ (Shue 1980 60).

Traditional inalienable rights theory makes moral right dependent on each person's inalienable right to his life, liberty, and pursuit of happiness. Governments are instituted to secure these, so each person under a civil government has equal and unconditional right to them (Brown 1955 208). Although basic functioning interest theories ostensibly promote something as close to mere survival as possible (problem also raised, e.g. by Ingram 1994 16), this is intended only as a starting point (e.g. Shue 1980 page). Beyond mere survival, however, it is difficult to see how this sort of account can avoid being overly prescriptive about what is to be valued for a human life (e.g. for X, family life
may be vitally important, while for Y, financial independence is crucial). This is where talk of capabilities can help. What becomes important is then what a person can do or be. However, it remains to be established what level of capability is basic.

To resolve this, some theories start with the question: what would ruin a life? The idea is that, while it is difficult to establish uncontraversially what goods are needed, it is easier to agree on what is too awful (Mandle 2006 52). Michael Ignatieff famously writes: ‘people from different cultures may continue to disagree about what is good, but nevertheless agree about what is insufferably, unarguably wrong’ (Mandle 2006 52, quoting Ignatieff in Human Rights as Politics and Idolatry). Related to Nyamu-Musemba’s argument from struggle, this relies on the idea that it is easier to pick out what is unacceptably violated than to use abstract reasoning alone to derive goods. However, looking at what would ruin a life risks being both too narrow and too broad. Consider how the recent Paralympic Games showcased high levels of capability despite disability that some might consider life-ruinous. On the other hand, rape is almost unanimously accepted as a violation of rights, with the general acceptance that rape ruins a life. However, since people are able to become ‘survivors’ and find a way to live positive lives after rape, such arguments using life-ruination are subjective. This sort of argumentation can be made for most core rights. Indeed, it can be made for most of the six basic rights listed by Jon Mandle in response to this comment by Ignatieff (Mandle 2006 52).¹⁹

Interest, functioning, and life-ruination accounts of rights have difficulty providing flexible, non-arbitrary and non-paternalistic allocations of rights, yet they each provide useful ways of demonstrating and testing the importance of rights. The capability approach is able to overcome the most serious difficulties shown in these accounts.

1.5.2. Whose obligation?: contract, struggle, shared humanity, sympathy and a sense of justice

Consider now the perspective of the one with the burden to secure the rights. Although purely deontological theory has been rejected above, it is useful to note Kant’s concern that in humiliating the humanity in someone else, a person denigrates humanity generally, including that in himself or herself. Thomas Paine builds his theory of rights on the fact that he feels distress at others’ suffering (Paine [1971] 1985). This sympathy at others’ suffering and sense of injustice when perceived rights are trampled are arguably the basis of the human rights movement (e.g. suggested by Clapham 2007 9), and theorists in a number of camps draw upon sympathy and a sense of injustice to support their theories (e.g. Rawls, especially in Political Liberalism). Given what Hume has told us about the need

¹⁹ (1) physical security (including bodily integrity), (2) due process and rule of law, (3) political participation, (4) conscience / expression / association, (5) minimally adequate share of resources, (6) basic education.
for sympathy to motivate moral actions, this can seem to offer backbone to theories of rights and to strengthen Henry Shue’s earlier comment about justifiability. This sort of theory states explicitly that rights are important because we feel they are. However, whether or not this works on an individual level (people are also motivated to perform nasty acts), another layer of reasoning is needed to make it work on an institutional level.

Some theories are more explicit about, and indeed make use of, the complex relationship between rights-holders and burden-bearers. The most common form of this is a contract theory, however struggle and vulnerability theories are also important. A hypothetical contractarian account (e.g. Rawls, Barry, Caney), where assumptions are made about how people would choose, can seem too abstract to ground anything, unless empirical evidence is offered regarding what people actually would choose. To resolve this, Frolich and Oppenheimer interviewed people in various countries. Asked to rank four options, subjects chose Rawls’ principle in about 1% of cases (discussed in Brock 2009 55). The most popular theories were those offering a guaranteed floor constraint in income (this was chosen in 78% of cases). Also important is the mode of agreement. Frolich and Oppenheimer’s study involved both initial surveys and then the monitoring of focus groups. They found that in 74% of cases, individuals had initially preferred a principle that was different from that chosen by the group (Brock 2009 56). This shows, in fact, that the mode of choice significantly affects the outcome. That is, Rawls’ contractarian principle of workable consensus would give rise to different outcomes from Harsanyi’s isolated utilitarian impartial spectator. This is relevant to considerations about evolving preferences (see Section 1.6). The contract itself does not, however, provide a useful justificatory device, since the justification given to the parties in the hypothetical contract are similar to justifications that would have to be given anyway. Finally, contract does not reflect how societies actually are set up (Waldron 1993 48), and so is an inappropriate way to justify society.

What I call ‘struggle theory’ is more closely related to how formal rights arise in the world, asserting that rights can only be seen and understood in terms of struggle. On one hand, struggle theory is psychological (struggle provides a means to discover rights), but does not contribute to their production. On the other hand, struggle can say something more fundamental about the nature of rights. Struggle is best seen as part of the relationship between right-holders and burden-bearers, since they all participate in the struggle in different ways.

For Celestine Nyamu-Musembi, rights are ‘shaped through actual struggles informed by people’s own understandings of what they are justly entitled to’ (Nyamu-Musembi 2005 31). Rights, then, are justified because of the real-world process in which they have arisen. This is problematic in two
respects. First, it is arbitrary which principles have been successful, and may depend upon the power behind the struggle. Second, the struggle theory only takes into account rights where the potential rights-holder(s) have recognised that they are subject to rights, ignoring ‘adaptive preferences’. That is, persons accustomed to disadvantage may adjust their preferences (Nussbaum 2000 99), perhaps considering themselves unworthy of the rights Nyamu-Musembi requires that they struggle for.

Nyamu-Musembi’s account of an actor-oriented approach to rights is attractive in two main ways. First, relating to the life-ruinous account above, it is only through deprivation of rights that it has been possible to see what rights there are. Mandani writes: ‘[w]ithout the experience of sickness, there can be no idea of health. And without the fact of oppression, there can be no practice of resistance and no notion of rights’ (quoted e.g. in Kabeer 2005 9 and Nyamu-Musembi 2005). Second, rights are not intended to govern life entirely, but are only to be called upon when society is inadequately securing decent conditions of life. They need to be struggled for, because their realisation represents the end of the struggle. That is, ideally, there would be no need to call upon formal rights, but until such a time, they must be found through struggle, as they are those things whose violation is unacceptable.

Robert Goodin ties obligations to vulnerabilities, so that obligations arise where persons are in a relationship of vulnerability to others. In this way, he justifies state boundaries from a cosmopolitan utilitarian starting point. His 1985 book, Protecting the Vulnerable, did two things important here. First, it directly addressed the derivation of special obligations between citizens. Second, it opened debate into the implications of this for obligations towards resident foreigners. Goodin argues that, although all individuals globally are equally important in the global utilitarian metric, our special vulnerabilities give rise to special relationships. A child is particularly vulnerable towards its parents, as are students towards their teachers, giving parents and teachers special duties.

In the same way, Goodin argues, members of a shared institutional scheme, or state, have special vulnerabilities towards each other, and are in a special position to support each other. Goodin argues that there may then be special obligations towards compatriots. However, in 1988 he argued that his justification for these ‘special obligations’ towards citizens shows they are not actually so ‘special’ and can be overridden (Goodin 1988). Key to this is the notion that what is important in rights/duties are the relationships between right-holders and burden-bearers. This is best characterised, however, through the notion of capability, which entwines both the allocation and the content of the rights/duties simultaneously, and which forms the basis of this dissertation’s theoretical framework.
1.5.3. Reasons for rejecting rights: neo-colonialism, and impoverished theories

Two key types of ways that rights are rejected are relevant here: accusations of neo-colonialism / cultural relativism, and viewing rights theories as impoverished. Conservative communitarian and socialist collectivist criticisms (Ingram 1994 13) criticise an enforced list of individual rights. These become less problematic if rights are seen as a list of claimable individual goods, as presented above, and will be developed.

Rights theory (especially human rights), is often seen as emerging from a western theoretical framework, and rights-promotion, therefore, as a neo-colonial project of spreading western values. However, this seems to reflect an outdated orientalist world-view. First, rights in some form appear in many traditions (e.g. see discussions in Sen 2005; Appiah 2005; Cohen 2004), and although justified differently, they basically lead to similar conclusions – rights to bodily integrity, basic bodily needs, spiritual growth, and interaction with others in families and communities. It is necessary, then, to separate the theory of rights from the modern-day enactment of those ideals.\(^{20}\) Thus, while rights may indeed be misused, rationalising coercion by hegemonic power, this is a misuse. The fear that rights may be misused in this way is not a reason to scrap what is otherwise a positive and important system (Beitz 2009 202; 2001 280). Second, the conception of rights developed in this dissertation is translatable among many theoretical and contextual backgrounds. The Capabilities Approach was developed by Indian economist Amartya Sen, and arises also in Ancient Greek and other theoretical backgrounds. Moreover, as Nussbaum notes, it is hard to imagine any human who has not wondered, ‘what am I able to do or be?’.

Joseph Raz argues that rights-based moral theories are necessarily impoverished, and as a consequence, are ‘unlikely to provide adequate foundation for an acceptable humanistic morality’ (Raz 1984 183). Raz is concerned with three types of impoverishment. First, and primarily, he is worried that there are duties other than those tied to rights (Raz 1984 184). Following from this, Raz is worried that rights do not allow for superogation. This will be overcome in the normative political theory under discussion here, for two reasons. First, we are not concerned with judging specific acts, but more we are concerned with rights as minimal conditions for legitimising political institutions. Second, we allow that many different arrangements of political institutions may arise, all of which may ensure rights-satisfaction. This will be discussed in more detail in due course.

The third way that Raz believes rights-based moral theories to be impoverished is that they cannot ascribe moral value to pursuing virtue for its own sake, since everything will be tied up in duties.

\(^{20}\) as one should separate Marxist theory of Marxism from the enactment of Communism in Russia and China, or Judaism from Israel
Although this may be more of a problem for personal morality than for the justification of political institutions, political institutions can be so-designed to enable moral activity and, indeed, to promote it. That this may not be possible is part of a misconception that rights-based theory needs to be in the form of a list of rules. It is necessary to be explicit, then, about the role that rights will play in the theory under discussion. Rights theory here is not intended as a moral theory per se, but as a normative political theory. It is intended to motivate institutions, not people. Of course, this also means that it must motivate individuals in the creation of institutions, since political institutions are motivated by individual concerns. Mackie notes that: ‘[w]hen we think it out, therefore, we see that not only can there be a right-based moral theory, there cannot be an acceptable moral theory that is not right-based’ (Mackie 1984 176).

Rights theories are, then, essentially driven by a commitment to promoting what is good for humans. Theories vary with regard to how to establish what is important in this regard, and, by extension, their conclusions vary regarding what is important. This section argues that, while rights are crucial to theorising about liberal society, this must be done in a complex, evolving, and often informal, way, rather than through traditional (in)exhaustive lists or homomorphisms onto duties. Nietzsche is accurate that much conventional morality is composed of attempts by the powerless to constrain the powerful (e.g. Nietzsche 1st essay on genealogy of morals though he sees this as a negative thing) (Shue agrees, 1980 18). Rights are a key way that this is done. Moreover, ‘capabilities’ provides a powerful way to explain how rights can be justified, can work, and can respond to standard criticisms.

Part III: Moving on from theory now, and the world as it is today

1.6. The institutional role in society’s evolution and the end of formal rights: Dynamic justice

There are two parts to the capabilities approach developed here: the immediate goal of promoting capabilities in each decision and action, and the longer aim of developing a society with better conditions for securing capabilities. In practice, this means enabling the evolution of society towards a situation where, in securing one’s own capabilities, one thereby secures those of others. The focus is on whether individuals have the capabilities discussed above, rather than whether this is written down anywhere in the form of laws, for example.
1.6.1. Rights as legitimising conditions for society: two levels of legitimation

Given the fundamental unit of justice is the individual person, the underlying aim of justice must be to promote what is good for individuals. This is diverse and changing but broadly, a just society, on the first level, is one securing capabilities for those vulnerable to it. For Charles Beitz, the project of establishing rights is the project of establishing what would be needed to legitimise society: ‘we must understand international human rights as stating, or trying to state, something more like necessary conditions of political legitimacy, or even of social justice’ (Beitz 2003 39, 44). This is similar to Rawls’ idea of rights-satisfaction (or, rather, primary goods) as the standards for ensuring a society against external intervention, but the focus, instead of being on goods, is on what goods do for humans (Sen 1979 218). Rights, then, might be seen either as important, and therefore crucial to the legitimation of a political order, or as important because they legitimise a political order. The reality is probably a bit of both.

For Nussbaum, the purpose of politics is to bring as many people to a basic level of capability-functioning as possible (Nussbaum 1999 42). Elsewhere, she notes that the standard account of the purpose of a government is to enable people to live a life with human dignity (Nussbaum 2011 64). This is described well by Aristotle, who notes that political planners need to understand what human beings require for a flourishing life – their capabilities (Nussbaum 2011 125). According to this theory, then, though government is fundamentally important to people, the current set-up is arbitrary. It is important also to recognise the distinction between: ‘what rights people have and the matter of what institutions should be used to secure those rights, that is, to avoid confusing the general case for rights with the case for a particular form of institutional provision. In particular,’ the case for rights is not exhausted by the case for bills of rights’ (Jones 1994 226). Rights need not translate directly to formalised rules,\(^2\) but must be enabled through institutional arrangements (e.g. Waldron 1993 31).

Understanding that it is more important that a right be secured than that it be claimed is crucial to the connection between two levels of legitimation. While a ‘political approach based on ideas of human capability and functioning’... helps us ‘to construct basic political principles that can serve as the foundation for constitutional guarantees to which nations should be held by their citizens’ (Nussbaum 2000 298), it is important to recognise that both of these levels functioning terms of both internal and external legitimation. Gillian Brock comments that the legitimacy of any governing

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\(^2\) This is controversial. E.g. Steiner presents rights as constituted by rules, arguing that the rules of moral rights are those of justice (Steiner 1994 56).

\(^2\) Dworkin, though focussing on law, recognises the importance of social rules alongside explicit legal principles (Dworkin 1991 46). For him, this is in the context of case law, which provides a good example of how it is not only important for justice what precise laws are laid out, but also what sort of social norms exist.
authorities we choose will depend on their ability to protect our vital interests (Brock 2009 52). The substance of the practice of the government, then, is key for Brock, while choice procedures and democracy is key for others. This chapter considers the two levels of the first sort of legitimation – that is, the emergency provision of rights (discussed above), and then the development of a society in which this is not necessary (discussed below).

1.6.2. Capability and human capital

The notion of 'human capital' ties easily into the idea of capability, but care needs to be taken to keep human capability as primarily important, perhaps enabling and enabled by human capital. 'Human capital' refers to human-based resources – people's abilities, skills, and contribution to economic wealth. The phrase, 'human capital', is itself problematic, apparently commodifying humanity, and it is important to avoid seeing human qualities only in terms of relevance to promoting economic goods (Tomasevski 2003 33; discussed also in Legrain 2007). Talk of human capital puts an emphasis on the contribution to production processes, while human capability emphasises the possibility for people to lead lives that they have reason to value (Sen 1999 293). These are closely related, but importantly different. This will be discussed particularly towards the end of this subsection.

The notion of human capital lends itself well to discussion within the human capabilities approach. It has already been noted that spending on human development (education, health, etc) for all is crucial to economic success (Sen 1999 143). This can be seen in Mahbub Ul Haq’s translation of his time as Pakistani finance minister to setting up the UNDP. He argued that the mantra of increasing GDP without ensuring a good spread of human development left Pakistan vulnerable to collapse into extreme poverty as soon as war meant that the minority who controlled the GDP left (Ul Haq 1976). This can be compared to what was done in various East Asian countries. For example, Japan concentrated very early in its development on mass education and health care. This has enabled the country to become remarkably successful very quickly (Sen 1999 143). That is, prioritising human resource development has been crucial to these countries to improve general human capabilities (Sen 1999 144).

There is, then, a virtuous circle. Social change (expansion of literacy, basic health care, land reform) enhances human capability to lead worthwhile and less vulnerable lives (Sen 1999 260). But at the same time, improved productivity and employability of people leads to increased human capital, and increased possibility and motivation for social change. Sen notes this:

23 E.g. (Barro 1996 22) offers detailed analysis of development in Hong Kong and Singapore.
The interdependence between human capability in general and human capital in particular could be seen as being remarkably predictable (Sen 1999 260).

Further, the increasing importance of the human capital perspective has helped to raise the perceived relevance of capabilities (Sen 1999 294). That said, already Adam Smith in the Eighteenth Century, was arguing that education and so increased capability was crucial to economic development in a state (Sen 1999 294). Further, conservative libertarian, Robert Barro, notes the importance of human development for economic development more generally. He also argues that changes in development lead to changes in political systems – most notably, towards democracy (Barro 1996 1).

The key difference, however, between the notion of ‘human capital’, and that of ‘human capability’ is with regard to means and ends, where human capital is a means, and a by-product, while human capability is the end. Sen puts it like this:

> The acknowledgement of the role of human qualities in promoting and sustaining economic growth – momentous as it is – tells us nothing about why economic growth is sought in the first place. If, instead, the focus is ultimately on the expansion of human freedom to live the kind of lives that people have reason to value, then the role of economic growth in expanding these opportunities has to be integrated into that more foundational understanding of the process of development as the expansion of human capability to lead more worthwhile and more free lives (Sen 1999 295).

This must have a significant practical bearing on policy. An increase in levels of education and health causally influence effective freedoms people actually enjoy and at the same time play a role in promoting productivity, economic growth, and personal incomes. This will, in turn, enable an increase in people’s effective freedoms. This can be summarised by considering three key elements in the role of capability (derived from Sen’s discussion at Sen 1999 296):

1. Direct relevance to well-being and freedom of people;
2. Indirect role through influencing social change; and
3. Indirect role through influencing economic production (human capability as human capital).

This dissertation emphasises the importance of seeing justice and normative questions in terms of promoting human capabilities, rather than in terms of some undefined abstract economic force. It is useful to talk of human capital, but only when this is done with explicit understanding of its human content, and its human benefits. A state’s human capital is more than a measure of numbers of people, and their age, health, and available man-hours. Also crucial are their capabilities: their level
of education, their willingness to risk and to work, and their sense of commitment to the community of the state, which will in turn affect how they perceive their self-interests and their position within the state. Central also are people’s understandings of what they want to do with their capabilities. So-constructing institutions that make it preferable to choose actions that promote increasing capabilities more generally is key to this. The notion of human capital will be important to the discussion in this dissertation, but it is essential to bear in mind throughout that ‘human beings are not merely the means of production, but also the end of the exercise’ (Sen 1999 296).

1.6.3. Complex and evolving perceptions of interest (‘adaptive interests’)

Another problem with the theories discussed so far is the tension between the paternalistic sense of giving people what is good for them, and dealing with individual perception of interests when interests in fact change or seem wrong. ‘Adaptive preferences’ usually refers to preferences people develop in response to privations, though in this dissertation it refers more broadly. Rabindranath Tagore offers a useful illustration, in this extract from ‘Letter from a Wife’ (quoted in Nussbaum 2000 111):

The doctor was rightly upset about [the unsanitary conditions in the women's quarters]; but he was wrong in one respect. He thought that it was a source of constant pain for us. Quite the contrary ... To those with low self-regard, neglect does not seem unjust, and so it does not cause them pain. That is why women feel ashamed to be upset about the injustice they encounter. If a woman must accept so much injustice in the life ordered for her, then it is perhaps less painful for her to be kept in total neglect; otherwise, she is bound to suffer, and suffer pointlessly, the pain of injustice, if she cannot change the rules governing her life. Whatever the condition that you kept us in, it rarely occurred to me that there was pain and deprivation in it.

As mentioned above, this also represents a limitation of the struggle theory, and can cause problems for the measurement of well-being required for Raz. For example, Sen documents a study of health reports of widows and widowers in Bengal. It found that, while widowers complained a lot, widows had few complaints. This could be taken to mean that the situation for widows was better than that for widowers, but independent medical assessment suggested the contrary (discussed in Nussbaum 2011 54,5). For Nussbaum and Sen, this is a problem particularly in understanding the preferences of women, who, often and long subordinated, may adapt their desires and feelings of self-worth (e.g. Nussbaum 1999 10).

Adaptive preferences in this dissertation refer more widely than those arising from privations alone. In fact, preferences will always be affected by context, whether in terms of what goods are socially
valued, or what actions are socially acceptable. A sufficiently flippant example relates to footwear. Some British women choose to wear extremely uncomfortable, even painful, shoes because these shoes are considered beautiful. This adaptive preference allows the wearer to be satisfied with lower basic functionings (such as mobility and lack of pain). This is seen as acceptable on the basis of socially produced norms.

Rights to functionings are also inappropriate in that they do not sufficiently account for the power of rights to enable change. Indeed, Sen writes: ‘Political rights are important not only for the fulfilment of needs, they are crucial also for the formulation of needs’ (Sen 1994 36). This is discussed by Nussbaum at (Nussbaum 2000 96). Further, persons may value different modes of functioning at different times.

A theory of justice must be able to take into account this evolving nature of human functioning, as well as the complex way that people view their own interests. It must also acknowledge the way that institutions can, and do, manipulate these changing preferences. As has been shown, capability-based theorising gives us a useful way in which to build such a theory.

1.6.4. Directing preference evolution

Sometimes preferences track genuine human goods and sometimes they do not. Further, sometimes preferences are tied to individual rational interest and sometimes they are not (this is discussed particularly in the social choice theory literature, e.g. Heap et al.). Worrying that her thesis relies too heavily on altruism, Nussbaum examines how and why altruistic motives arise and so how to cultivate them (Nussbaum 2011 96). In a 1997 article in Econometrica, Sen discusses three reasons for choice behaviour that are not obviously interest-based. He gives the example of a person entering a party, choosing which chair to take. This person may not take his or her preferred chair (the chair he or she would like to be given if he did not have to make the choice himself) for three reasons (Sen 1997 748):

1. Reputation and other indirect effects (not wanting a reputation as a chair-grabber)
2. Social commitment and moral imperatives (others may prefer that chair)
3. Direct welfare effects (avoiding the nasty looks received if taking a certain chair)

This dissertation suggests that these elements of choice behaviour, and how they evolve, are crucial to understanding how to develop a society securing certain rights.

Sociology and anthropology literature offers information about some local normative frameworks in order to test the overall normative framework being developed here. Ruth Benedict writes:
I spoke of societies with high social synergy where their institutions insure [sic] mutual advantage from their undertakings, and societies with low social synergy where the advantage of one individual becomes a victory over another, and the majority who are not victorious must shift as they can (Maslow 1971 p202, quoting Benedict).

That is, a high synergy society is ‘one in which virtue pays’. The argument, then, is that:

One can set up social institutions which will guarantee that individuals will be at each other’s throats; or one can set up social institutions which will encourage individuals to be synergic with each other. That is, one can set up social conditions so that one person’s advantage would be to another person’s advantage rather than the other person’s disadvantage. (Maslow 1971 p213, 4).

Benedict presents this, not as a moral principle, but as a fact. In healthy societies, ‘[i]t would not be true to say that they place the common interest above individual interests; they regard their individual interests as best served when they act jointly’ (Benedict 1943 446). This is a sentiment also expressed in (Freeman et al. 2007), noting that a company should be run for the interests of all its stakeholders, not for ethical reasons, but better to further the company’s and financiers’ interests. It is necessary, then, to consider both how people are now, and, given their functionings and preferences are not fixed, how to help them develop preferences conducive to a more just society.

Building a system in this way seems both healthier and more sustainable: healthier because it facilitates society/community/a better sort of welfare; more sustainable because, rather than a society set up such that one must benefit at another’s expense (with average benefit less than the highest), this system means moving towards a scenario where all increase in their capabilities together.

Economists, Akerlof and Kranton, develop an economics where ‘tastes vary with social context’, through discussing a utility function considering contribution to perceived preference-satisfaction (Akerlof and Kranton 2010 6). The iterative nature of how people value certain capabilities is observable through male dress-wearing. In the UK, wearing a dress elicits different reactions depending on whether the dress-wearer is male or female. A man who considers a summer dress to be more comfortable and more attractive than traditional male clothing may be dissuaded from wearing a dress for social reasons. These factors are not, however, fixed.

24 For a fictional demonstration of differing gender norms, see Anne Fine’s classic feminist children’s novel, Bill’s New Frock (Fine 1989).
Akerlof and Kranton explain that the self-image of an individual, j, is contingent on the actions of himself and others, and the extent to which these have an effect is determined by j’s assigned social categories (e.g. middle class British man), his given characteristics (e.g. tall, black, male), and the set of external prescriptions of which behaviours are appropriate for people in each social category in various situations (e.g. trousers-wearing is acceptable for both men and women, dress-wearing is considered odd for men). Appropriate behaviour prescriptions change over time, however. First, as individual j and others in this society act and react, the effects of these behaviours change. Suppose that one man wears a dress in SibleHedingham. This is an anomaly, and will not significantly affect cultural norms. If a second, third, fourth, perhaps one hundredth, man wears a dress, dress-wearing becomes decreasingly extraordinary for men in SibleHedingham. Once, say, half the male population, is wearing dresses, there is, presumably, a cultural shift (of course, this is contingent also on wider society). Thus, as agents act, their social categorisations change, and although each agent’s physical characteristics may remain constant, their meanings change, altering appropriate behaviour prescriptions. Certain key individuals may have more effect than others. If influential men, or men that particularly exude some notion of masculine identity, start wearing dresses, then the norms will shift more quickly. Consider, for example, David Beckham’s skirt-wearing incident in 1998, which led to a spate of male sarong-wearing in the UK.

Other cultural norms can be similarly altered. Michael Billig describes how the state uses its powers to alter action and preferences, through a mechanism he calls ‘banal nationalism’. While many in stable societies may seem to take their nationality for granted, Billig argues that this is because of an unnoticed constant re-creation of the nation. He argues that the nationalism that erupts in times of crisis draws upon something that is quietly nurtured daily in a mundane, ‘banal’ way (Billig 1995 5), fixing appropriate behaviours and social categories. Processes like this are central to what this dissertation sees as the second level of justice. I argue that these processes need to be directed towards ensuring informal capability-rights-promotion, rather than just to the promotion of arbitrary categorisations. This will be developed in Subsection 1.6.5.

1.6.5. Second level legitimation: rights satisfaction in the future
The second level of societal legitimation concerns how the institutions of society facilitate positive evolution towards a situation where more capability-based rights are satisfied. This will involve a movement towards a society whose institutions create conditions facilitating capabilities without

25 While working in this small village (http://www.siblehedingham.com/) in Essex, S. England for six months in 2006, I never once saw a man in a dress, though I heard negative references to men wearing dresses.

26 David Beckham is an iconic footballer, playing for the English national team. Stories of his sarong-wearing is revisited in this recent article from Reuters: http://uk.reuters.com/article/idUKL2718032020070427?pageNumber=2&virtualBrandChannel=0
formal enforcement. Society is not fixed. While Part II discussed what can perhaps be seen as emergency rights-enforcement, the second level legitimation explores the state's power to ensure better future conditions for justice. Waldron notes that '[s]ometimes liberals are accused of taking the beliefs and preferences of individuals as given and hence of ignoring the fact that forms of society may determine forms of consciousness and the structure and content of preferences' (Waldron 1993 41). This dissertation avoids this, seeing society as fundamentally changing, arguing that we can affect this positively. This is crucial if theory is to help us move towards the liberal ideal of individual autonomy, equality, and freedom, and explain the changing relationship of these with fraternity.

This has two sides. First, there is the concern that within comprehensive theories like Rawls', 'there is no procedure' ... 'to check whether the institutions are, in fact, generating the anticipated results' (Sen 2009 85). Second, there is the fact that the possible institutions and the desirable results change and that this can be directed. For both of these reasons, an iterative system is required. In this, at each point, the society is tested, establishing both whether the criteria chosen have been producing desired results, and also whether the context in which they act remains constant, or whether new institutions and new aspirations need formulating. Gillian Brock writes: 'all nations are 'works-in-progress', and their characters change' (Brock 2009 197). By this, she means that societies are changing culturally, so that new individuals, with new ideas and customs do not 'harm' or 'dilute' culture, but participate in its evolution. This notion of 'works-in-progress' can be usefully adapted to talk about the fundamental notion of the evolution of social rules and norms in terms of rights-satisfaction.

Various mechanisms promote capabilities in this way. For example, ritual hospitality, generosity, mutual-reciprocity relationships, cooperative techniques of food-sharing, traded income and property taxes (Maslow 1971 213). Serge-Christophe Kolm offers a taxonomy of reciprocity in a society. If A bestows a gift on B, then Kolm labels three potential following acts: \( B \rightarrow A \) ('simple reciprocity'), \( B \rightarrow C \) ('generalised reciprocity'), and \( C \rightarrow A \) ('reverse reciprocity') (Kolm 2008 76). Kolm is particularly interested in explaining the second, 'generalised reciprocity'. He suggests that there are three possible motives for such an act: a sense of propriety (perhaps Rawls' 'a sense of justice'?), a like for the person/people, and seeking personal interest (Kolm 2008 97). He considers what happens in a society driven by each motivation, when the motivation is reversed (Kolm 2008 104):

| Table 3: Kolm's reasons for reciprocity |

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27 This is a point made by several theorists, several of which were discussed already above. For example, (Donnelly 1993 21).
<table>
<thead>
<tr>
<th>Interest</th>
<th>Propriety</th>
<th>Liking</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>Sequential exchange</td>
<td>Balance reciprocity</td>
</tr>
<tr>
<td>Negative</td>
<td>Retaliation for deterrence</td>
<td>Revenge</td>
</tr>
</tbody>
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Considering the potential negative outcomes of these motivations makes it preferable, then, to develop a society where rights are distributed on the basis of liking or propriety.

The field of Management Studies also offers much analysis of how people best work together. McGregor offers a now classic pair of sets of assumptions (McGregor 1960, quoted in Boddy 2008 p.502):

**Theory X** assumes people want to avoid work and responsibility, so that they need to be coerced and controlled.

**Theory Y**, assumes people need to be committed to objectives to exercise self-direction (Boddy 2008 503).

In Theory X, management aims to set up sufficient rules and develop mechanisms of successful enforcement. In Theory Y, the goal is instead to ‘set up social conditions in any organization so that the goals of the individual merge with the goals of the organization’ (Maslow 1971 p.246). This is implemented, for example, through the creation of an 'insider' mentality in firms, schools, military academies (Akerlof and Kranton 2010 41), and states (Billig 1995).

Regardless of whether this insider/outsider mentality is needed, the crucial lesson here relates to the slow adjustments of underlying norms. ‘[I]n societies where advantages can be achieved only at the expense of others, the great and powerful are, if possible, even more vulnerable than the weak', since men do not feel free of hindrance and so ‘act with all the furtiveness and the aggression that goes along with serious frustration’ (Benedict 1942 395). The notion of justice sought in this dissertation is not a Platonic, timeless, abstract concept, but one which evolves. It is necessary, then, to capture both the dynamism and the complexity of justice, while retaining a functional concept. In a just society, rights are 'self-liquidating', becoming less relevant as society increasingly guarantees them informally (e.g. Donnelly 1993 21, Marx 1945 27). Bad social arrangements are not natural/necessary (Weinar 2008 9). Understanding how social conditions are produced enables us to develop something better. It is, then, insufficient to seek only to promote individual capabilities,
whether together or separately, though at the same time, promoting rights in the future must not undermine core rights in the present.

Crucial to this dissertation, then, is an appreciation of a state’s role in creating conditions for justice. Selina Chen writes that ‘stable justice is secured by creating a background set of social conditions which can foster the virtues of cooperation necessary for an effective sense of justice and generate the support of comprehensive doctrines for political conception’ (Chen 1996 252). Dynamic justice, then, is not about sudden revolution, but stability. The steady change advocated here maintains and enhances stability. Treating rights as a currency is counter-productive in the process of actually meeting the rights. This dissertation argues that the aim of society is first to secure capability-based rights, and second to ensure a society can emerge that decreasingly needs that enforcement.

1.6.6. Direct policy implications: education as a representative policy area

Education is especially important for social justice promotion in a context where there are non-citizens, for three key reasons. First, education is basic in securing capabilities. Second, education plays a key role in societal evolution. Third, education (especially of children) holds a particularly emotive place among the institutions of the state, as the inclusion of non-citizens is perceived not only to dilute access to a scarce resource, but also to change the nature of the resource that is delivered – and to change the values and norms that are transmitted. Education is important to enabling capability rights in two dimensions. First, having a certain level of education (e.g. literacy) itself represents a capability. Second, educational attainment enables access to other capabilities. Education also plays a key role in societal evolution and setting up the way in which the citizenry is composed. This will make Chapter Five’s examination of education important to examining the institutional- and policy-based implications of the obligations discussed throughout this dissertation.

1.7. Assumptions of citizenry in the literature: from ‘Justice Beyond Borders’, to Justice Within Borders for those excluded from it.

Liberal theories of justice and morality can no longer stop at national borders without justification. There remains, however, an unspoken assumption, even among many apparently cosmopolitan theorists, that co-nationals are due some sort of special treatment (e.g. discussed in Cole 2000). Political philosophy, particularly from the 1960s onwards, can be seen as an attempt to justify the arrangement of states and to find the most just internal structure. While successive philosophers have explored what these ideas mean for international and global spheres, insufficient work has been done to examine ramifications for migration and for those who are non-citizens in a state as a result. Many of the theorists discussed here apparently assume that rights are restricted to a state’s citizenry. Although some may at times discuss immigration or foreigners, elsewhere they use the
word 'citizen' or 'citizenry' without explanation or justification. This is problematic because it does not allow for the justification of the citizenry's composition, and it begs the question of how to join the citizen membership group.

1.7.1. Modes of exclusion from theory

There are three main ways that non-citizens are excluded in the literature discussed. The most common is the assumption of a state-based status quo, so that even apparently radical theory is unable to take into account non-citizens in states defined without them. A second, related, means of exclusion, is to focus only on relations within the citizenry, not including non-citizens among the ranks of the vulnerable and excluded. Finally, sometimes, non-citizens are considered, but only while abroad. Implications of this for when citizens are territorially present are not considered.

Assumed status quo

Hillel Steiner introduces the phrase, ‘magic dates’ to denote a phenomenon, e.g. in terms of property-ownership, and group-membership, where, until some magic date, it was possible to join, or take ownership, but after some magic date, the relation is fixed (Steiner 1994 264). This dissertation begins from the world as it is today because this is where we are now, not because the world today is magically different from at any other date. Theory must constantly shift with regard to the presumed starting point, to take into account changing norms. Rawls declares that the basic structure of society is ‘of basic institutions we enter only by birth and exit only by death’ (Rawls 2005 p.13). Indeed, it is surprising that in these major works defining the structure of society and interactions between societies, Rawls only mentions migration marginally, in one footnote in Political Liberalism and two footnotes in The Law of Peoples. These three references will now be detailed briefly.

In The Law of Peoples, migration is related to escaping economic mismanagement (Rawls 1999 38 n.48), and maintaining religious freedom (Rawls 1999 74 n.17). The former does not, Rawls argues, provide an overriding reason for immigration, and indeed can be limited in order to protect ‘people’s political culture and its constitutional principles’. The latter, meanwhile, provides a reason only for emigration. Indeed, he argues that to promote religious freedom within its borders, a liberal state must allow and assist emigration for religious minorities. These references to immigration, and emigration, respectively, are haphazard and underdeveloped and do not sit well within Rawls’ wider theory of a liberal justice that includes everyone.
In *Political Liberalism*, Rawls recognises that the question of migration is crucial, but puts off considering it:

> Immigration is also a common fact but we can abstract from it to get an uncluttered view of the fundamental question of political philosophy. Of course, immigration is an important question and must be discussed at some stage (Rawls 2005 136 n.4).

He does not in fact consider this further.

Original-position reasoning makes us 'systematically ignore nonparticipants in a given practice' (James 2005 309). For example, Rawls argues that liberal and non-liberal societies in the original position would choose to honour human rights, but allows only 'decent' societies, defined as those respecting human rights, to be represented in the original position (James 2005 311). Indeed, 'Rawls is quite explicitly concerned in the domestic context only with “citizens...normally active and fully cooperating members of society over a complete life” with “physical and psychological capacities within a certain normal range”' (James 2005 309 n49, quoting Rawls). Aaron James accuses Rawls of assuming that 'all reasoning about what social justice requires of us begins from existing practices' (James 2005 285). In itself, this is not problematic. The problem is that Rawls has the status quo at the back of his mind. That is, the restricted options and knowledge available behind the veil of ignorance force the conclusion to resemble how things are. This dissertation agrees with Rawls that '[w]e must always start from where we are now, assuming that we have taken all reasonable precautions to review the grounds of our political conception and to guard against bias and error' (quoted in James 2005 316 n61). However, it argues that we must also be open to significant deviation from this starting point.

Bizarrely, although in her 2009 book, *Global Justice*, Gillian Brock explicitly discusses immigration, and some of the needs and rights surrounding it, she at no point discusses the rights of non-citizens in a state. Throughout sections 6.2 and 6.3, entitled ‘The Current Situation: Are People’s Basic Liberties Well Protected Today?’ (Brock 2009 157-8) and ‘Obstacles to Freedom: Some Analysis’ (Brock 2009 158-61), respectively, she seems to assume she is only talking of citizens. And in Chapter Nine’s discussion explicitly of immigration, she does not discuss the rights of non-citizens within a state, but only the implications for other groups: citizens and others left behind.

Martha Nussbaum also limits her theory of capabilities to citizens. Throughout her work she seems to assume the citizen-composition, and that a state’s obligation is to its own citizens. She uses the word ‘citizen’ without explanation, and does not discuss the relationship of non-citizens to this. For example, in 2003, she wrote that entitlement is for all citizens, continuing: ‘to secure a right to
citizens in these areas is to put them in a position of capability to function in that area’ (Nussbaum 2003 35,7). Indeed, throughout this article, as elsewhere, she does not at any point question why it should be citizens, and does not explain how someone becomes a citizen. This un-questioned use of the word ‘citizen’ continues from her earlier writing (e.g. Nussbaum 1999 6), and through her most recent work (e.g. see Nussbaum 2011 74). Although Nussbaum rejects justice theorising whose scope is limited to citizens (Nussbaum 2011 128), she does not explicitly show how we would get beyond it, and her repeated unexamined use of the word ‘citizen’ is problematic. Part of the project in this dissertation, then, is to use the valuable aspects of Nussbaum’s theory, not least, her criteria for a just society, but giving equal importance to all involved – including non-citizens.

Charles Beitz emphasises the importance of justifying restriction of rights to citizens, but elsewhere takes it for granted. For him, (human) rights just are ‘conditions that the institutions of all domestic societies should strive to satisfy, whatever a society’s more comprehensive aims’ (Beitz 2003 44). For Beitz, then, the very definition of rights is based upon there being domestic society which is bounded. This explains why he is able, in 2009, to explain that in the first instance, institutional protection for rights is to be provided by states, through their laws and policies, where ‘the beneficiaries of these protections are citizens’ (Beitz 2009 85). However, he does not explain how the composition of that citizenry is to be decided, nor how others may enter it. This is a common problem. Daniel Copp, for example, also writes that ‘justice requires a state in favourable circumstances to enable its members to meet their basic needs through a normal lifespan’ (Copp 2005 39, emphasis added).

Ronald Dworkin, meanwhile, discusses at length disputes regarding the particular rights and obligations of citizens, but does not admit or acknowledge the question of who can be a citizen (Dworkin 1991 185). Confusingly, he goes on later to state that ‘[i]f someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so’ (Dworkin 1991 269). Does this mean that Dworkin would allow that the rights of non-citizens could trump the relation of citizenship? Or would he exclude non-citizens, by definition, from such rights? It is not clear from his work.

**Focussing on relations between citizens**

Some theorists focus explicitly on the citizenship relation, but omit to discuss entry into it. For example, David Held declares that ‘[c]itizenship is a status which, in principle, bestows upon individuals equal rights and duties, liberties and constraints, powers and responsibilities’ (Held 1995 66). Marshallian concerns with the citizenship relation itself aside (these will be discussed in due
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course), this glosses over an essentially 'caste-like' 'rank of citizenship' (to use Vlastos's expression, 1984 54). Gregory Vlastos argues that a legal system according all citizens an identical legal status focuses on hereditary nobility or dignity. You are, he argues, unable to lose that rank: 'even a criminal may not be sentenced to second-class citizenship' (Vlastos 1984 54, Carens says something similar at 1987 252). This has the worrying effect of simply excluding non-citizens from the ranks of the relevantly vulnerable.

Nyamu-Musembi, with her focus on the vulnerable, argues (using the words of Anne Phillips) for an understanding of citizenship as 'an active condition of struggling to make rights real' (quoted in Nyamu-Musembi 2005 45), but does not explain how one qualifies to participate in this struggle. However, 'every act of self-legislation is also an act of self-constitution: "We the people" who bind ourselves to these laws, are simultaneously defining ourselves as a "we" in the very act of self-legislation.' (Benhabib 2004 45-48). This tension comes to the fore when needy people move. Even Sen, champion of the vulnerable and excluded, apparently assumes citizenry without explanation. Consider, for example, the section 'Minority Rights and Inclusive Priorities' in his 2009 book, The Idea of Justice. In this section, he talks about democracy theory, but at no point explains who it includes, and does not discuss immigrants or non-citizens (Sen 2009 352-5).

Discussing non-citizens elsewhere, with implications for those who are present

Most theorists of global justice do discuss obligations to non-citizens, but only when they are overseas. This is seen neatly in the work of Jon Mandle, who explicitly discusses non-citizens with regard to political participation (Mandle 2006 86). He notes that the basic right to political participation is a citizenship right. That is, for Mandle, there is no general right to participate in the decision-making processes of other societies, ‘and individuals can properly be excluded from them’. He describes a hypothetical mechanism for allowing neighbouring / allied countries or other foreign groups input when a proposed law would significantly affect them, but concludes that ‘it is not unjust for a constitution to exclude them’ (Mandle 2006 87). He sums this up, ‘[i]n one case, the individual is a member of the collective body in whose name the injustice is being perpetrated, while in the other case he is not complicit in the injustice’ (Mandle 2006 87). In the case of territorially present non-citizens, who are excluded from citizenship, this may also be true. However, such individuals are affected by the policies of the state. Mandle omits to mention them.

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28 And also is not strictly true. Consider the Hamdi example, as well as the ramifications of the Canadian Immigration Law that came into effect in 2009, and the UK 1978 and other Commonwealth Immigrants Acts.
29 For example, also, domestically laudable statements like: 'The natural resources of a country belong, after all, to its people' [as opposed to despots or foreign companies] (Weinar 2008 9) raise the question of who are its people?
Consider, for example, Mark Curtis’s 2004 popular protest book. Although entitled: *Unpeople: Britain’s Secret Human Rights Abuses*, and discussing important violations of human rights in which Britain has participated elsewhere, it does not discuss the ‘unpeopleing’ of people in the UK itself (and does not acknowledge or explain this omission). An example of this is the positive policy of destitution of refused asylum seekers (e.g. Taylor 2009), the indefinite detention of people ‘pending deportation’, without trial and without recourse to other normal justice channels (e.g. LDSG 2009), and the thousand little instances of exclusion to which non-citizens are subjected in the UK, as elsewhere. There are, then, many ways in which non-citizens are excluded from consideration in theory. This dissertation seeks to indicate a way to remedy this.

1.7.2. Some problems

In 1994 Hillel Steiner wrote that, in the case of migration;

arguments for legal restriction that invoke the danger of socially harmful consequences cannot avoid being question-begging if the population over whom harms and benefits are being summed simply excludes some of those who would be affected by the restriction (Steiner 1994 91).

Phillip Cole argues that there is no justification within liberal theory for excluding others from the liberal demos. That is, rejecting open borders means normative political theory ‘comes to an end at the national border’ (Cole 2000 13). He concludes that, if this is so, ‘we have come to the end of political philosophy’. Cole concludes in favour of completely open borders, but he does not explain how this is feasible in practice.

Seyla Benhabib is also critical of how theories of global and international justice have not even considered migration (Benhabib 2004, 2008). Benhabib uses discourse ethics to remedy this, such that ‘only those norms and normative institutional arrangements are valid which can be agreed to by all concerned under special argumentation situations named discourses.’ (Benhabib 2004 13, quoting Habermas 1983). An institution, then, is not valid unless it could be agreed upon by everyone concerned; and indeed, migrants’ needs are often fundamental (life v death/tolerable life v intolerable life) (Singer 1993 256).

There are two further reasons why this is normatively inconsistent. First the fact of international interaction makes it impossible to argue that migration controls stop interaction:

[i]t was at one time possible to describe controls on immigration as a way of insulating citizens from interaction with the people they kept out. Now trade with and investment...
in the migrants’ home countries mean that interaction is an accomplished fact. Policy at the border decides only the form that it will take (Julius 2005 190).

This is also vigorously argued by Beitz, in his 1976 book, cited above. Second, irrespective of other existing interactions, the relationship in border control is problematic because it excludes persons from core rights on spurious moral bases:

[\textit{H}]ow can those who argue for universal principles of justice or for human rights, endorse structures that entail that the rights people actually have depend on where they are or more precisely on which place recognizes them as citizen rather than as alien? (Onora O'Neill, quoted in Cole 2000 138).

Those advocating substantial limits on immigration into a state often do refer to provisions for arrived migrants, while open-borders advocates do not. In 2005, nationalist David Miller referred to a state’s right to develop its state culture (Miller 2005 200), and a concern about population size (both global and domestic) (Miller 2005 201). Echoing concerns of classic communitarian, Walzer, against having a permanent class of non-citizens, Miller explains that a state’s right to exclude comes with the obligation to protect the equal status of all those living within its borders (Miller 2005 205). However, although some communitarians may be explicit about what their beliefs about first admission imply for the obligations towards those individuals once within the state, they leave the question of irregular immigrants unexamined. Walzer would grant citizenship to residents, based upon the state valuing its national identity; and on a society wanting to be the sort that welcomes migrants. Both of these suggest he would advocate naturalisation for irregular immigrants the same as for other migrants, though this seems unfair towards those migrating legally. It also compromises Walzer’s initial reasons for restrictive immigration policies. He argued that national borders that are too open:

(1) Will not allow for patriotism;

(2) Interfere with raising the standard of living of the resident poor; and

(3) Lead to the continual creation of heterogeneous populations which confounds the promotion of moral and intellectual culture with efficiently functioning political institutions (Walzer 1983 37).

Further, Walzer emphasises the principle of asylum – admitting people in dire need, where it is not excessively costly (Walzer 1983 50) – but he does not explain why this dire need should be addressed only in the case of those managing to reach another state’s borders.
Based on his analysis of Rawls, Carens advocates open borders in theory for two reasons. First, he argues that the freedom to move and to choose where to live and work is an important right in itself, essential to the basic liberty that all should have equally; and that any restriction would need to benefit the least advantaged. Second, Carens believes that the freedom to move across state borders is essential for enabling justice and human rights generally. This may be to facilitate the redistribution of resources, through labour migration, leading to remittances, skills-sharing, and self-betterment. It may also be to enable the realisation of human rights, for example, if they are not provided by a person’s home country (e.g. if there is a poor or corrupt government, or if that person wants to marry someone or access cultural resources in another state).

Carens also rejects traditional arguments for restricting immigration:

1. Birthplace is contingent and cannot confer entitlement;

2. Someone would have to show welfare of current citizens would fall below the welfare levels of the potential migrant if he were unable to migrate, allowing liberty to trump economic concerns; and

3. The suggestion that bad things may need to be done to protect culture or history would fail the veil of ignorance test (Carens 1987 261).³⁰

Carens argues, therefore, for a theoretical assumption of open borders. He acknowledges that in the real world, completely open borders are currently impossible, but argues that, if truly embraced, this assumption provides a better framework of understanding for real-world theorising. One aspect of the assumption of citizenry is that there is a right of exit, which is not matched with a right of entry. This is discussed at length in Cole 2000, but there is not scope for doing this here.

Phillip Cole dislikes Liberal theory’s apparent normative distinction between immigration and emigration (Cole 2000 43). Cole states the standard position, that ‘[a] sovereign state has discretionary power over movement across its borders except in two cases: (1) All agents have the right to exit; and (2) Its citizens have the right to enter.’ (Cole 2000 44). Cole’s concern is not only that some agent P can do X but not Y, but that some other agent, Q, can do both. While Barry, Finnis and Dowty offer possible reasons why it may be acceptable to restrict entry, but not exit, they do not explain why this restriction should differ between members and non-members. Carens also omits this aspect of the discussion. Once the asymmetry is so-understood, the paucity of its standard defences becomes clearer. Whatever the relative costs or importance of immigration/emigration,

³⁰ Later, he is ambiguous about this e.g. see my discussion in Bloom 2009.
Cole argues that it is nonsensical to allow only one group, namely citizens, to both emigrate and immigrate freely. He reflects that, while an alien may be occluded from a Liberal state for fear he may be subversive, citizens who actually engage in subversive activities are not deported (Cole 2000 142).

Cole cites an argument of Ann Dummett (Cole 2000 55). Suppose X and Y are neighbouring states, and agent P wants to cross from X to Y. Dummett notes three possible scenarios: (1) P is a citizen of X, a non-citizen of Y; (2) P is a citizen of Y, a non-citizen of X; and (3) P is a non-citizen of both X and Y. If we suppose the standard Liberal asymmetry described by Cole pertains, P only has an unconstrained right to border-crossing in (2). Dummett concludes that the only way to understand this, keeping the Liberal asymmetry in tact, is to assume that the right to emigrate does not entail a right actually to leave one’s state, which seems ridiculous. There are, then, some fundamental problems with discussing migration that need to be addressed.

1.7.3. **De facto privations of rights**
Irrespective of explicit exclusions, non-citizens today are in fact denied rights because of their non-citizenship. This can be even when rights are formally promised. This section argues, in three dimensions, that this is ‘a major equality issue’ (Andrew Clapham’s phrase; 2007 146):

1. Ignorance of the means of accessing rights (language as an exclusionary device)
2. No place to be (parallels with Waldron’s discussion of homelessness)
3. Assumed out of provisions (parallels with Nussbaum’s discussion of women)

**(1) Ignorance of the means of accessing rights (language as an exclusionary device)**

Non-citizens not conversant in the majority language may be unable to access rights, for example, if unable to: speak to GPs, read pamphlets explaining benefits, or read election materials (when eligible to vote)(Bloom and Tonkiss 2013 forthcoming). These privations are also felt by minority-language citizens, but in the case of non-citizens, there may be three important differences: cultural familiarity, entitlement to language-learning facilities, and the supposed distinction between a ‘minority’ language and an ‘immigrant’ language.

Focus on the third. Linguistic dominance is another case of magic dates, usually alongside outright oppression. The French language in France is dominant because since the sixteenth century, there has been a forcible submersion of local languages like Occitan (e.g. Myhill 2006 s.3.1). Language often leads to *de facto* exclusion from rights, but is also seen as a *legitimising factor* in excluding persons from rights to which they are entitled. An inability to speak English by citizens of EU accession states who are in Britain is sometimes presented as evidence of a foreignness that
legitimises the exclusion that it has produced, with effects for privation of rights (Bloom and Tonkiss 2013, forthcoming).

Considering language is important for two reasons, relating to needs of non-citizens, not usually experienced by citizens. First, non-citizens with a language different to the majority have special language-learning needs. The second consideration is the importance of education – learning and engendering the values, culture, language, and history of the state, as well as its collectivity. It is important to examine what the state’s role should be in educating non-citizens, and by extension, the role of the state in education of this sort more generally – whether it is a state-level concern to direct local cultures, languages and value-systems, or whether this is more properly dealt with on a local level. This will be examined in Chapter Five.

(2) No place to be (parallels with Waldron’s discussion of homelessness)

Jeremy Waldron’s argument concerning coincident privations of homelessness (Waldron 1993 309-38) applies also to the de facto privations of non-citizens. Waldron opens by arguing that ‘[e]verything that is done has to be done somewhere’ (Waldron 1993 310). He explains that a major function of property rules is to designate who is entitled to be where. Collective property has no private person in the position of owner, and its use is determined by officials acting in the name of the whole community. Most collective property includes things like streets, pavements, parks, and wilderness areas, for example. These common property areas usually have rules about what may be done in them, leaving persons without private property with ‘no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around’ (Waldron 1993 315). While Waldron speaks explicitly about citizens, it takes little imagination to apply this broadly to non-citizens.

Waldron’s concern is that, while it is generally agreed that public parks (and pavements and other common property) should not be used for these activities, which should be done at home, this in fact prevents those without a home from performing them at all. Specific restrictions on the use of public spaces (like banning defecation, urination, sleeping, and having sex) has a different effect, and indeed, a different intended effect, on homeless persons than on others (Waldron 1993 327), as, in the absence of any private place they have the right to be, these bans effectively prohibit the homeless from these activities altogether (Waldron 1993 328). Thus, ‘freedom to perform a concrete action requires freedom to perform it at some place’ (Waldron 1993 329). And so, ‘a rule against performing an act in a public place amounts in effect to a comprehensive ban on that action so far as the homeless are concerned’ (Waldron 1993 332).
This is relevant in the case of non-citizens not only because non-citizens may also find themselves homeless, but for a deeper and wider reason. The earth is divided into states, and each state may then be divided as Waldron describes. Persons can, then, find themselves de facto (or even formally) forbidden from many, often basic, human activities anywhere in the world. This is deeply problematic. If we think that there is a right to this or that capability, then there must be a right to it somewhere, and if a person is excluded from doing it anywhere, since they are excluded from full status anywhere, then this is a problem for the liberal theory grounding these goods. This was recognised in Hannah Arendt’s ‘right to have rights’.

(3) Assumed out of provisions (parallels with Nussbaum’s discussion of women)

Martha Nussbaum and other feminist theorists (e.g. Amartya Sen, Judith Thompson, Judith Butler, Ann Phillips, etc) argue that traditional theories of rights, and of justice more generally, are fundamentally flawed when they assume their jurisdiction to be that of men. Restarting the analysis, taking into account aspects of the lives of women that cannot be characterised in these traditional accounts, leads to theories acknowledging justice in family structures, notions of ‘adaptive preferences’, the role of care, and the relevance of vulnerability and need at different life stages. This has led such theorists to develop different, and more complex, notions of capability and need, and more complex ways of examining whether they are being met. Non-citizens are the next forgotten group to be acknowledged in this way. Considering non-citizens gives rise to different ways of understanding how states hold obligations, and the role that the citizenship relation itself can act. Thus, just as considering women raises particular questions, considering migrant workers, temporary migrants, irregular migrants, and non-citizens more generally, raises its own set of questions which are crucial for theory beyond merely as it directly affects non-citizens.

(4) Lack of enforcement and difficulty of assigning obligation

Those provisions specifically relating to aliens in the international covenants relating to human rights are:

- everyone lawfully within the territory of a state shall, within that territory, have right to liberty of movement and freedom to choose his residence (ICCPR Article 12 (1));
- an alien can only be expelled with law and review by competent authority (ICCPR Article 13);
- ‘[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present covenant to non-nationals’ (ICESCR Part II Article 2 (3)).
As with any global rights regime, it is difficult to see how this can be enforced effectively. This is for two reasons. First, it is necessary for a state to sign up to and ratify the convention in order to be bound by it. In the case of the ICCPR, in April 2009, most states had both signed and ratified the convention, leaving eight that had signed but not ratified, and twenty-one that had neither signed nor ratified. In the case of the ICESCR, almost all states have signed the convention, but 21 retain reservations, or supply their own interpretations on some of the articles.

Second, the articles are not always binding. This is especially clear since, as shown above, both conventions reiterate that nothing within the conventions is intended to impair 'the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources' (ICCPR Art 47). This leaves a loophole for states, particularly with regard to providing such rights to outsiders. That said, the human rights project makes two important statements: first, it acknowledges a basic humanity to be protected in everyone; second, it allows judgement to be passed across state borders on the treatment of persons therein. Irrespective of explicit exclusion of non-citizens from rights in a state, they are in fact denied rights for a number of reasons. Moreover, considering these reasons can lead to an enriched theory more generally.

1.8. Summing up and preparing for the substantive chapters
This chapter has presented the theoretical framework that will ground the rest of the dissertation. It asserts a modest cosmopolitan liberalism starting from a society-of-states world-view. The rest of the dissertation will examine ramifications of this for different relevant groups, in order finally to argue that the state does have obligations towards non-citizens within its territory, and to make some policy suggestions in this regard.

1.8.1. A modest liberal cosmopolitan society-of-states view: summing up Chapter One
This dissertation adopts an underlying liberal framework, where individualism is understood as important insofar as it promotes autonomy, but not as any notion of self-ownership, nor as negating the importance of society. It advocates equal liberty of the relevant sort for all individuals within the scope of the theory, and argues that fraternity (the importance of special connections between individuals – however arbitrary these are) is both at odds with, and crucial for, the liberal standpoint. The argument proceeds on the assumption of a modest normative cosmopolitan world-view. That is, that the appropriate scope of liberal theory includes all humans globally. However, it adopts the political empirical society-of-states perspective – the assumption that there currently are states, and that they interact thickly, with value relations beyond mere self-interest-promotion.
Crucial here is the notion of rights as deriving from capabilities. Rights in this dissertation do not need to be met by a coercively enforced canonical list, indeed it is better if rights are produced by social institutions, rather than enunciated and enforced through laws. However, in the mean time, a list of capabilities based upon those given by Martha Nussbaum, are to be sought for all individuals. As well as being about rights, capabilities are also about responsibilities. Once someone has the capability to help others develop capabilities, obligation arises. Rights and duties are not, then, connected in a one-to-one relationship, but rather rights and obligations arise around capabilities in a complex and changing way. The thesis has two levels: first, the level of securing capabilities that are lacking, second, the level of developing a society where capabilities are secured informally. Justice here is dynamic. Although it starts now with the situation as it is today, it must be re-evaluated continually, as the context changes.

Crucial to this dissertation is re-introducing non-citizens into theorising, even of global justice, that has ignored them until now. Although there are some theorists explicitly discussing non-citizens, or immigration, this is insufficient, and their work either still, to an extent, assumes citizenries, or does not provide any constructive recommendations for their theories' ramifications for non-citizens. This is not only a theoretical problem, but is part of an assumption of citizenries and states that leads to on-going de facto privations of non-citizen rights. A just society, then, is one which at least promotes the basic capabilities of those under its control and directs its evolution towards greater de facto capabilities in the society it governs. However, this must be seen in the context of the state's role in a world of states. Subsequent chapters will examine how this is to work in more detail.

1.8.2. A liberal democratic state has obligations towards non-citizens on its territory

This dissertation argues that a state calling itself ‘liberal democratic’ has substantial obligations towards ‘the outsider within’, that is, towards non-citizens within its territory. This will be argued according to two bases, and will be developed in four stages, represented in each of the four chapters that follow. The two bases according to which liberal democratic obligations will be argued for are:

- Implications of claiming to be ‘liberal’; and
- Implications of claiming to be ‘democratic’.

Each chapter will examine both of these, both in terms of their implications for arguments against, and arguments for, obligations. Finally, each chapter will also examine the implications of conclusions reached for the arguments in the dissertation as a whole. The four stages of the dissertation are:
1. Obligations towards citizens and implications for non-citizens (Chapter Two)
   a. A liberal democratic state has obligations towards citizens.
   b. Those obligations are mostly based on aspects of internality shared with anyone present.
   c. There are not good reasons for excluding those persons from capabilities.
   d. Therefore, it is not acceptable to exclude non-citizens from many of the categories of capability rights due to citizens.

2. Obligations towards non-citizens abroad and implications for non-citizens who are present (Chapter Three)
   a. A liberal democratic state has obligations towards non-citizens overseas.
   b. Those obligations are mostly based on aspects of externality, many of which are shared with non-citizens within the state.
   c. Reasons for excluding those persons from these capabilities will only be based on their moving from externality to internality in the state.
   d. Therefore, it is not acceptable to exclude non-citizens from many of the categories of capability rights due to non-citizens abroad, until, that is, they are sufficiently internal to be due the obligations at 1d.

3. Obligations towards irregular immigrants and implications for territorially present non-citizens more generally (Chapter Four)
   a. A liberal democratic state has obligations towards irregular immigrants, on the bases described above.
   b. Their irregularity does not exclude them from obligations.
   c. Therefore, a liberal democratic state also has obligations towards non-citizens within its territory more generally.

4. Implications for policy and testing theory against practical policy possibilities (Chapter Five)
   a. Education has specific implications for inclusion of non-citizens, however, these help to reinforce the obligations already discussed.
   b. Health also reinforces the obligations discussed.

While some aspects of this already have a large literature, others do not. The discussion in this dissertation will draw upon existing dedicated literature, where it exists. Where it does not, ideas will be brought across from other areas to develop arguments. This is an important and overdue project, challenging traditional justice theorising and traditional state construction, and will demonstrate that there are significant obligations – currently unmet – of liberal democratic states towards non-citizens within their borders.
Chapter Two: Citizens and non-citizens.

Citizenship is both a status and a practical membership, and the content of both of these is key to examining obligations to ensure capabilities. It is relatively uncontroversial that the scope of a state’s obligations at least includes citizens, who are generally internal to the state in two dimensions: physically and politically. A state’s obligations towards its own citizens derive primarily, therefore, from its internal justification (how it justifies its coercive power to those subject to that power). This dissertation, which demonstrates that a state has obligations towards non-citizens within its borders, has a problem here. If justice requires that substantial benefits be due to non-citizens, this can erode the significance of citizenship. However, as argued in Chapter One, meaningful citizenship is currently important to people; to their identities and to the way that they organise their political lives. Moreover, the extent and the mode of this importance varies considerably between societies and changes over time.

A well-documented democratic problem is that it is not possible to decide democratically who is in the demos (Cabrera 2012). Based on rights, one response is to set the boundaries of political institutions ‘according to possibilities for actually providing protections’ (Cabrera 2012 22). However, this chapter argues that this is too abrupt and does not take into account wider implications of the notion of citizenship. With this in mind, jus nexi will be developed as a means of citizenship allocation, with the notion of rights core to the access to the territory in the first place.

This chapter begins by examining what it is to become a member of the citizenry. It is built around the status and practical membership aspects of citizenship; examining the criteria for a person achieving citizenship status, and practical ramifications of this status. The discussion looks at the related question of who is bound by the commands of the state. It notes, crucially, that although this group overlaps with the citizen-membership group, there are citizens who are not bound by the state, and there are persons bound by the state who are not citizens (long-term residents, for example). Finally, this chapter focuses on the implications of the status of citizens to obligations towards non-citizens. This chapter is the first of this dissertation’s three central chapters. Considering what the theory developed in Chapter One implies for citizens tests the theory against a group that are already much discussed, allowing the theory to be developed more generally. Non-citizens in a state share much with citizens within that state, and this chapter argues that there are few relevant differences in terms of the state’s obligations towards them.

31Citizenry here refers to the body of citizens; citizenship is the status itself.
2.1. Jus nexi: establishing who is a citizen

Ayelet Shachar describes her *jus nexi* notion as a ‘genuine-connection principle of membership acquisition’ (Shachar 2009 164), building upon her sustained parallel between citizenship and property. Supporting the proposal in this dissertation, it presents an ‘incremental process, in which one’s centre of life gravity shifts’ (Shachar 2009 169). She acknowledges that an individual’s connection with a state changes and develops, and proposes a corresponding citizenship regime, overcoming problems of over-inclusion and under-inclusion. *Jus nexi* builds upon two principles of property relations: The Rignano Principle and the Principle of Adverse Possession; and, of existing models, best represents what liberal democratic theorists seem to mean when they talk about citizenship.

Shachar examines a version of the Rignano Principle applied to citizenship, for example, in both Canada’s Citizenship Law, and European Court of Justice decisions. The Rignano Principle derives from a 1924 paper by Eugenio Rignano (Rignano 1924; Shachar 2009 172), in which he essentially sets up a difference sequence,\(^{32}\) which can be simplified:

\[
\begin{align*}
\text{‘0 transfers’} & = \text{property a person creates or saves in his/her lifetime.} \\
\text{‘1 transfers’} & = \text{property inherited from a prior generation who had created or saved it themselves in their life time.} \\
\text{‘n transfers’} & = \text{property inherited from a prior generation who themselves received it as ‘n-1 transfers’ from a prior generation.}
\end{align*}
\]

According to this principle, as \(n\) increases, the heir’s entitlement decreases and the permitted taxation rate steepens. Shachar proposes a similar principle for citizenship, such that the need for citizenship-justifying accompanying behaviour increases, the further it is removed from the state, whereby ‘birth-right inheritance does not by itself establish a full right of citizenship’; it must be accompanied by behaviour such as residency, remittances, links, exchanges, and language competence (Shachar 2009 173\(^{33}\)). This avoids the over-inclusion of persons with no direct relationship to the state.

The Principle of Adverse Possession, meanwhile, states that: ‘one who... possesses property belonging to another for a sufficient period of time without the owner’s permission acquires title to the property’ (quoted in Shachar 2009 185). For property, this ‘dramatically limits the owner’s “right

\(^{32}\)A ‘difference sequence’ is a mathematical sequence: \(x_1, x_2, \ldots, x_n, x_{n+1}\) where \(x_{n+1} = f(x_n)\). Shachar uses different terms, but I think my presentation makes the principle clearer.

\(^{33}\)For more legal technicalities in English, British and in EU Law, see Smith 2008.
to exclude". Applied to citizenship, it would avoid under-inclusion of resident stakeholders who currently lack access to official status, and it implies immigrants, even irregular immigrants, might develop some membership claim based upon a *de facto* membership.

The principle of *jus nexi*, then, holds that, on the one hand, citizenship acquired by birth needs to be supported by cultural connections, and on the other hand, a person with a *de facto* relationship with the state, is entitled to citizenship, irrespective of the circumstances of his or her birth. This section demonstrates how *jus nexi* is able to overcome core difficulties found in three common ways of establishing membership (birthright, consent and exemplifying values), without losing their benefits, and demonstrates that *jus nexi* represents, at present, the best available ideal model.

**2.1.1. Pure birth-right**

*jus soli*, literally, ‘law of the soil’, refers to citizenship allocation based on birth on a state’s territory. *jus sanguinis*, ‘law of the blood’, refers to citizenship-allocation arising from birth to citizen parents. This subsection argues that the traditional correlation of civic and ethnic citizenships to *jus soli* and *jus sanguinis*, respectively, is unhelpful, and the common practice of characterising either as morally more palatable than the other is inappropriate. Every state currently observes a form of birth-right citizenship involving some combination of these. This is illustrated for selected countries in Europe and North America in the table (adapted from Weil 2008 400-401, 182):

Table 4: Birth-right citizenship allocation in selected countries in Europe and North America

<table>
<thead>
<tr>
<th>Country</th>
<th><em>jus soli</em> (date of inclusion)</th>
<th><em>jus sanguinis</em> (date of inclusion)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>No</td>
<td>Yes (1811)</td>
</tr>
<tr>
<td>Belgium</td>
<td>Yes (for 3rd gen, 1992)</td>
<td>Yes (1831)</td>
</tr>
<tr>
<td>Denmark</td>
<td>No</td>
<td>Yes (1898)</td>
</tr>
<tr>
<td>Finland</td>
<td>No</td>
<td>Yes (1941)</td>
</tr>
<tr>
<td>France</td>
<td>Yes (for 3rd gen, 1889)</td>
<td>Yes (1803)</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes (1999, with condns: dual nationality)</td>
<td>Yes (Prussia: 1842)</td>
</tr>
<tr>
<td>Greece</td>
<td>No</td>
<td>Yes (1856)</td>
</tr>
<tr>
<td>Ireland</td>
<td>Yes (1935, on condn of a parent's legal residence since 2005)</td>
<td>Yes (1935)</td>
</tr>
<tr>
<td>Italy</td>
<td>No</td>
<td>Yes (1865)</td>
</tr>
<tr>
<td>Country</td>
<td>1st Gen</td>
<td>2nd Gen</td>
</tr>
<tr>
<td>------------</td>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>No</td>
<td>Yes (1804)</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Yes (1953, for 3rd gen)</td>
<td>Yes (1888)</td>
</tr>
<tr>
<td>Norway</td>
<td>Yes (1982)</td>
<td>Yes (1894)</td>
</tr>
<tr>
<td>Portugal</td>
<td>Yes (for third gen [2006] &amp; on condn of parent’s residence, 5 yrs)</td>
<td>Yes (1822)</td>
</tr>
<tr>
<td>Russia</td>
<td>Yes (1864)</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>Yes (for 3rd gen, 1982)</td>
<td>Yes (1837)</td>
</tr>
<tr>
<td>Sweden</td>
<td>No</td>
<td>Yes (1894)</td>
</tr>
<tr>
<td>UK</td>
<td>Yes (on condn of parent’s residence)</td>
<td>Yes (no transmission to 3rd gen unless residence established in UK before child’s birth)</td>
</tr>
<tr>
<td>US</td>
<td>Yes (according to constitution, 1868)</td>
<td>Yes (as above)</td>
</tr>
</tbody>
</table>

Each country’s history influences the form this takes. For example, America’s *jus soli* principle arises from its heritage as a ‘nation of immigrants’ (title of Kennedy 1964), and the accompanying ideology that everyone born on American soil is born as a free American citizen. Meanwhile, France’s *jus sanguinis* principle celebrates each Frenchman as a citizen, able to bestow his citizenship upon his children, rather than subjection, like cattle, to a king or lord in virtue of birth on his land (Weil 2008 25). Each birth-right citizenship criterion was, then, considered progressive at its adoption. But, as Ayelet Shachar notes, both *jus soli* and *jus sanguinis* are equally arbitrary and misrepresentative of what citizenship should mean. She also worries both about resulting under- and over-inclusion (Shachar 2009 112). Both *jus soli* and *jus sanguinis* have advantages. For example, *jus soli* allows children of immigrants to be easily incorporated (Shachar 2009 115), while *jus sanguinis* ensures membership of the parents’ polity, irrespective of location of birth. Both also have problems arising from their emphasis on birth-right. The two following cases help to illustrate this (Nyers 2006).

Born in the US, while his parents lived briefly in Louisiana, Yaser Esam Hamdi grew up in his parents’ native Saudi Arabia. He became aware of his *de facto* American citizenship when, having been arrested in Afghanistan, he was held at the American prison at Guantanamo Bay. As soon as it was established that Hamdi ‘may not have renounced his American citizenship’, he was transferred to

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^34 Note that the assumption is that he should have renounced it – an assumption not usually made for a state’s citizens.
naval prisons and was eventually given a trial with a jury.\textsuperscript{35} His was described as an ‘accidental’ citizenship\textsuperscript{36} and was not completely acknowledged, either by state spokesmen, or the media. Upon release, Hamdi was forced to renounce his American citizenship, as he had obtained it ‘by accident’.

Young Jin Chun’s ‘accidental’ South Korean citizenship, by contrast, was upheld, forcing Chun to carry out military service. Growing up in the US, Chun was unaware of his \textit{jus sanguinis} South Korean citizenship. As a college student, knowing little of South Korea and wanting to visit, Chun went to teach English. South Korean law requires military service of male citizens between 18 and 35 and upon arrival, he was taken into the army (Nyers 2006 39, n1).

The cases of Hamdi and Chun are apparently of over-inclusion. This is, because the citizenship relation, as it stands, does not track what seems intuitively implied by citizenship. That is, if, for example, Chun had felt a special relationship to South Korea, or even spoken the language, it would appear less odd for him to serve in its army. However, Hamdi’s case also illustrates that fundamental aspects of citizenship (like not having it removed) are easily breeched when someone fails to meet some, possibly unspecified (or unspecifiable), symbolic criterion for which birth-right is merely a usually-successful proxy. Both would have been avoided by something like the \textit{jus nexi} approach.

There are also many cases of under-inclusion, excluding people from citizenship of the state to which they most belong. For example, Mohamed Kendeh was six when he left Sierra Leone for the UK, where he grew up, though he never obtained citizenship. When he was sixteen, he committed rape, and the British government sought to deport him to Sudan. With the \textit{jus nexi} principle, it is clear that this young man should appropriately be seen as British, so that it is inappropriate to deport him, both because Sudan should not be sent British criminals, and because it is inappropriate to send a British citizen to a country about which he knows so little, not even speaking the language. For Ayelet Shachar, the under-inclusion is more expansive than this. She is concerned that, as citizenships (and some citizenships in particular) bring such enormous benefits, acquisition should not rest upon an accident of birth. That is, that birth is not meaningfully related to the citizenship status it is allocating. The allegation that birth-right is arbitrary with regard to citizenship is found, for example, in Supreme Court judgements in the US, Canada, and Ireland (Bhabha 2009 196).\textsuperscript{37} And

\textsuperscript{35}This was unavailable to other Guantanamo detainees until the trial of Ahmed KhalfanGhailani which began in late 2010.
\textsuperscript{36} The use of the term ‘accidental’ citizenship seems to have developed in academic literature. An interesting recent book by RinkuSen and FekkakMamdouh undermines this term by arguing all citizens (of America) are accidental (Sen and Mamdouh 2008).
Simon Caney notes, ‘people should not be penalized because of the vagaries of happenstance, and their fortunes should not be set by factors like nationality or citizenship’ (Caney 2001 115).

Responses to the arbitrariness criticism of birth-right citizenship could include:

1. It is not arbitrary to allocate membership by birth;
2. Though arbitrary, birth provides a better fit than other membership allocations; and
3. It may be arbitrary in the abstract, but in the real-world, birth-right is important to understanding national membership, making it appropriate for allocating state membership.

First, an individual does not choose the circumstances of his birth, and in that sense they are arbitrarily thrust upon him or her (e.g. Caney 2000). These circumstances are also morally arbitrary, not making him or her a better or worse person. However, where a person was born, and to whom, has considerable significance in his or her life, besides the issue of citizenship, making them in some sense non-arbitrary. To pull Fred Twine’s comment out of context, ‘we are all born into an on-going world’ (Twine 1994 172). That is, as Carens notes, ‘children are not born into the world as isolated individuals, but as members of established social networks’ (Carens 1987 424). That accident of birth is, then, crucial to who people are and how they live out their lives, including cultural and value-system development.

However, this takes Twine’s (and Carens’) comments out of context. Twine calls upon citizens to ‘reconstruct their social world’ and take an active part in their polity. He does not engage with how they came to be citizens in the first place. While it may appear that birth into a polity (whether through soil or blood) best reflects this relationship described by both Carens and Twine, the examples of Hamdi and Chun suggest otherwise. The aspect of birth shown to be non-arbitrary for membership is not birth on the soil or with certain blood, but into a community, resulting in on-going participation in a certain lifestyle. These affective ties with a community may, however, develop between an individual and a community without any ‘birth’ connections. Most people remain close to where they were born, so it is understandable, though not justifiable, that birth-right be taken, mistakenly, as itself morally significant for membership allocation (Caney 2001 offers further discussion, though he does not engage with the possibility of changing the citizenship or the effects of crossing borders).

Perhaps, then, though arbitrary, birth-right offers the most efficient way to manage membership. Since every child is born somewhere and to someone, every child can be assigned to a state for

38 It is also important to note discussion against this assumption, e.g. see Sangiovanni 2011, who notes the circularity in attempts to defend this position and criticises adopting it as default position without argument. 39 The UN in 2005 suggested that 97% of people live in the state where they were born.
protection and membership. Moreover, this information is recordable and often recorded. For Shachar, the efficiency is false, since excluding people unhappy with their initial allocation is both administratively convoluted and expensive (constructing policed borders and deporting). Shachar’s critics can respond that, while disciplining rule-breakers in any system is costly, the dividends in terms of overall enforcement outweigh this. That said, the inefficiency remains problematic, and even if birth-right were efficient, it may not be justified.

Third, perhaps birth-right citizenship-allocation is justified because certain core human capabilities require recognition of currently valued memberships to be realised. This may change over time and across different groups as membership notions themselves change. It could be argued that, just as a right to marry does not mean that someone’s rights are breached if no one wants to marry him or her, being prevented from accessing citizenship does not contravene a person’s rights. However, citizenship, unlike marriage today in many liberal democratic countries, is a status necessary for many core capabilities. Problems emerge with birth-right membership where exclusive group law controls access to essential goods. That said, it will be argued that full political membership should not always require other sorts of membership (e.g. citizenship) in this way.

It is important to examine how people feel about their citizenship. Christian Joppke notes that, ‘what ordinary people associate with citizenship is one of the biggest lacunae in the literature’ (Joppke 2008 43). Although it is widely trivially assumed that ethnicity and race are important to people, two studies, in Germany and Spain respectively, for example, show that ordinary people see ‘behavioural traits’ as more important than ‘ethnic pedigree’ (in Miller-Idriss 2006, cited in Joppke 2008 43; also a theme in documentary film Aguaviva; Pujol 2005). For example, in the Spanish study, it was expressed that Romanian immigrants were more ‘like us’ than the officially coethnic Argentinians, because of their perceived attitude to work (Cook and Viladrich 2009). Interestingly, in the 1980s, attacking French use of the principle of jus soli, Jean-Marie Le Penn’s National Front’s slogan was: ‘Être Français, Cela se Mérite’ (to be French, you have to deserve it) (quoted in Brubaker 1994 138), which seems to imply a need, at least rhetorically, to look beyond birthright (though Le Penn included jus sanguinis as a mode of desert). It is crucial when attacking birthright citizenship-allocation to avoid Bhuba’s feared consequence: ‘The attack on birthright citizenship is first and foremost, an attack on the existing rights of citizen children’ (Bhabha 2009 199). The version of jus nexi described here would not fall into this trap, as the initial allocation of membership is not undermined.

Birth-right alone, then, is morally arbitrary and practically inadequate as a mode of citizenship allocation, and it may not even really reflect how people think citizenship should be allocated.
Regardless of potential practical benefits, by implying that an accident of birth is relevant to one’s political membership, birth-right citizenship is philosophically, theoretically, and ideologically, problematic because, as presented in Chapter One, liberalism builds itself upon the assumption of free and equal moral persons. Something like *jus nexi* would help to resolve these difficulties, as it both acknowledges birth as a pragmatic means of initial allocation, and recognises the importance of communal connections and other factors to political membership.

### 2.1.2. Pure consent

At the opposite extreme from birth-right, consent is another well-discussed potential ground for citizenship status. This section presents some problems with consent, which enables the further development of the notion of citizenship used here. Although consent is discussed throughout liberalism’s history, Locke is probably best seen as its modern instigator (Schuck and Smith 1985 10). For this reason, children cannot become subject to a political ruler until adulthood (Locke [1690] 2008 [s.118] 346; Schuck and Smith 1985 24), when they are old enough to give rational consent. He writes:

> a Child is born a subject of no Country and Government. He is under his Father’s Tuition and Authority, till he come to Age of Discretion; and then he is a Free-Man, at liberty what Government he will put himself under, what body politick he will unite himself to (Locke [1690] 2008 s118).

Even if completely free consent might theoretically be a beneficial way of allocating membership of a liberal polity, it is not found in practice, as most people are members of polities by happenstance.

Locke’s response that tacit consent is expressed when a person does not leave a polity (Locke [1690] 2008 [s.2] 268) is unsatisfactory, for two reasons pertinent to this dissertation. First, where most people live is predetermined by the circumstances of their birth. Unable to move, either financially or psychologically, they may remain present and yet not consent to the state ruling over them (e.g. see Hume [1742] 1948 363 and Hume [1739]2005 351). Second, people may feel they have a title to a certain area of land, though not consenting to the political system ruling over it. Indeed,

> [s]ubject only to exceptions such as the high seas and Antarctica, the geography of the globe is ‘nationalised’. There is no empty, non-national space where people can live beyond the reach of nation (Daubergne 2008 44).

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40 Alongside external physical constraints on demonstrating consent, or lack thereof, there may also be internal barriers. This dissertation will not discuss the extensive literature on psychological ability to consent, but notes that this is also problematic.
For example, the members of an anarchist cell in Shoreditch, East London, want to withhold consent from any state government; and the original Camp Embassy Campaign in Australia, active since 1972, argues that, never having consented to the Australian state, they do not consent to being treated as fellow citizens, whilst feeling connected to the land of Australia. They campaign for an embassy in Australia, like other non-Australian nations.

Renouncing citizenship is made difficult by the UN Convention on the Reduction of Statelessness 1961. For example, as a signatory to the Convention, Australia only allows a person to renounce Australian citizenship if they can prove that it will not result in statelessness. The USA, meanwhile, is not a signatory, so that a US citizen can renounce his or her citizenship, even becoming stateless, so long as he or she is outside the physical territory of the US. Naturalised migrants, despite the obstacles put in their way, are currently perhaps the only group genuinely expressing consent in their citizen-membership, with consent unable really to explain citizenship held by anyone else.

There is a further concern. If consent is key, it is not only the individual member that must consent to his or her membership. If the system is built on the consent of free and equal individuals, a new member should not be foisted upon a citizen body without their consent, since they would have consented to join the citizenry as it was constituted prior to the new member’s inclusion. However, if consent is mutual in this way, then it is again theoretically possible for individuals to be excluded from membership altogether, if everywhere withheld consent.

On some level, then, consent, insofar as it is useful, can be expressed through the jus nexi principle, which emphasises social participation which, to a certain extent, must be consensual. However, jus nexi avoids the need for people explicitly to choose where they are a member, while allowing for that choice in relevant cases.

2.1.3. Exemplifying values

Will Kymlicka and Wayne Norman discuss William Galston’s argument that responsible citizenship needs four sorts of civic virtues (Kymlicka and Norman 1994 365; 2000 7):

(1) General virtues (courage, law-abidingness, loyalty);

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41 Members demonstrate their lack of consent through absence from the electoral register, living at an unregistered address, and not participating in the country’s economy (eating food from rubbish bins, not working, not paying tax). When asked what they do if someone is sick, their answer was unsatisfactory, and given the proliferation of rodents I observed in their squat, this problem will presumably arise soon, if it has not already.

42 They often conflate ‘nation’ and ‘state’ in their campaign.


(2) **Social** virtues (independence, open-mindedness);

(3) **Economic** virtues (work ethic, capacity to delay self-gratification, adaptability to economic and technological change); and

(4) **Political** virtues (capacity to discern and respect others’ rights, willingness to demand only what can be paid for, ability to evaluate the performance of those in office, willingness to engage in public discourse).

That these reflect something considered genuinely important in citizen-memberships is expressed in the above-cited scattered studies from Germany and Spain, and in expressions like; ‘the sort of country we want to be’, or ‘British values’; or indeed, the demand by many countries that a candidate for naturalisation be ‘of good character’ (e.g. Gilbertson 2006; and see Australian Government 2011).

There are two types of potential implications. First, these values could be included in citizenship education, to be instilled in the existing citizenry. This will be examined extensively in Chapter Five. Second, exhibiting these, or some subsection of these, could be a criterion for obtaining citizenship. If the latter (as is the case in several countries), there are three further problems: testing this reliably, justifying the exemption of birth-right citizens from testing, and devising such a list non-arbitrarily; both because of its challenge to plural democracy, and because it implies some fixed set of values. If values are unchangeable, society may become antiquated, staid, dogmatic, and fusty. It may also become unsustainable (note the inevitable societal changes discussed in Chapter One). But if values can change anyway, then avoiding immigration, or sieving immigrants for values, seems strange. Again, *jus nexi* can help, as its emphasis on participation in society is both easier to measure, and not subject in the same way to definition change as society changes.

### 2.1.4. **Jus nexi** and entitlement to capabilities

In practice, *jus nexi* reflects an existing trend in membership-acquisition in various jurisdictions. As noted above, few contemporary jurisdictions base membership entirely on birth. *Jus nexi* would probably still begin by assigning membership at birth, explicitly acknowledging that this is only an interim. *Jus sanguinis* allocation would be constrained by the Rignano Principle, (as the generations continue, more demonstrated connection to the polity is needed for membership). *Jus soli*, meanwhile, would act as an entry into an on-going principle of Adverse Possession. A baby has not lived in or mixed in society at all yet, so, if they are to have access to membership (which, given the rights currently dependent on membership, they should), this must be allocated somehow at birth. After this, *jus nexi* becomes observably and usefully different from other theories. Because birth was
only ever acting as a stand-in for on-going participation, membership can change if a person comes to interact in a society other than the one in which he or she was born.

This chapter argues that membership and entitlement to capabilities are not the same thing. Indeed, it examines what the justified difference in terms of capability claims could be between citizens and others in a state. *Jus nexi* should not, therefore, be seen as the sole allocator of capability rights. Instead, it is the allocator of access to membership, and whatever that will come to imply. That said, access to capability currently relies largely on membership. As a result, a movement towards *jus nexi* membership will in fact lead to an opening out of legal entitlement to core capabilities.

Although on the face of it, *jus nexi* solves several problems found in other citizenship regimes, four main problems are still to be resolved. The first problem is how to access *jus nexi* in the first place. Indeed, as will be demonstrated in Section 2.3, many borders to citizenship are hidden in borders to presence on the territory. *Jus nexi*, then, needs to establish how someone can have access to the territory in the first place. That is, if it were to be adopted, without any change to entry or access to the community, citizenship would still, in effect, be based primarily on birth-right, since this is primarily how to gain entry (developed in Section 2.2). As a result, a movement towards *jus nexi* citizenship would need to be accompanied by a change in underlying principles and assumptions – something that would have to be gradual, and follow the evolution discussed in Chapter One.

A second problem with *jus nexi* is how plural memberships are possible. For example, it must take into account people moving between places, such as seasonal workers. *Jus nexi* can accommodate this, so long as it acknowledges participation in multiple communities, and is flexible about the form this participation takes. For example, requiring on-going continuous participation in a jurisdiction precludes seasonal workers. A flexible version of *jus nexi* could acknowledge seasonal workers who are engaged in a community for regular periods of time, even though these may not be continuous.

A third potential problem with *jus nexi* is that it may accentuate inclusion problems associated with birth-right. Making *jus nexi* more systematic could lead to denser rules, exacerbating the problems of under- and over-inclusion. For example, it may lead to more restrictive rules. Since any system of rules will be imperfect, this is not a problem with *jus nexi* per se, but more of a caution to ensure *jus nexi* avoids problems found in existing theories.

While care is needed to stop *jus nexi* citizenship allocation becoming more restrictive than existing regimes, the question also arises, whether anyone can be excluded from a *jus nexi* regime. Could someone convicted of a serious criminal offence, or of international crimes, be excluded from the nexus? The only relevant factor here should be that person’s participation, according to the relevant
criteria, in the society of the state. This aspect of *jus nexi* will be problematic for existing states who wish to exclude former criminals, for example. Access to citizenship is not about virtue, but about participation in the state. It is those who are interacting in the state that will produce and so exhibit the values in question.

The fourth problem to be discussed records the relationship between physical border crossing and access to the community and eventually membership. This question is addressed in detail in Section 2.2 below. *Jus nexi* will be initially unpalatable to states because of its presumption of inclusion. This, then, has to be seen as part of a more extensive on-going project. *Jus nexi* is not an all or nothing theory. Suddenly applied in its entirety, without changing underlying assumptions about appropriate societal composition would be problematic, leading to more exclusion, and the opposite effects from those intended. This will be developed in Section 2.2.

This section has argued that *jus nexi* citizenship represents the best model for what is generally meant by ‘citizen’ in liberal democratic theory. As this dissertation examines what is required for those adopting a liberal democratic approach, then, it adopts a *jus nexi* notion of citizenship. *Jus nexi* allocates citizenship based on community membership. That is based on participation in the social nexus in the state. However, in the world as it currently is, access to that participation is tightly controlled and, in many cases, requires birthright. As a result, if *jus nexi* were adopted suddenly, it would not have the desired results. It must instead be slowly implemented, alongside a change in the assumption of exclusion. This leads to the final conclusion of this section, that, while access to citizenship is important, *jus nexi citizenship* is reliant on access to citizenship in a state. Moreover, while citizenship status is currently important, it is crucial also to recognise that many sources of state obligation are based on aspects shared by citizens and non-citizens alike. This will be developed later in this chapter.

2.2. The relationship between physical border crossing and access to citizenship

TM Marshall is renowned for his democratising, de-classing, sociological analysis of citizenship’s role in British society (Marshall 1950, 2, Bloom and Feldman 2011 43). He argues that, while citizens may be equal in their citizenship, this is undermined by class inequalities. However, even the citizenship

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45 Consider, for example the case of Leslie Cunliffe, a British citizen who moved to Australia in 1967 in his early teens. In 1999 he kidnapped and raped a young woman, and was sentenced, and served, a 12 year prison sentence in Australia. This year, he was deported to Britain, despite having spent more than three quarters of his life in Australia. Consider also Clifford Tucker, who shot and killed a police officer, and has also been deported to Britain recently, after a 12 year prison sentence in Australia. Clifford Tucker moved to Australia from Britain as a child of 7 years old.
equality he describes is chimerical. Inclusion of, and equality between, all citizens corresponds to a profound inequality and exclusivity at its bounds (Bloom and Feldman 2011). Brubaker puts it thus: citizenship is ‘externally exclusive’, but ‘internally inclusive’ (Brubaker 1994, quoted at Joppke 2010). This tug-of-war between external and internal exclusivity/inclusivity is apparent in both theory and practice, and causes internal conflict in any theory trying to elaborate a liberalism both domestically and globally simultaneously. This section examines this problem, and its implications for non-citizens and their access to capability rights.

2.2.1. Universalism within and exclusion at the border

The theoretical tension emerges clearly from communitarian literature, which provides the most clearly elaborated account of a connection between internal social policy and external border policy. In a sense, communitarianism is an ideal example of jus nexi (and shows the importance of my forth concern, above, relating to access to participation in the first place). Communitarians advocate presence-based open internal membership regimes, alongside restrictive external borders. They argue that universal membership within a state requires that the state's cultural and social character is protected by strong external borders. For Michael Walzer, allowing there to be non-member permanent residents within a state is like being in a house with 'live-in servants', which he finds objectionable as it leaves some people, while fully present and contributing to society effectively denied full human status within the polity. To avoid this, he advocates easy access to membership for all long-term residents; indeed, he would offer easy membership for everyone 'present' (though his ambiguous understanding of 'presence' is problematic – see Section 2.4).

In reality, states' borders are more complex, both within and outside the physical border. The communitarian thesis relies on successful external border control, without acknowledging the difficulty achieving this, demonstrated by the substantial irregular migrant presence in most states. Furthermore, Walzer seems to want membership to represent something beyond presence, which persons can choose, and a state can choose to exclude them from. He also ignores the current diversity of ways people interact with foreign states as: temporary workers, as prospective citizens, as persons wanting protection until they can return home, and as students studying abroad, for example. Walzer's theory does not offer any specific prescriptions of treatment for those who will be present and not citizens.

That said, if taken to its logical conclusion, of enforcing citizenship, Walzer's approach could remedy a key concern raised by Linda Bosniak with ignoring the connection between border crossing and entry to membership of a state. Bosniak argues that separating entry to territory from entry to services is impossible. She explains that 'the "border" – conceived as regulatory sphere – follows the
immigrant into the national geographic space and shapes her experience there’ (Bosniak 2007 397). This is corroborated by Matthew Gibney's analysis of Europe’s frontiers as the frontiers of the welfare services, emphasising the symbolic importance of institutional borders (e.g. Gibney 2004; 2009 5). Many debates about immigrant rights, then, can be characterised as debates about how far into the territory the border can extend (Bosniak 2007 397 n.25). Access to territory cannot be controlled in the same way as access to services inside the territory, and control of access to the institutions that provide welfare and administer labour is arguably more crucial to sovereignty than access to the territory itself. Perhaps, then, an intermediary status between membership and outsidership would help. If so, it must again engage with Bosniak’s concern, since this status must be substantive if it is to avoid acting as yet another exclusionary device.

In practice, some level of legal community membership can already often be acquired merely by living within a state's territory and hence participating in the social nexus (e.g. Gibney 2005 4). A state may, then, as part of a movement implied in contemporary jurisprudence and political philosophy, have obligations towards non-citizens. International legislation, however, less clearly reflects such a broad commitment. The fact of substantial rights arising from residency raises the question of what should be special about citizen rights. This will vary according to context. The notion of citizen, though perhaps in some ways weakening (e.g. see Falk 2000), is powerful, used symbolically to reflect who should be within the polity in the first place.

Those advocating less restrictive border-crossing often do not engage with the issue of access to services within the state, or with subsequent membership acquisition and its implications for obligations towards non-citizens within the physical border. This makes the argument for open borders at least hollow, and at worst divisive. In Bloom 2009, I demonstrated how a welcome liberal attitude to the entry of Somalis to the UK was not combined with proper provision for their welfare and potential membership. This contributed to entrenched disadvantage in many Somali communities, alongside resentment among non-Somalis in some localities in which they settled.

Indeed, much immigration legislation in Britain, for example, focuses on who is a citizen, and who can enter, with surprisingly little discussion of welfare considerations for non-citizens. Allowing persons to cross a border must be accompanied by a realistic and systematic account of how to look after immigrants upon entry. This must involve a realistic and far-reaching set of obligations specifically associated with enabling capabilities for the territorially present non-citizen. These rights could be built upon a variety of bases: presence, contribution, and need.
2.2.2. Ramifications in terms of selection

Catherine Dauvergne offers a useful analysis of how citizenship law and migration law work together to create national borders (Dauvergne 2008 119). In prosperous Western states, she argues, migration law is the main hurdle to formal citizenship, since, especially in countries like Australia, Canada, the US and New Zealand, distinctions between permanent residence and citizenship are small and the former often enables the latter. This means that the migration conditions often act as proxii for controlling citizenship access, leaving access to citizenship untainted by the overtly exclusionary/xenophobic prescriptions (such as able-bodied-ness, academic qualifications, minimal financial security) which may govern entry (Dauvergne 2008 122; also raised e.g. by Hampshire 2010 84). However, keeping these distinct makes it more difficult to analyse what makes a person eligible for citizenship, and obscures who is the decision-maker.

Thus, Dunn is right that:

> debates over citizenship laws underscore the power of the ethnographic state, where a state’s claim to sovereignty creates for itself a privileged role for producing and controlling territorialised political spaces and identities (Dunn 2009 125).

But there is also something more subtle taking place. That is, while access to citizenship may need a certain transparency, access to immigration status is increasingly opaque, hiding some of the less palatable aspects of citizenship selection.

This is most easily demonstrated through the real-world examples of student status and the skilled worker programmes discussed in Section 3.1. For example, Australia permits foreign students graduating from Australian universities to apply for the Australian skilled migration programme, so that they could become permanent residents and eventually citizens (Gilbertson 2006; Australian Government 2011). Further, temporary worker and other work-based visa programmes make entry dependent on skills. Another requirement often put on obtaining a visa is the amount of money that a person has in their bank account. Neither of these would generally be considered as acceptable requirements for citizenship, but, as they provide the point of entry to the state, they effectively screen potential citizens for these characteristics. Naturalisation regimes based on periods of residency in fact, then, have these various criteria as a first hurdle. Thus, though citizenship can be seen as removed from these, if it is based on residence and residence has these criteria, then citizenship is also dependent on these criteria being met, at least in the first instance.
2.2.3. *Jus nexi* and entitlement to capabilities

*Jus nexi* should be seen as only part of the story of entitlement to capabilities within a state. However, acknowledging this can lead to consistency problems, as outlined above. This subsection focuses on three elements of this. First, building on the discussion above, I examine access to the capability to participate. Second, I look at the connection between *jus nexi* and border crossing. Third, I explore the possibility of exclusion. This section has already examined the problem of initial access to the capability to participate in the social nexus. It was argued that there is an inconsistency in suggesting that a person’s presence gives rise to entitlements if that person is not entitled to be present. This is exacerbated if there is eventually an entitlement to membership, since that person is then both entitled and not entitled to membership. For this reason, it is not helpful to focus in this way on status.

Section 2.4 will then present that, in fact, many of the aspects of citizenship that necessitate internal state obligations towards citizens are shared by anyone living in a state. This subsection examines access to the capability to participate. Above, it was argued that the border around the state is in fact largely within the physical border – excluding people from access to the welfare systems and labour force – which raises the question of whether people should be enabled to participate. This runs from granting more open work permit schemes, to allowing persons to participate in training programmes and to have access to language help and disability support. From what has been argued so far, it would be difficult to justify excluding those present from such schemes. However, this has two problematic implications. The first, regarding the specialness of being a citizen, will be discussed in more detail later in this chapter. The second relates to whether it is thereby possible to exclude, even at the border. This latter will now be discussed through the next two elements of *jus nexi* to be examined.

The connection between *jus nexi* and border-crossing is difficult to pin down. The first question is whether the process of network-forming starts already upon entry into the territory (and the answer is yes, it should). The second question is whether a *jus nexi*-based system has any obligation at the border to grant entry. I argue that *jus nexi* itself gives rise to neither obligations to exclude nor include at the border, since the person outside the border, assuming no special relationship or need, has no claim to entry. However, the fact of a social nexus within the state also does not lead to an obligation to exclude. Consequently, *jus nexi* itself says nothing about border policy. Other discussions, in other chapters (Chapters One and Four especially) argue for more open borders, however.
This leads to two further questions: first, what to do about people that commit crimes in the state, or become undesirable for some other reason; and second, what to do about people arriving at the border who are for some reason undesirable (have committed a crime, have some communicable disease).

The first of these is easiest to understand through two examples from the UK. The first example is that of Mohamed Kendeh, introduced at the start of this section, who was deported after committing rape, despite spending much of his life in Britain. As argued above, this is inappropriate for a number of reasons. Then, moving along the same spectrum, consider Ali Saif who arrived in Britain in 2002. Not allowed to work, and with no benefits, he worked illegally until he lost his job for having no papers. He then stole food from a street market and was convicted of theft. In 2009, he had so far been detained pending deportation for two years, although he could not be deported to his country of origin, Algeria, as the Home Office had lost his passport (LDSG 2009 19). In both of these cases, it is undoubtedly conditions in the UK that are more relevant to the person’s criminal activity than their country of birth. However, imagine a hybrid case, where, after but a few months, someone committed a more serious crime like rape.

In this case, the question is less clear, but largely because rape is considered a very serious crime. However, my discussion of the first example suggests that rape committed by a non-citizen might not lead appropriately to deportation. Perhaps, then, the small time period is relevant. However, the second example shows that this need not be so. An argument that can be put against this is that in the second example, the crime seems to have been in some way caused by conditions in the state. It is difficult to find a clear way to draw this line. It could be argued that there is a relationship between time period and seriousness, however this ignores the key element in both of these cases – the role of the state. In the case of Mohamed Kedeh, he was very much a member of the state. In the case of Ali Saif, the state where he was present, by its policies, put him in a situation where, in order to live, he had to commit a crime by that state’s own laws.

Consider now people arriving at the border who have either committed a crime or have a communicable disease. On this occasion, it could be that such a person should be turned away for the good of the social nexus. That is, it looks like the state might have an obligation, on the basis of *jus nexi*, to exclude, since it must promote capabilities. However, *jus nexi* does not promote the nexus, it just measures the level of participation. There might be reasons to exclude (e.g. to facilitate justice elsewhere or contain disease globally), but these are not based on the *jus nexi* principle introduced here. *Jus nexi* does not, then, tell us anything about the physical border crossing, and this, in itself, is instructive. In this sense it is conceptually different from birth-right principles, since
the birth itself can be neither questioned nor outlawed. It also does not pass judgement upon the rights of non *jus nexi* citizens, since they are, by definition, potential citizens.

This section has drawn attention to the *de facto* connection between border crossing and access to citizenship. This is relevant in two dimensions. First, the restrictions on initial border crossing in fact translate into restrictions on access to citizenship, since in most cases, naturalisation is dependent upon a period of lawful residence. Second, the restrictions on border crossing are not the most important restrictions. Instead, it is necessary to study the restrictions experienced within the border of the state.

### 2.3. Bases for special rights often coincident with citizenship

This section now examines standard ways in which citizens are seen as holding a special relationship with the state. It argues that, while these special characteristics will usually be true of citizens, this is not in fact special to their citizenship, and while most of those exhibiting these characteristics are currently citizens, many are not. These three bases for rights often coincident with citizenship discussed here are: presence, contribution, and need/vulnerability. This section notes that many of the special rights currently commonly arising from citizenship are actually based on these relations, which need not be connected to citizenship.

#### 2.3.1. Presence

Presence as a conferrer of claims against the state where a person is present is surprisingly difficult to analyse, complicated by the difficulty in pinning down its meaning. For the purposes of this dissertation, ‘presence’ includes both residence (itself a slippery term), and being in a state for shorter periods. It is important, however, to avoid conflating presence and residence, since, for example, obligations based on residence can be mistaken as being based on presence. As a result, claims properly arising from residence are thrown out as too strong for presence, or inappropriately strong claims are ascribed to mere presence.

Walzer falls into this trap, explaining that ‘territorial presence’ (so long as it is legitimate – he does not explain what happens if it is not) is enough to require a person to be enabled easily to become a citizen. He adds that ‘[t]he state owes something to its inhabitants simply, without reference to their collective or national identity’ (Walzer 1983 43). That is, ‘the men and women who determine what membership means, and who shape the admissions policy of the political community, are simply the men and women who are already there’ (Walzer 1983 43). This merges presence, inhabiting, and recognised presence, and can lead to confused criticisms based on the inappropriate allocation of

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46The interaction between presence and residence is also examined in (Bloom and Feldman 2011).
status. This section briefly considers: first, two arguments for presence as a conferrer of citizenship-rights; and second, whether presence could itself confer an appropriate claim to presence.

Two reasons are offered for presence as a conferrer of rights:

1. Internal justification of the state (the state is where those people are); and
2. External justification of the state (presence must be somewhere and everywhere is currently in some state).

The state bases its internal justification on what must be offered to members of society, membership of which is a social fact rather than definable by arbitrary categories of practices (Hampshire 2010 79). Moreover, if subject to the laws of a self-defining liberal democratic state, individuals must be given the capability to contribute to the making of those laws (Hampshire 2010 80) in order to be properly part of the demos, by definition of ‘democratic’.

However the state of presence cannot avoid providing the roads the person must walk upon, policing the towns he or she interacts in, perhaps supplying the park benches he or she must sleep upon, as well as controlling the institutions that the person must call upon for his or her immediate needs and indeed, has an obligation to provide these things, as will be developed in Subsection 2.3.4. This means that, in virtue of a person’s living presence in a state and the state’s overall justification in a territorial space, the state cannot help but provide certain benefits and exerting certain coercions, and thereby deriving certain obligations to promote capability.

Consider also nomadic groups like Europe’s Roma and Travellers, and also seasonal workers, who, not defined territorially, are disadvantaged if benefits depend on sustained presence on a territory, even losing opportunities for political representation. We see from the Traveller experience in the UK, that travelling between local jurisdictions can be as problematic as between states (e.g. see Ofsted 1996; Derrington and Kendall 2004). Nomadic groups will be better protected if there are fixed obligations towards those with even transitory presence. In fact, the state also exerts coercive power over the merely territorially present individual in a way it does not, and cannot, exert over someone, even a citizen, who is not territorially present. For example, the UK may enforce my compliance in not smoking marijuana while I am present there, but if I go to Holland, this is not the case. This is because, although smoking marijuana is illegal on the territory of the UK, it is not illegal to UK citizens (Section 2.4 considers in more depth the relationship between states and their citizens abroad particularly with regard to crimes of paedophilia and trading in human organs).
The definition of territorial presence is also complicated in other ways. A brief filed on behalf of the UNHCR regarding US obligations at the American Guantanamo Bay detention centre concludes that a state has obligations to provide for all ICCPR rights ‘to individuals within a state’s effective control regardless of location’ (Neuman 2009 275, emphasis added). This, then, is even broader (and reinforces the fiduciary/waqf relationship analysis), since to be under a state’s ‘effective control’ may, as in the case of Guantanamo Bay and America, even include persons not present on the state’s core territory (this will be touched upon again in Chapter Three).

Presence, as a conferrer of claims against the state, makes sense theoretically and practically. However, confusions can arise from the fuzzy and broad notion of presence itself. For example, the state may well have different obligations towards tourists from those it has towards long term residents, though this dissertation argues that it does have certain basic obligations towards both (and indeed most states currently acknowledge obligations to provide, for example, emergency medical help for all non-citizens).

If presence confers appropriate claims against a state, could it coherently confer a claim to presence itself? That is, once you are present, are you entitled to be present? This would apparently undermine justification for preventing presence (possibly because such prevention is in fact contradictory). Boswell highlights the tension in the idea that in virtue of being physically present, agent X may derive claims against the state, but that at the same time, X might not be entitled to that presence itself, and so to entitlement to those rights. This problem necessarily arises whenever political communities, physically unable to exclude everyone they want to, have some level of closure (this anomaly will be explored specifically and in more detail in Chapter Four).

Part of this should include at least a consideration of prospective obligations. Brubaker notes that different conclusions are reached, depending on whether actual or potential immigrants are considered when determining conditions of access to citizenship. When the question becomes one of control and ability to exclude, then, although ‘[n]on-citizens are routinely excludable; citizens are not’, there are differences in the excludability, and ‘[t]he citizenship status of potential immigrants therefore matters a great deal to the state. The citizenship status of actual immigrants matters much less’ (Brubaker 1994 181). This is because non-citizen residents, especially long term residents, generally cannot be routinely excluded.

In many respects, citizenship status is of minor importance for access to social services in wealthy states. Regular presence is more crucial. Sassen suggests that this leaves non-citizens with little.

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47Though they do become excludable by revoking citizenship – see the Hamdi case discussed in Section 2.1.
incentive to naturalise, thereby devaluing citizenship (Sassen 1996 102). Indeed, a recurring theme in Sassen's work is that regular immigration status is more crucial than citizenship. Citizenship, then, is most crucial because it guarantees the right of presence itself; the contemporary incarnation of Arendt's description of citizenship as a 'right to have rights'.

Finally, consider the preamble to the Argentinian constitution, which explicitly affords benefits based on presence on the territory:

We, the representatives of the people of the Argentine Nation, gathered in the General Constituent Assembly by the will and election of the Provinces which compose it, in fulfilment of the pre-existing pacts, in order to form a national union, guarantee justice, secure domestic peace, provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves, to our posterity, and to all men of the world who wish to dwell on Argentine soil: invoking the protection of God, source of all reason and justice: do ordain, decree, and establish this Constitution for the Argentine Nation.48

This subsection has argued also that it is theoretically necessary in some contexts, explicitly to define substantial benefits based on presence, whether or not those persons that are present are citizens. The extract above shows that it is in fact already politically possible.

2.3.2. Contribution

Contribution can take a number of forms. For example: certain sorts of taxation, volunteering, participation, or producing services that are mutually beneficial. Persons in a state can develop contribution-based obligations and rights claims in two ways: based on a threshold of contribution or aligned to the level of contribution. This subsection focuses on the first of these. The second will be touched upon in the next subsection. According to the first, a person either contributes or does not, without admitting degrees, and any level of contribution ties a person into the system of appropriate claims. This is practically useful because it does not need a non-arbitrary measure for the level of a person's contribution (whether by man-hours, skill, market value, et cetera), so long as it is above some (admittedly probably arbitrary) threshold. It also enables more diverse participation in the system.

As with presence, there is a circular question regarding the entitlement to contribute. Although, unlike presence, it is difficult for someone to contribute without the state's consent, the question of the entitlement to contribute remains. Given the above discussion of presence, if only full members

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can contribute, this may leave members unfairly paying for non-contributors. Another possibility, that those who *benefit* should contribute, is both circular and problematic, as many beneficiaries of general public contributions are not, and could not be, contributors in a traditional sense (children and the insane, for example). Even if there is a wider understanding of contribution than just material contribution, the circularity problem remains. One commonly adopted option is that participating in the state’s economic system (as workers, investors, buyers, sellers) produces an entitlement, and requirement, to contribute. Perhaps, then, entitlement to enter the economic system may rest on some other basis discussed here (e.g. presence or participation – *jus nexi*).

There is a more fundamental circularity. If those who can contribute are those who benefit and those who can benefit are those who contribute, then it is hard to see how a person can enter the cycle. A related question, to be developed in Section 5.2, is whether the state has an obligation to *enable* a person (ensure he or she has the relevant capabilities) to contribute to it. This problematises the state’s role in deciding who can contribute and to what extent. Moreover, if contribution is the root of claims, it affects the sort of claims persons can develop against the state.

Gomberg argues that labour need not represent a burden and loss of liberty, instead describing labour along Marxist lines, as self-realisation. Indeed, he writes that contribution to society (through labour) is a necessity (duty) and a good (capability) (Gomberg 2007 152). This is, then, more than a discussion of whether a person should be allowed to develop claims based on contribution. Core to this is the acknowledgement that the wealth and capabilities of the state are not significantly separate from the wealth and capacities of those persons that contribute to it; and also that the contribution itself is an important vindication of an individual’s capability. Despite all this, it becomes clear that not only citizens in fact contribute in modern polities and, moreover, there is not a good reason why only citizens *should* contribute.

2.3.3. Need/Vulnerability

If contribution and presence might activate state obligations, then need (lack of basic capabilities) or vulnerability indicates the *level* of claim on the state - or the implied level of benefit the claim may give rise to. Need should be interpreted broadly. There is the absolute need of a starving person for food, but also relative need. Much of this was discussed in Chapter One’s introduction to capability, which explained need as a lack of basic capability. The fiduciary/waqf idea discussed in Subsection 2.3.4 below also fixes the importance of need. Chapter One introduced the notion of vulnerability, which Robert Goodin uses to explain both the special relations in a state and the need to help foreigners. This will not be examined in detail here, but recall that the argument is that vulnerability towards specific others gives rise to obligations in those others.
Two main problems arise for this as a way to explain heightened obligations towards citizens. First, there may be stronger needs/vulnerabilities outside the state. Second (responding to problems raised above regarding presence and contribution), those who are most vulnerable in the state may well be those present against the state’s wishes and contributing the least (or even precluded from contribution either by personal capability or by the state’s laws). These will now each be considered in turn.

First, need alone as a basis for capability rights may give priority to persons far from the polity. One way around this is to define presence/contribution as a criterion for the consideration of obligation, and then to order level of obligation based on the need/vulnerability of those who are already present or contributing. This may remove the problem initially, but it raises new questions. For example; whether need or vulnerability gives rise to obligations to allow or facilitate presence or contribution (as is already widely believed in the case of asylum, for example).

The second concern is that the most needy or vulnerable among those present in a state are currently largely those present against the state’s wishes. Although a number of qualifications could then be added to the argument (e.g. regarding rule-breaking or wider sovereignty concerns), these would need to be justified. Need/vulnerability in relation a state represents a strong reason for obligation, and for level of obligation. However, need/vulnerability in a state may ascribe more obligations towards non-citizens than citizens. Need and vulnerability, then, represent plausible grounds for obligations, but this is not restricted to citizens.

2.3.4. Fiduciary/qaqf relationship

Once someone is a citizen, the state must justify itself internally to him or her (before he or she is a citizen, it is an external type of justification that must be offered, though this section will demonstrate that the distinction is, in fact, difficult to draw). This subsection argues that the notion of a fiduciary or رقْف (waqf) relationship helps to understand the internal justification of the state, and the way in which it can relate to different persons therein.

The argument from a fiduciary relationship says that: given there are states, and people are under their power, those states have obligations. In the financial literature, a ‘fiduciary’ is someone held in a position of trust by a ‘beneficiary’. The fiduciary has obligations towards the beneficiary, in virtue of his or her position of power and trust (definition developed, e.g. in Sealy 1962). Fiduciary concepts can, then, be usefully applied to internal state obligations, since the fiduciary relationship resembles an appropriate relationship between the state and those under its power. However, the fiduciary relationship sets up the citizenry as powerless and passive. Better, is to see it as a waqf relationship, where the inhabitants act collectively as both waqef and beneficiaries and the state’s
officials act collectively as *mutawalli*. This makes it possible to describe a situation in which being a beneficiary is not necessarily the same thing as being a contributor.

The state holds discretionary administrative power over a wide variety of citizens’ interests, and citizens are unable to exercise the power that they have entrusted to the state. Indeed,

[b]ecause the problem of justifying the state [internally] is precisely the problem of articulating the conditions under which the state can exercise non-consensual coercion, the fiduciary model is well suited to the task (Fox-Decent and Criddle 2009 315).

On this basis, the obligations a state has towards everyone under its power (citizens and non-citizens alike) derives from the Kantian requirement of treating humans as ends in themselves and not mere means to ends (Kant 1785 37), thus precluding the instrumentalisation or domination of persons (Fox-Decent and Criddle 2009 310, 326; Criddle and Fox-Decent 2009).

*Prima facie*, the fiduciary explanation of obligations arising from internal state justifications fits with this dissertation's methodology. It does not claim that the state’s power is consensual, nor grounded in any notion of pre-institutional timeless rights (Fox-Decent and Criddle 2009 315, 316). Instead, it assumes that the state exists non-consensually, trying instead to make the exercise of its power more acceptable. For Fox-Decent and Criddle, then, ‘the fiduciary principle authorizes the state to secure legal order, but subject to fiduciary constraints that include human rights’. That is, the state must ensure core capabilities for those it is entrusted to protect. However, this removes the crucial capability of self-rule.

The fiduciary concept in Western legal systems is informed by the *waqf* principle in Islamic law, introduced into English law in the Thirteenth Century by Franciscan friars returning from the Crusades (Fox-Decent and Criddle 2009 335; Kuran 2001 848). While the fiduciary may take decisions on behalf of the beneficiary, or beneficiaries, for their benefit (Sealy 1962 80), in principle, the *mutawalli* of a *waqf* (who has the corresponding role) carries out strict instructions of the *waqef* (creator of the *waqf*), ostensibly for the benefit of third party beneficiaries (Kuran 2001 861).

That is, in the fiduciary case, the property is held in trust and administered for the beneficiary as owner, while there are three parties in the *waqf* agreement: the sovereign owner (*waqef*, retaining mastery even after death), the servant administrator (*mutawalli*), and the beneficiaries, who themselves theoretically have no power in the arrangement (Marwah and Bolz 2009 813). This reflects a crucial difference in the underlying principles. The strength of both the fiduciary and *waqf* concepts over others is that they do not require that the beneficiaries be *citizens*, have any history in the state, or sign up to any ideology or contract. Instead, the state is in this protective relationship
towards all those under its coercive power, just because of the coercive power that it holds. This theory therefore assumes that the state has obligations towards non-citizens and citizens alike.

However, the waqf allows that the one who administers the arrangement be instructed in this by a third party, who also provides the resources, in order for certain goods to be achieved. The analogy with the state is then that the citizenry act as both waqef and beneficiaries and they elect their officials to act collectively as mutawalli.

There is precedent for considering this sort of relation on a state level. Historically, waqfs provided social services for vast portions of populations in the Islamic World, running, for example, villages, shops, markets, and bath-houses, funding soup kitchens, mosques and hostels (Kuran 2001 849). In these cases, the waqf was set up and funded by philanthropists. The liberal democratic state, then, where persons are seen, separately, as equally part of the sovereign body and as equally part of the body benefitting, could be seen as a situation where the inhabitants take on both the waqef and beneficiary roles, with state as mutawali, or administrator. The relevant rights and obligations would then be dependent upon being subject to a state’s coercive control, reducing the underlying significance of citizenship. This relationship with the state, then, need not and is not only held by citizens.

This section has argued that none of: presence, contribution or need/vulnerability provide sufficient justification for supposing a special, rights-privileging relationship of the state with its citizens rather than with residents more generally. This makes them problematic as reasons for excluding non-citizens from certain benefits. However, it has also been argued that excluding persons from presence and contribution is also problematic.

2.4. When citizens are not present: civic duty and citizenship rights
This section focuses on the other half of a person’s being a non-citizen: his or her being a citizen not present in his or her state of citizenship. That is, most non-citizens present in a state are also citizens somewhere else. Since most analyses of duties to non-citizens ignore their citizenship elsewhere, it is fitting that here we discuss these before looking at territorially present non-citizens. This dissertation, in seeking to establish the obligations of a state towards non-citizens, must also take account of the relationship between a state of citizenship and its citizens abroad.

2.4.1. Dual citizenship: the franchise and military service
Dual citizens may be simultaneously both citizens abroad and citizens who are present. This can have problematic implications. In 1982, the first contingent of young men with dual French and Algerian

49 A minority of non-citizens are in fact stateless. The situation for them is different.
nationality reached the age of military service; children of Algerians living in France were French, by article 23 of the Nationality Code\(^{50}\) (Weil 2008 155). Both France and Algeria required military service, putting the young men in a difficult position, and generating a campaign by the Algerian consulate to ‘free these men from French allegiance’, describing them as ‘Frenchmen in spite of themselves’\(^{51}\) (Weil 2008 155). This situation raises wider questions for the ramifications of dual citizenship.

Many young Algerian men applied not to be French citizens:

Table 5: Algerians applying to be released from French citizenship (from Weil 2008 155, n.7)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of applications</th>
<th>Percentage rejected</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>758</td>
<td>72%</td>
</tr>
<tr>
<td>1984</td>
<td>2,949</td>
<td>85%</td>
</tr>
<tr>
<td>1985</td>
<td>1,034</td>
<td>71%</td>
</tr>
<tr>
<td>1986</td>
<td>872</td>
<td>44%</td>
</tr>
</tbody>
</table>

The situation was somewhat resolved with the agreement that a dual citizen could choose in which country to perform his military service. This was particularly pertinent, as France and Algeria were, at the time, on opposing sides militarily.

In the early 2000s the issue of overseas voting again came to a head in Australia, when Australia felt threatened by Italy’s new rules allowing postal votes and creating expatriate constituencies in the Italian parliament (these persons may or may not have also held Australian citizenship).\(^{52}\) The public debate at the time uncovered a wider issue of citizenship as a membership status versus presence. In a 2009 interview, a former Australian ambassador to Rome explained the fear at the time:

> an Australian resident, possibly with dual citizenship, could come to hold the balance of power in the Italian parliament and be tempted to use that power to induce the Italian government to intervene in issues of an Australian domestic character (Mascitelli and Battison 2009 515).

\(^{50}\)By double application of *jus soli*; they were born in France, and born to a parent born in pre-independence Algeria – considered French soil.

\(^{51}\)This terminology is reminiscent of the ‘accidental citizenship’ discussed earlier.

\(^{52}\)In 2001, the Italian Parliament created four overseas constituencies: Europe, South America, North and Central America, and Africa, Asia and Oceania and Antarctica. Arguably, the overseas electorate was key in electing Berlusconi in the 2006 election, in which 1 million expatriate Italians voted (Dauvergne 2008 133).
The right to vote is often seen as a core symbol of citizenship, and stake-holder-ship in state governance. The Australian fear was that Italians may use their vote in Italy to effect change in Australia, the state where they had a primary stake. This would, it was feared, devalue Australia’s independence and autonomy.

This may appear alarmist, since Australia is already interlinked, and pressured, in many ways, irrespective the overseas enfranchisement of a few thousand Italians. However, this reasoning is not unique. For example, Theodore Roosevelt declared: ‘we have no room for any people who do not act and vote simply as Americans, and nothing else’ (quoted in Choate 2007 239). Meanwhile, of the 214 UN member states and territories which elect their own authorities, 115 have legal provisions to allow electors to cast a vote in a national election abroad (including, interestingly, both Australia and the United States).\(^5\)

Enfranchising across borders also affects the meaning of the franchise and the *demos*. Voting comes to be regarded as a badge of membership, rather than as a means to self-government in a geopolitical space. However, perhaps this is necessary in a world where modern migrants may have stakes in several polities, through residence, family, and other connections. Perhaps no one of these sorts of stake should alone determine enfranchisement, but rather an appreciation of the complex nature of participation in a complex state-based nexus. Paolo Boccagni describes how Ecuadorian expatriate enfranchisement has altered Ecuador's political landscape. For example, the new draft constitution contains an entire section on ‘human mobility’, and one article explicitly explains Ecuador’s intention to protect Ecuadorians everywhere, regardless of their ‘migration status’, thus actively reflecting expatriates as full members of the demos. This relates to the notion of the ‘domestic abroad’, which will be discussed in Subsection 2.4.3.

Voting, then, is appropriately available to those governed by the body to be voted upon. This should include all residents, though it is not clear it should include also citizens who are resident elsewhere. Further questions arise regarding those with stakes in a number of jurisdictions, such as seasonal migrants or persons with property in a number of locations, but a flexible notion of *jus nexi* as described here can accommodate these difficulties.

Both military service and the franchise can raise severe existential questions for states when citizens are abroad, even/especially when they are in a state in which they are also citizens (recall joint US/South Korean citizen, Young Jin Chun). The franchise is important to internal justifications, enabling a person, at least symbolically, to have some say in how they are governed. If persons not

governed are eligible to vote, this weakens its justificatory aspect. This is especially so when some of those who are subject to the laws of the state, since present there (i.e. non-citizens), are ineligible to vote. Military service, meanwhile, is both a significant sacrifice, and one which requires a demonstration of loyalty to the polity. Both voting and military service, then, illustrate key conflicts that arise between someone’s being a citizen abroad and being a territorially present non-citizen where they are now. That is, it is a non-trivial matter to establish the location of that person’s appropriate civic duty and the source of their basic capabilities. As a result, it is important to consider the bases for internal obligations towards citizens and to recognise that they do not apply exclusively to citizens.

2.4.2. Territorial effects and universal principles: extraterritorial prosecutions

This chapter has largely argued that law should apply to the person where they are, rather than to the person as a citizen. Two examples of extraterritorial prosecution can appear to be counterexamples to this: cases of engaging in paedophilia overseas, and of buying human organs abroad. These are not, however, counterexamples. Both highlight issues of exploitation (noted, for example, with regard to body parts, in Widdows 2009; 2011 19-23, 72-75). Two bases for extraterritorial jurisdiction (adapted from Watson 1992 43) will be invoked:

1. Territorial effects principle (a person is subject to the law of his state of citizenship when his actions affect his state of citizenship)
2. Universal principle (a person is subject to the law of his state of citizenship when his actions are universally agreed to be repugnant/unlawful)

This is in line with International Law, which argues that a home state has an interest in deterring nationals from doing things damaging to the state and its reputation, and that the international community has an interest in deterring serious crimes that would otherwise go unpunished, since no state has jurisdiction (Watson 1992 68-9).

Travelling overseas to engage in sexual activities with children is currently illegal in some form in twenty states. Examining the domestic explanations of these laws, as well as the international discussions, demonstrates that they are not about prosecuting the actions of citizens per se, but about enabling the prosecution of child sexual exploitation in a world in which laws of abode and

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54 Consider Wilfred Owen’s bitter poem, declaring the lie in the words of Horace, often quoted in Britain at the opening of the First World War: Dulce et decorum est pro patria mori (Owen 1917) – it is right and proper to die for one’s country.

55 Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Mexico, New Zealand, Norway, Spain, Sweden, Switzerland, Netherlands, Taiwan, Thailand, United Kingdom and United States.
non-deportability may make it undesirable to return the accused to be prosecuted (e.g. Edelson 2001 494), especially when potential punishments fall into categories which preclude extradition from those home countries, or where host countries do not prosecute these sorts of crimes effectively. Further, when destination countries enforce laws against child sex tourism, the persons wishing to engage in these activities can (and do) just move their activities to countries with less rigorous enforcement (Edelson 2001 486). This makes it necessary for taking wider responsibility.

Sexual exploitation of children is not seen as a domestic issue, but as a 'major international problem' (Newmann et al. 2011 121). The Convention on the Rights of the Child 1990 (hereafter CRC) requires that ‘ratifying countries must protect all the world's children, therefore, prosecution of child sex tourists is an international obligation of all countries’ (Edelson 2001 515 n172). As international laws protecting children are directed towards all children, stopping child sex tourism is not a domestic but an international obligation, for states to act upon however they can. As a result, '[c]ommentators argue that to combat child sex tourism, countries should extend legislation extraterritorially prohibiting sexual crimes against children' (Edelson 2001 493).

In this sense, then, extraterritorial prosecution in cases of child sex crimes can be seen, not as an instantiation of a citizenship principle, but as part of an international effort to prosecute crimes considered universally repugnant, exploitative, and illegal. It is a pragmatic way to respond to these crimes in a world of states and unequal enforcement among state jurisdictions. It is also part of an attempt to keep intact citizenship benefits of abode and non-extradition. This rationale can be seen through considering various jurisdictions' adoption of the extraterritorial legislation. The UK, for example, implemented anti child sex tourism laws in response to international pressure (Edelson 2001 514), the USA’s PROTECT Act 2003 was brought in for similar reasons (Newman et al. 2011 116), and the Australian Child Sex Tourism Act 1994 explicitly mentions Australia's international obligations (Edelson 2001 508).

A subsidiary justification for measures against child sex tourism should also be mentioned. Given evidence-based research (e.g. Newman et al. 2011) suggesting that those engaging in sex with children overseas may well also do so at home, prosecution of this activity is also part of responding to a territorial effects principle. Consequently, the UK, for example, now lists overseas sex offenders on the national sex offenders register. Indeed, prominent cases of convicted child sex tourists in the United States include persons who work with children at home (e.g. see Edelson 2001 483 and Newman et al. 2011 117).
Consider now the very different example of organ transplant tourism (and I mainly focus here on kidneys). Although on the face of it this may appear to be a similar situation to that of child sex tourism above, as it relates to the legality of going overseas to pay for something that cannot be bought legally at home, it involves persons travelling from richer to poorer countries to do so, and that there is currently extraterritorial jurisdiction of home countries over those taking part in these activities. However, there are crucial differences in the reasons for extraterritorial enforcement. The most important difference to consider is that those who are buying the organs are themselves vulnerable and sick. The trade is, for them, a matter of life and death. There is also not an internationally agreed upon convention against the buying and selling of organs (Shimazono 2007) in the same way as there is against sex with children (e.g. CRC 1990 Art 34). While most countries, especially most industrialised countries, have signed up to conventions against child sex tourism, the situation is much more ambiguous with organ sale, even to countries banning it at home. Indeed, while there is a large literature against the buying and selling of organs (e.g. listed at Scheper-Hughes 2011 82), there remains significant disagreement. Therefore, while universal principles come into the justification of extraterritorial jurisdiction in this case, there are also two further important considerations: territorial effects principle, and a sort of universal consideration of not undermining foreign legal systems. All three of these are considered below.

First, consider the implications of the territorial effects principle. This has two aspects: first, the jurisdiction is not exactly extra-territorial, since the concern may be seen as being with bringing into the country goods that it is illegal to buy or sell; second, there are public health considerations in the home country. I will consider these in turn.

Peter Grabosky, formerly of the Australian Institute of Criminology, notes that a ‘variety of illegal activities may take place on the way into or out of Australia’ (Grabosky 1998 2). The concern is that illegal activity is taking place on the border to the state. Just as a state may want to control in ingress of a number of things that it considers to be wrong/harmful/undesirable in some other way, it may not want bought organs to enter the country.

Second, there are a number of public health concerns. ‘Botched’ transplant surgeries taking place overseas are dealt with by home public health systems (Scheper-Hughes 2011 69). Indeed, the surgeries need not even be botched. There are cases, described by Scheper-Hughes, of patients who are not appropriate recipients of surgery, needing significant aftercare, and Crozier and Baylis note, for example, a Canadian couple that pay for donor eggs for fertility treatment abroad who then require extensive maternal and neonatal care to be paid for by the Canadian state (Crozier and Baylis 2010 297). Further, in countries with a publically funded healthcare system, going abroad for
surgeries may also lead to concerns regarding equality, for two sorts of reason. First, as with private healthcare availability in a public healthcare country, people with resources can buy their way off waiting-lists (Crozier and Baylis 2010 300). Second, by going abroad, a person may be able to buy their way out of legal restraints, for example, on buying organs.

Now consider Universal Principles. In some cases, extraterritorial jurisdiction supports foreign legal systems. As discussed in the cases of child sex tourism above, one important consideration is to avoid sheltering perpetrators from justice and to support overloaded justice systems.

A further concern pertains in both cases, but can be seen more easily in the case of human organ trade. In countries where buying and selling human organs is illegal, there are insufficient organs for the potential recipients. In the UK, for example, 2010 figures suggest that there are annually about 1200 organs donated,56 about 1000 potential recipients die from lack of an organ, and there are about 6,000 people on the waiting list for donor organs (Woodcock and Wheeler 2010 282). If there are other countries where these can be bought, then countries making it illegal at home are essentially pushing the problem of buying and selling organs overseas, especially as patients will most likely return home having received their organ. This is particularly apparent in Israel’s Ministry of Health’s move, in 1994, when they ‘made it lawful to buy insurance to cover the cost of life-saving transplants abroad’ (Woodcock and Wheeler 2010 284). This was revoked in 2009 (Scheper-Hughes 2011 67). By not prosecuting this activity, it looks like the state is saying that buying and selling organs is only not ok if done at home.

There is a further, related, problem. In some of those countries with large international trade in organs, the trade is in fact illegal. For example, ‘[d]espite the fact that the sale of organs is legally prohibited in Pakistan, this country remains a leading destination for foreigners seeking to purchase kidneys’ (Crozier and Baylis 2010 300). The argument is that the sending state holds some responsibility for off-loading this trade onto a country like Pakistan that struggles to enforce its law against it. Not undertaking extraterritorial jurisdiction in such cases can, then, be seen as exporting harmful exploitation (Crozier and Baylis 2011 300) and handicapping foreign law enforcement.

A further territorial effects concern is to protect vulnerable citizens and residents from exploitation. Those buying organs are usually desperate end-stage kidney disease patients, who may be willing to take great risks, and pay large sums, to someone who is offering to save their life (Scheper-Hughes 2011 81). There are, then, unlike in the case of child sex tourism, two sets of very vulnerable groups

56 400 heart-beating, 200 non-heart beating, 600 living.
involved here: the desperately ill and the desperately needy (Scheper-Hughes 2011 86). Scheper-Hughes quotes an advert seen in Recife, Brazil:

I, Manuel da Silva, 38 years old, rural worker, father of three sick children, am prepared to sell anywhere (in the world) any organ of which I have two and the immediate removal of which will not cause my immediate demise. (Scheper-Hughes 2011 64)

The extraterritorial jurisdiction of the state is to protect the desperately ill among their citizens and residents, but is also part of a universal principle of protecting the vulnerable more generally. The persons hoping to sell organs are in a situation where they have few other options. Going to developing countries to buy organs is condemned by the World Health Organisation and the International Transplant Society (Spurgeon 2001 1446), irrespective of their opinions about the buying and selling of organs per se. It is seen as exploitation of persons in positions of vulnerability created by the international context, rather than anything specifically about the citizenship relation. This will be developed in Chapter Three’s discussion of state obligations to non-citizens who are not present.

There are, then, strong arguments for extraterritorial jurisdiction in the cases of both child sex tourism and organ transplant tourism. However, this is not because of an argument in favour of jurisdiction on the basis of citizenship. They are responses to two key elements relevant to the way the world is set up. First, that the enforcement of universal principles may be haphazard in a world of states and citizens and unequal enforcement capabilities of states; and second, that activities in one country may affect life in another. Neither of these, then, act as counterexamples against the idea that a state should enforce rules against those in its territory rather than against its citizens wherever they may be.

2.4.3. Diasporas and ‘domestic abroad’

Diaspora has been applied to various groups in a number of contexts, and its proper application is contested. Latha Varadarajan’s term, ‘domestic abroad’ provides a useful way to understand modern diaspora (Varadarajan 2010). She suggests that diasporas are emigrant communities that are being ‘constituted’ (actively created), and that diaspora communities become seen as pockets, as homes from home. This definition allows for the enormous contextual differences between, for example, the Jewish diaspora discussed by Borin and Borin (Borin and Borin 2003) and the African diaspora discussed by Gilroy (Gilroy 1994).

Diaspora identity is also tied to global politics and power relations. This is apparent in African Union attempts to develop a notion of ‘African Diaspora’, aiming to tap into the wealth of human capital
among people of African origin. This is seen already in Article 3(q) (amendment) of the African Union’s Constitutive Act: ‘[The Union Shall] invite and encourage the full participation of the African Diaspora as an important part of our continent, in the building of the African Union’. In 2005, AU member states had adopted this definition:

The African Diaspora consists of peoples of African origin living outside the continent, irrespective of citizenship and nationality and who are willing to contribute to the development of the continent and building of the African Union (African Union 2005).

This led to much debate, and the reaffirmation of four important elements: bloodline, migration, ancient/modern, commitment to homeland.

This question has been discussed repeatedly, for example, at an African Diaspora Meeting convened by the AU at the offices of the Permanent Observer Mission of the AU to the UN in New York, in October 2010. The debate surrounding this indicates two major problems with ‘diaspora’ to be elaborated:

1. Sub-continental affiliation may be stronger; and

2. Multi-level diaspora identities may be missed, choosing Africa as the arbitrary salient origin.

Each of these is now elaborated in turn.

First, throughout history, Africans abroad have not identified particularly as ‘African’, but as Yoruba, Akan, or Malinke, for example (Palmer 2000 29). Subsuming all of these groups under ‘African diaspora’ may hide individuals’ own identifications, as well as diasporas within the African continent (e.g. see Pereyra 2011). Practical implications of this can be seen in the corresponding sub-case of the Somali diaspora, often considered collectively by receiving countries, despite comprising warring clans with mutual antipathy in diaspora mirroring that in Somalia (this case is discussed further in Bloom 2009).

Second, across the ‘African diaspora’, multiple migration stories form multiple complicating layers to diaspora identities. Blanket reference to the ‘African diaspora’ misses, for example, a person living in London’s Jamaican community, feeling herself more a part of the Jamaican diaspora than the African diaspora. Colin Palmer, an African diaspora scholar, notes that ‘the construction of a diaspora, then, is an organic process involving movement from an ancestral land, settlement in new lands, and sometimes renewed movement and resettlement elsewhere’ (Palmer 2000 28).

Four reasons for special obligations held by the ‘homeland’ state towards its diaspora arise:

(i) Diaspora communities may contribute significantly to the ‘homeland’;

(ii) Some states are now trying to locate their diasporas;\(^58\)

(iii) Diaspora persons may be linked to homeland by others, possibly against their wishes (and/or that of the ‘homeland’); and

(iv) Diaspora persons may themselves feel connected to the ‘homeland’, possibly against the wishes of the ‘homeland’.

These will be considered in turn.

Diaspora communities’ contributions to the ‘homeland’ elicit obligations towards them, because of both their vested interest, and their contribution to the state.\(^59\) This is recognised in the Philippines, for example, where provisions and protections recognising expatriate contribution include: an annual celebration of expatriate contributions; and mechanisms to facilitate investment at home.

Some countries are just beginning to recognise their diasporas (e.g. the UK, see Finch et al. 2010; Richards 2007), and in fostering diaspora consciousness, they open obligations towards those persons. This trend is seen in two examples. First, in July 2000, Vicente Fox Quesada was elected as president of Mexico. Soon after election, he declared his intention to ‘govern on behalf of 118 million Mexicans’, despite a resident Mexican population of only about 100 million. He was talking also to those of Mexican origin living elsewhere (Varadarajan 2010 3). Quesada made it clear his interest was in diaspora, not merely emigrants, ceremonially honouring 200 persons of Mexican origin in the United States, including persons born in both Mexico and the US.\(^60\) A second example is the 2003 celebration, in New Delhi, of the first ever ‘Pravasi Bharatiya Divas’ (Day of Indians Abroad). At this event, panellists from the Indian diaspora, from over 60 countries, debated the meaning of diaspora and the appropriate relationship that should be developed between the Indian...
diaspora and the Indian state. Varadarajan notes that, ‘strikingly, most of the Indians who were being welcomed back home were not Indian citizens’.  

Some persons are identified with a ‘homeland’ state, against their own wishes because of a conflation between nation or group identity and a state citizenship. The Jewish diaspora is linked by many to Israel, regardless of individual self-identification. Included in this externally ascribed diaspora are persons given special protections and rights of settlement in the state of Israel (in virtue of having a Jewish mother), but also persons who are not given these privileges. Regardless of their parentage, persons in the Jewish diaspora may be violently targeted because of actions of the Israeli state. The suggestion is that Israel thereby develops special obligations towards these persons. The suggestion is that irrespective of a felt connection among relevant groups or states, the perceived connection and practical ramifications give rise to some obligation, perhaps as minimal as to consider these groups when deciding on policies that may affect them.

Finally, some persons in exile feel a connection to a geographic place, even when the state with jurisdiction over it does not recognise them as a diaspora community. Two examples of this are: the Tibetan diaspora, and the Palestinian diaspora. This raises, then, the question of whether it is the enclosure of the space of the state that is relevant to the development of the obligations, or whether it is the shared ethnicity / history with the ruling group of the state that is important. The shared memory, to which Paul Gilroy refers (Gilroy 1994 293), must be actively sustained and, in some sense, created.

The Dalai Lama recognised this in his call, in 1990, to American Jewish leaders, to ‘share the secret of Jewish survival in exile’, and indeed through the organisation set up in 2000 (and in which I was personally involved in 2000 and 2001), called the 'Tibetan Jewish Youth Exchange'. This exchange invited Tibetan youth workers to the UK, to be trained, alongside Jewish youth workers. They then worked at Jewish summer camps and Jewish youth workers helped at Tibetan summer camps. The emphasis was on the development of an identity around exile and a homeland rhetoric that has become almost fictional.

In some ways, then, a state does have obligations towards members of its ‘diaspora’. It is, however, difficult to define the diaspora, and, as has been shown, in some ways, the diaspora is partly defined according to the obligations that are perceived to be held. The obligations, where they exist, are

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61 In 2005, India created a new legal form of citizenship, ‘overseas citizen of India’, allowing a legal connection to the country, without usual citizenship rights like voting or standing for office (Dauvergne 2008 135).
62 Official website: [www.tjye.org.uk](http://www.tjye.org.uk)
based on the demands made by the state and the goods received. They are also based in the desire to create a diaspora feeling. A diaspora is not a fixed entity, instead it is:

a social construct founded on feeling, consciousness, memory, mythology, history, meaningful narratives, group identity, longings, dreams, allegorical and virtual elements all of which play an important role in establishing a diaspora reality. At a given moment in time, the sense of connection to a homeland must be strong enough to resist forgetting, assimilating or distancing (Shuval 2000, quoted in Kumar Sahoo and Maharaj 2007 5-6).

There may be obligations that arise because people are stigmatised by the 'homeland's activities, and there may be obligations based on the connection people feel and their desire for identity. These persons may be citizens of the homeland state, may be seen as citizens, or may see themselves as citizens, or may in fact have little political connection with the state and its territory at all.

Non-citizens in a state are in fact also usually citizens of somewhere else abroad. This section has argued that the state of citizenship has little appropriate jurisdiction over these persons while they are overseas, and that for both practical and justificatory purposes, these persons must look first to their state of presence for protections, welfare, and other support. As a result, the state of presence must undertake to respond to these needs.

2.5. What the status of citizens implies for non-citizens

Two key problems remain: first, whether there can be any special quality to the citizenship relation; and second, how the fact of different styles of citizen-relationships (e.g. welfare state / no welfare state) affect relationships with non-citizens. These two concerns answer each other. Understanding obligations towards citizens who are not present helps to separate obligations of presence and of citizenship. This chapter has explored whether the condition of presence is either necessary or sufficient for the rights/obligations usually connected with citizenship. Two practical aspects of the situation for citizens highlighted in this chapter impact particularly on how we can understand the development of a state's obligations towards non-citizens. First, non-citizens in a state are usually also citizens somewhere else, and so also share a relationship with another state. Second, significant inequality between citizens affects how immigration will be experienced. Acknowledging and addressing these concerns will be crucial to developing a realistic theory of obligations towards non-citizens. This section first sums up the chapter's conclusions regarding the rights of citizenship. It then discusses how this relates to migration and to non-citizenship.
2.5.1. The rights of citizenship

It is crucial not to forget the important role currently played globally by citizenship. A theory which advocates significant obligations towards non-citizens risks undermining aspects of the notion of citizenship. Rousseau comments:

Do we want nations to be virtuous? - Let us begin then by making the people love their country; but how can they love it, if their native land means no more to them than it does to foreigners, and if what it does for them is only what cannot be refused to anyone? (Rousseau 1755b 18; also quoted in Carens 2002 100)

Moreover, local context is important. For example, contrast Kenya and Botswana. While Botswana has a welfare state, Kenya does not. Furthermore, while Botswana attracts skilled migration from the region, Kenya hosts large refugee populations, especially from nearby Sudan, Uganda, and Somalia, who are eligible to protections and sources of funding unavailable to Kenyan citizens, from outside agencies like the UNHCR. The wealth and needs created by these very different immigrant demographics and local contexts of inequality and redistribution must influence how both states’ citizenship regimes develop, including both criteria for the status of citizenship, and its associated capability-benefits. This dissertation argues both for a move towards jus nexi citizenship availability and for a more complex notion of capability obligations beyond citizenship status. However, understanding citizenship itself and the role it currently plays is crucial to understanding non-citizenship, and vice versa. Generally, citizens are inside the physical and political space of their state of citizenship. Their relationship to that state is, then, in contrast to non-citizens and especially those overseas, who are outside both of these spaces.

Even Christina Boswell, advocate of significantly open borders, holds that the state’s legitimacy requires at least a symbolic attempt to guarantee privileged access to certain rights and services for its citizens (Boswell 2008 188). This, she argues, is how the state retains the ‘loyalty and compliance’ of its citizens. Further, the development of human rights leads to a ‘redefinition of the bases of legitimacy of states under the rule of law and the notion of nationality’, eroding the legitimacy of states that fail to respect human rights (Sassen 1996 102).

The status of citizenship has ramifications for non-citizens, and the status of non-citizenship has ramifications for citizens. This chapter has shown that some of the key reasons for special obligations towards citizens are in fact also shared by non-citizens. It has also shown that the main reason for ascribing special treatment to citizens is that this is currently presumed important. Finally, it has noted that persons who are non-citizens in a state are also often citizens elsewhere. If the
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state does not want interference in its internal affairs by a person’s state of citizenship, this must come with obligations towards those persons thereby denied the protections of their home state.

*Jus nexi*-based citizenship should not be imposed suddenly in a state presuming exclusion, as it would then just serve to reinforce exclusions. Instead, it has been argued, gradual adoption of a *jus nexi* citizenship regime should develop alongside increased access to the nexus itself, in terms of access both to the territory and to the state's institutions. I noted that many countries have in fact been developing in this way. The *jus nexi* route, it has been noted, may lead eventually to a dilution, or even disintegration, of citizenship as a status, but not in the short and medium term.

2.5.2. Citizenship overseas vs. non-citizenship here

The fact that the same person is simultaneously both a citizen abroad and a territorially present non-citizen makes these obligations and relationships more complex and integrated than they seem at first. Citizenship as an all-or-nothing status hides important ways that citizenships interact globally. That many people are *in fact* citizens of more than one country means that this is already acknowledged by many states. The fact that some states prevent this, and that the situation is changing (e.g. India's development in 2005, of 'Overseas Citizenship of India') reiterates the importance of context and flux, as state and individual interests evolve. This thesis advocates harnessing this evolution, and directing it towards increased capabilities and a global and domestic society conducive to increasing capabilities. The obligations described are of a particular state towards those under its effective control.

When citizens are abroad, they become non-citizens where they are, and this dissertation focuses on their relationship with the host state. However, it is important to examine also how this interacts with the acceptable role of their state of citizenship. This intertwined and constantly changing context must affect the nature of the wider set of obligations involved. Two shifts are needed. First, so long as there are territorial states, people should be subject to the legal system *where they are*, but also protected by that system and supported in obtaining capabilities. Second, people should be eligible to vote only for the government *that governs them*, though, as has been discussed, this is complex to establish, given migrants’ stakes in multiple countries, through family connections, and property ownership, for example.

This has an associated effect. To protect the sovereignty of the state of presence it is necessary to recognise a status of a state's obligations towards non-citizens therein. This would avoid the need for a state of citizenship to act too strongly within the borders of a foreign state where its citizens are present. Throughout this dissertation’s discussion of obligations towards territorially present non-citizens, it is essential to recall that they will almost all also be citizens abroad.
Citizenship plays a key role in today’s world and a move towards something increasingly akin to *jus
nexi* would help to make this allocation more appropriate, as was discussed above at length. However, internal justifications of the state come to mean justifications to those who happen to find themselves within the state’s control, *whether or not* they are citizens.

This chapter has argued in favour of three developments to the citizenship relation to direct the currently existing framework of states towards increased justice. First, citizenship allocations should become ever more motivated by the underlying assumptions and practical implications of *jus nexi* citizenship. Second, the role of other statuses in producing claims must be acknowledged. Third, each sort of obligation to secure capability should be based upon the nature and context of the state and that capability in particular. This will be developed particularly in Chapter Five, through the discussion of perhaps the most complex and most crucial of capability rights: education. This chapter concludes that the reasons usually given for motivating special treatment of citizens in a liberal democratic state in fact apply equally to most non-citizens who are within the territory of the state. As a result, while citizenship itself has to be re-examined, the implications of this status also need to be revisited in the interim.
Chapter Three: Non-citizens abroad and non-citizens in this state.

This chapter argues that, on the basis of external justifications for its existence, a liberal state has obligations towards non-citizens abroad. These are more than obligations towards people as people and are different in basis from obligations towards those within the state. However, as will be argued, these obligations are not lost as a person crosses the border into a state. The discussion in this chapter provides a useful step towards understanding obligations towards non-citizens within the state for a number of reasons. First, non-citizens within this state were usually once non-citizens outside this state. Second, there exists a substantial literature examining obligations towards non-citizens abroad, which it will be useful to draw upon. The first three sections analyse different aspects of the enclosure of a state (people, territory, resources), and the implications for obligations towards non-citizens overseas. This chapter then examines in more detail the resulting obligations, as well as the implications for obligations towards non-citizens who are within the state.

3.1. Enclosing people and human capital

This section considers how enclosure of humans results in special obligations towards specific others overseas. It begins by discussing the enclosure of human capital directly, and damage to it. It then examines that enclosure through the example of medical doctors. This uncovers problems in the notion of ‘human capital’, but also demonstrates its usefulness in the context of the discussion of capabilities. Finally, this section considers hindered human capital development, particularly through previous colonisation.

3.1.1. Understanding the enclosure of human capital

Chapter One already examined the development of human capital in order to make use of other resources. It also examined the relationship between human capabilities and human capital, such that talk of human capital is useful, but only so long as it is seen only as a means to, and secondary outcome of, human capability. This section draws attention to the problem of the attempt to enclose the human capital of a state. The enclosure of people has different implications for capabilities, depending upon which of the three notions of enclosure that is adopted, and each of these in turn again has different implications for the capabilities of different groups. Throughout this chapter, different ways of understanding ‘enclosure’ will be examined.
Enclosure has three sides. It keeps outsiders from entering and keeps insiders from leaving. It also can be seen as the mere drawing of a line around insiders without restricting the movement either in or out. By enclosing human capital, then, I mean delineating the use of that human capital. Enclosing a group of people and making use of their collective skills and talents, whilst developing their identity as members of the state community is crucial to modern statehood.

3.1.2. Damage to human capital

There are many ways that human capital can be damaged. Above, I discussed ways that human capital can be lost (through migration, disease, war, for example). Damage is different, however. I will focus here on previous colonial occupation. There are four possible reasons why justice may have to take into account previous colonial occupation:

(1) Retribution;

(2) Previous exploitation has created current poverty;

(3) Previous exploitation has created current wealth; and

(4) Historical experience is central to what has created common self-understanding.

The last point will be particularly important to developing the specific conception of justice introduced in Chapter One. This will be examined after (2) and (3). (1), retribution, will not be discussed in detail, however, since, as argued in Chapter One, emphasis is on the situation today, rather than looking up historical wrongs.

The states with the lowest rating in 2009’s Human Development Index (HDI) are considered to have ‘Low Human Development’. Table 6 categorises these according to their colonial history. In some cases this has been simplified (perhaps over-simplified) to make it possible to construct a table:

Table 6: Countries with ‘Low Human Development’ organised according to their history of decolonisation from European powers

<table>
<thead>
<tr>
<th>Independent from France, date</th>
<th>Independent from UK, date</th>
<th>Independent from Belgium, date</th>
<th>Independent from Portugal, date</th>
<th>Has not been colonised by Europeans</th>
</tr>
</thead>
</table>

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63Eritrea gained independence from Italy in 1941, from UK in 1951, and from Ethiopia in 1993
From the table, observe that 22 out of the world’s 24 least developed countries (according to UNDP 2009a) were European colonies until the mid-Twentieth Century. Meanwhile, all of those European states are now in the category ‘very high human development’. In most cases, it has only been about 50 years since independence.

European colonial powers gained considerable wealth from their Empires and they continue to benefit from the human capital- and capability-enhancing institutions thereby stimulated; museums, universities and libraries being the most obvious of these. Justice may have to take into account previous exploitation, then, because of the large wealth stimulated by this exploitation for the exploiters. Given that the former colonial powers mentioned in the table are all now very wealthy, the suggestion is that some of this should be made available for capability-promotion to those in regions that helped to stimulate this wealth.

Consequently, rather than looking backwards, responding to the impact of past and continuing colonialism to human capital development is, then, a crucial part of thinking about justice today. The key, then, to developing obligations based on past damage to human capital elsewhere is in two stages: currently benefitting from past damage; and currently suffering from past damage. This will be revisited in Section 3.3.

3.1.3. Human capital: example of medical doctors

The case of medical doctors is an important human capital case to consider, because the discussion of the justice of allowing the movement of medical professionals is both an urgent vital question for many of the world’s poorest inhabitants, and highly controversial (e.g. see also Legrain 2007). Medical doctors can be seen as ‘human capital’ in two ways. First, they represent a significant material investment in terms of training and other resources, a significant proportion of which is usually state-sponsored. Second, medical doctors and other health care professionals (hereafter, HCPs) constitute part of a country’s wealth, crucial to its human development more generally. After

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64 East Timor was occupied in the following year by Indonesia, and it became a sovereign state in 2002.
65 Created as a haven for freed slaves from America, Liberia gained independence from the United States in 1847. In reality, like Canada and the US, it was never de-colonised.
introducing the topic of HCP migration, this subsection examines ethical tensions that arise and analyses possible policy responses according to the justice framework developed in this dissertation. It concludes that the coercive enclosure of human capital contravenes the notion of justice developed in this dissertation, and that this gives rise to obligations to support human capital needs globally.

A study reported by the British Medical Association\(^{67}\) indicates that in Britain in 2010, GP training cost £344,728 (excluding pre-specialist training), the majority of costs were borne by the National Health Service overall, and some by the individual student. Recent plans to increase the contribution made by students would mean medical students contributing up to £45,000, still leaving 87% to the state.

The 'brain drain' of medical staff from poorer countries to richer ones was already being described in the 1960s (Scott et al. 2004 174), and today political leaders in Less and Least Developed Countries (LDCs) across the world, and medical associations and journals from across the developed world, have spoken of this movement as the most serious human resource problem facing LDCs’ health ministries (e.g. Scott et al. 2004 174, Patel 2003 927, Hagiopian et al. 2004; Brown and Connell 2004 2195).\(^{68}\) The concern is that countries with very limited resources are investing in the training of medical staff for them to use their skills in wealthy countries. One Indian theorist sums this up: ‘in effect, the people of poor countries are paying for the health care of those who live in the richest’ (Patel 2004 927). For example, one estimate suggests that South Africa loses more than $1 billion \textit{per annum} this way (Clemens and Pettersson 2006 3). Medical education currently costs Ghana about $9 million and Nigeria about $20 million \textit{per annum}, while an estimated 28% of doctors from Sub Saharan Africa are currently overseas (Clemens and Pettersson 2006 12). Alongside the significant direct loss in terms of investment in training, this also lowers average incomes, as doctors generate surrounding skilled jobs, and lost tax revenues (Hagiopian et al. 2004). This issue is becoming increasingly pressing, and ‘the transnational flow of health workers has never been higher’ (Eckenwiler 2009a ii).

The situation is, however, more complicated than just put-upon poor countries losing doctors to evil rich countries. It is part of a much larger movement of HCPs between countries of all development levels, for training and experience, as well as for permanent relocation. For example, Ireland is also

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\(^{67}\) The Personal Social Services Research Unit, commissioned by the Department of Health, publishes an annual report of costs within the health service. The results on training are reported by the BMA at [www.bma.org.uk/press_centre/presstrainingcot.jsp](http://www.bma.org.uk/press_centre/presstrainingcot.jsp) (accessed 28th February 2011).

\(^{68}\) It is important to note that another issue hampering any discussion in this area is the significant lack of comparable data (e.g. Clemens and Pettersson 2006 2; Brown and Connell 2004 2194; Hagiopian et al 2004; Kangasniemi et al 2004 3).
experiencing a ‘brain drain’ of HCPs, so that in 2000, only about 23% of medical graduates from the
previous 12-15 years were still practising below consultant grade (Lancet 2000 177). Meanwhile, of
the 4,000 to 5,000 overseas nurses entering Australia each year, many are from the UK,69 New
Zealand, Canada, Ireland and Norway (Scott et al. 2004 174). The active recruitment of Canadian
medical graduates to underserviced areas in the US has left many provinces in Canada short of
doctors and these provinces subsequently actively recruit HCPs from Less Developed Countries
(Bundred and Levitt 2000 246).

It is particularly interesting to examine the UK here, for two reasons. First, the UK is one of the major
beneficiaries from the immigration of HCPs (Pond and McPake 2006 1453), particularly from India.
Second, in 2004 the British National Health Service (NHS) led the way globally, by introducing a code
of practice regarding the overseas recruitment of HCPs, prohibiting it from advertising in developing
countries unless this is part of an agreed recruitment programme and part of intergovernmental
cooporation (e.g. Patel 2004 927). While there has long been immigration of HCPs to the UK (Suri
2005 documents the reception of those arriving in the 1960s), in 2001, following a global advertising
campaign, this flow increased (Pole and McPake 2004 1449), and by 2003, the number of newly
registered doctors trained overseas doubled, representing 30% of the total. This is much higher than
other similar countries (in the US it is 26%, Germany 6%, France 3%). Meanwhile, currently 10% of
India’s registered doctors are working in the US, UK, Canada and Australia (though predominantly in
the UK) (Mullan 2006 381).

Particularly urgent to consider is the situation in Sub Saharan countries, from which there has been a
significant increase of emigration of HCPs. This is despite a doctor density of less than 13 per
100,000 inhabitants (compared with the UK’s 164 and the US’s 279) (Hagiopian et al. 2004). This
means that, while in the US, the arrival of around 5,000 doctors from SSA accounts for an
insignificant portion of its medical population, and even a small proportion of its immigrant medical
population, for the emigration countries, it represents a significant hardship (Hagiopian et al. 2004).
Zambia, for example, has just over half the doctors the WHO estimates it needs to meet basic needs
(Bundred and Levitt 2000 245). And, in 2006, the WHO declared that 57 countries face severe health
worker shortages (including many from SSA) (Eckenwiler 2009a iii). As well as being heavily
populated, and in a low level of development, this region suffers from a significant disease burden,
from malaria and HIV/AIDS, as well as diseases that are easily treated in other parts of the world,
such as mumps and measles. Other regions may also contribute only comparatively few HCPs to the

69Indeed, the effort to recruit UK trained HCPs can be seen in the posters displayed in tube stations throughout
2011 and 2012, advertising work in Australia, Canada and New Zealand, and careers fairs for work in those
countries.
wealthy countries' workforces, yet this has a significant impact at home. Data from the South Pacific Islands, for example, describes states with low or negative economic growth, who are unable to meet their inhabitants' basic health needs (Brown and Connell 2004), while South Pacific doctors are working in Australia and New Zealand.

The tension that arises is usually characterised as a simple dilemma, setting in opposition the right of the individual to travel, and the countries' need for an adequate health workforce. For Hagiopian et al., the realities of the geopolitical system mean that ideals of free movement need to be set aside:

[i]n an ideal world, freedom of movement is a universal right for individuals, as there is ostensibly no rational reason why anyone could have a stronger right to be in any place more than anyone else. Today, however, differences in wealth between countries create flows of educated people seeking better opportunities far from home (Hagiopian et al. 2004).

This has led to declarations like: ‘the ethics of national policies which allow countries to recruit en masse the most qualified physicians, at no cost or penalty to themselves should now be challenged’ (Bundred and Levitt 2000 245), and ‘How dare we try to solve our manpower problems’... ‘by taking staff from countries where manning levels are much lower than our own’ (Beecham 2002 66). The trouble with these two comments is that they focus on the ‘capital’ aspect of the HCP's role. However, the human aspect, and the human right to move, and to seek opportunities and fulfilling work, needs also to be considered. Now consider three complicating aspects of the situation: the need to travel for training; internal inequalities; insufficient, incomplete, and inaccurate data.

In many countries, migration for training is necessary for HCPs, especially for specialisation. In SSA, for example, medical schools are concentrated in a few countries, and others have very few places for medical students. In the South Pacific Islands, meanwhile, it is mostly necessary to go overseas for tertiary education, and medical training is no exception (Brown and Connell 2004 2207). In India, while there are many medical schools, specialist training is available for less than half of medical graduates (Mullan 2006 385). This means that the most common first step of the migration process occurs because training is simply unavailable in the individuals' countries of origin.

Having moved for training, many HCPs remain in the country of their training provider. One study suggests that 60-70% of overseas medical students stay in the UK after the completion of their training (Kangasniemi et al. 2004), and Vikram Patel notes that few Indian medics going overseas for training return (Patel 2004 927). This means that, on the face of it, aggressive recruitment alone cannot be blamed for the 'brain drain', which can partly be seen as part of a wider phenomenon of
skills-sharing. However, receiving states are aware of settlement rates and ensure opportunities to settle for the top students. They also benefit financially. For example, overseas fees for medical school in the UK are around £16,500 per annum (Kangasniemi et al. 2004 11). It is important also to recognise that the migration does not all go one way. One private medical school in India reserves 30% of its places for the children of ‘Non Resident Indians’, who return for initial medical training as it is cheaper than in the USA, for example (Mullan 2006 388).

Now consider the question of whether, if the large emigration ceased, that would really give poor, and especially, rural, people, better access to health care. The ratio of HCPs to population in India’s wealthy city centres rivals that in the UK, whilst the ratios in rural areas are among the worst globally (Mullan 2006 381). India is currently the largest exporter of doctors (Mullan 2006 380), and, like the Philippines, over-produces doctors for emigration, with a view to benefitting from the resulting remittances (Hagopion et al. 2004; Eckenwiler 2009b 173). A 2003 public statement of the Indian Minister for Health and Family Welfare, that India has enough doctors has been much criticised (Mullan 2006 387). This has been picked up by rich-country policymakers, such as the NHS’s head of employment policy, in a response article in The Lancet (Mellor 2004 928). An Indian spokesman suggests, however, that a decrease in emigration would provide a helpful first step in redressing internal inequalities. That said, in India, around 42% of medical students are at private high-fee medical schools. Those graduating after such an investment will expect to earn high salaries, which will not be possible in government health services in rural areas (Mullan 2006 385).

There are two types of policy responses offered to the problems discussed here. The first is a restriction on movement. This includes policies making emigration more difficult (Bundred and Leitt 2000), and those making immigration more difficult (Buchanan 2010). This assumes that it is appropriate to restrict certain persons in the use of their skills and expertise to certain states. It also assumes a Theory Y type of situation (see the discussion in Chapter One), whereby persons respond only to coercion – not being able to move. However, this is inappropriate, in terms of the capability rights of free movement discussed above, and the notion of justice that is being developed.

The second type of policy response is more positive. It looks at building on the drivers of the emigration, including the two mentioned above, and others, so that it has more positive outcomes for all involved and makes migration decreasingly necessary for achieving desirable capabilities. The below list of potential policies is inspired by (Patel 2004 927; Mullan 2006 389; Scott et al. 2004 175; Eckenwiler 2009b 178):

1) Improve design of training programmes (involving bilateral input)
2) Provide doctors support to develop satisfying professional lives, including transparent routes to promotion, and support in setting up businesses or buying property
3) Recipient countries invest in source countries, and/or pay compensation
4) Develop codes of conduct for recruitment of HCPs, including bilateral cooperation

On this basis, then, the obligation to promote health globally leads to obligations to support the health-based capabilities of migrants in various ways.

The first crucial element is the improvement of the design of training programmes. A number of commentators have noted that training programmes, especially in wealthy countries, leave doctors ill-trained for work in the very different contexts in their countries of origin. Bilateral design of training programmes would leave doctors better equipped to work in different contexts. For example, in many Less Developed Countries, hospitals may have different technology and different sets of skills may be needed for the different health needs. There may also be different geographical considerations. For example, Tonga’s population is distributed across over forty islands (Brown and Connell 2006 2195), which means that the role of the HCP may be quite different to that in a metropolitan teaching hospital in the US, for example. This is intended to reduce the dissatisfaction and frustration felt among HCPs upon returning home described, for example, by (Clemens and Pettersson 2006 2267; Patel 2004 928). An example of such a bilateral arrangement can be seen between the UK and Ghana, such that Ghanaian nurses work in the UK for specific periods, learning specialities that are of particular use in Ghana (Lancet 2000 177). Patel includes in this programmes enabling doctors from developed countries to work in developing countries (Patel 2004 927) – and there are other movements, for example (Hagopianet al. 2004) mention Cuban doctors working in African countries.

This leads into another area of support for HCPs re-entering their domestic labour force. Brown and Connell found that in the Pacific Islands, emigration was less likely among HCPs who owned businesses or homes in their home countries. They advocate better enabling such individuals to get established upon return. This reflects findings elsewhere, where HCPs became frustrated with local bureaucracy and difficulties in advancing their careers (e.g. Patel 2003; Mullan 2006 388). (Clemens and Pettersson 2006) argue that the best outcome is for HCPs to return with skills and capital, and to be given support to use these skills and capital effectively. This needs support for returning HCPs from both countries of origin and countries of training. Some theorists suggest the creation of awards, like the Rhodes Scholarship, which would be connected with opportunities at home, and institutional relationships to enable good quality on-going training to be available in the home country (Buchanan 2010).
Again, this last point is connected to the next. It has been argued by some that wealthy countries should reimburse sending countries for their input into the human resource development, and for the loss in terms of health care. However, this gives the impression of commodifying the HCPs that are moving, with states effectively buying their use (note Eckenwiler’s phrase, ‘supplies of health professionals’, 2009b 177). Another, more appropriate, way to frame this is as investment in human capital development in those countries providing it. Or, in another way, that those countries benefitting from the relationship should invest into ensuring that those currently suffering the burdens come to benefit also.

There is another layer to this. The investment in training in a country with very limited resources may mean that it is not possible to offer competitive salaries. Indeed, another major force driving people to move is salary. This is recorded in most studies of HCPs who have migrated to wealthier countries. The discrepancy can be seen by considering nurses from Pacific Island States. A Pacific Island nurse working in Australia or New Zealand can earn around AUS$1100 per month, while a returned migrant nurse can earn only AUS$318 per month, and a nurse who has not migrated at all can expect an average of AUS$221 per month (Brown and Connell 2199). Wealthy countries can play a large part in helping other healthcare systems to become more competitive in retaining their HCPs.

While discussing salaries, it is also important to note the very poorly paid side of health worker migration – in the direct care workforce in the US, for example, this is primarily made up of migrant workers and their median wage is about 32% lower than that of all US workers (Eckenwiler 2009b 172).

Finally, codes of conduct could be developed for recruitment of HCPs by MDCs in LDCs. In this area, the British NHS has led the way. The codes of practice can enable bilateral support, for example, of community service components of medical training, which LDCs like India have had difficulty in enforcing (Mullan 385). The code of conduct could include the points discussed above.

If a person’s skills and talents are considered to be not properly his or her own, but a shared resource, perhaps a person, A, uniquely skilled at a procedure combating condition X, derives also special obligations in virtue of this skill. A state in which X is common may feel it has a claim on A’s talents, and consequently on him or her. On the other hand, perhaps a person’s level of education and expertise is a product of his or her society, and so also of the global arrangement of resources. When applied to people themselves, this has significant implications, implying perhaps that claims upon property or material resources may also extend to claims on people. It is important not to contravene the core capabilities either of HCPs or of those needing their expertise.
Medical human capital is, then, a powerful and important aspect of the resources of a state. It is expensive to cultivate and it is detrimental when it is lacking. This subsection has argued that, while it is counter to a HCP’s capability rights to prevent him or her from moving, it is problematic when LDCs lose doctors they have trained to wealthier states. Human capital development, then, cannot be seen as solely the responsibility of individual states, and the duty to make decisions about ensuring sufficient medical staff in poor regions should not be put upon individual HCPs (and their families) alone. Instead, there is a global responsibility to ensure adequate health provision, giving rise to obligations to support human capital development and retention worldwide. That includes the design of training programmes in host countries and imposing conditions in countries of emigration.

It is necessary, then, to develop a theory that may take into account causal and/or historical factors which are part of how the world functions today. This may be recent, so that, given more Malawian doctors are now in Manchester than Malawi (Sabates-Wheeler 2011), the UK has specific obligations towards Malawians deprived of medical help. This could also reflect wars, occupation and colonisation in the past that impacts upon the present. This is because the impact such factors currently have upon societal functioning are significant. It could also be a mixture of these. Seeing people as human and as part of human capital is problematic, but also essential. Just as individual humans are the means by which to measure the success of a state, they are also what comprises the state. As a result, it is crucial to understand what the nature of the group enclosed by the state means for that state’s functioning and for its obligations.

3.2. Enclosing territory

Territory is traditionally an important part of the state. Although this is largely because of the resources thereupon, this section tries to separate the territory itself from its resources, leaving the latter to be examined in Section 3.3. People need to stand upon some space of land and the workings of state institutions, from road-building to health services, all must take place in a designated territorial space. Meanwhile, where the state is and where its borders are, seem to be important to people. In the ways states are currently understood, it looks like some connection is needed between a state and a space on the earth. However, this need not mean the vast and exclusive territories existing today.

This section begins by discussing arguments offered against a territorial state, arguing that, while we can perhaps hope to move gradually towards less territorially founded states, modern states are tightly tied to territory, making territory currently crucial to discussion about them. That said, the question remains as to how enmeshed territory need be in the other aspects of the state. This
section examines exclusion from a territory and the sorts of obligations that result. Finally, this section considers repercussions in terms of capability rights and hence, the obligations of justice following damage done to another's territory.

3.2.1. Non-territorial state?

Much political organisation and other state activities do not require territorial location. To see which aspects of the state's functioning can continue without traditional territoriality, consider state-like entities that are not traditionally territorial. This subsection discusses both nomadic groups and attempts to create non-territorial states. Although the heavy state we now know, with its large government and body of social institutions, cannot function non-territorially in its current form, there may be scope for more flexibility. Thomas Pogge, meanwhile, has suggested instead more fluid state-like arrangements that would not be tied to territory per se, but to a variety of levels of identification, including homestead or village as well as more global arrangements (Pogge 2002). Alternatively, the state could function as an insurance scheme which could supposedly operate for subscribers anywhere (e.g. I could subscribe to one insurance-scheme state and my spatial neighbour could subscribe to another).

Both of these introduce flexibility about the relationship between territory and state, without breaking down structures needed for developing capability rights. However, they either eventually defer to state-like territory or are not good at protecting the vulnerable (as with an opt-in insurance scheme). Proposing different levels of jurisdiction, either larger or smaller than the state, boils down merely to differently-sized state-like institutions, and since there already exist differently sized territorial states, this does not change theory significantly. Completely assigned global territory at least provides a catch-all. Everyone is somewhere, so a scheme that requires a state where the person is to look after him or her, ensures everyone is, at least theoretically, protected (not all states will live up to this and people may want to move). Opt-in schemes are problematic unless it is possible somehow for the vulnerable and expensive also to opt in (Curran 2002 59; Devarajen and Jack 2007).

Germany's health care system is a good example of the recognition of this, providing, as it does, a national health insurance system to catch the majority, who are not able to 'opt-in' to private insurance schemes. Indeed, with the aim that 'no citizen falls beneath a particular level of care' (e.g. see Lisac et al. 2010 33). Other countries with the same ambition have found that a system run entirely on opt-in subscription fails to provide for the poor. For example, Ghana's NHIS, launched in 2004, aimed to 'assure equitable and universal access for all residents of Ghana to an acceptable quality package of essential health care', aiming for universal coverage by 2009. However, by 2010,
coverage remained at 35% (Sarpong et al. 2010 192). Although income-dependent and not need-affected, the scheme remains opt-in and constitutes a hardship on poorer Ghanaians, leading to exceptions from payment for certain procedures, in an attempt to mitigate effects of this (e.g. since 2008, all women can have medically-supported birth for free without insurance) (Sarpong et al. 2010 195). 70

Some examples of apparently non-territorial state-like arrangements will now be considered. First, Europe’s Roma community offer a possible concrete example of a state-like organisation without a fixed territorial location. In 2000, as part of an on-going process, the Romani World Conference defined itself as a ‘non-territorial nation’ (Üstündag 2008 215). The first World Romani Conference, held in London in 1971, with delegates from fourteen states, formally approved an international Romani flag and anthem71 (Üstündag 2008 216), and a year later, the International Romani Union became a member of the Council of Europe (Üstündag 2008 216). These, like territory, are all traditional trappings of states. However, in important ways, the Roma do not function as a state, not having centralised institutions for welfare, for example.

Next, consider Atlantium.72 Although often perceived as little more than a joke, the development of the Atlantium idea highlights important themes in the practical difficulties of a non-territorial state concept. On 27th November 1981, Atlantium was founded as a global non-territorial state. It describes itself as a ‘parallel global sovereign state’, based not on physical space, but on its global citizenry (Ryan 2006 74). Interestingly, in January 2008, it acquired a small space of New South Wales in Australia as its administrative capital. This raises the concern mentioned earlier, that, as a state is physically governed by spatiotemporal beings, if nothing else, this governing group must sit somewhere, which space, given the current nature of the globe, must itself be governed by someone. As a result, either the governing group of the state govern from a space which is, in turn, governed by someone else (as in the case of Atlantium), or there is some territorial state space.73 In the modern era of internet and virtual space, it would be interesting to see how modern technologies and associated new ideas have affected and are affecting the necessary spatiality of states.

70 For discussion of a similar scheme in Indonesia, see Sparrow et al. 2010, and theoretical discussion at a more abstract level in Devarajan and Jack 2007. Curran 2002 offers a classic analysis of this situation for opt-in schemes.
71 The words to the Romani anthem are to be found, in both Romani and English, at www.romani.org.
72 Official website: www.atlantium.com
73 A potential counter-example dealing with this problem is not a state, but the UN’s Turtle Bay headquarters which, though in the US, has its own post office and medical, dentistry and policing infrastructure.
Section 2.5 explored non-territorial aspects of territorial states as they apply to citizens abroad (e.g. voting, legal jurisdiction). In cases of overseas voting, for example, the geographic state begins to resemble an administrative base, locating the state wherever its citizens are, like an extension of what happens in Atlantium. Many capabilities depend on spatial location (e.g. see Nussbaum’s list). This will, for the foreseeable future, be governed by states.

### 3.2.2. Exclusion from a territory

Exclusion from a territory gives rise to a set of claims which differ from those arising from exclusion from the resources thereupon (to be considered in Section 3.3). This section discusses two aspects of this: restriction to freedom of movement, and identity-loss, or other ills suffered by non-access to a specific territory, such as a ‘homeland’.

Excluding someone from a territory restricts their physical freedom to move which, as argued in Section 1.4, is a key capability. This may seem trifling if the space of one state is set against the global surface area simpliciter. However, the global surface area is entirely divided into states, so that if each state restricts movement of non-citizens, free movement is severely impeded. This results in obligations upon all state bodies that enclose a territory. The Universal Declaration of Human Rights (UDHR) also declares in Article 13, that:

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

It remains necessary to establish, however, what it is about this freedom that is important.

There are two ways to see this. First, free movement is a core capability, which means that territory is vitally important because freedom of movement must range over territory itself. That is, there is an existential need for free movement. If a person can theoretically be denied entry to every territory on earth, then a person’s very existence theoretically can be denied. This imposes strong obligations upon states to support the existence under acceptable conditions elsewhere of those it excludes from its territory. If free movement in and of itself is the capability to be protected, it is territory that is important and the enclosing of territory that inhibits rights. By extension, it would be the enclosing of territory alone that gives rise to obligations, irrespective of what is on that territory. This means that, as every state encloses territory, every state has such obligations towards outside others. A second way to see the importance of freedom of movement is as instrumental. That is, free movement is needed to enable other important capabilities. If this latter is adopted, the question is not about territory, but about what is on the territory, such as material resources, some sort of identity, or human relationships, which is discussed later in this chapter.
However important free movement is, it is not the only good that is important to capabilities, and so to justice. It is generally agreed that liberty should be restricted to make communal life feasible (e.g. the enforcement of traffic regulations, as well as less arbitrary rules such as that against murder). What is important is not necessarily the amount of territory enclosed, but the fact of the enclosure.

Surface area does not, for example, determine the level of development or wealth within that territory. Apart from the US, Australia and Canada, the countries that currently enjoy the highest level of development currently also enjoy the least surface area, and wealthy states overall have proportionately significantly more wealth per m². This is shown in the table:

Table 7: Average GDPs and Surface Areas (calculated from CIA world factbook74).

|                                | Average GDP (PPP) (US$ billion) | Average Surface Area (thousand Sqm) | Average GDP (PPP) (US$) per Sqm | GDP per  
|--------------------------------|---------------------------------|-------------------------------------|----------------------------------|--------
| Countries with 'lowest human development' | 15                              | 492                                 | 30,052                           |        
| Countries with 'highest human development', excluding America, Canada and Australia | 596                             | 123                                 | 4,853,397                        |        
| Just America, Australia and Canada | 5,455                           | 9,184                               | 593,992                          |        

This will be developed in Section 3.3, which discusses specifically the resources upon the territory of the state.

Although territory is important partially for the free movement it represents, it may also be important for other capabilities, irrespective of what is on the territory, because of where it is and the part this plays in identity. Perhaps the most dangerous way that territory can be coveted is as a perceived homeland. As has been argued, it is necessary to take into account people as they currently are in their world. Tibetans may be unhappy and lack core capabilities in India, not only because of well-documented discrimination, and material privations, but also because they feel themselves to be displaced from a land which is important to their identity and way of living fully. As such feelings are important to humans, it is important to take them into account. This emphasis on place in identity is exemplified in the apparently intractable situation in Israel/Palestine. Stretches of desert are ‘reclaimed’ because of where they are, not what is on them and many lives are lost over inches of ‘holy’ land.

Territory is, then, important to people and peoples and exclusion from a territory is, in itself, a grave hardship. This may be through the loss of free movement that exclusion from anything brings, and which exclusion from territory brings in a particular way. It may also be through the loss of some

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other capability, available on a **specific** territory. This is most evident in the case of identities tied to place.

### 3.2.3. Damage done to another's territory

Damage\(^{75}\) perpetrated against another state's territory (and the resources on it) may lead that other state and its inhabitants to develop some sort of claim on the resources of the state that has caused the damage. However, there may also be a claim to the territory of that state. Central to this is the claim for a safe space to be, which created the obligation deriving from potential existential denial discussed above. Closely related are: a space to grow resources; and the essential connection between space and resources. These will be considered in more detail in Section 3.3.

First, however, people need a place to **be**, otherwise their very existence may be forbidden (recall the discussion of homelessness in Chapter One). At the outset, it is necessary to establish what sort of space may count as eligible. Suppose two people, A and B live on a small, round, island, with a line drawn down the middle, and S(A) is the space where A carries out life, and S(B) is the space where B carries out life:

![Figure 1: An island divided equally between A and B](image)

Consider four scenarios:

1. An intentional fire caused by A renders S(B) uninhabitable
2. An accidental fire caused by A renders S(B) uninhabitable
3. A freak fire renders S(B) uninhabitable
4. A fire caused by B renders S(B) uninhabitable

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\(^{75}\)Damage here includes physical damage and devaluing, e.g. by altering a market.
The question is whether, in any of these scenarios, A has an obligation to let B sleep in S(A).

Although it will be argued that there is such an obligation in all four cases since B will otherwise lack core capabilities and A is capable to provide for them, the case for A’s obligation will be harder to make for each scenario in turn. A has an obligation in all of the scenarios, for two reasons. First, need itself gives rise to an obligation upon those able to assist (see Chapter One Part II). Second, if there had been no boundary prior to the fire damage, the shared space would merely have been halved. As the boundary is arbitrary, the new situation is presumably not relevantly different from this (they each have fundamentally equal claims to each square metre). It is important to recall in all of these cases that the situation is a-historical with regard to the division of the island and that this may give rise to changing ideas of justice, which ideally would converge on the timeless cases.

Now consider another round island, this time inhabited by three persons: A, B and C:

Figure 2: An island equally divided between A, B, and C

Consider again the same four scenarios and in each, try to establish who is obliged to allow B to sleep in his space (assuming no relevant difference between A and C, except where specified). As before, B will be denied core capability rights if left without help, so the key is to establish where the obligation lies. It looks like, while in scenarios 2, 3, and 4, both A and C have the same level of obligation for giving B a place to sleep, in 1, A has more obligation, but for reasons other than justice alone.

This is a live question. Consider, for example, the case of Bikini Atoll. As a result of nuclear tests carried out by the US in December 1947, this South Pacific Atoll became, and remains, uninhabitable. The former inhabitants of Bikini Atoll are seeking compensation from the US. On 29th January 2009, a case of Bikini vs. United States went through the Appeal Court, following up claims filed in the 1980s. Although Bikini Atoll is distant from America, rather than on the same

landmass as in the examples above, it still provides a helpful example of (1). As a result, it seems clear that the US has obligations towards former inhabitants of these islands, and, indeed, as Bikini Atoll cannot be made inhabitable, part of this must include facilitating settlement in the US.

Territory and the importance of territory can be separated from the resources upon it. There are three ways in which territory is important in itself. First, everybody must be somewhere if they are to be at all; Second, enclosure of territory restricts the free movement of those excluded from it. Third, specific territories have important meanings for certain peoples, as homelands, for example. Exclusion from these ‘homelands’ constitutes a significant hardship and hindrance to happy life. The fact that territory supports resources is also an important aspect of its value, to be considered further in Section 3.3. While some have tried to envisage a non-territorial state, states as they exist today are currently tied closely to territory – both practically, since the institutions of the state are housed somewhere, and emotionally, as the state is identified with a territory. Both of these are important in understanding obligations arising from exclusion from a territory, and from damaging another’s territory. It is also important in forming a background to Section 3.3’s discussion of understandings of relationships to resources on that territory.

3.3. Enclosing, damaging and sharing resources

This section argues that resources are relevant for two reasons: first, they are central in allocating value to an enclosed territory; second, they are key to core state functionings. It has been suggested so far, that while it may theoretically be possible to group people sub-globally, and even somehow to locate those groupings territorially, without designating this or that portion of the world’s resources to a particular group’s exclusive use, states as we currently know them, need some territorial location, and generally have quite extensive territory. This section examines a selection of arguments traditionally offered for enclosing resources and considers resulting external obligations. It then explores ramifications of damaging others’ resources once allocated. Finally, this section considers sharing resources. It will be argued that some sort of propertied allocation of resources is useful, but that the development of a system whereby promoting one’s own welfare promotes that of others (a society that is ‘siphoning’ or ‘virtuous’) is necessary to reduce normative problems.

3.3.1. Enclosing resources

According to John Locke, we need the institution of property to enable the best use of the earth’s resources (Locke [1690]2008 286). He offers three ways to justify property: self-ownership; working back from the ownership of what a person eats; and labour’s investment of value, putting on this the proviso that such acquisition should not stop others from acquiring as much and as good of what there is (Locke [1690]2008 291). Peter Singer, on the other hand, starts from the current distribution
of perceived property rights, presenting this ownership as unjustified while some do not have enough to sustain adequate life (e.g. Singer 2009). Which approach to property is adopted impacts upon what it is to be a state. For Nozick, who adopts a predominantly Lockean view of property (Nozick 1974 9), the state comprises the institutions for governing the protection of private property. The question is whether the state has a justifiable overriding claim on those resources designated to it, or whether some other state or distant individual might also have a genuine claim. Showing how even the libertarian approach of Nozick gives rise to obligations towards distant non-citizens demonstrates that the enclosure of resources must also give rise to obligations in liberal theories, unless a relevant difference can be demonstrated between insiders and outsiders (the difficulty of this will be demonstrated in subsequent sections).

Locke puts two restrictions on the appropriation of property. For him, no one may take what another has laboured for unless one of the following conditions are broken:

(i) ‘[E]nough and as good [should be] left in common for others’ (Locke [1690]2008 288); or

(ii) Only take ‘[a]s much as any one can make use of to any advantage of life before it spoils’ (Locke [1690]2008 290,295)

Their meaning evolves through Locke’s writing on Property (Locke 1690 pp285-302). Initially, the emphasis is on (ii). Locke notes that in a world with indefinite resources, there will always be enough left for everyone else, but even in such a situation, Locke criticises someone who gathers more acorns than he can eat, letting some rot. This waste, he argues, renders the property acquisition illegitimate (as God gave the earth to man for his use and enjoyment). The religious angle aside, this is an interesting argument against acquisition for the sake of acquisition alone.

As items with longer shelf-life become available, people can amass wealth on a larger scale, and the emphasis switches. The fear that people would needlessly hold possessions that will decay, (ii), subsides, replaced by the concern of insufficient resources left for everyone else, (i). Initially, this is not a problem. Locke explains that a person cannot be condemned if ‘he would give his Nuts for a piece of Metal, pleased with its colour’ and kept it ‘by him all his Life’ (Locke 1690 300). However, once there is money, it became acceptable, by (ii), for a person to amass wealth, as the metal money would not rot. Resources come to be held in a new sort of way, and power can be wielded on the basis of property which itself has no intrinsic value. The development of material wealth that itself has no intrinsic worth, and which has no maximum shelf-life, has led to concentrations of power that could not have existed previously. This is because wealth of this sort is not vulnerable to decay or
appropriation in the same way as older, rawer, sources of wealth. However, monetary wealth and power are vulnerable, in different ways. This will be discussed in due course.

Wealth and the wealth of a state, ceases to be about traditional resources and raw materials. Table 4 in Section 3.2 showed that on average, the countries with the highest human development just had significantly higher per capita wealth per m². Locke argues that a person who is able to make a piece of land a hundred times more profitable than nature, should not be beholden to give up what he has managed to do. This might be used to argue that the highly developed countries with small surface areas should not have obligations as a result of their wealth. Locke, indeed, was not concerned with the unequal wealth amassed in his own time. For him, obligations only arise through a contravention of either (i) or (ii).

He did, however, support the notion of charity, a non-justice, traditionally supererogatory, obligation towards others. It is, however, hard to understand a proper and distinct role for a duty of charity of this sort, since; if supererogatory, it is not a duty, and if not supererogatory, then it is not charity.

Locke is speaking about individually held resources and relationships of obligation/charity amongst individuals. This dissertation is specifically about relationships of obligation between a state and individuals, which are different. The discussion becomes one of institutions and justice when we consider the sort of state institutions that could engender desirable societal behaviour. It seems clear that there are some obligations of a state towards distant individuals on the basis of enclosing resources, but it is difficult to see quite what they are or how they would be enforced. Justification of the state’s exclusive use of resources in the territory (e.g. controlling how they are bought, sold, taxed) must also be found in its external justification. It is hard to see how global justice could allow massive hoards of resources while some have access to very little. If need (lack of capability) is important, then enclosing resources is perhaps more problematic than enclosing territory alone. Exploring particular situations of sharing resources and pay-offs, and of resource damage illuminates one way in which specific obligations can be allocated.

When looking at enclosure of this sort, it is useful to consider Quinn’s list of four state activities which are justified by self-protective rights (Quin 1985 341):

1. Mount limited violent self-defensive against attacks on person and property;
2. Erect barriers (e.g. fences you cannot climb);
3. Attach immediate cost to violation of some right; and

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77 This may have had ulterior motives, as Waldron notes: ‘Locke was seeking the support of the Whig merchants and squirearchy for his revolutionary policies, and therefore he needed to show that political equality in the fundamental constitution of the state did not imply economic equality’ (Waldron 1988 p.148-9).
(4) Confine people who have shown that they cannot be controlled by other methods.

Cecile Fabre responds to this sort of reasoning, however, by noting that a denial of core capabilities (she says ‘human rights’) gives people reason to wage war against the wealthy. She argues that not being able to feed the population is itself an infringement on sovereignty, and that self-defence thereby allows aggressive war in such a situation. She argues that, when thousands are starving in a state, it makes it hard to be an effective state (Fabre unpublished). Such obligations are crucial to the discussion here. There are, then, obligations which arise on the basis of damaged resources.

3.3.2. Sharing resources and sharing pay-offs

According to Garrett Hardin, the scenario of the ‘tragedy of the commons’ was first sketched in an 1833 pamphlet by William Foster Lloyd,\textsuperscript{78} who asks that we picture a pasture open to all (Hardin 1968). Each herdsman using the pasture will most likely put on it as many cattle as possible. This arrangement may work for centuries, as tribal wars, poaching, and disease keep numbers down. However, with social stability will come tragedy, as each herdsman seeks to maximise his gain. The gain to one herdsman of another cow is 1, while the loss he endures from this is only a fraction of -1, as it is borne by the whole society. As a result, each herdsman is best off increasing his herd without limit, which will lead to ruin of the shared resource. Hardin concludes that private ownership is preferable, as this induces people to take care of things. As air and water cannot be fenced, he believes another means is needed to combat pollution. He suggests offering financial benefits for treating waste products. Examining the global commons in this way provides a useful means of exploring how society could be organised to benefit everyone therein.

This subsection examines the obligations to mitigate the ill effects of activities, even when these ill effects will be felt by someone else. As has been established throughout this dissertation, justice does not require the same response from everyone (see Chapter One). For example, the most efficient mitigation for anthropogenic climate change is possible in the developing world. Given their stage of development, the World Bank argues that, if newly developing states alter their trajectory now and develop in a cleaner way, this will be the overall most economical way to reduce future emissions, as it would be cheaper to develop in this way from the outset than to change an older, dirty infrastructure (World Bank 2010 12). But such development is expensive, and emerging economy states may not be inclined to sacrifice in this way for global good, especially while others pollute with impunity. On the other hand, more developed states are reticent to try to reduce

\textsuperscript{78}Hardin describes him as an amateur mathematician, the frontpage of his Two lectures on the Checks to Population 1832 show him also as a professor of political economy
emissions as others develop their infrastructure towards even higher polluting capabilities. To avoid disaster, the parties must come together, to address concerns collectively.

While many resources are shared, rivers provide particularly useful illustrative examples of shared resources which have had to be understood collectively since ancient times. Studying processes of river-sharing between several states provides some insight into resource sharing more generally. The analogy is particularly helpful since inevitably some states are nearer the source of the river, some lower down its course (Toset et al. 2000). This means that the power dynamic is uneven at the outset, as it is regarding resources and power globally, and this arrangement is fixed for the foreseeable future.

Figure 3: The Mekong River Basin

As Figure 3 shows, the Mekong river is shared by China, Myanmar (Burma), Viet Nam, Thailand, Laos, and Cambodia. It is important for water and aquaculture, as well as transport and other goods in these countries and the wider region. The region has seen much conflict, tension and regime-change, which has contributed to its slow progress towards successful river-sharing. This is characteristic also of other rivers shared by multiple countries (e.g. the Nile). The Mekong River is

79 Source: web.worldbank.org
worth studying, for the conflict that has surrounded it and the use of its resources, and the interesting history of the Mekong River Commission (MRC). Based, since 1995, on agreements between Cambodia, Laos, Thailand and Viet Nam, and later China and Myanmar, the MRC builds upon the UN's 1957 Mekong Committee. Lessons learnt from the Mekong are used throughout river and watercourse sharing globally and provide lessons for resource sharing more widely. Two principles, developed in the discussion over water-sharing are particularly relevant here: first, the Harmon Doctrine and its fall from grace; second, the water barrier and its potential importance in overturning the Harmon Doctrine. The ability for states to reach agreement on both the rejection of the Harmon Doctrine and the utility of the water barrier are causes for optimism more generally.

As Attorney General of America, Judson Harmon strongly defended America's sovereignty and that of individual states. The 'Harmon Doctrine', which is named after him, holds that a state can use the water in its borders without restriction, even if that substantially injures a neighbour (Gleick 1993 106). This sort of mind-set could be damaging in wider questions of justice and resource damage. Some upstream nations still cite the Harmon Doctrine, but almost all river treaties signed in the past 100 years reject it (Gleick 1993 107). This rejection shows that there exists an understanding that groups may have some responsibility to protect the resources needed by one-another for basic capabilities (and that they recognise this in treaty-making), but also that they may, even if justice is served, have different required and allowed courses of action. The 2010 World Development Report puts this well: 'A climate-smart world is within reach if we act now, act together, and act differently' (World Bank 2010 10).

Now consider 'the water barrier', as defined by Malin Falkenmark (Falkenmark 1986). This estimates the level of water below which significant development constraints will occur (and hence loss of core capability rights). As has been argued, obligations exist, not to be completely selfless, but to ensure others do not fall below a certain threshold of deprivation. This will be taken up below, through Henry Shue's discussion of adaptive burdens of climate change. In this case, the general principle requires also an understanding of the particular contexts of the states in question. For example, Browder and Ortolano discuss the relevance of democratic process in Thailand and conflict elsewhere to water-related development (Browder and Ortolano 2000 515). Obligations here rest on need (lack of capability) and ability to help (possession of capability). Those in positions of more power (like Thailand) are clearly at an advantage, but also have greater obligations.

This translates to the global context of resources more generally. The needs (lack of capability) of persons, and a state’s capability to help them, give rise to some obligations based on the enclosing

[^80]: http://www.mrcmekong.org/
of resources to which they may otherwise have had access. It is arbitrary that Thailand is upstream of Cambodia, downstream of Laos. It is, therefore, arbitrary that any particular Cambodian is reliant on the Thai government. Just as with the relationship between a citizen and his or her state, the obligations are based on vulnerability and capability to help. Similarly, it is arbitrary that a particular Mexican citizen is reliant on the American government both for development support and for the possibility to move to improve personal conditions; however, he or she is. This affects the US's obligations towards him or her, both while he or she is in Mexico, and if he or she decides to migrate to the US.

This subsection has argued that damaging another's resources, even if the resources damaged are geographically distant, leads to obligations. The next subsection will present this aspect with focus specifically on adapting to anthropogenic climate change, after substantial damage has been done.

### 3.3.3. Damaging resources

There has been much debate in the recent literature regarding obligations to suffer the burdens of anthropogenic climate change (e.g. World Bank 2010; Caney 2010; Miller 2008b; Neumayer 2000). Above, the discussion was particularly on the mitigating efforts needed to avoid depletion or damage while using shared resources. This subsection focuses on adaptive burdens needed after a resource has been damaged. As with the discussion above of human capital, this subsection supports a view based on current benefit and current ability to pay. This is similar to that put forward by Simon Caney in his extensive treatment of the subject (e.g. in Caney 2010; 2009). The discussion will proceed in three stages. First, it will give a brief discussion of anthropogenic climate change, summarising the situation as it currently stands, according to the scientific and policy literature. Following this, the distinction between adaptive and mitigative burdens will be discussed. Finally, those currently benefitting should take a substantial share of the adaptive burdens.

While states may be able to control some sorts of cross-border influence, others may be beyond their control. For example, consider the radioactivity found on the Irish coastline opposite England's Sellafield nuclear plant (e.g. see Hall 1993, who gives a thorough discussion of legal situation, though omits more recent failed attempts to force international intervention), or the concerns of spreading GM (genetically modified) crops across borders in continental Europe (e.g. European Parliament resolution 2003/2098). No one owns the skies or the seas, or can take an overview responsibility of the earth. Damage to these resources are felt by all but can be created by anyone. On a global level, the apparently anthropogenic change in climatic conditions is now generally recognised to be
generated by excess waste products being discharged into the common air.\textsuperscript{81} This includes a rise in average global temperature, and a projected long-term rise to dangerous levels.\textsuperscript{82} This will be central to the following discussion of potential implications for obligations arising from resource damage. The attempts to deal with climate change are good examples of where it is widely agreed that policy-directed societal evolution will be useful over the long term (World Bank 2010). The relevance of three aspects will be considered: causes, consequences, and ignorance. This will follow a brief discussion of other ways in which obligations may arise from resource damage.

There is an imbalance in both the cause of climate change and the experience of it. Although different figures may result from different ways of categorising contributions and grouping states, most would agree with the overall conclusion that the currently wealthiest states have contributed most to the problem of anthropogenic global warming. Meanwhile, rising sea levels, loss of natural resources and more extreme weather events will most affect those in countries that are more exposed and less resilient to climate hazards. According to the World Bank, while richer countries are more likely to suffer more \textit{per capita} damage, their higher level of initial wealth makes them more able to withstand this damage (World Bank 2010 7). It is clear, then, that as with migration, anthropogenic climate change is an area that forces global consideration.

Simon Caney has discussed two types of burdens that must be borne (Caney 2010 204; Caney 2005b 751): mitigation of current activities’ contribution to on-going atmospheric pollution (e.g. Caney 2009), and adaptation of activities in response to change that has already happened, or is already happening. These two sides to the burdens of responding to anthropogenic climate change need to be discussed differently (states could avoid mitigating activity, but cannot avoid at least minimal adaption of their own activities, even if they decide not to help adaptation anywhere else), but must also be considered together, since they impact upon each other.

For Caney, climate change forces us to consider the moral relevance of decisions of past generations (Caney 2005b). However, it is not clear that climate change does this particularly, nor uniquely. Much global justice theorising focuses on the connection of previous, present and future generations. This may be in an abstract way, through theorising the legitimacy of current arrangements, based on how they were formed. However, it may be more practical: for example, taking into account the current effects of past wars, colonisations, and sanctions. It is also not

\textsuperscript{81}Sir John Houghton estimated, in 2004 that less than ten active research scientists disagree with the notion of human-induced climate change (Hillman 2004 25).

\textsuperscript{82} This has major effects for the world’s non-human population and the job of the environmental ethicist is an important one, to establish the normative implications of this. However this dissertation focuses on humans, and this section of this chapter on the implications for inter-human justice of these environmental changes.
particularly true of climate change, since, as I will present, the notion of justice adopted in this dissertation is not backward looking, except insofar as it accepts that past actions still affect the situation today, giving some an advantage over others. Past exploitation is, then, only of concern to justice insofar as it is having an impact today. This approach is largely similar to that of Caney, though it differs slightly in its formulation. Discussing climate justice in this way avoids several of the problems raised with other ideas, such as ‘polluter pays’, or that ‘those who can pay should pay’. This discussion will start with considering the benefits of avoiding a historical accountability approach. It will then briefly note how my principle also provides a better alternative to the ability-to-pay principle.

Polluter Pays principles have been adopted in a number of international agreements. Among other things, the Kyoto Protocol committed 40 industrialised countries and the EU (known as the Annex 1 countries) to reduce collective gas emissions by 5.2% from the 1990 level by the year 2012 (The ‘Kyoto Protocol’ to the United Nations Framework Convention on Climate Change is an international treaty that aims at a ‘stabilization of greenhouse gas concentrations in anthropogenic interference with the climate system’). At the negotiations for Kyoto, ‘the Brazilian Proposal’ suggested that industrialised countries’ emission targets should be based on their historical contributions to global warming (Fuglestvedt and Bård 2006; Rive et al 2006). This would mean that the currently industrialised countries would have the narrowest targets.

Eric Neumayer emphasises the importance of ‘historical accountability’ (Neumayer 2000 186), and indeed, Caney (e.g. 2009) acknowledges the appeal of the polluter pays principle, since it seems intuitive that those who cause a problem should be responsible for cleaning it up. However, there are a number of practical problems that arise when trying to apportion burden on the basis of historical accountability:

(a) People today would have opposed the decisions that have led to the current situation (Caney 2005b 760);
(b) People in the past were ignorant of the full extent of the damage that they were causing (Caney 2005b 761);
(c) It is not always clear who should be responsible for who’s past actions (Caney 2005b 756);
(d) It is not always clear which actions caused which damage.

83 Delivered at the negotiations for the UN 1997 Kyoto Climate Conference.
84 http://unfccc.int/2860.php
85 UN documents reference: FCCC/AGBM/1997/MISC.1/Add.3
There is also a further problem, of a metaphysical sort, raised by Derek Parfit (1984 356), that in fact the currently existing persons would not have existed had policies been different. These will now be discussed in turn.

Before showing how the notion of justice developed in this dissertation can avoid these problems, consider a scenario. Suppose that two farmers own neighbouring fields. One field has been having ever improving yields, while the other field has been experiencing ever more frequent crop failures. This has been going on for years and years. Eventually, the current generation farming farm A come to realise that the chemicals they have been washing from their field down into farm B break down the soil in farm B, leaving ever increasing parts of the field taken up by rocks. Using these chemicals has enabled those farming A to become richer and richer. Many years ago, they were able to modernise their harvesting techniques, in order to make more money, and to be able to buy more chemicals. Farm A consistently is able to out-bid farm B at market, and some years, has had to loan farm B seeds in order to plant. Having discovered the effects of the chemicals, farm A initially continued to use them. However, now, they have told farm B, and have agreed to cease to do so. The question is whether they also have any obligation to support farm B to develop adaptively to the new rocky soil. They do, and for the reasons discussed in Section 3.2’s island examples:

(1) They have an obligation relating to the capability (B’s lack thereof, and A’s capability to help); and
(2) They have an obligation deriving from current structures that continue to entrench the disadvantage.

Insofar as the Kyoto Protocol’s Annex 1 countries are currently industrialised and are current polluters, it can avoid being backward-looking. Henry Shue notes that the Annex 1 countries are wealthy because they industrialised, while the poor states are poor because they have not yet industrialised (Shue 1999 543).

In the notion of justice developed in this dissertation, the past decision-making method is not relevant (so that a and b on page 127 are removed), since all that is relevant is how the past activities are currently felt. Just as current inhabitants of wealthy states currently enjoy the wealth and benefits that have been made possible largely because of industrialisation, they must incur the responsibilities. This is also the case for those wealthy persons in poor states who are benefitting from industrialisation. Further, (c) is also thereby discounted, since it is not necessary to find a genealogical link to those past polluters. All that is necessary is that we find who is currently benefitting from the past pollution. This means, for example, that the child of a Ugandan immigrant
to London, if she is able to benefit from the wealth that has arisen from polluting activities (and still arises), then she has an obligation also to take on some of the burdens. Even though neither she nor her forebears made the decision to pollute. It is, then, relevant both that there is capability to help, and how that capability comes about.

Finally, (d)'s objection is that it is not always possible to establish which particular polluting behaviour caused which specific aspect of the phenomenon of anthropogenic climate change. The principle adopted here allows a broader vagueness. That is, if the person or group or persons is benefitting from previous exploitation, then they have some obligation to redress this. Shue puts this more simply, stating that you should pay the costs if you get the benefits (Shue 1999 533). And, indeed, Neumayer discusses work done by economists, demonstrating that there is some correlation between historically emitting dangerous chemicals and current wealth (Neumayer 2000 189).

Finally, in Reasons and Persons, Derek Parfit notes that historical accountability towards current persons does not make sense, since if a different policy had been adopted, those specific persons would not have existed. Granted, the quality of life might have been better, but this would have been a quality of life enjoyed by different people. As a consequence, there is no obligation arising towards currently existing persons. However, this relies on some sort of genealogical tracing back of blame. The principle in use in this dissertation starts with today, and today’s wealth and power, and asks, where relevant, whether it has come about from exploitation which persists.

Another prevalent approach that is adopted is that those with the ability to pay should pay to improve the situation of the worst off. To an extent, this dissertation has supported such a view. However, this is adopted alongside the requirement that systems be improved so that the good of one is the good of others. Crucial to bringing about such a scenario is requiring that those harming others’ resources stop the harm and pay for the damage. E Page offers one response to this, to base the principle on the ability to pay, and then offer some relief from this obligation to those who did not cause the problem (Page 2006 172). However, this is still not satisfactory, in terms of the underlying principles behind the obligations. There are two aspects to this. There is the need to raise persons above the level of desperate destitution; and there is the need to enable a more balanced participation in the world. The first of these is everyone’s responsibility. The second of these require the on-going cause of the imbalance to be addressed.

While it seems clear that much current wealth has been made possible because of current and past polluting activity, it is not obvious that it is wealthy states that should be held to account. The prevalent assumption that states are the core experiencers of both benefit and burden can be
attributed to what Pogge calls ‘explanatory nationalism’ (Pogge 2002 139). Pogge warns that this has become almost ‘common sense’ among theorists. However, this assumes both that the leadership of the state properly represents the persons living therein, and that the state has power to act, and is not driven by corporations, for example. Pogge argues that corrupt leaders often take ownership of their states’ capital, and sell it, exchange it, and use it for their own benefit, ignoring the needs of the populace (Pogge 2002; 2003). This means that, as recipients of benefits, it is the global elites that should respond to the burdens of climate change (Caney 2005b 770).

On the other hand, Kate O’Neill points out that states are in fact ‘the only actors with decision-making authority in the international system’, so that they should be centre of discussions concerning the burdens of adapting to (and mitigating) anthropogenic climate change (O’Neill 2009 50). Indeed, this point was made in Chapter One: that states should be seen as important, because they currently are the most powerful units in the international arena. However, this ignores the power of networks of elites, not least, international corporations, and Caney warns that it is precisely this focus on international responses to crises that drives the inappropriate focus on countries (Caney 2010 219).

Caney calls his principle, the ‘History-Sensitive Ability to Pay Principle’ principle. He explains how obligation for supporting the global effort to adapt to the anthropogenic change that has occurred and is occurring is to be apportioned:

The duties to bear the Remainder should be borne by the wealthy but we should distinguish between two groups – (i) those whose wealth came about in unjust ways and (ii) those whose wealth came about in ways which were not unjust – and we should apportion the greater responsibility to (i) than to (ii). (Caney 2010 217)

This is similar to the approach adopted in this dissertation, except that Caney includes (i) and (ii) in the same category. Instead, I argue that there are two things going on here. First, there is the need to reorganise society so that no one is living in abject poverty. Second, there is the need to reorganise the global system, so that it becomes increasingly the case that, in benefitting oneself, one benefits others. Both (i) and (ii) have obligations in both of these categories. However, (i) has special extra obligations in the second. This is because (i) is currently a crucial cog in making the system one of funnelling instead of syphoning. There is a crucial problem with this, as with morality and justice more generally – the problem of non-compliance. This would be avoided by the global development of a system whereby those not complying are ostracised, for example.
In the island example in Section 3.2, damage was caused by one party and experienced by another, but it was argued that there is substantial obligation to those whose home is damaged and rendered uninhabitable, even when there is no responsibility for the damage. If global warming is seen as a global problem, damaging the global set of resources, then this must affect how the dividing up of available resources can be justified. For example, if A and B share resources equally, and then 25% of the resources are destroyed, it is wrong that B should be left with 27% of the previous whole, A with 48%, just because of the arbitrary way in which the damage was felt. That is, the damaged land, air, or resources, are not intrinsically the property of the poor, just as the supplemented resources of the wealthy are not theirs by any natural quality. Instead, it is the result of a previous division, and now that the division has become uneven, it is necessary to make changes in order to reset the balance.

When enclosing resources, two considerations must be taken into account: the needs of those thereby excluded from the resources enclosed, and the genuine needs of the encloser. Most people in the most developed parts of the world live in territories, and use resources, that were enclosed long ago. Any modern reshuffles have been more of a readjustment of something that is already there, than really an enclosing. Contemporary theorising about justice in this area, then, requires a view from a world already primarily designated. At some distant point in the future, it may become relevant to revisit these base delineations, but today, more pressing, is to consider what obligations may arise as a result of this delineation (and its impact on capabilities), especially where resources become damaged (thus changing the overall balance of resource-allocation, and changing the relationships between what is enclosed), or where resources need to be shared. In such cases, clear and immediate obligations arise in a state causing damage to the resources needed by individuals elsewhere, and between states sharing resources (especially where there is an uneven power dynamic). Meanwhile, evolving obligations arise, enabling global society to be more conducive to healthy development generally.

3.4. Obligations to persons excluded and obligations to their states

This section brings together this chapter's discussion of obligations towards a state's non-citizens overseas. It then uncovers two important contentions in this dissertation: first, whether sovereignty can admit gradations (rather than being all or nothing); second, that there is a necessary relationship between rights and obligations, and between obligations and permissions. Humanitarian intervention is an example where one state can be seen as justified in wielding significant power within another state, and where obligations towards individuals and obligations towards states may
come into conflict. This will become central also to the discussion of the relationship of the state towards non-citizens that are present.

3.4.1. A liberal state's obligations towards non-present non-citizens

This chapter has argued that a state has particular obligations towards distant others in various ways. These range from the very fact of enclosing people, territory or resources, to the causing of damage to the people, territory or resources needed for securing the capability rights of those distant and excluded others. Crucial to a state's obligations towards those excluded from its territory, resources, or institutions, is the role of other states. Literature on migration too rarely considers the role of both emigration and destination countries (as was discussed in Section 2.4).

Justifying the state externally gives rise to obligations towards non-present non-citizens. These go further than obligations owed merely to humans as humans. In enclosing some portion of the world's people, territory and resources, and excluding others from the free use of these, the state cannot ignore the needs of those thereby excluded. And, in a world where territory and resources are limited, the needs of those excluded are pressing. In most cases, advocating a complete revision of the current distribution is not useful. Further obligations arise because the people, territory and resources enclosed by each state are not constant. Dynamic justice must take into account this changing situation and also the changing needs of people and the changing capacity for change of states and people, edging towards a system where promoting one's own capabilities promotes those of others, where mutually beneficial characteristics are socially promoted (these could seen as Philippa Foot's virtues, as defined in 1978 165, 1983).

The obligations towards distant others are generally imperfectly held. This chapter has shown that some localised situations may lead to specific obligations, but that even in the absence of clear perfect obligations, some sort of obligation does pertain. This lack of perfect obligations towards specific distant others can often be given as a popular reason against there being any state obligation towards distant others. The obligations are based upon individual capability, since this is the core of the notion of justice presented here. These obligations may be both positive and negative in character. As well as providing an analysis of obligations towards persons who are clearly outside the state more generally, this Chapter has suggested special obligations that might pertain between specific outsiders.

In practice, similar mechanisms produce obligations towards potential and actual immigrants. Saskia Sassen notes that major receiving countries tend to receive immigrants from their spheres of influence (Sassen 1996 71). This is, for example through: 'postcolonial and current neo- or quasi-
3.4.2. Humanitarian intervention
Following the trend in philosophical literature (e.g. Macklem 2008 369), humanitarian intervention will be taken here to mean:

The threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory the force is applied (Holzgrefe 2003 18).

Contemporary humanitarian intervention theory tends to include also intervention in situations of generalised violence (e.g. in Somalia) and natural disasters (e.g. in the aftermath of Haiti’s earthquake). As with state coercion generally, there are two aspects to the justification of humanitarian intervention: justifying it to those in the state intervening (internal), and justifying it to the subject of the intervention (external). The external justification is the most commonly discussed (e.g. Macklem 2008, Nardin 2005), with internal justifications less prevalent in the literature (Buchanan 2010). Allen Buchanan emphasises the importance of internal justifications, which look at how the action can be justified to the citizens of an intervening state (Buchanan 2010). This is necessary because intervention uses human and financial resources supplied by the citizenry (Tesón 2003 123). Also important is the self-definition of the state-citizenry in terms of values and norms. While this section focuses on external justifications, the internal justifications of humanitarian intervention provide an important backdrop.

There is a key difference between how the state is understood in this dissertation (as described in Chapter One), and how it is understood by theorists like Buchanan. This affects how the question can be asked. In this dissertation, the state itself is not justified nor is it relevant to pursue a timeless

86E.g. almost all immigrants to Europe from the Indian subcontinent and from the English Caribbean in 1996 lived in the UK, and similarly with regard to North Africans and France, and other groups in other former colonial countries (Sassen 1996 86).
87Thanks to Dr Mba Nmaju for discussing this with me.
definition of it. Instead, this dissertation recognises that currently, states just are, and that the task ahead is to figure out how to use states, and the evolution of states, to develop just institutions.

The basic liberal argument for humanitarian intervention in broad terms has two stages (Tesón 2003 94):

1. Governmental tyranny and extreme anarchy ‘are serious forms of injustice towards persons’; and

2. ‘[S]ubject to important constraints, external intervention is (at least) morally permissible to end injustice’.

Fernando Tesón, presenting this argument, considers (1) to be uncontentious, focusing his defence on (2). I also briefly defend (1) in the context of my thesis.

For a society to be described as categorically unjust in the context of this dissertation, there must be deprivation of core capability rights, with no effort to direct societal evolution towards a set-up socially guaranteeing core capability rights.

Consider how a situation of genocide would fit into my definition. First, for those killed, there is a full cessation of their capabilities. However, some might argue that, despite this, society as a whole may do better without previous ethnic disputes, so that although something ghastly was perpetrated, this in fact represents an example of positive social evolution. There are two main reasons to reject this, based on the way that justice is understood in this dissertation:

(A) It has already been argued that positive social evolution must improve general capability at each stage, so that it is not acceptable to do something awful, even if it were to lead to something good (see Section 1.6.5)

(B) This is inappropriate as an element in the process of societal evolution, which was intended to open access (practical and ideological) to systems promoting mutually beneficial behaviour.

On this basis, there is at least one situation in which society can be identified as unjust (and there will be more, of a less severe nature). On such an occasion, then, intervention is warranted, though the nature of this intervention still remains to be discussed.

Now test (2). In the twenty first century, there are four times as many deaths at the hands of victims’ own governments, or as a result of civil strife, than from all wars between states (Wilkins 2010 234). And there are surely some cases where interference from outside is permissible and required. A 1999 communication by Kofi Anan (former secretary general of the UN) puts this well:
To those for whom the greatest threat to the future of the international order is the use of force in the absence of a Security Council Mandate, one might ask – not in the context of Kosovo but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of states had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold? (quoted in Caplan 2000 24)

Richard Ashcroft draws attention to the internal justification of the state (discussed in more detail in Chapter Two. He follows a Hobbesian contractual argument to demonstrate that a state loses its internal legitimacy if it fails to ‘preserve the citizenry from the condition of Hobbesian War’ (Ashcroft 2005 132) which, for him, means conditions under which human life is, as Hobbes puts it, ‘solitary, poore, nasty, brutish, and short’ (Hobbes 1651 89; quoted at Ashcroft 2005 131).

For Ashcroft, this implies something wider than usually assumed: ‘the chief role of the state is to create conditions of stability and trust between citizens and between citizen and the (representatives of the) state’ (Ashcroft 2005 134). A state, then, becomes illegitimate if it fails to provide for the needs of its citizens. The question arises, then, whether this also legitimises some level of intervention by other states into its internal affairs. This reiterates the argument in Chapter Two, that the state has no purpose beyond promotion of the flourishing of individuals, and the promotion of a mutually beneficial society. For Nardin, things which ‘shock the conscience of mankind’ justify intervention (Nardin 2002 67). It is difficult to pin this down, but at whatever point the obligation arises, that obligation is towards individuals, and against the sovereign power of the state.

Consequently, alongside the obligation to intervene must be some sort of a right, or claim to intervene (the state, or states, that interfere with another state’s sovereignty themselves act as sovereign states). It is not clear that these need be distinct. Being allowed to intervene need not be tied to good behaviour elsewhere. Nardin uses as an apparently parallel case: that a murderer is not forbidden from saving a drowning child (Nardin 2002 68). However, the situation regarding intervention in states is different, as some sort of integrity is relevant to legitimise (popularly) an intervention to make it successful and to avoid humanitarian intervention discourse challenging sovereignty looking more like a ‘project of imperial world domination’ (Cohen 2004 2, discussed also
in Nardin 2005). This follows from the need, reiterated throughout this dissertation so far, that obligations of justice be related to individual and evolving contexts.\footnote{Note also that even when the intention is positive, the outcomes are problematic if carried out in ignorance of local contexts (see Kingsolver 1998).}

Humanitarian intervention is not just an action against some abstract state entity, for the protection of vulnerable inhabitants. The state subject to intervention is made up of many persons. Indeed, as there may be no clear military target to be destroyed, the aim of humanitarian intervention is presumably to break the will of the portion of the community that is oppressing the other part (May 2010 221). This means that it is not the state per se that is violated, but individuals within that state. Larry May notes that this includes children under seven years old whom it is difficult to see as complicit in the rights violations making humanitarian intervention necessary (May 2010 226). Humanitarian intervention can cause significant capability loss: loss of life, injury, damage to property, and problems for state stability that may take a generation (or more) to recover from (May 2010, 225). Given its necessity in some, hard to distinguish, situations (note Kofi Anan’s comment above), it is hard to see humanitarian intervention as wrong per se. However, given the horrors of war, it is hard to see it as good (May 2010 224).

\subsection*{3.4.3. Humanitarian intervention and sovereignty}

The discussion so far relies on a fixed notion of ‘sovereignty’. In reality, however, sovereignty is more complex. Robert Keohane offers four types of sovereignty (which he has developed from the work of Krasner) (Keohane 2003 285)\footnote{For an important alternative discussion, see (Krasner 1999)}.:

1. Domestic Sovereignty (effective organisation of authority within the territory of the state);

2. Interdependence Sovereignty (ability to regulate movements across state borders);

3. International Legal Sovereignty (fact of recognition of an entity as a state, by established states); and

4. Westphalian Sovereignty (exclusion of external authority structures from decision-making process of a state).

Keohane explains that these need not come together, and indeed, gives examples of states surrendering one or another of these elements of their sovereignty. Keohane concludes, not only that there are gradations of sovereignty, but that, while humanitarian intervention may limit
external sovereignty, it may be needed to restore domestic sovereignty. This fits well with an account of sovereignty that derives from the need to promote human capability, and which gives sovereignty itself no value of its own. These different aspects of sovereignty, are then vehicles for promoting human capability and so will take different levels of priority depending on context. For example, to a newly independent state, the internal legal sovereignty and domestic sovereignty may be most important. An older, more confident state may have other concerns.

It is, then, possible to contravene one aspect of sovereignty without disturbing the others, so long as this is acceptable to the people of the state at this time. Given the earlier discussion, the nature of the entity that may or may not be doing the intervention will be important as well as the sort of intervention involved. Thus, while a state entity may have an obligation to intervene, it may have an obligation to do this as part of a multi-state grouping, like the UN, for example. The obligation derives from its own enclosure and ability, while the mode of execution derives from the context. However crucial some intervention may be, unilateral humanitarian intervention can be seen as aggressive. Indeed, humanitarian intervention is still considered illegal by the vast majority of international law scholars (May 2010 222).

The relatively familiar discussions of humanitarian intervention show how the relationships of perceived obligation of two separate states towards an individual can come into conflict, threatening to destabilise the state concept more generally. This feeds back into the justification of the state, as any justification that can be offered for this or that state relates to the justification of states altogether. This means that, for example, calling into question the sovereignty of a distant state of presence of individuals to which a state has obligations, calls into question the sovereignty of all states in some way and requires an examination of the root of obligations.

An obligation to intervene does not mean an obligation to be the prime actor and unilateral decision-maker. Instead, obligations of justice must be seen as flexible, changing and dynamic. In the case of humanitarian intervention, then, the tension between obligations towards individuals and obligations towards their state turns out to exist in a different form to that suggested earlier. While it may look like a state must choose between supporting another state and an individual, it must instead be participating in moving towards a mutually beneficial global society, and through this to enact obligations towards distant others. Humanitarian intervention questions a simplistic notion of sovereignty within the wider system. The concern relates, then, to the notion of sovereignty and its changing role in a world promoting human capability generally and moving towards mutual benefit.

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90 It is important to notice that for Sassen, sovereignty today is in the people, rather than the monarch, so that it is in appropriate to see the state and its sovereignty as something other than the people that comprise it.
This changing role must admit of the different aspects introduced above, and a changing emphasis on each of these, depending upon time and place. It is a dangerous precedent in our current system of states to breech state borders when what happens within them is distasteful. But, paradoxically, it is also important to challenge the assumption of ultimate, one-dimensional, sovereignty in order eventually to achieve more open states and promote general capability through a system of mutual benefit. It is necessary, then, to see the crossing of these various types of borders as intertwined.

3.5. What the status of non-citizens overseas implies for those present: when non-citizens cross borders

Non-citizens are characterised by exclusion. The non-status of non-citizen is defined by not being a citizen. Non-citizens overseas are excluded in two dimensions. They are excluded from citizenship, and they are excluded from the territorial space. There are two main ways in which the obligations towards non-citizens impact upon obligations towards those non-citizens who are territorially present. First, many of the reasons for obligations are not erased when the person crosses a border. If the need to meet the obligation is removed, this will only be when that obligation has been met. Second, part of the obligations towards some non-citizens overseas discussed in this chapter gave rise to an obligation to admit that non-citizen into the territory of the state. In such a case, the admission is itself part of the obligation, so does not remove obligation, except insofar as it may remove the need to meet a different set of obligations for that person overseas. These two considerations will now each be addressed in turn.

First, the obligations towards non-citizens overseas discussed here derive from exclusion. Exclusion from human capital, or the ability to develop one's own capabilities, gives rise to obligations among all those capable of enabling further capability development. However, there is also a special obligation upon those who benefit specifically from the set-up that currently leaves some without capabilities. For example, those who benefit from the movement of HCPs from countries with already very low doctor to population ratios, have an obligation, not to stop those persons from moving, but to help set up the global structures such that the movement benefits everyone involved, and indeed, settling in such countries becomes more attractive for HCPs.

In a world of states, exclusion from territory can be a hardship in a number of ways. It contravenes the basic capability to move (see 3 in Nussbaum's list in Subsection 1.4.2). It also can hamper access to other capabilities, such as family and cultural fulfillment (see 7). This is based on the territory itself, rather than the resources thereupon. When it comes to resources, there are a further set of obligations that arise. These obligations do not disappear when someone crosses a border. There are
two possible scenarios that may happen after a person has crossed into a state that holds obligations to them abroad:

1. They are given access to the opportunities, resources, and movement upon that territory; or
2. They are excluded from this.

If (1), then it is not that the obligations towards that individual have disappeared, it is just that they have been met. If (2), then the arguments presented in this chapter still hold. Chapter Four will argue in detail why even irregular border-crossing does not discount these obligations.

There is a second factor that needs to be considered. In Section 3.2, it was argued that, if sufficient damage has been done to a person’s territory to make it uninhabitable, or to make decent life there impossible, then there arise obligations to enable that person to enter the territory of another state. This damage can be seen broadly. There are the cases of damage pure and simple, as in the example of Bikini Atoll, discussed above. However, there are situations of war and violence, of sickness and disease, and of stunted opportunities. All of these can be seen as damage to the human capital growth opportunities, territory, and resources of a state, and as has been argued here, gives a person claim to the human capital growth opportunities, territory, and resources on other states, most particularly, those currently responsible for this damage.

The relationship between a state and non-citizens outside its borders, then, has a significant impact in terms of obligations upon non-citizens within its borders. This chapter has argued that a state has obligations towards non-citizens overseas, in virtue of exclusions from territorial and political membership. Moreover, when those non-citizens cross the border into a state which had obligations towards them overseas, these obligations do not fade, though the form in which they are to be met may change.
Chapter Four: Irregular immigrants and non-citizens generally.

Irregular immigration is not merely a philosophical device or thought experiment. The International Organisation for Migration (IOM) estimated in 2005 that a third to a half of new entrants into developed countries are irregular immigrants. Merely engaging with the question of obligations towards irregular immigrants challenges the assumed relationship between the state, the citizenry, sovereignty, and the spatial territory they inhabit. It explodes the tension between territorial presence and citizen membership as bases for appropriate claims against a state. Indeed, it 'presents a legitimacy crisis for states whose raison d'être is based in the sovereign protection and privileging of a territorially bounded community of citizens' (McNevin 2007 657).

This chapter engages directly with the question of state obligations towards irregular immigrants, and explores the essential tensions involved. Section 4.1 sets up a working definition of irregular immigration, explaining the different ways that a person’s status can become irregular, and reviews existing arguments for state obligations towards this group. Where these exist, they are unsatisfactory. It then offers a discussion of capability rights for irregular immigrants. Section 4.2 continues, by analysing existing practical policies and practical policy debates regarding state treatment of non-citizens. This dances between two extremes, both to be discussed here. It also examines the special case of access to the labour market. Section 4.3 then presents how irregularity of immigration status draws attention to the variety of borders of a state: geographic, institutional and symbolic and the difficulties involved in discussing irregular migration. Finally, Section 4.4 discusses the connection between debates about state obligations towards irregular immigrants, and towards non-citizens more generally, examining implications of obligations towards irregular immigrants for the main question of this dissertation.

4.1. Existing discussions of obligations towards irregular immigrants

There is strikingly little discussion of irregular immigration in mainstream philosophical literature. There was a small explosion of general debate in this area in the 1990s when the Californian electorate voted for ‘Proposition 187’ (subsequently overruled), and in 2008, surrounding a symposium convened by Joseph Carens, and these will be central to discussions of literature here. Although some definitions were offered in the introduction to this dissertation, Part A develops more complex definitions, arguing why the term ‘irregular’ is adopted, over other prevalently used
terms. Part B looks at sources of this irregularity, and Part C presents Joseph Carens’ main arguments for state obligations towards irregular citizens, and demonstrates why they are weak, especially when measured against real-world concerns.

4.1.1. Practical definitions
Irregular migration exists because it is defined into existence (e.g. argued at Dauvergne 2008 15), and understanding irregular migrant status needs an examination of practical definitions in the disciplines that create it. As with other legal statuses, if there were no legal restrictions on the movement of persons, ‘illegal’, ‘irregular’ or ‘undocumented’ migration would be non-existent. This is supported by literature. Khalid Khoser argues that irregular migrants move for the same reasons as any other migrants. They move irregularly because of increasing restrictions on legal movements (Koser 2007 54; Ghosh 1998 p34).Irregular migration also represents a mismatch between the state’s power to exclude and remove, and the weight of people hoping not to be excluded or removed.

This subsection presents why I adopt the term ‘irregular’ to describe this category of migrants, comparing it to other terminology. The various words used are not synonyms and this chapter tries to avoid the prevalent ambiguity and dehumanisation, implicit criminalisation, and military-type imagery, which is discussed below. If a phenomenon is ‘irregular’, it does not follow an expected pattern, which most accurately describes the immigration phenomenon discussed in this chapter, and ‘irregular’ (as an adjective) lacks the value-ascription made by other terms often employed. Peter Schuck disagrees, declaring that one should ‘call the activity what it manifestly is, “illegal”, rather than “irregular”, an arguably amoral euphemism’ (Schuck 2009), and De Genova believes irregular to be merely a ‘less obnoxious but not less problematic proxi’ for illegal (DeGenova 2002 420). These comments are unfair. Individuals may enter into the category discussed in this chapter as a result of illegal (possibly unknowingly and unjustly), incorrectly administered, or tardy activity. In this dissertation, therefore, the more neutral phrase ‘irregular migration’ is adopted, and words like ‘illegal’, ‘undocumented’, ‘unauthorised’, and ‘clandestine’ will be used only in contexts where a narrow interpretation of these words accurately describes the situation. These will now be briefly discussed in turn, along with Catherine Dauvergne’s term, ‘extra-legal’ (e.g. see Dauvergne 2008).

Although ‘undocumented’ and ‘unauthorised’ have the advantage of emphasising the bureaucratic element in the definition of this group of migrants, these words refer inadequately to the persons usually understood to be in this category. Nicholas De Genova argues that ‘undocumented’ is the most honest term since the problem is in the documentation (De Genova 2002 420), but this is too
narrow. I also want to include (and I think so does De Genova), for example, someone who is documented, but irregularly, or who is documented but irregular.\textsuperscript{91}

The use of ‘illegal’ or ‘clandestine’ connotes criminality (Koser 2007 54), while in reality a person may find herself or himself in this category for merely contravening administrative regulations or procedures (e.g. by failing to complete a form in time). Using phrases like ‘illegal immigrant’, or indeed the noun ‘illegal’ (or even ‘irregular’), arguably also denies humanity. It implies a person’s very existence is illegal. This term also causes concern among academics and activists advocating freer or free migration. For example, Dauvergne writes: “‘Illegal’ is one of the most derogatory terms applied to the type of border crossing I am concerned with here” (Dauvergne 2008 4). Its legalese aspect gives it the ‘allure of crisp precision’, although no such crisp distinction is possible. This view is shared, for example, by the ‘No One Is Illegal’ campaign\textsuperscript{92} (a global movement calling for an end to borders and immigration controls). Dauvergne also mentions this movement, drawing attention to the linguistic evolution it symbolises, given it is possible to use ‘No One Is Illegal’ as a rallying cry, when previously it would not have made sense at all to apply the adjective ‘illegal’ to a person rather than to his or her actions (Dauvergne 2008 10).

It is important to avoid also the use of military language in discussing this category of migrants. Illegal immigration is to be ‘combatted’, implying that the state is ‘at war’. This discussion of military-type operations coincides with the imagery of an enemy, of criminal offenders, and eventually of ‘illegals’ as ‘non-persons’ (Cholewinski 2007 305). Consider the language used on just one page in a UK government document from 2007, Managing Global Migration. With regard to irregular immigration and immigrants, it uses: ‘crime’, ‘illegal’, ‘clandestine’, ‘corrupting or defrauding’; and describing UK government response: ‘tackling’, ‘fight’, ‘combat’, and ‘target’ (FCO 2007 13). This is also evident in recent splicing of discussions of irregular immigration with those of national security and the ubiquitous threat of terrorism. This ‘[u]nfocused war rhetoric’ is unhelpful (Beare 1999 13), muddying discussion with prejudices and emotions (e.g. Canada and the USA moved immigration into departments dealing with security – discussed in Section 4.4).

The term ‘extra-legal’ suggested by Dauvergne may help to get around some of these difficulties, as it is explicit that the immigrants function, not so much illegally, against the law, but outside the law, in a different legal space. This is attractive. However, in reality, it is impossible to function extra-

\textsuperscript{91} For example, documented with incorrect information, documented but has overstayed, documented and ignored – eg. Refused asylum seekers. In 2007, 19% of asylum applications in the UK were accepted and a further 9% were given humanitarian or other reasons for the right to remain (Taylor 2009 8). This leaves just under three quarters without status.

\textsuperscript{92} Official website: www.noli.org.uk
legally, unless you are in a sufficient position of power to override legal prescriptions. For most irregular immigrants, their relationship with the law is in fact one of animosity and fear of detection because they are contravening its prescriptions.

For the reasons given above, this dissertation adopts the term ‘irregular’ to describe the immigration examined in this chapter.

4.1.2. Sources of irregularity

Irregular migrant status can be allocated by three different parties: the country of origin, transit countries, and the destination country (Ghosh 1998). It may also derive from international organisations, regional affiliations, and perhaps even private companies, contractors or individuals. For example, if the UNHCR refuses refugee status to a person in a country where they are mandated so to decide, then that person remains irregular in that state, and perhaps also in other states to which they travel.

Regional affiliations may also affect irregularity decisions. For example, under the Schengen free-movement regulations between some European states, certain persons are not eligible for regularity. In ECOWAS, a person has some free movement rights, but may have his or her ECOWAS citizenship revoked (e.g. for permanent settlement outside the ECOWAS region, or for committing a crime), whilst retaining his or her national citizenship. Theoretically, then, a second country citizen could be rendered irregular in a member state on the basis of an ECOWAS, rather than a state, decision.

Private companies, individuals, and contractors, may also decide upon irregularity, for example, by imposing employment restrictions which when, contravened or altered, can put someone into a state of irregularity. There are restrictions, for example, on who can receive au pair visas to the UK, requiring that persons be within a certain age bracket, single, without children, and of one of a list of nationalities. There may be a stipulated maximum weekly wage, and a requirement to live with a resident family and work in a private household (Anderson 2008 199). Non-compliance with these conditions can transfer an individual into irregular status.

There is a strange lack of any global or regional legal definitions of irregularity in destination countries. Instead, criteria for irregularity are implicitly stated, with the tendency being to assume irregularity and then determine who is regular based upon the meeting of criteria (Guild 2004 4).

93Austria, Belgium, Czech Republic, Denmark, Finland, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland.
That is, irregularity is assumed until the migrant can prove regular status. This results in limited access to welfare benefits and the legal labour market, and makes people vulnerable, at risk of exploitation by letting agents and employers, and of getting embroiled in criminal networks.95

Perhaps, then, irregularity should be referred to as a 'non-status', rather than as a status of its own. Generally, irregularity in a destination country involves at least one of a list of features, delineated similarly by most writers in this area (e.g. Castles and Miller 2009 306; Koser 2007 56; Guild 2004 3), giving the following list:

1. An illegal/clandestine/unauthorised border crossing;
2. Staying longer than permitted;
3. Working in a manner not permitted by the host state’s immigration conditions; and
4. Asylum seekers not given refugee status, or refugee status removed.

I add also a fifth feature, strangely absent from many discussions:

5. Committing a criminal offence (even if offence is minor and if time has been served).

In reality, someone’s status can change overnight and without their noticing, such as when a visa elapses (Koser 2007 57). There are also many layers of possible ambiguity. In many countries, frontiers are porous, with ethnic and linguistic groups straddling borders. Nomadic peoples may range over state lines that may not be clearly marked on the ground. Finally, many people have no proof of their place of birth or citizenship (Koser 2007 56). These factors all contribute to making enforcement against irregularity often arbitrary.

Irregular immigration, then, for the purposes of this dissertation, is immigration which contravenes some administrative regulations in the host country. This includes those who have committed serious crimes in their home countries and now live abroad to avoid punishment, alongside child soldiers who have fled torture and being forced to kill, but are now unable to prove their age and identity. It includes someone who has travelled with cash from illicit trade to continue such trade in a new country, alongside a husband and father who has spent months travelling dangerously to a more affluent country to earn money from menial labour to send home. It also includes the large number of gap year backpackers who, in Australia, allow their tourist visas to expire and float into what is one of Australia’s largest groups of irregular immigrants. Indeed, the largest nationality

95 E.g. see Ken Loach’s 2007 film, It’s a Free World...
group overstaying entry visas in Australia in 2005-06 were Americans, as can be seen in Table 7 (Dauvergne 2008 16, n.43):

Table 8: The Top three countries in terms of over-stayers in Australia in 2005-06

<table>
<thead>
<tr>
<th>Country</th>
<th>No. of over-stayers</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States of America</td>
<td>4,800 (10% of total)</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>3,800</td>
</tr>
<tr>
<td>People’s Republic of China</td>
<td>3,700</td>
</tr>
</tbody>
</table>

The non-status of irregularity comes from a variety of sources and irregular immigrants cannot be seen as a homogenous category. Consequently, generalised normative judgements about them are bound to be problematic.

4.1.3. Unconvincing grounds for obligations

Existing arguments for basic rights for irregular immigrants are weak, especially in the context of the realities of statecraft. This will be demonstrated through criticism of the arguments offered by Joseph Carens, who arguably leads the field. For Carens, irregular immigrants are entitled to basic human rights on what boils down to two main grounds: as they are not criminal they should not be deprived of rights as criminals; and as humans, irregular immigrants just are entitled to basic human rights. Neither of these is very convincing as grounds for this state to have obligations towards them. The first because it is solely negative; the second because it is thin. These will now each be developed in turn. While some, like Henry Shue and Simon Caney, argue that all are entitled to basic human rights, they do not explicitly discuss the problems involved in allocating the associated obligations to a state in which a person is irregularly present. This subsection is specifically intended to critique the explicit arguments given by Carens. Those of Shue and Caney are discussed elsewhere.

To make his first argument for state obligations towards non-citizens, Carens enumerates differences between violations of immigration laws and of criminal laws (Carens 2008 166). He explains that immigration laws are usually seen, and punished, as administrative matters, giving

fewer safeguards to immigration-law-violators. This makes removing further rights on the basis of criminality inappropriate, since irregular immigrant status is not criminal but administrative. On this weaker point, his argument seems sound and complete, but the situation is more complex.

Criminalisation of irregular immigrants takes two forms: social, and practical. Defining a person’s status as irregular or ‘illegal’ propagates social value judgements in themselves and others. Godfried Engbersen argues that, for many irregular immigrants, their illegal status ‘influences the establishment of social relations’ by overshadowing their other social characteristics (Engbersen 2001 240,1). Perhaps the EU’s reorganisation of its pillars reflects a recognition of this. In the Amsterdam Treaty 1997, while policing remained in the third pillar of the Union, asylum and immigration moved from the third pillar (intergovernmental cooperation) to the first pillar (community integration) (Cholewinski 2007 302). The pillars system was abolished by the Lisbon Treaty 2009, which made efforts to homogenise member states’ treatments of asylum seekers.

Penalising irregular migrants can also render those eligible for regularisation unable to prove it. For example, the status of refugee can be made less meaningful if draconian immigration control measures limit access to the status even for those who need it (discussed in Section 4.4). That is, criminalising irregular immigration also criminalises the search for asylum and other protective statuses (Gibney 2006 143).

This leads to a second, more practical, form of criminalisation. Without access to legal work or welfare, living undercover, sometimes in debt to people-smugglers, irregular immigrants more than members of other immigrant groups may have to participate in criminal activity for survival. This is corroborated by field research. Matthew Gibney’s study of the UK, Germany, and Spain concludes that ‘most of the crime committed by people living without a regular migration status is the result of circumstances, not character’. And indeed, the criminal offences found in LDSG’s smaller and detailed study included: using false documents to work, claim asylum or seek to leave the UK; as well as petty theft to eat (e.g. LDSG 2009 13,19). The argument, then, is that the activity of irregular migrants is not sufficiently bad to merit the levels of sanction that they receive; and further, that the sanctions against their irregular presence, or the creation of their irregular presence in fact is a key factor in the cause of, rather than a deterrent against, criminal activity.

Carens’ second ground for irregular immigrants’ entitlement to basic human rights from the host state is based on the common assumption that: ‘[p]eople do not forfeit their right to be secure in their persons and their possessions simply by virtue of being present without authorization’ (Carens 2008 166). Shue and Caney would probably agree, but they do not say so explicitly. For example,
police are expected to protect irregular immigrants from being robbed or killed. He notes an entitlement in many countries to common freedoms of speech and religion, as well as to receive lifesaving medical treatment. However, Carens does not engage with reasons for this. He concludes merely that: ‘[t]he fact that irregular migrants are entitled to basic human rights shows that liberal democratic norms and standards limit the means that may be used to achieve immigration control’.

Christina Boswell agrees that basic human rights should be afforded to irregular immigrants, but is confused with Carens’ presentation. She argues that if there are rights to education and health care on human rights grounds, then ‘it seems bizarre not to extend a right not to be deported, or a right to leave and re-enter one’s country of residence’ which, Boswell claims, are more fundamental than the socioeconomic claims Carens defends (Boswell 2008 190).

Predictably, David Miller’s concern pulls in the other direction but raises a similar problem, arguing that Carens conflates citizenship rights and human rights (Miller 2008 194). Miller would protect what he sees as irregular immigrants’ human rights but is against a right, for example, to be paid for work performed. He argues that such a right sits alongside ‘paying taxes, voting, sitting on juries, helping to maintain public order, and so forth’ (Miller 2008 195). The central problem here is that Carens seems to advocate presence as the conferrer of rights, without any legitimisation of that presence. This is a tension that will be hard to remove from discussion of irregular immigrant claims against a state.

Boswell agrees that the state’s legitimacy requires at least a symbolic attempt to guarantee privileged access to certain rights and services for its citizens (Boswell 2008 188). This, she argues, is how the state retains the ‘loyalty and compliance’ of its citizens. Boswell couples this, however, with the claim that the only consistent Liberal position would be to accept a right to mobility, at least under certain conditions (Boswell 2008 191). In the absence of this possibility, however, she offers an alternative. She suggests states should be encouraged to ‘pursue a policy of benign neglect’, ignoring the phenomenon of irregular immigrant presence (Boswell 2008 191). This literature does not address explicitly what may be the basis of the specific obligations to provide for any particular right under discussion and how this relates to irregular immigrants.

Carens claims that it is uncontroversial that tourists and temporary visitors be denied social and administrative rights, such as: to drive a car or a boat, to own a gun, to use public libraries and swimming pools, to have access to programmes facilitating entry to higher education, public health care, or social housing (Carens 2008 181). However, he notes that for temporary residents, access to these rights can depend on factors such as ‘how long they have been resident and why’ (Carens 2008
Carens argues that the state’s right to enforce immigration laws does not allow it to enforce exclusion from all social benefits. He puts it that, as well as unfair and possibly unjust, such denial is often also against the state’s own interests. Carens’ arguments for basic human rights for irregular immigrants are grounded in weakly substantiated claims that they are not criminals and that they just are entitled to basic rights. Although I agree broadly with the conclusion and many of the premises, I have shown that I do not think that the former is established by the latter because it is necessary to show that this state has these obligations now that the individuals are present.

4.1.4. Irregular immigrants and capability rights

A liberal democratic state has obligations towards irregular immigrants, and the irregularity itself may contribute to those obligations. That is, an irregular immigrant is both explicitly inside and explicitly outside the state. As a result, such an individual is eligible for both external justification and internal justification of the state, and for the accompanying obligations. The fact that a person is due human rights is not sufficient to allocate this state to provide for them. Shue himself recognises that ‘[i]ssues about the right to emigrate, the right of asylum, and other related matters are very important, but require separate treatment because of the complexities involved’ (Shue 1980 194 n.20), these are touched upon in the two volumes he has edited with Peter Brown, examining justice and migration (particularly relating to the US and Mexico).

Chapters One and Three argued that a liberal democratic state has external obligations. That is, it has obligations to enable basic capabilities abroad, and to allow persons onto its territory, especially when the receiving state is contributing to the hardships experienced. As a result of this external obligation, when a person manages to cross illegitimate boundaries, the privations they receive as a result of irregular presence are also not justified. Chapters One and Two argued that a liberal democratic state has internal obligations. That is, it has obligations to enable the basic capabilities of those within its territory – including all in the space that the state tries to enclose. On the basis of these internal obligations, those who are irregularly present should have as much access to state obligations as any other non-citizen.

This chapter examines in more detail the specific ramifications of irregular presence. It argues that the irregularity itself does not provide enough reason to counteract any of these obligations. Moreover, note that an intentional denial of these capability rights (e.g. in the UK’s policy of destitution) can appropriately be examined as a form of torture. This can be seen if we consider Sussman’s definition of torture (Sussman 5):
at a minimum, torture involves deliberate infliction of intensely distressing affective state on an unwilling person for purposes that person could not reasonably be expected to share.

It is useful to consider destitution (and some of the other practices affecting irregular migrants, including indefinite periods of detention, for example) in terms of torture, both because of the evidence obtained regarding the effects of these practices upon the victims, and because it helps to contextualise the discussion of ‘dehumanisation’, which will be given below, putting it in the context of allowing persons to torture others.

An irregular immigrant is, then, a non-citizen who, by living in a state, in some way challenges its immigration conditions, whether by entry, work, or sustained presence. State obligations towards irregular immigrants are difficult to discuss within existing theoretical frameworks. Advocates of free migration or open borders find it difficult to differentiate between immigrants, irregular immigrants, and everyone else, in their system. Meanwhile, it is difficult for those who support restrictive borders consistently both to allocate full human rights to irregular immigrants, and to sustain the notion that they are not entitled to the presence that confers the obligation to fulfil these rights. Existing arguments for there being state obligations towards non-citizens are few and unconvincing when applied to real-life considerations. This is because irregular immigrants challenge dearly-held notions of sovereignty and state integrity. These tensions must be central to developing a credible response, which can only be done using the complex and dynamic notion of states and justice developed in this dissertation.

4.2. Practical policies: from Proposition 187 to Carensian firewall

This section explores two sorts of ways of responding to irregular immigrants' welfare needs promoted in the policy literature, disagreeing with their polarity. In the 1990s the American state of California voted on 'Proposition 187', which would require doctors, and other service providers, to be active in the enforcement of migration regulations, and would deny basic welfare services to irregular immigrants, for example. Subsection 4.2.1 discusses mainly Proposition 187 because of the vast literature that arose around it, but also touches on related provisions in other jurisdictions. At the other extreme, Carens argues that there should be a 'firewall' between immigration enforcement and basic rights provision. Thus, police, education, and health service providers should be disconnected from border control, regardless of whether this makes enforcement of border restrictions more difficult. Such a firewall would help those entitled to a regular status to go about claiming it (Groenendijk 2004 xx). This section discusses possible benefits and ramifications of such a
'firewall' in the context of the debate that surrounded 'Proposition 187'. Finally, it explores the special case of access to the labour market.

4.2.1. Proposition 187

In 1994, the Californian public voted to pass Proposition 187. Among other provisions, it removed irregular immigrants from access to basic welfare benefits and placed pressure on welfare service providers to report on service users that they suspected to be present in the state illegally. Most of the debate at the time focussed on two things: whether the Proposition was politically or practically conducive to its intended result of helping control immigration; and implications for anyone other than irregular immigrants themselves. This uncovers concerningly unquestioned assumptions even among advocates of better treatment for irregular immigrants (Bosniak 1996 567). An alternative theoretical discussion looks at justice, which enables analysis of the interests of the irregular immigrants themselves. The Proposition was dropped in 1997 when it was ruled unconstitutional for states to adopt immigration measures against existing federal law. Humanitarian concerns did not feature in this decision. I will now trace and critique the discussion of the time and relate it briefly to measures in other states.

Bosniak lists three main reasons given against Proposition 187 in the campaign literature of the time:

(1) It may cause racist or xenophobic backlash against Black or Hispanic individuals who are either citizens, or legally present non-citizens (Bosniak 1996 560);

(2) It will not be an effective method of immigration control because the majority of irregular immigrants migrated either to find work or to join family members, not to seek welfare benefits (Bosniak 1996 562); and

(3) It will cause social pathologies, for example, imposing illiteracy on a generation of children, and dissuading people from seeing a doctor, which becomes more costly in the long term (Bosniak 1996 563).

Bosniak's concern is that, while these may be important reasons against the Proposition, they apparently ignore the question of justice for the irregular immigrants themselves. The assumption is that irregular immigrants are not themselves subjects of justice, but are objects in a system that is more or less just for others. Thus, for example, (1) is concerned not about racism per se, but that others may be maliciously or mistakenly subjected to measures which are acceptable, but only when directed at irregular immigrants.

Bosniak diagnoses the problem:
Despite progressives' commitment to challenging systemic forms of subordination and marginalisation, the political and legal landscape they are concerned with is most often a national landscape (Bosniak 1996 580).

That is, even those championing irregular immigrants' interests frame the debate around assumed nation and sovereignty. She argues that if we are really to understand what irregular immigrants should receive in the way of welfare benefits, it is necessary to address the legitimacy of enforcing national borders (Bosniak 1996 584).

This is reducible to a central dilemma. To the standard opponent of Proposition 187, the exclusion of irregular immigrants from state institutions seems objectionable, while their territorial exclusion seems inevitable (Bosniak 1996 590). Bosniak argues that the reason why Proposition 187, which said nothing about entry, was eventually overruled as taking immigration decisions properly made on a federal level, was because 'national border enforcement does not take place at the physical border' (Bosniak 1996 591). This point is crucial throughout this dissertation (e.g. see Section 2.3) and is expanded elsewhere in this chapter. The exclusion from territory and exclusions within the territory are both distinct and intertwined.

In the European context, Godfried Engbersen writes that, while much emphasis in the literature is placed upon the notion of a 'Fortress Europe', with impenetrable borders and drawn up drawbridges, this is not the whole story. He tells of a Europe in which, though territorially present, immigrants are excluded from public services by internal surveillance, a situation he calls 'Panopticon Europe'. This is because he claims that the focus is no longer on guarding territorial borders, but on guarding public institutions and labour markets through surveillance (Engbersen 2001 242).

Although the existence and increasing powers of FRONTEX seem to discredit Engbersen’s view that guarding borders has lost its importance for European powers (e.g. see Papastavridis 2010), it is interesting and enlightening to think in terms of the guarding instead of the social and welfare services. Freeman also refers to the culture of surveilling, controlling and making people leave (Freeman 1994 22). The debate must, then, centre on whether the borders to state services are properly extensions of territorial borders or whether, as Ziv and Lo comment, with regard to health care, such services have ‘a special humanitarian role’ (Ziv and Lo 1995).

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97 Referring to Jeremy Bentham’s prison within which the guards can see everything that goes on (Bentham 1787).
98 Created by the EU in 2004, to ‘coordinate the operational cooperation between Member States in the field of external borders management’ (Papastavridis 2010 75).
A short appendix to the discussion in this subsection is the French ‘delit de solidarité’ ('crime of solidarity'), such that helping an unauthorised immigrant (including providing food or shelter) has been prohibited in France (history summarised at Carrère and Baudet 2004). This initially derives from an ordinance dating to 1945, regarding the entry and stay of foreigners in France. From 2005, this related to a law based on the 1990 Schengen Convention, carrying a prison sentence of up to five years and a maximum fine of €30,000.\textsuperscript{99} In 2009, this was reaffirmed, introducing an arrest quota, to become 5,000 in 2011.\textsuperscript{100} There are other methods adopted also in other countries. For example, one Chinese province reportedly offers rewards to private individuals reporting irregular immigrants.\textsuperscript{101} More commonly, the hiring of irregular immigrants is illegal in many countries, such as the UK, Malaysia and the USA, though the enforcement of this is varied.

These arguments assume that access to state institutions must be tied to state-sanctioned access to its territory, though this may be to different extents and in different forms. The discussion of this, from the perspective of Proposition 187 demonstrates that even those contesting this assumption may make arguments that do not take account of capability rights of the irregular immigrants themselves.

4.2.2. Implementing a ‘firewall’

The firewall principle, on the other hand, advocates that territorial access and institutional access should be kept separate. That is, that immigration enforcement should be kept separate from basic rights provision, welfare services and labour markets. Boswell argues that implementing such a firewall ‘creates a series of legal and political anomalies’ (Boswell 2008 188). She describes two paradoxical situations that arise. First, she notes that, since an individual has been present on the territory, he or she is entitled to claim remedy for any previous violation of his rights. His or her future rights are, however, contingent on his or her continued residence in the country, against the state’s wishes, so that it is contradictory to suggest that the legal system should uphold his rights in the future. Once that future is in the past, the situation apparently changes and the person can seek remedy for past wrongs, which seems odd.

The second paradox is that, given there is much connection between the various aspects of the legal system in most countries, it will be likely that a person’s irregular status will become visible. At this point, the state must either regularise the person’s status or else carry out some sort of

\textsuperscript{99} Convictions are listed at \url{http://www.gisti.org/spip.php?article1791} (accessed 27.07.11)
\textsuperscript{100} There are many reports of this law, for example in the associated press report: \url{www.msnbc.msn.com/id/29899231/ns/world_news-europe/t/helping-illegal-immigrants-crime-france/} or in a New York Times blog: \url{http://schott.blogs.nytimes.com/2009/04/14/delit_de_solidarite}
\textsuperscript{101} \url{www.lifeofguangzhou.com/node_10/node_37/node_84/2010/08/18/128210399779463.shtml}
enforcement measures. Compensation can, then, only consistently be directed at past violations. Future violations cannot be expected to occur, since in the future the person will theoretically either be regular or deported/detained. Thus, Boswell’s core criticism of Carens’ stance returns. That is, that there is a ‘basic contradiction between guaranteeing access to rights while denying a right to be present to access such rights’ (Boswell 2008 187). This is similar to the much criticised carrier sanctions, whereby the receiving state guarantees refugee status, but imposes measures to stop people arriving to get it, thus in effect denying refugee status.

However, the firewall provision is itself intended to avoid anomalies of practice. Currently, lines are drawn arbitrarily between deserving and undeserving, and complicated processes are in place for proving the former (e.g. Sales 2002). For example, individuals moving to access labour markets are generally seen as ‘economic migrants’, less deserving of support, despite the fact that desperate economic hardship may be as bad as, or worse than, the violence or aggression covered by refugee status as it deprives those experiencing it of core capabilities (e.g. see list in Subsection 1.4.2). This lack of a clear line between the deserving and undeserving is key. The refugee regime is an attempt to impose crisp distinctions where none are possible. The problem with this is that it seems to advocate ignoring an underlying problem of assumptions rather than addressing it. A theory advocating a gradual improvement in capability and more inclusive mutual benefit must engage with these underlying assumptions.

4.2.3. Special case of access to the labour market
The labour market is a useful example, because of its importance to capability (e.g. see Nussbaum’s capability right number ten) access to it is often restricted, and because free movement of capital and services is theoretically core to economic globalisation (see Goodin 1992). Furthermore, while increased immigration is often associated with effects on low end wages, as the Layard-Nickell model demonstrates, ‘unemployment cannot be blamed on immigration’, since job availability responds to the size of the labour force (Vaitilingam 2006 4). There are some oft-cited reasons for controlling entry to the labour market: protecting jobs of native workers, protecting wage levels, discouraging increased migration, and avoiding access to a settled status. There are also less explicit reasons for restricting opportunities for legal work. Irregular work is not always really ‘unwanted’ (Castles and Miller 2009 306); an irregular workforce provides vulnerable, easily exploitable, workers for essential services, who can be removed when they are no longer needed, and it is possible to employ them without making controversial immigration decisions. Freeman notes that it is unrealistic to suggest states would be able, or would even want, to prevent all illegal immigration, so he asks, not how to eliminate it, but what a reasonable level of illegal immigration would be (Freeman 1994 22).
Carens cites two arguments given against equal work-place rights for irregular immigrants. First, provision of such rights increases incentives for potential irregular migration. Second, it ‘seems to directly undercut the state’s claim to control the terms of entry in a way that granting basic human rights does not’ (Carens 2008 173). That is, while some non-citizens, such as tourists and temporary visitors, are unable to work, it is odd for those irregularly present to be both entitled to work and protected while working. Indeed, although Carens does not mention it explicitly, some irregular migrants may have travelled on a tourist or temporary visitor visa and then either overstayed or chosen to work against the conditions of their visa. Protecting work-related rights of irregular migrants thus implies that the work-related rights of these non-working tourists would be protected if they did work irregularly.

Carens claims, however, that, as with basic human rights protection, ‘the state’s right to apprehend and deport migrants does not affect its obligations to protect them against being robbed while within its jurisdiction’ (Carens 2008 174). That is, that the state should protect their right to be fairly remunerated for the work that they do. Carens focuses not on the specific rights, but on whether it is acceptable to treat irregular immigrants differently from everyone else regarding labour protections.

What is at stake, then, is not the right to work as irregular migrants, per se, but the right for all workers to receive basic protections in the workplace irrespective of other statuses. Indeed, as Carens later puts it, though in a slightly different context, ‘[w]hat is against public policy is their employment itself, not the specific tasks they perform’ (Carens 2008 174). Further, Carens does not discuss the fact that a large number of migrants become irregular as a result of working in contravention of labour laws. Possibly, by irregular migrant, he specifically means those who have made irregular border crossings or overstayed their visas, but he does not clarify this. This is a key omission, one that Bridget Anderson touches upon in her argument that despite state assumptions, labour market control need not be connected to entry control (Anderson 2008 199).

There is another practical barrier to protecting work-place rights. Although covered by international conventions on workplace rights, many irregular immigrants are reluctant to enforce them because of the power employers wield over them as the gatekeepers to their immigration status (Guild 2004 4). This makes it ‘acceptable’ to deny irregular immigrants work place rights (Shelley 2007 28). This vulnerability makes some employers prefer irregular immigrants. States may also prefer a population of irregular immigrants to do unpopular work for low salaries, to be deported or sacked when necessary, if this seems less politically damaging than accepting legal immigrants during times of
skills shortages, who are then harder to remove or ignore. This provides another reason for a firewall.

Bridget Anderson warns against conflating exploitation and illegality (Anderson 2009). She argues that regular migrants are also barred, to different extents, from the full gamut of workplace rights. Anderson blames the lack of ‘portability of visas’. Individuals are often given a visa only for work for the employer for which the visa was granted, potentially making the employment rights of legally resident immigrants ‘purely formal’, since they are reliant on one employer’s good favour to remain legally present (Anderson 2008 202) (and therefore suffer the threat of irregularity). Anderson argues that immigrants in general ‘must be as mobile as citizens if employers are not to derive additional and unfair advantage from their labor’ (Anderson 2008 202). Avoiding such exploitative situations also protects citizens’ access to employment, since otherwise, the added strictures protecting them may make them less attractive to employers.

Carens sums this up in his three arguments for including irregular immigrants in work-related social programmes: ‘fairness (as reciprocity), need, and systemic effects’ (Carens 2008 178). First, it would be unfair to require irregular workers to pay into an insurance scheme yet be ineligible for its benefits. Second, like other workers, irregular migrants can equally succumb to injury, old age, and unemployment. Finally, allowing irregular migrants to work without having to pay into such schemes would make them preferable to employers over native workers. Indeed, regarding work-related rights in general, Carens notes that if irregular immigrants are not eligible for the same rights as citizens and legal residents, then it becomes more difficult consistently to maintain these rights for citizens and legal residents. Obligations of a state to protect labour rights of irregular immigrants are necessary, then, to protect all workers in the state.

These two extreme potential responses to irregular immigrants (Proposition 187 and the Carensian firewall) represent two more general approaches to irregular immigration and non-citizens. The former assumes closed states and acceptability of tying together institutional and territorial borders. The latter assumes basic obligations to all and suggests a way around a system that assumes otherwise. The former is problematic for its assumptions of acceptable differential treatment. The latter is problematic because it does not engage with the systematic assumptions of the former sort, but tries to impose an idealised world-view upon a non-ideal world. A new, less polarised, framework for discussing potential obligations towards non-citizens is needed.
4.3. Theoretical and symbolic irregularity

Once the physical border is crossed, other crossing-points are reached. Considering obligations towards irregular immigrants opens again the discussion of prioritising some territorial grouping. Even if someone is within the physical borders of the state, they may be outside institutional and/or symbolic borders. These are all closely intertwined, but are importantly also kept separate. The institutional borders are those around welfare services and work permits. The symbolic borders are harder to locate, but, arguably, are the most powerful, for the effect they have on access to other border crossings. The symbolic border protects what it takes to be ‘one of us’, and perceived deserving of access to territorial and institutional borders, including even the citizenry (deriving, for example, from conflation of ‘nation’ and ‘state’). This section first examines the relationship between geographic and institutional borders. It then looks at the symbolic nature of irregular immigration. Finally, it considers the symbolic borders themselves, which can be made most visible by considering specific cases of irregular immigration, rather than just the phenomenon as a whole.

4.3.1. Relationship between geographic and institutional borders

A key issue left unaddressed by the literature is whether control of entry into the territory should be coupled with the control of entry into state institutions, like the labour market, or whether, while one may concern sovereignty, the other may involve something else. First, it is useful to recapitulate what is meant by a state of citizen membership. If the state puts in place restrictions on who may enter, remain, and work in its territory, then there will be individuals who, contravening this, develop an irregular status. This status can be seen as threatening to a state of citizen membership in a number of ways. Irregular entry and work may be seen to (developed from list in Djajić 2001 137):

1. Undermine the authority of the state;
2. Undermine the objectives of legal immigration programmes;
3. Impact on fiscal programmes, wages, and employment opportunities for natives; and
4. Alter the composition of the population, challenging cultural hegemony, internal security, and national cohesiveness.

Each of these relates to different parties involved in a relationship with irregular immigrants in the host state, who have been discussed above.

First, the state has made regulations regarding entry, stay, and work in its territory. If these rules, and by extension the laws of the state more generally, are to be taken seriously, some sort of
enforcement is needed. For example, meting out consequences when rules are overridden. Without apparent negative consequences for overriding the rules, the rules themselves lose clout, and core elements of the state’s entity and legitimation are challenged. The state claims obedience from the citizenry on the condition that it protects their capability rights (See Section 1.6). It is not living up to its part of the bargain if it fails to enforce its rules. Irregular immigrants appear threatening, then, because they have overridden some rules of the state. Once the individual is within the state, recognising their presence as anything other than illegal may seem to give some legitimacy to it, and thereby, to the law-breaking of which it represents an instance. When considering this contention it is necessary to engage with the legitimacy of such rules, and the appropriate relationship between the weight of enforcement and what is being enforced.

Another group to be considered are current, previous, and prospective regular immigrants into the state, who may feel threatened and undermined by the presence of irregular immigrants for three reasons. First, it may seem to disadvantage those following legal channels if others who have not followed this path are also admitted. Second, it calls into question the credibility of legal channels for immigration if those legally present are categorised alongside those present merely as ‘non-citizens’. Finally, irregular migrants who are seeking asylum may feel that those not seeking asylum hamper the administrative processes. It is necessary to establish whether the needs of these other groups should be allowed to impact on benefits received by present irregular migrants.

A third group affected by the presence of irregular immigrants are current workers and employers in the state. However, as discussed in Section 4.2, it is not clear that they are affected specifically by irregular immigrants' *irregularity*. If wages are driven down or employment opportunities taken by those working in worse conditions for lower wages than natives, this is not because the individuals are irregularly present, or even because they are working irregularly, but because their employers are treating them in a way that is illegal or should be unacceptable. The fact that individuals are irregularly present may force them, from fear or necessity, to accept conditions that others are unwilling to put up with.

Finally, the people of the state more generally may be affected in terms of the cultural, security, or 'cohesiveness' situation. This is only a *particular* concern of irregular immigration if regular immigration programmes control for such factors. Whilst security is an important concern and it seems acceptable to exclude individuals who pose a direct security threat to the state, this may not be so for cultural and cohesiveness considerations. This was discussed and left unresolved in Chapter Three.
David Miller argues that irregular immigrant presence undermines immigration policy in general. It makes it unfair to those who have followed the rules and immigrated regularly. It also reduces the legitimacy of a democratic state in which ‘citizens have to be convinced that it is fair in its assignment of rights and responsibilities’ (Miller 2008 197). In a lecture given in March 2009 in Leicester, Bridget Anderson set up another problem with the popular debate over rights for irregular immigrants: the polarisation of irregular immigrants into victims or villains, with those who support migrant rights tending to place more individuals into the victim category. Anderson is concerned that drawing such firm lines allows the idea to develop of villainous migrants, included in which are often those who are more accurately described, if anything, as victims (Anderson 2009). Characterising people as victims is, however, no better. She argues that victims can only suffer or be helped, but cannot be angry or participate (Anderson 2009). It is necessary, then, to see irregular immigrants and non-citizens more generally, as active agents in their own right (Bloom 2010).

Providing welfare support for irregular migrants may seem to be in tension with a coherent immigration system. This is not the only arena in which such tensions exist. Some states have a policy of banning heroin, yet providing safe places for addicts to shoot up and get clean needles. Forbidding undocumented immigration, yet legislating regarding the conditions for such individuals’ employment conditions appears similarly incoherent, making an activity illegitimate whilst also legislating for the protection of those who contravene it. This has parallels with the literature regarding the protection of those involved with illegal drugs and prostitution (where it is forbidden) (see, for example, Rhodes et al. 2012 and Rhodes et al. 2010).

Recognising the relationship and distinction between physical and institutional borders is crucial in understanding the realities of irregular migration as well as potential obligations towards irregular immigrants.

4.3.2. Symbolic nature of irregular immigration

Irregular immigration is often perceived as symbolic: as a challenge to the assumption that a state may decide who may enter its borders. The reality is more complex. It is not necessarily undesirable to the state or other parties that people contravene immigration laws, and states use immigration laws and the creation of irregularity to their own advantage. This will be considered here and will be used to develop a more nuanced theoretical approach. It is important to examine current motivations for policy and enforcement decisions, to help develop a picture of what irregular immigration really consists of.

There are numerous aspects to the complex phenomenon of irregular immigration. States enable, and sometimes facilitate, irregular immigration. For example, the US and others turn a blind eye to
the irregular immigration and employment practices that facilitate domestic economic growth (Joppke 1998). Further, lacking regular status may be arbitrary. For example, in South Africa’s ‘Operation Crackdown’, papers were allegedly destroyed or disbelieved (Klaaren and Ramji 2004), or, in Syria’s response to the mass Iraqi migration following the 2003 invasion, when the length of visas issued to Iraqis upon arrival changed month on month. These cases are important to study as they are part of what the current picture is really like.

To summarise:

A. States sometimes turn a blind eye to immigration irregularity;
B. Individuals float in-and-out of regular status and states enforce inconsistently;
C. Irregular immigrants fill essential labour roles and are easily exploited;
D. Individuals may have irregular status in one respect, regular status in others; and
E. States create ambiguity, for example, through buffer zones.

When states are unable to enforce their own immigration rules, the relationship between the irregular migrant and the state may not be the simple one of victim and oppressor that is often presented. Malaysia provides a vivid example, as irregular immigrants, able to produce fraudulent documents, can enjoy privileges of citizenship unavailable to native rural poor (Sadiq 2005 102). Most symbolic is the right to vote. Kamal Sadiq argues that this has even affected Malaysian electoral politics, so that politicians need to espouse increased rights for irregular immigrants. This is interesting since non-citizens are generally particularly vulnerable because they are unrepresented politically. Similarly, nine out of the fifty-four Commonwealth countries, such as the UK and some in the Caribbean, offer democratic rights to Commonwealth citizens living in their territory, irrespective of migration status; although rights of entry are denied (I analyse this situation in Bloom 2011). The relationship between exclusion from voting and being maltreated by a state is discussed in (Barry 2005 102).

A further aspect of the state’s ambiguous relationship with irregular immigrants is its desire to keep their status unclear. Consider the creation of buffer zones, or, as Gibney describes them, ‘a thousand little Guantanamos’. These are regions which, though under the state’s control, do not count as territory of the state, so that the status of the individuals within them is unclear, and consequently, so is the required behaviour of the state towards them. The most famous example is Guantanamo Bay, which has been used often by the United States for its strange status - owned by the US, but not US territory. This will be discussed in more detail in Section 4.4).
The relationship between the state and irregular immigrants is ambiguous. Membership and entry criteria are used to the state’s advantage, often engendering useful irregular immigration. As a result, the problems of counter-sovereignty rights for irregular immigrants in the state of citizenship membership are less fundamental. Ignatieff notes that ‘it is the nature of rights to be abused’, which he presents, not as reason against those rights existing, but merely to have more effective policing (Ignatieff 2000 37). He notes, ‘[h]uman rights are there to protect people who do not have secure citizenship, or who arrive at our doors without rights of their own’ (Ignatieff 2000 37) ‘… and even the clandestine immigrants in the zones of transit in our countries or the populations in the camps of refugees, can invoke them [the rights of man]’ (Rancière 2004 305). That is, ‘[t]hese rights are theirs when they can do something with them to construct a dissensous against the denial of rights they suffer’ (Ranciere 2004), acting as someone who could have those rights but does not.

The vicious circle from Arendt develops when you identify the rights of man with the subject deprived of any rights (Rancière 2004 306). Agamben argues that either the rights of the citizen are the rights of man, or the rights of man are the rights of the citizen. If the former, then, as man is an unpoliticised person, who thereby has no rights, rights are no thing at all. If the latter, then the rights of man are attached to being a citizen in a constitutional state, and so the rights of man are the rights of those who have rights, which is tautologous (Rancière 2004 302).

One reason why it may be surprising to see the high proportion of irregular immigrants in Australia that are from the US and the UK is because of perhaps unarticulated assumptions about who entry conditions appropriately exclude. Indeed, entry conditions are designed so that those that are seen as acceptable, and as ‘one of us’, cannot (see Table 8 at the end of Section 4.1). Irregular immigrants are, by definition, outside what the state wants to define as inside its symbolic borders.

However, it is crucial to recognise that symbolic borders are harder to define and harder to control than this implies. For example, there was local outrage last year in North West London when a middle-aged woman was detained by the UK Border Agency with a view to deportation (personal acquaintance). This was mainly based on the fact that she was felt to be inside certain symbolic borders. She was a volunteer in a local church and a regular cook at homelessness and immigration projects (personal acquaintance). Other examples of localised outrage are seen, for example, in the 2005 case of an Oxford University student, whose deportation was contested by fellow students at his college, or when parents of a child at the school in the film, Entre les murs faced removal.

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102 Specific rallies and events were organised, but also the issue was raised at protest events initially directed at challenging other issues (personal reflection). The background of the case is discussed, for example, in (Guardian 2005).
The Outsider Within

(Laurent 2008). Studying irregular immigration and the state’s involvement in it helps to show where the official borders and the symbolic borders come apart.

The state can try to control access to geographical territory and to the symbolic state, but in the end the borders that the institutional state has the most power to effectively control, and the most justification for controlling, are the institutional borders. This dissertation argues that the de facto crossing of both geographic and symbolic borders obliges the state to give access also, to some degree, to its institutions. The context will affect the extent to which symbolic border-crossing is possible, which will be one factor in establishing how much institutional access is necessary.

4.3.3. Who is human?
Having, in previous chapters, considered obligations towards non-present non-citizens and towards citizens, both present and non-present, this section is able to isolate obligations arising from presence itself, irrespective of other considerations. As has been argued, this discussion must be seen, not in some abstract possible world, but in this real world as it is configured, and as it could be configured.

Irregular immigrants provide a paradigm case of where rights, usually presumed to be held by all, are believed to be legitimately withheld from some. James Nickel notes:

‘a disputed moral question lurks in the background. Do documented aliens in the United States have moral claims to needed medical care than can generate duties for hospitals and government agencies? Or is providing such care simply a matter of prudence and charity?’ (Nickel 1986 20).

Nickel presents such a question as sinister, since, if these rights are called human rights, such a question implies the assumption that such individuals are implicitly (or perhaps even explicitly) not fully human, or have somehow forfeited some of their humanity. In this subsection I will focus on what it means to be human – and whether some ‘featherless bipeds’ (to use Richard Rorty’s phrase) are not in fact fully human when it comes to rights claims (Rorty 1993 124; see also Glover 2001 407).

Michael Perry, examining descriptions of atrocities perpetrated by Serbs against Muslims in Bosnia, believes it is obvious that

some things are bad, indeed some things are horrible – conspicuously horrible, undeniably horrible – for any human being to whom the thing is done (Perry 1998 63).
He concludes that there must be some things that just either should, or should not, be done to humans, suggesting a necessary distinction between human rights, which should be driven towards enabling fully human existence, and human goods that he says would enable capabilities. The latter, he notes, may not be universal, while the former must be.

In Chapter One, I argued otherwise. Whilst individuals will find different ways to use their capabilities, certain core elements are needed more generally. It is degrading to say that someone in abject poverty or involuntary extreme incarcerated seclusion is not living a human existence, but it may be true that they are denied full human capabilities. There is another difficulty – that of whether a line can be drawn between basic capabilities and more extravagant ones. Considering the same examples of extreme violence discussed by Perry, above, Richard Rorty notes that the perpetrators do not see themselves as violating human rights because they do not see the victims as human (Rorty 1993 112). This can be seen repeatedly, where, for example, ‘Tutsi’ was made synonymous with ‘cockroach’, or ‘Jew’ with ‘rat’. Indeed, as Bonnie Honig notes, in order to deny someone rights, we make him or her an ‘other’. Ignatieff relates Primo Levi’s description of trying to convince a camp doctor at Auschwitz that he is a chemist, in order to avoid death (Ignatieff 2001 3). Ignatieff writes: ‘[h]ere was a scientist, trained in the traditions of European rational enquiry, turning a meeting between two human beings into an encounter between different species’. Indeed, removing the prohibition on doing certain things to other humans might soon also remove our inhibitions (Lukes 2005 15). Indeed, Lukes suggests that crossing the line as to what may and may not be done to other humans, helps to undermine what he describes as Durkheim’s religion of the individual.

These may be dramatic instantiations of a wider, hidden, phenomenon. Perhaps banal dehumanisation exists in an unnoticed, constantly reiterated form, as Michael Billig describes ‘banal nationalism’ as the flag hanging limp and unnoticed in the corner. In rural Cambridgeshire (where there was a large Traveller population), extreme anti-Gypsy comments were deemed acceptable, even by school teaching staff. Similarly, note the banal use of negative language and negative stories out-weighing positive ones to denigrate irregular immigrants’ humanity. This might help to explain how people who are usually keen to promote the cause of the vulnerable, disadvantaged, and put-upon, are sometimes bizarrely incredulous at the suggestion that irregular immigrants may

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102 E.g. see discussion on UN website: http://www.un.org/preventgenocide/rwanda/infokit.shtml
104 E.g. consider the Nazi propaganda film, The Eternal Jew (Hippler 1940).
105 Personal experience as a secondary school teacher in rural Cambridgeshire. I am in little doubt that these derogatory remarks were part of what allowed otherwise kind and generous persons to sanction the violent destruction of Traveller sites in the local area and the exclusion of Travellers from local services and amenities.
106 E.g. see references to British and French press at (Fassin 2005 363).
be due human rights. The perception that 'illegals' must be outside even basic human rights obligations is concerning and sinister and there is a vacancy in the literature for work to be done specifically on this Billig-esque phenomenon of banal dehumanisation.

Moral philosophers (e.g. Bernard Williams, Plato) often concentrate on the psychopath, who is rather rare, looking at how to reform him. However, this neglects:

the much more common case: the person whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this range, the ones he or she thinks of as pseudohumans (Rorty 1993 124).107

It is striking that much of the literature dealing with human rights simply bypasses the question of non-citizen rights, let alone those of irregular immigrants. This is understandable given the history of human rights. For example, Joshua Cohen explains that the role of human rights is to 'present a set of important standards that all political societies are to be held accountable to in their treatment of their members' (Cohen 2004 196). And indeed he goes on to enumerate an account based on membership, so that, he believes, disagreements about human rights can be seen 'as disagreements about what is required to ensure membership – about what consideration is due to each person in a political society' (Cohen 2004 197).

Cohen mentions that this can also be understood as articulating the conditions of membership in a more global society, but dismisses this, noting that most people live most of their lives within particular political societies, so that it stands to reason that we focus on membership of particular political societies.108 This dissertation sees cultivating a feeling of fellowship with humans excluded from or outside one's own political society as an important project.

Jean-François Lyotard focuses on the importance of interlocution for recognition as a person. He argues that '[i]f a human being can speak, he is a possible interlocutor' (Lyotard 1993 140). This is translated into a right:

[i]f any human being can be an interlocutor for other human beings, he must be able to, that is, must be enabled or allowed to (Lyotard 1993 140).

This offers an interesting perspective on the case of irregular immigrants, who are disenfranchised, and so not allowed access to this symbolic interlocution. Lyotard says of concentration camp victims

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107 Note also discussion in Glover 2001.
108 Jacques Rancière notes that the first to make the point that the rights of man looks suspiciously like it is really about the rights of the citizen was made by Edmund Burke at the time of the French Revolution (Rancière 2004 298).

that they were not spoken to, they were ‘treated’. That is, they were not even enemies because ‘they were not human’ (Lyotard 1993 144). This concern is brought out in the particular case of asylum seekers in my 2010 paper, ‘Asylum Seekers: subjects or objects of research?’.

Rorty notes that history has many examples of when ‘all men’ or ‘universal’ rights are invoked to the exclusion of some. He offers three main ways in which ‘we paradigmatic humans distinguish ourselves from borderline cases’ (Rorty 1993 113). These are: animal/human distinction, adult/child distinction, and man/non-man (woman) distinction (Rorty 1993 114). This idea is useful for considering irregular immigrants, often thought (implicitly) to be justifiably derived of rights.

Removing the legal right to work from individuals, alongside the removal of access to social welfare systems also seems to send a message that a person is not human; that their very basic human needs are non-existent. It appears that the state is pretending that they are just not really physically there, rendering them unable to live without breaking the law (recall Section 1.7.3’s discussion of Waldron’s analysis of liberty for homeless persons).

4.3.4. Difficulties in discussing irregular migration

Some claims appropriately conflict with sovereignty, by their definition. It is perhaps most important to study these, uncovering how obligations form at the edges of legitimacy. In his introduction to a 2008 symposium in Ethics and International Affairs, Joseph Carens notes that he does ‘not know of any previous work by a political theorist or philosopher that takes the questions about the rights of irregular migrants as its focus’ (Carens 2008 185 n.2). This is part of a pattern in Carens’ work. In 1987, Carens’ article ‘Aliens and Citizens' opened debate explicitly upon the rights of immigrants, and his 2008 symposium, 'The Rights of Irregular Migrants' opens debate in another area which, though crucial to contemporary political theory and philosophy, has, as yet, been largely ignored.

Although Carens has elsewhere argued forcefully against borders and border control, in this symposium, he adopts the assumption that states are entitled to control entry and deport those present without authorisation, which he calls the 'conventional view' (Carens 2008 164). He does this in order to examine what is required, even if generally held assumptions are accepted. Boswell contends that, in adopting this assumption, Carens loses something crucial to his case (Boswell 2008 191). She argues that without the 'right to enter and settle in a country in which one's access to basic human rights would be assured', access to the various rights obtained in virtue of being resident somewhere becomes contingent on whether an individual is able to violate migration rules, becoming an irregular resident. That is, in effect, the state offers the rights but then takes measures to stop the person from being able to claim them.
Carens's device is, however, part of a method of ‘immanent, or internal critique’, judging an institution according to an unfulfilled normative criterion by which that institution judges itself (Moan 2008 205). As Carens is explicit about his assumptions, it is not as damaging as Boswell presents, and indeed may be essential to developing a useful theory. Carens’ method is distinct from mine. He assumes the borders as a constraint on an ideal theory. I include them because of their relevance to current existence. In Carens’ assumption, the borders are cardboard and false. In my theory, the borders are inherently changing and dynamic, and may weaken or strengthen depending on a diverse range of policy decisions. This difficulty with Carens’ theory arises because of the nature of his project. The picture of the world used in the ideal theory is inaccurate, making it difficult to understand justice for real people in the real world from conclusions reached in ideal theory.

This disagreement between Boswell and Carens uncovers the key difficulty in discussing justice for irregular immigrants generally. If there were no borders, there would be no irregular immigrants. Thus, if you start from the position that all border control is unjustified, you cannot engage with the existence of irregular immigrants (or perhaps any immigrants) at all. This, alongside overhanging emotional content, may begin to explain why irregular immigration is so significantly under-discussed in theoretical literature. The phenomenon of irregular immigration is uncomfortable because theory becomes less stable when forced to interact with the realities of human activity. This dissertation represents a direct attempt to tackle this engagement.

Although there has been reluctance among philosophers to tackle questions of irregular immigration, there is a literature touching on the normative questions involved, produced by those who cannot but encounter irregular immigration through their practical work in the field. The theory developed in this dissertation can facilitate this real-world-relevant discussion because it develops its notions of capability and mutual benefit by examining the world as it is and people as they are. It recognises that people value their borders, but that this is dynamic, changing over time and place. The justice that is developed is not fixed, but describes a transition from the situation as it is now to something a little bit better. Much public discourse focuses on reasons why a host state may feel threatened by irregular immigration (e.g. Beare 1999 37), and discussions of irregular immigration often present a contest between the individual migrants’ rights and the sovereignty rights of the state. This is why the suggestion that such individuals may be due counter-sovereignty rights can seem particularly problematic. Engaging with this directly must be part of developing a credible theory.

Host states’ reticence to offer protections to migrants can be traced through the life story of the International Convention on the Protection of the Rights of All Migrant Workers and Members of
their Families (‘Migrant Workers’ Convention’). Saskia Sassen referred to this as ‘[p]erhaps one of the most important documents seeking to protect the rights of migrants’ (Sassen 1996 100). It came into force on 1st July 2003, with 22 ratifications, twelve and a half years after it opened for signature (Dauvergne 2008 22), and has little likelihood of more general ratification (e.g. see DeGucheneire and Pécoud 2009 39 and other contributions in DeGuchteneire et al. 2009). Part of the reason for this is that more than half of the articles, and 73% of the active articles, are directed towards host and transit states. Table 9 is compiled from my reading of the Convention:

Table 9: Parties to which various provisions of the Migrant Workers’ Convention are directed

<table>
<thead>
<tr>
<th>Parties</th>
<th>No. of articles</th>
<th>proportion of articles</th>
<th>proportion of active articles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Host and transit states</td>
<td>47</td>
<td>51%</td>
<td>73%</td>
</tr>
<tr>
<td>Sending States</td>
<td>1</td>
<td>1%</td>
<td>1%</td>
</tr>
<tr>
<td>Both</td>
<td>16</td>
<td>17%</td>
<td>29%</td>
</tr>
<tr>
<td>Definitions and practical provisions</td>
<td>29</td>
<td>31%</td>
<td>n/a</td>
</tr>
<tr>
<td>Total</td>
<td>93</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

A key aspect of the Migrant Workers’ Convention is that it is directed at workers, irrespective of migration status. Indeed, this is made explicit throughout the Convention. This means that, theoretically, irregular migrants are also eligible for most of its protections, although in practice, they may be nervous to actualise them. The rights protection of immigrants, in particular of irregular immigrants, can seem to conflict inherently with sovereignty ‘because their mere existence signifies an erosion of sovereignty’ (Sassen 1996 64). It is crucial to engage with this tension in order to develop a workable theory.

This section has argued that conflating membership of symbolic state society and membership of human society has led to concerning exclusions of persons from protections of capabilities

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209 Twenty ratifications had been needed for it to come into force. By December 2007, it had 37 ratifications, all primarily from sending counties. Indeed, all of the ratifying countries in 2007 were in the 2/3 of countries with the lowest GDP per capita in 2006 (Dauvergne 2008 23).

110 Excluding rounding errors (%s were rounded to 0d.p.)
considered basic for humans. It has argued that a state has the sorts of obligations developed in Chapter One towards irregular immigrants, despite their immigration status, and irrespective of the fact that these may challenge state sovereignty. That said, dynamic justice must make prescriptions based upon current contexts, moving on from the situation as it is now, with exclusive states, significant irregular immigrant presence, and generalised acceptance of their privations.

4.4. Irregular immigrants and non-citizens more generally

Crisp distinctions between legal (deserving) as opposed to illegal (undeserving) migrants are artificial (Beare 1999 37). For example, most refugees were once irregular immigrants, and it is strange that such persons swing so quickly from unwanted ‘irregulars’ to deserving victims both in public perception, and in available protections. This section examines the impact of the creation and treatment of irregular immigrants upon non-citizens more generally. It starts by summing up the findings of this chapter with regard to state obligations towards irregular immigrants. It then considers the connected ‘moralising’ of migration and impacts on asylum. Finally, it considers broader connections between the discussion here and other statuses.

4.4.1. Obligations towards irregular immigrants

Irregular immigrants are subject to both external and internal coercions by states. That is, they are both excluded from states and coerced internally by them. This gives rise to a complicated set of obligations. Chapter Three argued that, based on external justifications for the state enclosing its territory, resources, and persons, obligations arise towards those excluded from, and disadvantaged by, this arrangement. It was argued that these obligations are mostly imperfect, towards those excluded generally. There are, however, cases where special relationships of culpability, vulnerability, or ability-to-help, give rise to special obligations. Irregular immigrants would once have been outside the physical territory of the state, and so in the category of distant non-citizens. Obligations towards them may then have been general. However, once within the state’s borders, individuals become particularly vulnerable towards it, and their current privations are based on the decisions and actions specifically of that state.

Chapter Two examined internal state justifications, and consequent obligations. Two dimensions of internality were discussed: physical-territorial, and institutional. The case of irregular immigrants shows how these come apart. External justifications for large parts the institutional closure have to be offered for the coercions irregular immigrants experience whilst on the territory. Indeed, these coercions are arguably greatest (and so the obligations strongest) for the irregular immigrant in

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111 To claim asylum in a state, a person must usually already be present in that state, so will usually have crossed borders irregularly to get there.
virtue of his non-status there. Many of the perfect state obligations towards citizens in Chapter Two were based on some level of institutional membership, but the institutional access is itself an obligation upon the state regarding those under its coercive power. Crucially, it was argued that the states’ institutions must be dynamic, adapting to emerging contexts.

It has been demonstrated that symbolic borders must be addressed before anything else, but that, for symbolic borders to be broken down, institutional and physical borders need to be crossed (Hampshire 2011). Based upon both internal and external state justifications, states have some obligations towards irregular immigrants. These obligations are, however, tricky to pin down, for two main reasons. First, much evolution in public opinion is needed before irregular immigrants are fully accepted symbolically everywhere into the human family, let alone into the family of those within a state space. Second, admission of irregular immigrants into the state institutions can be felt to undermine the state itself. The project of developing just institutions must be directed towards addressing this symbolic bordering in order to engage with other types of borders.

Theoretically, irregular immigrants are entitled to at least human rights within all states that ascribe to UDHR. However, it took a while, for example, for EU lawyers and judges to accept that ‘everyone’ in the European Convention on Human Rights really referred to ‘every human being’ – including irregular immigrants (Groenendijk 2004 xix).112 This Chapter started by offering a working definition of an irregular immigrant as someone whose presence in a state contravenes some legal or administrative regulation, possibly through entry, presence, or work. It was argued that existing discussions of obligations towards irregular immigrants are rare in the philosophical literature, and offered some discussion and comments on what there is. As irregular immigrants are perhaps the most marginalised group, this implies that there are some obligations towards non-citizens per se.

Throughout this dissertation, it has been argued that the context in which we live our lives changes constantly: communal values and symbolic meanings evolve as time goes on. It has also been argued that this evolution is not driven by mystical forces beyond human control, but can be directed by just institutions. A state has special obligations to secure capabilities for all who are under its effective control. This includes irregular immigrants. The way this should, by justice, be manifested, will change depending on the context of the state, and will hopefully become more substantial as just institutions help to make a society more open to better treatment of irregular immigrants. This will, crucially, involve a slow change in the communal understanding of the relationship between their symbolic, institutional, and physical borders, and the way in which access to these borders is governed.

112 This is shown, for example in the case of Abdulaziz, Cabales and Balkandali v United Kingdom (1985)
4.4.2. Moralising immigrants

Contemporary immigration regimes imply there are ‘proper and improper reasons to migrate’ (Dauvergne 2008 18). This was touched upon in Section 4.1.1, where the adoption of the term ‘irregular’ was explained. Discussion here first considers the idiosyncratic colloquial moralising of immigrants; then the connection between this and legalisation of migration; finally, it will challenge concerning moral distinctions.

In popular discourse in Britain, someone migrating from a poorer country for economic reasons is less acceptable than someone migrating for humanitarian reasons, whilst if from a wealthier country, it is considered more acceptable to move to improve job prospects, especially if you are highly skilled. In the UK, a student from Britain going to study abroad is often seen as open-minded; a student from Pakistan is a potential visa over-stayer.113 A British backpacker going to India is considered adventurous, while an Indian back-packer going to Britain is considered suspicious.

Dauvergne notes also that mass movements of people overseas (e.g. persons moving from Rwanda to Burundi), are described in American press as refugees, and any maltreatment or refused entry is seen as humanitarian disaster (Dauvergne 2008). If the same Rwandans arrive in America, they are ‘illegals’, or ‘asylum seekers’, assumed bogus until proven otherwise.114 (Consider the discussions in July 2011 of the Kenyan government’s disinclination to allow Somali migrants access to a newly built refugee camp).

Catherine Dauvergne charts a Twentieth Century movement of legalisation of migration, previously unregulated by law. Now, she claims, there is a corresponding ‘illegalsation of migration’, occurring in three ways (Dauvergne 2008 2):

- An increasing regulatory framework;
- Increasing flows of people; and
- The use of rhetoric and panic.

113 See Ra’aneh Alexandrowic’s recent film, James’ Journey about a South African pilgrim to the ‘Holy Land’ for parallel assumptions in Israel.

114 A particularly instructive example of this is the case of three men that was taken to the House of Lords, and still their asylum claim was rejected and they were returned to Sudan. They fled violence in Sudan and claimed asylum in Britain. It was agreed by the tribunal that they had a credible fear of persecution and probably death if they were returned to Darfur. However, it was decided that Sudan was a sufficiently large country that they should instead be IDPs within the country. They were returned to the IDP camps around Khartoum. House of Lords Secretary of State for the Home Department (Appellant) v.AH (Sudan) and others (FC) (Respondents) [2007] UK HL49 on appeal from [2007] EW CA civ297.
The increasing regulatory framework and the increasing flows were discussed briefly in the introduction to this dissertation, and throughout the following chapters. The rhetoric and panic is visible, for example, in the military-style language used to describe migration, discussed in Section 4.1, above. Couching the debate this way has a negative impact upon those migrating. Illegalising migration runs counter to a movement towards increased mutual benefit. Section 4.1 demonstrated problems with associating irregularity with deviousness and criminality. It will now be shown that even where irregular border crossings are explicitly intentional, the context may weaken the possibility of moral opprobrium.

An estimated 2,000 irregular migrants die each year trying to cross the Mediterranean and it is impossible to know the numbers leaving home annually who never arrive at their destination (Koser 2007). Indeed, ‘the negative consequences of irregular migration for migrants are often underestimated’ (Koser 2007 62). That said, presenting irregular migrants always as victims is an oversimplification, hiding their agency (McNevin 2007 672). In reality, irregular immigrants have usually decided to be in the host state irregularly, despite the difficulties, and may benefit from the entrepreneurial and other opportunities offered by their irregular status (McNevin 2007 672). They have, then, made a conscious choice that, all things considered, it is better to be irregular abroad.

If the situation for irregular migrants can be awful, this raises the question of whether a person can really choose it, that is, whether such a choice is valid, and what it implies for conditions back home, and obligations more generally. If, on the other hand, conditions are not so abominable and inexorable as to be impossible to choose, then irregular immigrants’ choices should be respected as genuine. That is, irregular immigrants should be seen not only as passive victims of a system, but as active agents working in the context of existing institutions and situations to improve their lives, and the contexts of these difficult choices should be acknowledged.

4.4.3. Preventing asylum

The confusion between ‘irregular immigrants’ and ‘asylum seekers’, made possible by the fact that most asylum seekers are irregular migrants, causes concern (E.g. see discussions at Fassin 2005 376; Van Der Valk 2003). There are usually few, if any, legal means for potential refugees to enter a state to claim asylum. Indeed, many states make significant efforts to prevent such entry. This section will first consider problematic rhetorical conflations of irregular immigration and asylum-seeking. It will then consider how this plays out in practice, as states undertake extreme measures to prevent entry.

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115 The International Centre on Migration Policy Development estimates that between 100,000 and 120,000 persons cross the Mediterranean each year without the required documents for entry into Europe (Papastavridis 2010 76).
of potential asylum seekers. Finally, a problematic side-effect for asylum of increased immigration controls generally will be discussed.

Although the refugee definition is apparently precise, refugee status determination is a problematic way to allocate desert, for two main reasons. First, the same state that will be obliged to provide benefits based on refugee status is charged with determining eligibility. Second, the 1951 Refugee Convention and its 1967 Protocol’s narrow definitions do not include everyone in desperate need, excluding, for example, those in dire economic need, who may also not have basic capabilities as listed by Nussbaum (see Section 1.2). Most states have additional categories of those eligible for protection outside ‘refugee’ status (for example, victims of indiscriminate violence can receive Exceptional Leave to Remain (ELR) in the UK; Clayton 2006 417). As far as I know, none takes into account extreme deprivation or poverty.

In Britain, politicians from all points on the political spectrum celebrate reduction in asylum claims and assure the electorate that they are continuing to decrease. This translates into practical efforts to reduce the possibility of asylum claims, for example, when people from ‘refugee-producing’ states find it hard to obtain entry visas (Dauvergne 2008 54). Britain, like other states, has re-assigned the status of tracts of territory. For example, ensuring that some overseas territories no longer count as British for the purposes of asylum applications. France has acted similarly, including areas of mainland France. America’s famous Guantanamo Bay is an old example of this, with a long history of holding Haitians, prevented from claiming asylum in America (see also Section 2.3), as it is not American soil, but under American ‘effective control’.

Meanwhile:

Most innovatively, Australia has moved to excise whole tracts of territory from its ‘migration zone’, rendering parts of the state ‘nonterritory’ for the purposes of claiming asylum (Migration Amendment Regulations No.6, quoted in Dauvergne 2008 15).

The troubling efforts made to preclude asylum applications are seen strikingly in the example of the Norwegian ship, Tampa, which rescued 433 mainly Afghan asylum seekers near Australia, and was prevented from entering Australian waters. After a month, Australian naval vessels moved people from Tampa to New Zealand, Papua New Guinea and Nauru, the latter two of which have no system for addressing asylum claims. The Australian government handed over significant amounts of money to facilitate this agreement. This is troubling because of the external obligations discussed in Chapter Three, but also because of the specific vulnerability discussed in various places in this dissertation. It
also helps to demonstrate anew the danger that the placement of state borders has upon the fates of those whose lives depend vitally on which side of those borders they happen to be.

Alongside trying to make it difficult for people to make asylum applications, several states try to make it unattractive to do so. For example, in the UK and Australia, government literature is keen to reassure people that they are ‘tough’ on asylum seekers (Ashcroft 2005a 125) and the British policy of destitution is well documented (e.g. see Taylor 2009). The perceived legitimacy of such action is maintained by comments like that of a former British Secretary of State for Health, John Reid, who declared that failed asylum seekers were ‘effectively stealing treatment from the people of this country’, in a 2003 discussion about the decision to exclude failed asylum seekers from access to free medical treatment (quoted in Cole 2007 270).

Richard Ashcroft notes that:

…it is shaming to live in a country which not only mistreats migrants in these ways, but even sees political parties appeal for votes on the basis that the public actively supports them doing so (Ashcroft 2005a 125).

Indeed, in the UK, the active policy of destitution for refused asylum seekers renders already vulnerable persons living in extreme poverty and in situations of extreme vulnerability, more vulnerable and more deprived.¹¹⁶

There is another negative side-effect of the conflation of irregular immigrants and refugees. Increased border control measures increase the incentive for persons to pretend to be refugees, in order to enter as economic migrants. This feeds into a vicious cycle, as more people inappropriately claiming asylum leads to more measures to try to keep potential ‘bogus’ asylum seekers from the state, and increasingly draconian measures are taken against claimants. For example, in 1996 the ‘US introduced mandatory detention for asylum-seekers until they could show a "credible fear of persecution"’ (Gibney 2006 146) and Australia has long had in place a system of automatic detention of asylum seekers (Zion et al 2010). This makes it difficult to build a provable asylum claim.

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¹¹⁶ E.g., a young mother I have met conceived her toddler following rape in her home state in Central Africa, and carries scars from systematic institutional abuse and generalised violence. She currently lives with her son in a friend’s sitting room in London. Despite everything, her son behaves like a happy normal toddler. Unfortunately, he suffers from a genetic condition, requiring a one-off major corrective operation. If not operated upon, he will eventually die from the condition (which is long-term and will become increasingly severe). The mother has now spoken to a doctor that she can trust, who diagnosed the condition and treatment, but she lacks the money for an operation and is terrified that if her son spends time in hospital, they will be returned to her home state, where she is certain she will be attacked again and killed, orphaing her son (she has no living family). Since refused asylum in the UK, she is not allowed to work and currently lives on the voluntary support of religious groups, charities, and friends.
Although, as noted in Chapter Three and so far in Chapter Four, many irregular immigrants are not
the neediest from their country of origin, and there are ways to address economic need other than
asylum or membership, in some situations, asylum and/or membership are necessary to ensure
capabilities and this will come alongside certain obligations. That said, I have argued that freer
movement, should come alongside wider policies of aid and market reform.

4.4.4. Irregularity, security, and regular statuses

Irregular immigrants are rendered irregular by the creation of states’ immigration regulations, and it
is important to acknowledge the contingent and arbitrary nature of the irregularity, and also its
dangerous ramifications. This is not to say that irregular immigration is alone in this, but to reinforce
the fact that contravention of regulations and wrongdoing may come apart. This can be seen
through the example of the civil rights movement in the US. Consider in particular the celebrated
incident of Rosa Parks, a 42 year old African American woman who, in 1955, refused to surrender
her seat for a white passenger. This example is particularly pertinent because it was the artificial lack
of full citizenship status afforded to her that made her subject to this exclusion from protection from
losing her bus seat. When Parks disobeyed the law, it is not generally thought that she was engaging
in wrongdoing, but demonstrating precisely that the contravention of regulations and wrongdoing
come apart when the regulations themselves create unfounded unequal status between people.
Now, it is seen in most liberal states as unacceptable openly to discriminate between citizens in this
way. However, it is considered acceptable to discriminate against non-citizens, particularly
irregular non-citizens, despite the fact that this status is created by the very family of regulations that then
discriminate against those with irregular status. This parallel is discussed in various ways by
theorists. For example, Carens offers the parallel with feudalism and slavery (Carens 2011 134)
Cabrera describes irregular immigration as civil disobedience (see Cabrera 2012b), and Caney refers
to a ‘global apartheid’ (Caney 2001 116).

Irregular immigration is currently seen by some as wrong, so that the immigration controls that
create the status of irregularity are also seen to protect against irregular immigrants, who would not
be irregular in the first place if it were not for this law. Thus, the status of irregular immigrants is
created by the law and then regarded as somehow criminal or bad. The exclusion itself, then, needs
to be re-examined, away from notions of wrong-doing, which are themselves defined by the very
exclusion criteria that need to be examined.

Saskia Sassen argues that the most important distinction today is not between citizenships, but
between those with legal immigration status and those without (quoted in Dauvergne 2008 20).
Indeed, transnational migration highlights the boundedness of community and creation of citizen
and alien (Jacobson 1996 5), so that as people migrate irregularly, the meanings of the other statuses are called into question. For example, the securitisation of migration had been developing for some time, but was made more politically viable since 11th September 2001. This marks illegal immigrants as security threats and potential terrorists rather than as potential refugees. Moreover, security fears from certain countries and consequent immigration restrictions, may encourage people from those countries to migrate irregularly (see above), further increasing fears.

In March 2003, the United States’ Immigration and Naturalization Service was incorporated into the recently-created Department of Homeland Security, suggesting a different ‘governing ethos’ for migration issues (Dauvergne 2008 96,7), and one which is found widely in Western countries. In Canada, in late 2003, the Department of Citizenship and Immigration lost its enforcement roles to the newly-created Canadian Border Services Agency, part of the new Department of Public Safety and Emergency Preparedness (Dauvergne 2008 97), making this department responsible for screening immigrants and making asylum decisions. Migration and irregular migration is then moved from a demographic and social concern to a security one. Recent history suggests that, as a government closes one kind of entry category, the numbers in another increase (Sassen 1996 79). Sassen adds that ‘if a government has, for instance, a very liberal policy on asylum, public opinion may turn against all asylum seekers and close up the country entirely’, which, in turn, will increase irregular entry (Sassen 1996 79). It is crucial, then, to recall that the various immigration policies and statuses will affect each other. The current phenomenon, described by David Weissbrodt, of a wide variety of non-citizen protections, each independent, and depending on status, is, then, misguided (Weissbrodt 2008). Not only should persons be offered protections based merely on the non-status of non-citizenship, as argued in this dissertation, but also the protections offered on the basis of one or another status, even if justifiably differentiated, will not be able to remain divorced from the treatment of other non-citizen groups. There is also an impact upon citizens, as the acceptability of maltreating irregular workers, for example, makes them preferable to employers over regular migrants or citizens (see Section 4.2). It has been noted that some argue that migration negatively impacts upon low end wages more than upon those of others, and that welfare services might not be the best way to redistribute resources on a global level.

The creation of irregular immigrants, and the state’s behaviour towards them also impacts upon non-citizens more generally. Of most concern is the impact upon those hoping to claim asylum. However, there are also implications for all groups of migrants, as well as citizens. There is no precise normative line between irregular and regular immigrants and the illusion that such a line exists is both false and divisive. Saskia Sassen argues that there are two reasons for the observed
increasing rate of illegal immigration (Sassen 1999 104): the closing of labour opportunities and the tightening of asylum regulations. Dauvergne adds the increasingly draconian enforcement of migration conditions and narrowing of regular migration opportunities. I add also the increasing systemic global inequalities. Moralising migration is problematic and dangerous, as is the related legalisation, and ensuing illegalisation of. A liberal democratic state has, then, obligations towards irregular immigrants, based on both their internality and externality to the state. Moreover, the irregularity itself does not relevantly alter the nature of these obligations, so that these obligations also pertain to non-citizens more generally within the state’s territory.
Chapter Five: Practical Policy

Implications: Education.

Education is crucial to a person's capabilities, not least in a society where participation depends upon learnt skills like literacy and the opportunities available are strongly affected by wider social knowledge and training. This is affected by style of teaching and expectation, by level of access to special help with learning and behaviour difficulties. Acknowledging significant inequalities domestically is crucial for contextualising obligations to non-citizens. Discussion today about the extent to which it is necessary to offer education (in its fullest sense) to all present in the state, regardless of citizenship status, is remarkable by its absence both from education literature and from literature relating to obligations to non-citizens. This chapter opens up discussion of state obligations to educate non-citizens and uses this to examine critically practical implications of this dissertation's conclusions for real-world policy development generally.

Section 5.1 opens by demonstrating why education policy has been chosen for consideration, and develops a working definition of education as well as examining some parallels with health policy. It maintains that ‘[t]oday, education is perhaps the most important function of the state and local governments.' (Chief Justice Warren, 1954 Brown v Board of Education).\textsuperscript{117} I argue that there are two reasons for state-funded education, and Section 5.2 argues that children (including non-citizen children) have unacceptably reduced capability by being un- or under-educated for adult life in society. In Section 5.3, common modes and justifications offered for excluding non-citizens from public education will be analysed. Section 5.4 argues that education is a social public good, crucial to societal self re-creation. Although the focus here is predominantly on education of children, implications for education of adult non-citizens are also considered. It will be argued that education is essential to developing a just society, both with respect to the individual capabilities it offers, and in the opportunity it provides for social development and eventual mutual benefit.

\textsuperscript{117} US Supreme Court case, crucial in desegregating American public schools, acknowledging that equal and inclusive education for all citizens would benefit society as well as the individuals concerned. Indeed, at this time, ‘[s]chools were the major channel the nation chose to bring about a more equal society' (Grant 1988 6). A fascinating portrait of this period in one public school is found in the first half of (Grant 1988).
5.1. Why consider education?
Some resources are always 'scarce' (we could do with more), and there is already extreme need and inequality domestically.\footnote{This difficulty is examined in more detail regarding a case study of Somalis in London in (Bloom 2009).} Providing for non-citizens is hardest to justify internally when it takes from the most vulnerable citizens, or citizens we care personally about. Both of these complicating factors will arise when discussing education. This section begins by demonstrating why I decide to examine education (Subsection 5.1.1) and drawing attention to the relationship between education and health (Subsection 5.1.2). It then develops a working definition of education, as it is used here (Subsection 5.1.2). Finally, it notes that it is insufficient to look only at legal access to education, as actual access to education is more relevant (Subsection 5.1.4).

5.1.1. Education as first among social benefits
Education should be considered before other social benefits for a number of reasons:

i. Potential obligations to offer education to non-citizens are under-discussed;

ii. Education is crucially important to everyone living in society;

iii. Including non-citizens in education services both consumes resources, and somehow alters the nature of those services;

iv. Education sits uniquely on the frontline, both of state-re-creation; and of the interaction between non-citizens, the state, and its citizens; and

v. In practice, the importance of state obligations to educate are already widely recognised, even towards non-citizens.

These will be discussed in turn.

i.- \textit{Potential obligations to offer education to non-citizens are under-discussed.}

Possible obligations to educate non-citizens are under-discussed, both in (1) literature concerning both non-citizenship and immigration, and in (2) literature on education. Education is also absent from the work of key theorists of global justice: Simon Caney, Henry Shue, Gillian Brock and Heather Widdows, however, given their important contributions more generally to the discussion of global justice, this chapter draws upon their work. Regarding (2), consider for example David Weissbrodt’s 2008 book, \textit{The Human Rights of Non-citizens}. One of the few works specifically examining non-citizen rights, on only two pages is education referred to directly, showing the small role he sees it as playing among human rights more generally. Gożdziak and Ensor remark that, although migration
has increased and migration research has increased correspondingly, very little has focussed specifically on child migration (and, I add, consequently, even less on their education), despite, for example, about a third of all migrants from developing countries being aged eighteen or under (Goździak and Ensor 2010 274). This again shows insufficient consideration of non-citizen education. Details of arguments that do exist will be examined in due course.

To illustrate the absence of discussion of non-citizens in education literature (2), consider the vast 2008 Handbook of Education for Citizenship and Democracy, edited by Arthur et al. in which, despite its 569 pages, none of its 42 chapters addresses immigrants specifically and its index has no entry for ‘alien’, ‘foreigner’, ‘immigrant’, ‘migrant’, ‘non-citizen’, or ‘refugee’. This seems symptomatic of a larger tendency in education literature to skirt the issue of non-citizenship. Few texts refer to the citizen/non-citizen distinction. Instead, looser terms, such as ‘immigrant’, ‘minority’, and ‘ethnic group’ are adopted, avoiding legal distinctions and their ramifications. In one respect, this exhibits something positive about educationalists’ outlook. For example, Neville Harris’s 2007 Education, Law and Diversity does not offer any significant reference to non-citizens, apparently assuming their inclusion in public education on equal terms to citizens. This attitude hides the fact that non-citizens do in fact miss out on educational access based upon their non-citizen status in many countries.

ii.- Education is crucially important to everyone living in society.

Many policy areas are under-discussed, so this alone is insufficient reason for discussing education policy here. Public education, and its connection to citizenship status, is vitally important in other ways. Education has long been recognised as a special sort of good. It features explicitly as one of the Millennium Development Goals and several other MDGs rely on it. Insufficient education for life in the society where a person is to live leaves him or her impoverished, in a more complex way than lack of material goods such as food and shelter, and a more fundamental way than a lack of civil benefits like the franchise (the particular example of health will be discussed in the next subsection. In the US Supreme Court case, Plyer v Doe (45), Justice Brenan explains: ‘[t]he deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological wellbeing of the individual, and poses an obstacle to individual achievement.’ This will be discussed explicitly in Section 5.2.

iii.- Including non-citizens in education services both consumes resources, and somehow alters the nature of those services.

Education is peculiarly emotive, partly because it primarily concerns children. It is feared that non-citizens in schools change the nature of the education delivered, negatively affecting other children’s
upbringing (e.g. see Harris 2007 389). The strength of feeling that pertains in this regard was seen strikingly in Southall, London. In the 1960s, a group of parents removed their children from a local school, concerned that an influx of foreign students had both lowered standards (as a result of significant educational needs) and changed the school’s cultural composition. Central government responded by enacting rules restricting the proportion of new immigrants in schools, intended to protect cultural transmission. Indeed, in 1963 the then Minister for Education stated:

If possible, it is desirable on education grounds that no one school should have more than about 30% of immigrants.... I must regretfully tell the House that one school must be regarded now as irretrievably an immigrant school. The important thing to do is to prevent this happening elsewhere ((Hansard vol.685 cols 433-4 27nov1963) quoted in Swann 1985 193).

Suggesting state-run schools (and the children therein) need ‘protection’ from non-citizens reflects problematic underlying assumptions, with problematic ramifications.

iv. *Education sits uniquely on the frontline, both of state-re-creation; and of the interaction between non-citizens, the state, and its citizens.*

A fourth reason for considering education first among social benefits is its role at the frontline (the ‘chalk-face’) of social change. Schools are key places where non-citizens and citizens come into direct contact regularly. Schools also play a role in passing on cultural mores and in modelling communal life. Indeed, it is for this reason that ‘[e]ducation has a longer and more direct experience of responding to diversity than many other areas of governance’ (Harris 2007 2). This makes schools important institutions for reducing non-citizens’ ‘alienage’ (Pinson et al. 2007 204), individually, and in the receiving society more generally. This will be examined in more detail in Subsection 5.4.3.

v.- *In practice, the importance of state obligations to educate are already widely recognised, even towards non-citizens.*

A final reason to consider education is that its importance is already recognised and often protected in law, although its content is both highly relevant and left ambiguous. The right to education ‘constitutes one of the oldest parts of international human rights law’ (Tomasevski 2003 24), and its role in ‘unlocking’ other human rights, such as employment, security, avoiding marginalisation, enabling political representation, physical and mental health, and physical protection is well recognised (e.g. Tomasevski 32; HRW 2005; Maslow 1971 196-199). This will be discussed in more detail in Subsection 5.1.4.

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119 Merry contests the special role of schools as a forum for meeting of these different groups, but does not satisfactorily demonstrate that any other fora play this role.
Discussion of education in the context of this dissertation is, then, crucial. Its social role helps to test theoretical conclusions and develop a more realistic picture of justice. Its emotiveness feeds the reticence of policymakers to address educating non-citizens, leaving non-citizens in fact excluded even from education systems with implied intentions to include them. Proper and open discussion is needed to remedy this situation, and ensure either exclusion or inclusion is appropriate. Education of non-citizens is under-discussed, but it is also at the frontline of non-citizen interaction with the state and its citizens, and is a long-established capability right. For these reasons, obligations of a state to educate non-citizens must be examined here.

5.1.2. Education and healthcare

Health provides an interesting contrast with education. Both of these goods have big effects on how one’s life goes in terms of acquiring capability rights, as well as being important elements of capability in themselves. Further, Law and Widdows emphasise the importance of education in how health is experienced. They write, for example, that: ‘The impact of blindness on health is significantly affected by the degree to which, for example, road and building design, the provision of public information and the provision of schooling are designed with blind people in mind’ (Law and Widdows 2008 313).

Like education, health is not an all-or-nothing good, but admits gradations, both in quality, and in terms of what level is considered necessary. For example, education includes access both to knowledge of basic things needed for most people’s day to day life, and to highly specialised study, such as university-level biochemistry (developed in Subsection 5.1.3). Similarly, health includes both basics needed for day to day life (water, food, basic medicines) and very expensive and specialised treatments. Although health care may appear to have more immediate impact on life (e.g. heart bypass operations), education is also needed in order to make use of health and other resources effectively (discussed below). Like education, however, healthcare is crucial to different people in substantially different ways (e.g. some will need chemotherapy and operations for life or well-being, and some will not, while some will need educational support that others do not). However, enabling some to reach a very high level of education is crucial to wider society in a way that is different than for health.

Another relevant similarity between health and education follows from this. They both have an inherent scarcity. That is, there could always be more of them and more is almost always seen as desirable. Furthermore, this scarcity is distributed unevenly, so that any privation experienced as a result of including new arrivals in education and health services reduces availability for others already using those services. Moreover, as both education and health provision are already
distributed unequally in most societies, such privations will most affect those who are already the least well off in terms of those goods. And, since both health and education are important to obtaining capabilities more generally, this will most affect those who are already generally least well off.

However, there is an important difference between health and education, which is why I chose in this dissertation to look particularly at the example of education. That is, while new arrivals may be seen to bring further health problems, or put especial strain on health services (for example, if they carry new diseases), some argue that the very nature of education changes when new arrivals are included. This was discussed already in Subsection 5.1.1, but will also be crucial in the rest of this chapter. The importance of both health and education policy are undeniable, and this is recognised both through international agreements and literature. However, I am keen to look in depth at one policy area in particular, and given the emphasis that this dissertation puts upon the changing social context, the special role in this of education policy cannot be ignored.

5.1.3. Developing a working definition of education
As with health, defining what education means is difficult and is laced with implicit value judgements (see discussion with regard to health in Law and Widdows 2008). For Law and Widdows, health is ‘the ability to cope with the demands of life, or the ability to exercise key functionings’ (Law and Widdows 2008 308). That is, it is part of the framework needed to enable some of the most basic elements of human life and, while relevant to all of Nussbaum’s listed capabilities (see Section 1.4.2), the discussion in this chapter focuses on the elements particularly crucial to numbers 4 (senses, imagination and thought), 5 (emotions), 6 (practical reason), 7 (affiliation), and 10 (control over one’s environment).

It is widely agreed that education has two main goals. It is concerned with the ‘transmission to the younger generation of the skills necessary to effectively undertake [sic] the tasks of daily living and with the inculcation of the social, cultural, religious and philosophical values held by the particular community’ (Hodgson 1998 3). That is, there is a goal relating to individual capability development (See Section 5.2); and there is a goal of benefitting, and changing the nature of wider society for the better, enabling mutual benefit and capability more generally (see Section 5.4).

Understanding education’s purpose or purposes will help to establish appropriate content and beneficiaries of any obligations. Although most may recognise that education is important, what education is or should be is less readily agreed (or even discussed). That is, education may be assumed desirable, while the practical attributes making it desirable are left unspecified (Ahmad 2003 188). Indeed, even while UDHR was being developed, one theorist suggested that the right to
education may go against human rights where it involves indoctrination and unequal opportunities (quoted in Spring 2000 17). This subsection will use existing definitions of education in legal rights instruments to develop an initial working definition.

In the Nineteenth Century, a combination of Socialism and Liberalism, both ideologically requiring well-informed intelligent citizens, solidified education's human right status. Indeed, on a domestic level, the 1919 Weimar Constitution devoted an entire section to ‘Education and Schooling’ (Articles 142-150) (Hodgson 1998 8), and, with a wider scope, a League of Nations declaration in 1924 later become the 1959 Charter of Child Welfare (Hodgson 1998 10). Although not directly recognising children's right to education, it is implied in a significant number of this document's operative principles, and it formed the foundation of the 1959 Declaration of the Rights of the Child (Hodgson 1998 10). The first instance of an explicit human right to education, with a corresponding state duty to provide it, was in Article 121 of the Constitution of the USSR in 1936 (Goździak and Enson 2010 278). By 1988, a right to education was explicitly mentioned in the constitutions of 52 countries (Goździak and Enson 2010278) and in 1999, it was agreed that educational institutions must be accessible to all within a state’s jurisdiction (UN doc E/C.12/1999/10 para 6(b), quoted in Weissbrodt 2008 66).

The Declaration of the Rights of the Child 1959 (DRC), Principle Seven, declares, for all children (irrespective of citizenship status), that:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

Although the DRC 1959 specifically discusses the right of children to education, education is not always thus restricted. Article 26 of the UDHR 1949, for example, states:

(1) Everyone has a right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and
professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect of human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Consider five major international binding legal documents featuring the right to education:

A. UNESCO Convention against Discrimination in Education (1960)
B. International Convention on the Elimination of All Forms of Racial Discrimination (1965)
D. Convention on Elimination of All Forms of Discrimination against Women (1979)

Six aspects of the aims and purposes of education emerge from these:

(1) a means of personal development (A, C, E);
(2) for understanding Human Rights (E, B, C, A);
(3) for understanding people and combating prejudice (B, D);\(^{120}\)
(4) for enabling effective participation in a free society (C, E);
(5) for developing respect for one’s parents and for one’s identity (E); and finally
(6) for cultivating a respect for the natural environment (E).

This echoes lists developed by theorists (e.g. Hodgson 1998; Smith 2010 who adds, for example, ‘the maintenance of peace’ at page 322). Further, this reflects the two goals introduced in this section.

\(^{120}\)Also stated strongly in the more recent Vienna Declaration of the World Conference on Human Rights in 1993, Paragraph 33: ‘[e]ducation should promote understanding, tolerance, peace and friendly relations between the nations and all racial or religious groups.’ (Smith 2010 317).
(1) and (2) relate to individual capability, and (3), (4), (5) and (6) relate to a mix of individual capability and societal evolution.

These instruments reflect a disagreement regarding the appropriate level or age of ‘education’. Some want to include pre-primary, primary, secondary, higher, and adult levels of instruction in the definition (e.g. Hodgson 1998); while others argue only that ‘states should make primary education free and compulsory for all children regardless of their status, including textbooks and supplies’ (Lynch 2010 136). The Refugee Convention also distinguishes between primary and secondary education, while the International Convention on the Protection of Rights of Migrant Workers and Members of their Families does not. While I agree that education in its widest sense properly refers to many levels, both formal and informal, this chapter adopts a narrower definition, referring predominantly to the formal and informal instruction delivered through a public education system. This will include the transmission of basic functional skills necessary for basic capabilities in the relevant society, such as the three Rs (reading, writing and arithmetic); context-relevant skills which are needed for capability only in the society in question; analytical skills which are needed to enable more complex capabilities; cultural skills which enable the capability to function in a particular cultural context; and the germs of context-based specialist skills which enable much higher level capabilities. In a democratic society, this includes civic education which gives a person the capability to participate. Education as capability-enhancing, then, also plays a pivotal role in internal state justification, described in earlier chapters, for example in Section 1.6.6. It must be acknowledged that, though children are the focus here, this does not mean an adult who has not successfully obtained these skills as a child should necessarily be excluded from education.

Given its context-specific intentions, it is absurd to try to specify precisely what is to count as relevant and essential education for every society for all time (computer literacy is now a ‘basic capability’ in Britain, though twenty years ago this was not the case). However, this does not mean that there cannot then be a universal right (Spring 2000 4 makes the counter claim). There is a universal obligation to ensure capability rights, and so an obligation to educate, although the substance of this may vary according to time and society.

**5.1.4. Legal vs. actual exclusions from education**

Of those countries fully guaranteeing free primary education for all citizens, some have a policy of charging non-citizens for education, and many have policies directly or indirectly excluding non-citizens from public education systems. For example, in some countries, stateless children may be allowed attend school only if there is space after all citizen children have been registered (Lynch 128). Other ways of excluding non-citizens from educational opportunities include: insufficient
access to information; problems arising from mid-term entry; lack of local language training; lack of coordination among education providers to ensure needs are met; and absence of specific policies protecting their capability rights (McDonald 1995 47). Taterina Tomasevski, UN Special Rapporteur on the right to education (1998-2004), wrote in 2003 that the right to education must involve four A’s: availability, access, acceptability and adaptability (Tomasevski 2003 51), the absence of any of these rendering the right to education hollow since capabilities are not in fact altered. This is an instance of the more general case discussed in Subsection 1.7.3.

There are, then, several ways that non-citizens may lack fully equal access to the capability right of education, despite legal access to a public school system: resources allocated may be insufficient; organisation to facilitate inclusion of non-citizens may be lacking; and arrangements may not be made for meeting specific migration-related needs. Chapter Four mentioned also that mistrust of the state may cause an unwillingness to access services, which may impede full educational participation and hence access to associated capability rights, for example, see Section 4.2.3.

In Colombia, for example, local schools often have insufficient space for internally displaced children, despite legal requirements to enrol them (HRW 2005 26). Consequently, in 2002, in 21 areas, 8.8% of school age displaced children were enrolled in school, compared to an overall enrolment rate of 92.7% (HRW 2005 26). In Sri Lanka, meanwhile, ‘[t]hese shortages have been exacerbated by poor information about student concentrations and needs, meaning that those teachers available are often mis-allocated’ (HRW 2005 28, emphasis added). Some states respond by allowing minority or non-citizen groups to set up schools at their own expense. Indeed, rather than obliging the state to provide education, the European Human Rights Act 1998 Article 2’s first protocol instead restricts the state’s interference in education.

Perhaps, then, the moral requirement is merely negative, not to stop immigrant and non-citizen communities educating. Consider the 1921 Declaration with regard to Albanian nationals of Greek heritage. The first paragraph of Article 5 stipulates that Greek-heritage Albanians be allowed to manage schools at their own expense. This was a significant protection. In 1933, when the Albanian state took over all primary education and closed all private schools, it argued that this constituted equal treatment, as no one in the state could attend private schools. The Greek community did not see this as equal treatment, as everyone now had to be educated in Albanian language and customs, which, for some, was their mother tongue and national language, and for others was not (Steiner et al. 2007 99-101). This removed from the children of the Greek community the capability to function

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121 The distinction between legal and formal equality in education is discussed also, for example, in Steiner et al. 2007 102; Smith 2010 318).
in, and develop, their cultural heritage. The disparity apparent in this example helps to illuminate other more subtle cases where, although educational access may be legally equal, contextual factors render the access de facto unequal. Sections 5.2 and 5.4 will argue that the state has a positive obligation to educate, though the form in which this obligation is dispensed may vary between groups and between states.

In Subsection 1.5.1, I noted Henry Shue’s list of duties associated with subsistence rights: avoid depriving, protect from deprivation, and aid the deprived. Essential to transforming a formal fulfilment of an obligation to educate into an actual one is additional support for students unable to benefit from traditional schooling methods. Most wealthy states offer special educational programmes for citizen children. However, immigrant children may under-participate in these schemes, because of: language difficulties; unfamiliarity with the system, and with parental involvement in schooling; discomfort interacting with teachers; trust and respect for teachers as experts (making them unapproachable); confusion around immigration status and implications for eligibility and entitlement (Conger and Grigorenko 2010 180). The wider conditions in which a child lives are also crucial to educational success. Poverty, along with disparities in health care availability significantly contribute to lower educational outcomes (e.g. see Ferguson et al. 2007; Engle and Black 2008), and in wealthy states, immigrant and non-citizen children are more likely than others to live in poverty, although this varies across immigrant groups (Hernandes et al. 2010 14).

Unlike workplace rights, schoolroom rights are not well established. This is interesting since, unlike work, which may be denied to non-citizens in every state, schooling may be compulsory and intended to improve the lives of those schooled. It is, then, strange that the quality and conditions are not protected by supra-state agreements, while conditions of work are. An obligation to educate non-citizens (if one exists) must require more than merely allowing non-citizens into public education systems, but must also offer them a credible education, responding to particular needs, including needs of non-citizens that may differ from those of citizen and majority children, and ultimately, contributing to improvement of capabilities and the development of a just society.

Education here is defined as the formal and informal public delivery of the basic knowledge, skills and understanding necessary for life in both existing and projected future society (local, domestic, and global). As such, it is crucial to the realisation of capability rights and the development of a just society. The content will vary with context and change over time. This section has demonstrated that it is important to consider education. Education is central to enabling capabilities including those deriving from other social benefits in the state - both for the individuals therein, and for the society as a whole. There is also a long-established capability right to education itself, both in legal
documents and political theory. Finally, education, unlike other social goods, has a unique role in societal self-definition and creation and in the engendering of a mutually benefitting society (e.g. see Hursthouse 1999 81 regarding individual moral training). Education of non-citizens is under-discussed, emotive, and necessarily sits at the front line of immigration response. The attempt to define education and to define a right to it is fraught and value-laden. Education also feeds inequalities into society more generally, for if people are effectively denied the necessary skills for participation, society is unequal and exclusive. This chapter uses the theory developed so far in this dissertation to examine the state’s obligations to educate non-citizens, both theoretically, and with a view to finding a useful practical response.

5.2. Education and Capabilities
Receiving an education is crucial to an individual’s capability to take full part in society as an adult, and is, then, crucial to Nussbaum’s capabilities numbers 4, 6, and 7). A person who is either not educated (un-educated), or who is not educated sufficiently for the society in which he or she is to live (under-educated) is put at a significant disadvantage. It is not obvious who is responsible for avoiding creating this avoidable lack of capability. I broadly agree with Carens that the obligation to educate rests on the society where the child lives, which is one society rather than another merely by ‘a matter of fact’ (Carens 2008 170), but add that there is also a general global obligation to educate children. This section begins by presenting un-education (in Subsection 5.2.1) and then under-education (in Subsection 5.2.2), as harmful. Subsection 5.2.3 then explores the implications of this for obligations.

5.2.1. Un-education as a disability
For Carens, education is a ‘fundamental need’, the denial of which is fundamentally harmful to welfare (Carens 2008 170) because it significantly restricts a person’s capabilities. Education falls into the same category as protection from starvation and the provision of basic medical care and shelter, because individuals cannot provide adequately for their own education and will suffer significant and enduring disability if it is denied them (Hodgson 1998 20; this sort of human weakness was discussed at Subsection 1.3.4). As a result, it falls into the category of basic rights set by Henry Shue (Shue 1980) and, as I argued in Subsection 4.1.3, though Caney and Shue do not specify to whom the obligations should be assigned in the case of immigrants, it is unlikely that they would say such persons should be denied basic rights upon border crossing (see also Subsection 1.3.3).

In their 2003 paper, Jean Dréze and Amartya Sen are explicit:
An illiterate person is significantly less equipped to defend herself in court, obtain a bank loan, to enforce her inheritance rights, to take advantage of new technology, to compete for secured employment, to get on the right bus, to take part in political activity – in short, to participate successfully in the modern economy and society. Similar things can be said about numeracy and other skills acquired in the process of basic education. (Dréze and Sen 2003 3).

This relates to the discussion, in Subsection 1.4.4, of Simon Caney and Gillian Brock's discussion of equality of opportunity and relates to capabilities 4, 5, 6, 7 and 10 listed by Nussbaum (see Section 1.4.2). In Subsection 1.4.4, it was noted that there would be disagreement about what counts as a relevant opportunity. The capability approach adopted here enables discussion to focus instead on what people can do and be. In most societies today literacy and numeracy are themselves basic capabilities, needed for everyday life. Un-education here refers to a lack of basic public education as defined in Section 5.1. Other sorts of education may well be invaluable, but as Drèze and Sen make clear, a lack of the basic knowledge of the three Rs, as well as other basic functional skills and understandings is a handicap for life in contemporary societies.

A practical side-benefit of ensuring a basic formal education is the protection of children's rights more generally (Spring 2000 3). Joel Spring explains that exercising the right to education requires children to have adequate health care, housing, protection from exploitative labour and physical abuse. That is, a right to a basic formal education cannot be realised unless the child can be physically present in the classroom, which itself needs a host of other protections to be in place. Through realising the right to education, these other rights are also protected.

The damage caused by un-education goes further than mere loss of the opportunity to access lucrative employment. Un-education excludes people from taking part, on a basic level, in modern society, in which basic reading and writing and understanding of arithmetic (as well as certain linguistic and cultural knowledge) are assumed. Un-education refers to the lack of these, the most basic learnt skills for life in society. Given that ‘[o]ne of the most striking things about human behaviour is that most of the things we do are learned’ (Fulcher and Scott 2007 116), the content of a basic education may be quite basic indeed. An elementary education, then, involves literacy, fundamental maths, and basic civil education (Pentii Arajävi, quoted in Smith 2010 318). Also key is what sociologists call 'socialization’, the process by which a person learns to be a member of a particular society (Fulcher and Scott 2007 117) and, though much of this may be done before school age, schooling certainly has a role to play.
While it is easy to under-estimate how much education is necessary, it is important to maintain a distinction between the most basic education and more debatable, complex education. A recent large-scale survey in the UK showed the importance to people of reading printed material. It focuses on sight-loss, which provides a rare opportunity to explore what someone who could read at one point feels about now being unable to do so. It found that 52% of the general public would find a neighbour reading out the results of a medical test uncomfortable (Kaye 2010 9). 75% of those surveyed would be ‘upset’ if they could no longer read newspapers and magazines; and 79% would be ‘upset’ if they could no longer read books (Kaye 2010 22). Meanwhile, a recent Economist article quotes a Masai herder: ‘[w]e pick out the brightest children, those with the most potential, and then send them off with goats. It takes brains to identify each animal, find water, and ward off cattle rustlers. School is for those that are less quick.’ (quoted in Tomasevski 2003 17). There is, then, significant variation between societies as to what skills are crucial and recognising this is important to developing a thorough understanding of the obligations of justice. Moreover, this may change over time, and will be affected by skills needed for participation in global society. Regardless of this, some skills are basic to functioning in a society and that society (and the state that governs it) has a responsibility to ensure those in it are capable of participating therein.

5.2.2. Under-education as a loss of opportunity

A person can be formally educated, but insufficiently so for making use of the opportunities in the society in which he or she is to live. For example, she or he may also need competency in a major state language, or of broader societal norms (e.g. of etiquette or religion). Alternatively, she or he may have been put into public education with insufficient supportive provisions (e.g. directed language help, or dyslexia support), rendering him or her unable to access the education to a sufficiently high level. This section discusses three ways this may lead to opportunity loss: first, thinking skills and confidence enable opportunity-taking; second, pleasurable and enriching activities; third, understanding social mores is key to social status and availability of opportunities. These are opportunities for higher level capabilities

Without education, a person is unable to realise his full potential and function fully within society (Hodgson 1998 19). Beyond the most basic literacy and numeracy, this involves conversance in areas deemed important by the society in which the person is to live, and training in necessary ways of thinking.\footnote{Various ways of understanding this are found, for example, at (Rousseau 1762a 10; Maslow 1971 196-199).} Aristotle also emphasises the importance of learning beyond functional skills (Aristotle 384 p455): ‘Roughly four things are generally taught to children, (a) reading and writing, (b) physical training, (c) music, and (d), not always included, drawing’. While this chapter may not specifically
choose these categories, it is useful to consider what Aristotle goes on to explain. He tells us that a, b and d are useful for daily life. However, he promotes (c) as a way to instil fulfilling and broadening leisure activities. ‘Clearly then there is a form of education which we must provide for our sons, not as being useful or essential but as elevated and worthy of free men’ (Aristotle 384 427). This is echoed in Mrs Gradgrind’s comment in Charles Dickens’ *Hard Times*, ‘[b]ut there is something – not an Ology at all – that your father has missed, or forgotten, Louisa.’ (Dickens 1854 194). However, under-education, depending on how un-education is defined, may be more basic than this.

Education can provide training in the essential skills, logical thought and reasoned analysis that form a basis for individual dignity and self-respect, especially in societies that esteem learning and academic achievement (Hodgson 1998 19). Tied into this is also the opportunity for individuals to develop more generally, participating in cultural expression such as appreciating art or literature, which goes beyond reading merely to interpret train timetables, for example. A diverse education enables children to have experiences that may bring them pleasure if they decide to develop the interest. Education in this category, then, is an end in itself, as well as a means to an end.

There is a social aspect to this. Akerlof and Kranton note that:

> schools are not just mechanical factories that teach skills. Rather, as historians, sociologist [sic], and educators explain, schools are institutions with social goals. Not only do they import skills, but they also import norms regarding who students should be and what they should become. These ideals affect how long students stay in school and also how much they learn while there (Akerlof and Kranton 2010 62).

An ignorance of social mores is another way to harm a child through under-education. This can both hamper him or her in the negotiation of the adult world, and damage his or her sense of self and belonging. Although social mores are largely passed on through informal education, there is a key way that a public education system is involved (e.g. Grant 1988).

It is important to acknowledge also that the sense of under-education is harmful. In Sierra Leone, for example, ‘[t]he education system was based on the premise that the children would complete primary school and continue in education, ultimately obtaining jobs.’ This left those unsuccessful in the school system frustrated, ‘forgotten aspirants’ (Tomasevski 2003 30). Society’s definition of sufficient education significantly affects who can succeed. First, because the definition of success will be more easily attainable for some than for others. Second, because society’s definition of sufficient education will significantly affect who is able to succeed later in life. Under-education carries stigma.
and leads to social-class-like stratification. This dissertation has emphasised the importance of actively directing society in terms of what it classes as important.

This subsection has argued that, even when basic education is available, a person may also be significantly harmed by under-education. How much education is adequate will vary across, and even within, societies, and between individuals, and this will change over time. Yet this does not preclude state-level obligations from being established. As argued in this dissertation, if the state wants overall jurisdiction over a territory, it must take on responsibility for meeting capabilities which are otherwise inhibited by this enclosure – whether this is as a result of being outside it or inside it.

5.2.3. Implications for obligations

Harm caused by un- and under-education can significantly impair capabilities. The major difference between the denial of an education and the denial of some medical operation that will avert a disability is probably that, as nobody is born able to read and write, for example, everyone must be taught it. A truer comparison, then, would be the denial of basic food and shelter. Education is needed in the same way as the body needs adequate food and shelter for development. It will now be useful to establish what the foregoing discussion of the harm caused to children (and to adults) of un- and under-education implies for obligations of the state, specifically, the obligations of the state towards non-citizens in its territory.

Chapter Three presented discussions of duties towards non-citizens that traditionally focus on those not present. Education, however, like many social services, is tied to a place, delivered in situ, bringing the learner into contact with the educator and so can represent other goods tied to place. Having said that, unlike the provision of roads and policing, technological advances mean education can now be offered abroad. This is already done. Some European countries use internet and laptops to help fulfil their duty to educate children in Travelling communities. Further, higher educational qualifications can now increasingly be obtained via distance learning, using new forms of communication.123

In Chapter Three, obligations towards non-present non-citizens were found to derive from certain aspects of the creation (and re-creation) of the state, which involves excluding outsiders from human capital, territory, and resources. This gives rise to obligations to support education, like other locally-delivered goods. However, the extent to which this can be a genuine obligation will depend on context. It is important to recognise that education is not the only active path, such that the

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123 In Britain, this is pioneered by the Open University, and programmes available at QMUL’s Centre for Commercial Law Studies explicitly offer distance-learnt courses to students overseas: http://www.ccls.qmul.ac.uk/courses/distancelearning/index.html
alternatives – non- or under-education – become non-decisions. Instead, when a child is presented to the state, various life-paths are open; each with various inputs. Deciding between not educating and educating is a two-way decision. It is not a decision either to do or not to do.

Based upon the fiduciary notion of the state’s obligation to provide certain benefits to all those under its power, Fox-Decent and Criddle argue that education is an obligation. They write that:

[w]ithin a modern state with complex rules of private law and public law, an individual lacking in literacy and civic education would depend on the grace of others to know her legal rights. Although those educated others, like the beneficent slave master, might never abuse their power, they would necessarily dominate anyone forced to depend on them for want of education. Furthermore, the illiterate would be unable to access public offices, participate in public debates, or otherwise engage in democratic processes that presuppose literacy and civic education. (Fox-Decent and Criddle 2009 331).

This echoes the comment of Dréze and Sen given in Subsection 5.2.1, but here the focus is different. The hardships that would be experienced hold the un- or under-educated person under the power of others. Un-education and under-education, then, though difficult to distinguish and dependant on context, are crucial for developing capabilities. The state has obligations to educate all children under its effective control. Given non-citizens within the state’s territory are de facto under its effective control, the state has an obligation to educate them, to avoid the harm that would be caused by their un- or under-education.

5.3. Modes and excuses for exclusion

Various modes and excuses are offered for the exclusion of non-citizens from public education. Examining these will be important in understanding the sorts of stakes that people feel in education and the sort of role that they feel it, and exclusion from it, should play in their society. This section takes up four themes in the exclusion of non-citizens from public education:

- Subsection 5.3.1: receiving education should be based upon payment of tax (Subsection 2.3.2);
- Subsection 5.3.2: education should only be for future citizens (drawing particularly on conclusions in Section 4.3 and Sections 2.1, 2.2, 2.3.1);
- Subsection 5.3.3: full access to public education systems will encourage heightened levels of (unwanted) immigration (drawing particularly upon conclusions in Sections 4.2 and 4.4); and
The Outsider Within

- Subsection 5.3.4: special educational needs of non-citizens undermines overall service provision (drawing on Sections 3.1 and 3.5).

It is important to note that, by engaging with these criticisms, I am not intending to imply that they rest on relevant bases for discussion, but to engage directly with commonly voiced arguments.

5.3.1. No education without taxation

One immediate response that can be offered to the argument that receipt of a free public education should be earned either through contribution, or in advance of future expected contribution (e.g. Miller 2008 196) is that no recipients of traditional school education have, by definition, paid tax. However, falling back on parental tax-payment is also problematic.

First, non-citizen adults may pay the same tax as citizens, and if they are prevented from paying tax (e.g. through exclusions from work), this is generally involuntary, making the argument circular. As with other benefits, denying them on the basis that persons have been excluded from paying income tax because they have been excluded from work, because they are not citizens, collapses back into ‘no education without citizenship’, which is the question under discussion in the first place, so cannot provide an argument for itself. This circularity was discussed already in Subsection 2.3.2.

Second, different citizens pay tax at different rates, and some citizens may receive significant benefits with little monetary contribution. Would a taxation requirement for education require that, before enrolling their children in school, or receiving extra educational support, parents would have to establish the size of their contribution to the public purse? Even if it were not the amount, but the fact of contribution that were important, this is still problematic. It excludes, for example, orphans of teenage parents who died before beginning tax payment. Tying receipt of education directly to tax contribution is difficult to do without simultaneously disadvantaging vulnerable citizens.

Moreover, education enables people to contribute more in the future. Perhaps, then, the catchphrase should be inverted: no taxation without education; educating students on the understanding that they will pay back in tax over the course of their lives. If this is the case, then it only makes sense to exclude non-citizens if evidence shows that, given the same educational opportunities as citizens, non-citizens would go on to pay less tax or to contribute less to society. Of all benefits, education is perhaps the most bizarre to find itself tied to pre-payment of taxes or other contributions.

5.3.2. They may not be future citizens

The future contribution aspect of Subsection 5.3.1 leads into the suggestion that, as current non-citizens may not be future citizens, there is not an obligation to educate them. Some argue that
education is not a human (presence) based right, but a citizenship right – based on a person's future citizenship in the state that is educating (e.g. Miller 2008 196, Moan 2008 208). If education is intended to re-create a domestic society well-versed in its own value system, which is economically productive and well-integrated, then the argument is that persons that will not be citizens of that future demos need not be educated-for-membership, and it is inappropriate and unnecessary for that state to educate them.

This argument has four main problems. First, it has the same circular internal logic of common arguments for excluding persons of a certain race or gender from full education because those persons will not become citizens, and then excluding them from full citizenship because they do not possess the level of education perceived necessary for that status. Second, related, but different, participation in public education removes barriers to citizenship so that those persons will be future citizens if they so-want (see Section 2.1’s discussion of jus nexi citizenship acquisition).

The Millennium Development Goals include that by 2015 every child globally would be able to attend and complete primary school. This represents a recognition of the fundamental importance of education for capability rights. This was supported by the pledge that no country seriously committed to universal primary education should be thwarted by costs (HRW 2005 3), and the international target of contributing 0.7% of GDP as overseas development assistance (ODA). The average level of ODA in 2004 for donor states remained at 0.25%. This is made more disappointing by the significant benefits wealthy states receive from educating international students (see Subsection 5.3.4, below), and leads to interesting questions. For example, ‘[s]hould tuition fees charged to students from aid-receiving countries in the donor country be recorded as export, or aid, or both?’ (Tomasevski 2003 118). Indeed, Section 3.1 argued that education represents a key important way of redistributing wealth in the form of human capital.

That a person is not a citizen and may not become a citizen, then, is not sufficient reason to exclude him or her from a public education system. Moreover, ‘the illegal alien of today may well be the legal alien of tomorrow’ (in Plyer v Doe 1982), and the non-citizen of today may well be the citizen tomorrow. While non-citizens may not stay in the state, citizens may also leave, and the wider trade in highly skilled persons and tertiary education all contribute to increased (see especially Subsection 5.3.4), rather than decreased, obligations of a state to educate non-citizens.

5.3.3. It will just encourage more immigration

Now consider the popular argument that non-citizen children should be excluded from states’ public education systems because including them would encourage more (unwanted) immigration. There are three claims: it encourages migrating parents to bring children with them; it encourages parents
to move to obtain a good education for their children; and, once their children are included in public education systems, parents are more likely to stay beyond completion of their planned work or study, and it becomes more difficult legally to force them to go. It will be argued: first, that these claims are factually debatable; and second, that regardless of their inaccuracy, they do not provide sufficient reason not to educate.

While offering education makes the non-citizen experience more positive, this does not necessarily mean that excluding non-citizen children from public education will be sufficient to stop parents deciding to migrate or stay. More concerning, however, excluding them from a societal good in order to deter others uses non-citizen children for their power to sway connected adults. International law recognises children’s particular vulnerability and their inability, in many instances, to enjoy fully autonomous decision-making. One consequence is that granting or withholding benefits can focus on related adults instead of children themselves. Punitive measures excluding certain categories of non-citizen children from school in various states also focus on their parents’ immigration status. For example, the UK’s 2004 Asylum and Immigration Act uses ‘already vulnerable children as pawns to convince their parents’ to leave the UK, expecting involvement of social service departments in immigration control, which they have strongly resisted (quoted in Pinson et al. 2007 218). Even in the discussions on the Convention of the Rights of the Child, which itself makes no distinction based on citizenship or immigration status, the drafters were concerned not to undermine immigration regulations. For example, the Federal Republic of Germany presented the following reservation: ‘nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory or his unlawful stay there is permitted.’

The actual vulnerability of children, beyond merely their legal status, can be overlooked. For example, one student in the inner-city Paris high school class in the recent French film, Entre les murs (Laurent 2008) is absent, although he is allowed to stay in the country, because of the feared deportation of his parents. This occurs in several countries (e.g. see Lynch 2010 125), deriving from the need to protect vulnerable children by not deporting them, but leaving children in effect more vulnerable. Bound up with this tension is the difficulty in defining what is a ‘child’. This can move the discussion away from protecting vulnerable youngsters, to satisfaction instead of international laws, based on arbitrary age cut-off points, established by equally arbitrary tests. This is exemplified in the controversial skeletal tests to establish the age of persons presenting as ‘children’ (Halvarsen 2003

\[124\] For example, in Plyer v Doe 1982, it was noted that Texas' charging illegal immigrant children for elementary education was not an effective way to stem illegal immigration.

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5) which, aside from their proven inaccuracies, reduce the definition of childhood to meeting an arbitrary definition rather than immaturity, vulnerability and need (de la Rasilla 2005 5).

5.3.4. Special needs of non-citizens undermines provision for local students

It is sometimes argued that, as non-citizen children have more special educational needs than native students, they should be excluded from the public education system. This is unsatisfactory on a number of levels. First, there is not evidence that non-citizen children have more educational needs than citizen children. Second, having special needs to be met is not generally considered an acceptable reason for exclusion from education. In most modern and wealthy countries, it is usually assumed that even very disabled or disruptive children should be educated, with differing levels of support. Third, countries actively seek some categories of non-citizen students, so presumably not all non-citizen students undermine provision for locals.

There is surprisingly little empirical research available on immigrant children’s rates of disabilities and special educational needs (Conger and Grigorenko 2010 170). A recent paper bringing together American results finds that; according to one study, about 5.7% of children of immigrants are reported by parents to have a learning disability, compared to 12.4% of children in the native population. According to another study, 6.9% of foreign-born children are reported to have a disability, compared to 10.2% of native born children (Conger and Grigorenko 2010 172). Meanwhile, James Nickel argued in the US, in the 1980s, that ‘undocumented immigrants are not heavy users of most social services, but they do use average amounts of education and medical care’ (Nickel 1986 19).

This implies that, either children of immigrants are less likely to be disabled, or immigrant parents and the children’s’ teachers are less likely to report disability. While anecdotal evidence from America implies that immigrant children are disproportionately represented in special educational services, data, for example, from the New York City Department of Education, suggests that immigrants are less likely to participate in special education; and school system data suggests that immigrant children, especially older immigrant children, are much less likely to be in special education programmes (Conger and Grigorenko 2010 174,175). Results from other countries (e.g. Denmark, Finland, Switzerland and Germany), indicate that in these countries, immigrant children are over-represented in special educational programmes (Conger and Grigorenko 2010 176). The claim that immigrants generally have more special educational needs, even including language learning, cannot be assumed: the American 2000 census showed that most immigrant children spoke English well, with only 32% of children aged 5-10 reported as 'limited-English-proficient',
compared to 40% speaking both English fluently and another language at home (Hernandes et al. 2010 10).

Like other states, centrally, the UK insufficiently acknowledges specific needs of non-citizens, leaving local authorities scrabbling to make existing funds cover newcomers’ needs. This may be on a school-to-school basis, so that an individual school with a sudden influx of non-citizens may find itself coping on the same budget as a school without this influx. For example, the Education Act 1996, Section 312 (3) provides that

a pupil cannot be classed as having a “learning difficulty” where that difficulty is “solely because the language (or form of language) in which he is, or will be, taught is different from a language (or form of language) which has at any time been spoken in his home”. Consequently, any (special financial) provision made on account of that difficulty will not be special education provision (Harris 2007 425).

While in the UK and elsewhere, central government delegates responsibility to educate children (including non-citizen children) to local authorities, immigration is controlled centrally, including policies directly affecting local authorities’ welfare systems. For example, the ‘dispersal’ of asylum seekers and refugees (Pinson et al. 2007 68) means children are moved at short notice to new school districts. Alongside the disruption to children, this leaves schools struggling to support them. Already in the 1980s, Lord Swann’s report into the teaching of minorities in the UK confirmed that immigration entry conditions have a big effect upon immigrant communities (Swann 1985 210).

In practice, none of the few funds available in the UK for providing extra support for educating non-citizen children are on account of them being non-citizens. One is specifically to support vulnerable children. Another is for children from ethnic minorities. This means that when a school decides whether to support non-citizen children’s needs, the most likely to be disadvantaged are those who are already most vulnerable. Non-citizen pupils may, then, have special needs to be addressed, but this is not a reason to exclude them: rather, it is a reason to ensure proper preparation and support is provided. It has been shown that this is not currently being done sufficiently in the liberal democratic states mentioned above. The corollary of the alternative conclusion would be to exclude others that cost more, including, for example, physically disabled children.

Many countries hoping to withhold some of the benefits of public education from non-citizens also actively recruit highly skilled persons and even students from overseas. These immigrants have been

125 See Section 14 of the Education Act 1996.
126 A similar situation is descried in America in (Olsen 1988 44).
educated for many years at others' expense. This sits uncomfortably with denying full access to
education to non-citizens immigrating without that desirable level of education. There are, for
example, more than four hundred EducationUSA advising centres worldwide, and Allan E Goodman,
President and CEO of the American Institute of International Education, explains:

[s]tudents from all over the world contribute substantially to their host campuses and to the
U.S. economy. Their active engagement in our classrooms provides U.S. students with valuable
skills that will enable them to collaborate across political and cultural borders to address
shared global challenges in the years ahead.

Evidence would be needed to demonstrate that these non-financial benefits cannot manifest at the
public school level.

The financial aspect is undeniably huge. The US Department of Commerce estimates that
international students contribute $17.8 billion to the US economy through tuition and living
expenses, with 70% of all international students' primary funding sourced outside America. In
Australia too, at $AU15 billion, international education has become the country's second largest
export industry (Luke 2010 48). Indeed, this is playing an increasing role in funding Australian higher
education overall, as increased international student contribution correlates with declining per
capita federal funding for Australian students (Luke 2010 48). Sydney University has come to have
30% international students, and regional universities like Central Queensland are peaking at 45%
(Luke 2010 48). Table 10 shows a similar phenomenon in the UK:

Table 10: The Top 20 (by number of students) largest recruiters of international students among UK
universities in the academic year 2008/9 (from UKCISA data)

<table>
<thead>
<tr>
<th>Institution</th>
<th># Non-UK students</th>
<th>% Non-UK students</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Manchester</td>
<td>8,800</td>
<td>23</td>
</tr>
<tr>
<td>University of Nottingham</td>
<td>7,900</td>
<td>24</td>
</tr>
<tr>
<td>University College London</td>
<td>7,125</td>
<td>34</td>
</tr>
<tr>
<td>University of Warwick</td>
<td>7,080</td>
<td>25</td>
</tr>
<tr>
<td>London School of Economics</td>
<td>6,555</td>
<td>68</td>
</tr>
<tr>
<td>University of Oxford</td>
<td>6,020</td>
<td>25</td>
</tr>
<tr>
<td>University Name</td>
<td>Students</td>
<td>Rank</td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>----------</td>
<td>------</td>
</tr>
<tr>
<td>London Metropolitan University</td>
<td>5,810</td>
<td>22</td>
</tr>
<tr>
<td>University of the Arts, London</td>
<td>5,750</td>
<td>26</td>
</tr>
<tr>
<td>University of Leeds</td>
<td>5,690</td>
<td>18</td>
</tr>
<tr>
<td>University of Northumbria at Newcastle</td>
<td>5,650</td>
<td>17</td>
</tr>
<tr>
<td>University of Greenwich</td>
<td>5,555</td>
<td>21</td>
</tr>
<tr>
<td>University of Birmingham</td>
<td>5,550</td>
<td>19</td>
</tr>
<tr>
<td>University of Edinburgh</td>
<td>5,485</td>
<td>22</td>
</tr>
<tr>
<td>University of Cambridge</td>
<td>5,430</td>
<td>24</td>
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<tr>
<td>University of Westminster</td>
<td>5,420</td>
<td>23</td>
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<tr>
<td>Imperial College London</td>
<td>5,420</td>
<td>38</td>
</tr>
<tr>
<td>City University</td>
<td>5,345</td>
<td>25</td>
</tr>
<tr>
<td>University of Sheffield</td>
<td>5,295</td>
<td>21</td>
</tr>
<tr>
<td>University of Bedfordshire</td>
<td>5,165</td>
<td>30</td>
</tr>
<tr>
<td>Kings College London</td>
<td>4,875</td>
<td>22</td>
</tr>
</tbody>
</table>

Indeed, there is a strong economic motive for a university to ‘internationalise’ (Luke 2010 53).

Beyond immediate financial and cultural advantages of recruiting international students, international students in higher education also swell the numbers of highly trained people in key disciplines in recipient states (Altbach 2004 20). The estimated figures of Chinese and Indian students not returning home after studies in the US are 66-92% and 77-86% respectively (Altbach 2004 21). These students arrive as undergraduates, or, more commonly, as graduate students or professionals seeking further training or specialisation. This enables the US (and others) to select from the best graduates, without paying for the many years of education they have already received. Consider, for example, the Health Care Professionals discussed in Subsection 3.1.3. Encouraging
immigration of highly skilled individuals without reimbursing emigration states should, then, feature in the wider non-citizen education debate. In reality, education and skills are being constantly shared as people migrate. The basic education of non-citizen children is just one facet of this.

Non-citizens may or may not have special educational needs. However, this is not a viable reason for excluding them from government-provided education. First, this is because it is not given as reason to exclude citizen children, so that the special needs themselves are not decisive. Second, because states actively recruit non-citizen students in other sectors, arguing that they in fact benefit the education system they are entering.

This section has argued that four major reasons given against the education of non-citizens are not only unsuccessful, but actually collapse into reasons for such an obligation. First, future citizens and residents must be educated, so they can contribute, both financially, and otherwise, to society. Second, even if some may leave, many will not. Third, already highly educated immigrants arriving to contribute could be seen to compensate for this and to add normative weight to the obligation to educate. Fourth, it is not clear that non-citizens put particular strain on education services, and even if they did, this would be insufficient reason alone to exclude them. This section has demonstrated, not that a state does have substantial obligations to educate non-citizens, but merely that these arguments do not provide adequate reason to conclude that it does not.

5.4. Engendering the desired state
Education plays a unique role in society, different to that played by social goods like health, because of its pivotal contribution to state-creation (and re-creation). This section examines three ways in which this occurs. Subsection 5.4.1 introduces the most visible: the explicit transmission of the values and identity perceived as important in the state, creating the 'sufficient degree of homogeneity' required for societal survival (Durkheim 1911 70). As well as directly creating a shared cultural and ideological space, education can counter marginalisation, both through ensuring persons have the practical skills to engage economically (and otherwise) in the state, and by avoiding feelings of exclusion among some portions of society. Subsection 5.4.2 presents language as a special case of this. Subsection 5.4.3 explores the forum education offers for a controlled mixing and meeting on equal terms of all sections of the population. It will be argued that a state has obligations deriving from its own self-creation to educate non-citizens on its territory. The content and form this takes will, however, vary, depending on the context of each state.
5.4.1. Education of values and identity of state

Education cannot be ideologically neutral (e.g. see Macedo 1995). The facts it teaches (e.g. evolution or creationism), the means it adopts (e.g. boy/girl segregation; texts; exams) the role-models it offers (e.g. punitive schoolmasters with canes; persons from particular ethnic groups or socioeconomic backgrounds), and those characteristics that are valued (e.g. sporting prowess; politeness; academic ability), will affect young people’s self-development, and what they come to value in the future. That is, education is driven by values that exist in society, but it is also central to creating new values and attitudes (Tomasevski 2003 60). This makes it central to creating and perpetuating state identity and the sort of state society that exists. As a result, the state must be careful when deciding what, and how, to teach, and who should deliver it.127

Aristotle offers two useful lessons regarding the content of education. First, that it should not be directed to producing one virtue alone (Aristotle, 384 458), and second that

\[\text{education must be related to the particular constitution in each case, for it is the special character appropriate to each constitution that set it up at the start and commonly maintains it, e.g. the democratic character preserves a democracy, the oligarchic an oligarchy (Aristotle 384 452).}\] 128

Indeed, society can use education to effect a slow change of character in the society and so of the appropriate constitution. This is discussed in subsection 1.6.3, under the heading ‘adaptive preferences’. It was noted that a person’s preferences can be different, depending on their context and their feeling of what is possible or what they deserve. However, it was also argued, in Subsection 1.6.4, that society in fact adapts preferences of people and that this is central to how societal evolution can be driven.

Durkheim celebrates a dynamism in education that is crucial to what it is (presented in Subsection 5.1.3). He argued that if we want our children to be able to function within society, we must educate them according to the society, whatever we think of it. This makes sense as an argument against sudden revolution, or for education that is context-specific, but it wrongly ignores education’s context-shaping role. For Durkheim, to develop a public education system, it was necessary to look into the society, to find some principles held generally that need to be inculcated into all children, whatever their caste or class (Durkheim 1911 68). For him, these already existing common thought

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127 One would also expect that it would be keen to ensure everyone in society had been thus indoctrinated/instructed. This is also relevant if the person may later live abroad, exporting understanding of its ideals.

128 This is reiterated in Rousseau’s preface to Emile, where he writes that ‘one kind of education would be possible in Switzerland and not in France’ (Rousseau 1762a 3).
patterns, special to the specific society, should be found. This relates to a comment by Dewey, that 'any education given by a group tends to socialize its members, but the quality of the socialization depends upon the habits and aims of the group' (Dewey 1916 47). This again ignores education’s active role in shaping society.

Michael Billig’s notion of Banal Nationalism has already been discussed in this dissertation (see particularly Subsections 1.6.4 and 4.3.3). Billig argues that the state must constantly re-create itself through small acts; flags hanging limp in the corner of a room, foods eaten as national dishes, and small re-confirmations of the nation in newspapers and the media more generally. Another means of delivery is through decisions about schooling. The pledge of allegiance in America, the use of the Turkish language in Kurdish majority areas of Turkey, the recitation of Buddhist prayers in Southern Sri Lankan schools; these are all instances of how national self-identity is re-created through public schooling systems.

Indeed, this conscious effort to create a ‘cohesive nation’ through schooling has been a common policy throughout European history (Heater 1999 168). This is appropriate, for two reasons discussed above:

(1) It is not possible to educate neutrally so it is better to make active decisions; and

(2) Public education systems are so-placed as to give them this role whether they like it or not.

The many subtle choices made about education, how it is delivered, who it is delivered to, and the content of what is delivered, impact dramatically upon society’s later formation. Indeed, some worry that, absent active engagement with the role of educational institutions, ‘natural prejudice and institutionalised discrimination will dominate’ (‘Multicultural education in the 1980s’, quoted in Swann 1985 315).

It has been argued here that education, and how it balances the needs of the man and the citizen, will vary with context. Significant domestic instability may need the development of an integrated notion of the citizenry (consider post-genocide Rwanda, or post-conflict Albania), so that the role of education may need to be primarily inward-looking, to help to secure the coherence of the state’s systems and infrastructure, and to restore confidence in it. In more stable states, the education system’s role is different. It can put even more into pushing those it educates to look beyond their borders and beyond those usually considered members within those borders. To be a just institution it must be primarily directed at promoting individual capabilities, and play a special role in promoting a harmonious and mutually benefitting society.
5.4.2. Language

The language of instruction affects capability rights and hence the substance of rights to education in two main (apparently competing) ways (Tomasevski 2003 176):

1. Compulsory instruction in a language that the child does not understand hampers learning; and
2. Education in the non-dominant language(s) may prevent a child mastering the official/dominant language(s), precluding continuing education or employment, thus hampering full development and integration.

Although language discrimination is often given less attention than gender, race, or religion, it can significantly limit access to education and other capability-enabling services (Smith 2010 205). Language also provides us with a means of comparison between the ramifications of difference among existing citizens, and of difference amongst non-citizen groups. The literature uses 'minority languages' to refer to marginalised languages with long standing in the state. 'Immigrant languages' are languages of 'non-native' groups. The perceived need for two such discretely applied terms (minority and immigrant) is instructive, and it is useful to consider both whether there is a genuine contextual normative difference between them, and the relevant differences people see between them. There must either be overlap or a clear way to establish how an immigrant group becomes a minority group.

This subsection explores the difficulties, importance, and benefits of including non-citizen children, speaking diverse languages, in public schools. It introduces contexts of language diversity, comparing conflict between hegemonic languages (e.g. English and French) and between hegemonic and less powerful languages. It then examines pedagogy literature about the implications of different policies, and real-world situations.

As with any policy area, context is crucial, and:

The language policy of a country is situated in a socio-historical context in which it is applied and discussing it outside that context might be futile because you might be dealing with the consequences of an underlying cause instead of addressing the cause itself (Sure and Ogechi 2009 151).

A report from the 1970s on the Francophone/Anglophone tensions in Canada offers interesting insight into this. It emphasises other languages originating from original settlers, but does not explain why the length of settlement is relevant (RCBB 1978). Explaining this will probably help to
uncover at root the perceived moral difference between ‘minority’ languages and ‘immigrant’ languages and, more generally, the differentiation in protections for different cultures, traditions, groups and people. For example, there is a difference between teaching a language as a foreign (immigrant) language and as a Canadian (national/minority) language (O’Bryan 1976 16).

The ramifications of these distinctions, as well as of their ambiguity, are seen in some countries of Central and Eastern Africa, where literature on the struggle between local languages and colonial languages is more developed than in the North American case. As a result of the colonial history of Kenya, English is powerful and prestigious (Sure and Ogechi 2009 151). In Tanzania, where there are approximately 25 million people, and at least 120 indigenous languages (Roy-Campbell 2001 10), English is used as the main language of education. In Cameroon, where the population is less than seven million and there are more than 225 languages (over all four major African language families), there are two official languages – French, and English (Chumbow 1980 281). This means that citizens who speak English and/or French invariably also speak a Cameroonian language. This produces a situation of de facto bi- and tri-lingualism (Chumbow 1980 301).

Indeed, one UNESCO/Unicef project found that more than 70% of African school children are taught in a language other than their mother tongue (Tomasevski 2003 174), while the 1953 UNESCO conference on ‘The Use of Vernacular Languages in Education’ noted that a child will learn to read more rapidly if he or she first learns to read in his or her mother tongue (Chumbow 1980 302). Consequently, de facto multilingualism impacts upon children’s educational attainment, and hence upon the capabilities obtained through that education.

That said, it is not always obvious what is to count as a child’s ‘mother tongue’ (Sure and Ogechi 2009 3). The child of immigrants, or of a minority group may grow up stronger in the dominant language than in that of their parents. Indeed, Akerlof and Kranton observe that immigrant children adopt even the accent of their peers, not their parents (Akerlof and Kranton 2010 11). It could, then, be argued, that it is in fact discriminatory to either deny them dominant language medium instruction or to force them to learn a minority language as well. The situation is then full of apparent conflict.

In many countries, the struggle over official and instructional languages is on-going and tied to political power. In the Canadian Province of Quebec, tension between the native speakers of French and of English has long been manifest, as French speakers struggle to maintain the provenance of French as the dominant provincial language, and as one of the two Canadian national languages. Between 1901 and 1931, and then from 1951 onwards, Quebec, like other Canadian provinces, saw
high levels of immigration.\textsuperscript{129} Non-Catholic immigrant children were excluded from Catholic Francophone schools, forcing many immigrant children (even francophone Jewish and Muslim immigrants from North Africa) to enrol in the Anglophone Protestant schools with more expansive admissions procedures.\textsuperscript{130} In the 1980s, this changed, so that immigrants, including Anglophone immigrants, were (and are) required to send their children to Francophone schools.

The impact of the earlier policy is seen today in English language's establishment in the province and entrenchment of group-based linguistic provenance. Failure to ensure children are taught in the language necessary for participation in society was harmful in two ways: the child is now an English-speaking adult in a majority Francophone province; and the linguistic self-development of the province is weakened. Elsewhere, excluded from dominant culture, non-citizens may be forced to school their children themselves, establishing potential eventual challengers to previous hegemonies. This is unjust for two reasons: (1) it denies children capabilities relating to functioning in society, (2) it does not produce a society disposed to mutual benefit, or siphoning.

This is apparent, for example, in the US, where Spanish-speaking immigrants in areas with previous English-language hegemony are seen as threatening by some Anglophone communities. Consider the rhetoric of the ‘English only’ campaign. While organisations like U.S. English advocate that the ‘unifying role of the English language in the United States’\textsuperscript{131} is best promoted by the establishment of English as an official and required language in the US, others observe instead a desire to protect hegemonic power (Auerbach 1992). The 2009 American Community Survey suggests that Spanish is the primary language spoken at home by 35.5 million people in America aged 5+, representing about 10% of the population. Indeed, headlines like ‘[t]hose who don’t speak Spanish may be left behind’ (Sharp 2001) help to heighten the fear that English may lose its hegemony. Anglophone Americans, especially in some states, are keen, then, to protect English language hegemony.

Auerbach highlights two sorts of concern from the English only campaign: a desire to bring unity and equality through one language, and a desire to exclude newcomers (Auerbach 1992 844). Yet, she notes that enforcing English to the exclusion of other languages does not bring socially positive effects, instead reinforcing exclusion and disaffection (Auerbach 1992 850). She concludes that the


\textsuperscript{130} The 1972 Genderon Commission study found that in the late 1960s of 43,500 non-English, non-French speaking children, almost 40,000 were enrolled in English schools (Magnet 1995 147).

\textsuperscript{131} Official website: www.us-english.org
debate must instead be about power. Neither English nor Spanish is a ‘native’ language of the United States and arguably, Spanish presence is older than English. Speakers of ‘native groups’ languages can be ignored in the hegemonic nativist-like rhetoric of English-language protectionism.

Inadequate education provision allows an under-class to develop. For example, an early US education policy of total submersion left some immigrants unable to function in the mainstream language, labelled as ‘retarded’ (Salomone 2010 25). This lack of inclusion persists in major immigration countries today.\(^\text{132}\) The concern to avoid an underclass is dual-faceted, including both group alienation from the mainstream, and practical disadvantage. Having put themselves under the power of the state, its internal justification means that the state will then develop obligations towards these non-citizens. The form and content of these obligations still needs to be established.

The damage caused by allowing an educational underclass to develop can be seen in the extreme recent example of Rwanda, where, from the late 1800s, Catholic missionary schools openly favoured Tutsi minority students. During the 1920s, the church set up ‘special schools’ to educate the Tutsi minority to be Rwanda’s future leaders (Bush and Saltorelli 2000 9). Few deny that this educational history had a direct impact on the events of 1994. Although this example is extreme, more generally, strong divisions are created in society by differences in educational arrangement. Consider the Quebec example above, or the treatment of Albanians in schools in the Former Yugoslavia, or indeed currently, the marginalised young men who, in various parts of Western Europe, decide to cause violence against the country that schooled them, in the name of a peculiar Islamic ideology. These are all cases of a ‘cultural estrangement’ with apparent links to inadequate or unequal educational provision alongside wider deprivations and exclusions (e.g. detailed in Jayaweera and Choudhury 2008) from core capabilities.

Non-citizen children may then have particular needs relating to language, the unsettlement of migration, and distress at what they have left behind. While some writers consider other difficulties, most literature focuses on language and cultural differences. For example, Yvonne Channer discusses the experiences of black Caribbean young people in British schools in the 1970s. She agrees that:

\[
\text{[m]any of these children were separated for long periods from their parents, who came to England leaving them with relatives in the Caribbean. And once they arrived in England these children had to come to terms with a new home, a strange country, the change in climate, the transition for some from a rural to an urban society, the disorienting effect of being plunged}
\]

\(^{132}\) E.g. Consequences of language exclusion in modern France are discussed in (Jerrio 2010).
into a new cultural milieu as well as the likelihood of encountering new siblings (Channer 1995 9)."\(^{133}\)

Although the author dismisses this as a reason for current difficulties of Caribbean pupils in schools (she writes long after this group’s major period of migration to Britain), it is useful for two reasons. First, it can inform contemporary responses to other groups. Second, how this was dealt with in the past may affect today’s communities. She also mentions that those who had had some education in the Caribbean before arriving in the UK found themselves sometimes a whole school year ahead of English peers and were bewildered by the retrogressive step, contributing to later underachievement.\(^{134}\) She also criticises schools’ denigration of Creole and home culture. Not addressing these issues of exclusion initially has entrenched racism and poverty among this community, even though current members are predominantly fully and unquestionably citizens of the state, creating divisions also in wider society.

There is another side to this. Non-education and non-inclusion of non-citizen children may let another sort of underclass develop among majority, or citizen children, who are then left with only one language and minimal interaction in the multicultural world around them. Educating all children in society about their position in the global arrangement lets a state develop its position in the world. Non-citizen children bring with them experience of living in, and traversing, different cultures. They can thereby enhance the perspectives of existing citizen children with whom they interact, enabling all citizens to grow into adults with the capability to do business, diplomacy, or seek work, outside the narrow sphere of their home community.

This is also relevant to the discussion of the state’s ‘human capital’ development (as defined in Sections 1.6.2 and 3.1). Hernandes et al. note the value of multi-lingual immigrant children as a resource:

> [e]ducation policies and programs fostering bilingualism among children in immigrant families could provide a valuable competitive edge as the US seeks to position itself in the increasingly competitive global economy (Hernandes et al. 2010 11).

As non-citizen children that speak languages from Arabic to Zulu can develop into citizen adults bilingual in the host-country language and their home language, perhaps also in a third or fourth language, they can contribute significantly to their new country of citizenship’s ability to function in...

\(^{133}\) See also the personal account, regarding Haitian movement to the US, in (Danticat 2007).

\(^{134}\) My own narrow teaching experience has shown many immigrant children arriving with better behaviour than British peers, for example, watching in horror as others talked back to teachers, but changing their behaviour to fit in over time.
the global system. However, their potential contribution reaches beyond this. In directing thought and a sense of being more globally inclusion of non-citizen children assists the movement towards a more mutually beneficial global society, engaged in siphoning. Including them as soon as possible and educating them in the values and ideology, as well as collectivity, of the state could help to ensure they do choose to become citizens and contribute their skills to their adoptive society.

5.4.3. Mixing and mingling; integration into what?

JS Mill views ‘placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar’ as ‘one of the primary sources of progress’ in human development (Mill 1876 351). This position has been defended in this dissertation, but is particularly important in schools. Early socialisation experiences are crucial to developing prejudices and ethnic attitudes (Padilla Ruiz and Brand 1974, quoted in Bush and Salterelli 3), and ‘[s]chools are often the first places where many immigrant families began to negotiate their cultural differences with the mainstream society’ (Sirin and Ryce 2010 151). It is important to expose children to, and teach them about, each other as early as possible. Integrating the state’s children into the more dynamic state of the future, and its position in the world, is essential to developing a stable society. Further, education can itself be seen as central to both symbolic and institutional border crossing.

The inclusion of non-citizens in public educational institutions is not only important in making sure non-citizen children develop the required skills for life in society, nor to ensure they know how to integrate into it. The task is not to perpetuate and bring newcomers into, a pre-existing homogeneity, but to create ‘a new more capacious sense of ‘we’” (Salomone 2010 239). Subsection 5.4.1 already explained education’s dynamic role in societal dynamism. The object is not to enable some, rather than others, to integrate, but to enable the development of an integrated society. This means, for example, that ‘family and school cultures should also be understood as fluent and not fixed – particularly when embodied in children who travel between the two worlds’ (Sirin and Ryce 2010 155, emphasis in original). A vivid account of the multi-faceted and non-polar way of natural integration is found in (Ware 2007).

This is counter to the idea that integration is increasingly associated with a course, a test or a contract, with the idea of giving up an identity in order to be allowed to stay in a country (Carrera 2010), which demonstrates an assumption that certain foreigners do not know or respect ‘our’ values; and that people need to be tested on fundamental rights to have access to their fundamental rights. This concern was raised particularly in subsections 2.1.3 and 5.4.1. This is particularly problematic where wealthy, highly skilled, migrants may not be subject to the tests.
A British government report from the 1980s already noted that:

> to seek to represent ‘Being British’ [this could equally be any national grouping] as something long established and immutable fails to acknowledge that the concept is in fact dynamic and ever changing, adapting and absorbing new ideas and influences (Swann 1985 7).

To suggest that the public education system does not have an active role in controlling this change is to suggest, inaccurately, that there is some fixed identity, or set of values, that are sitting there, waiting to be taught. As has been argued throughout this thesis, society evolves, and has always been evolving. The policy choices available now are not timeless; what will be politically conceivable and desirable today may be inconceivable in the future, options that seem impossible today may become obvious in the future.

Internal dilemmas in Liberal democracies are particularly exposed when ‘minority groups challenge the values of the liberal democratic ideology’ (Widdows 2005 80). At this point, Widdows suggests that there exist two available responses (Widdows 2005 81):

1. Label the group as unreasonable;
2. Modify the ideology to accommodate the difference.

For Widdows, neither is really possible until the values of liberal democracies are more fully articulated. I argue further that a satisfactory response is impossible without the mixing and mingling discussed here.

From 1960 to 2000, the proportion of children in the US in immigrant families tripled, from 6% to 20%, with 0-17 year olds from 133 distinct states of origin, and with 93 distinct languages spoken at home. It is estimated that in less than 25 years, no single racial or ethnic group will form the majority of US children (Hernandez et al. 2010 7,8). Schooling must support the state adjusting to this changing demographic.

Non-citizen children, like any children, may not stay in the society in which they are currently hoping to be educated, but educating them is still crucial. As well as the contribution they may make to opening horizons and mind-sets of already citizen children, they create global networks for those children to develop as adults. The child of a migrant worker who will return to Bulgaria may make friends with children in their local school in South Wales, and maintain connections with them. In this way, children grow up with an understanding of their position within a global network, and can perhaps feel more comfortable about travel and trade.
Education’s role in engendering the desired state gives rise to obligations to include non-citizens in public education systems. This is to develop the sort of state that will promote individual capabilities and a culture of siphoning, or mutual benefit. It is also to disseminate these values among the populace – whether to be used within, or outside, its borders. It is also important to educate in order to produce a desirable social make-up; to avoid creating an underclass. Language provides one example of where sometimes double standards are defended for long-standing minorities, and new minority groups. Finally, the role of the public education system as a cauldron for society makes it important to include non-citizens. This helps the next generation to develop ways to live with the future demography of their locale. It also enables all to benefit from the diversity of cultures, languages and understandings.

5.5. Education and other social benefits
A self-defining liberal democratic state has obligations towards non-citizens within its territory. An important one of these is the obligation to educate. Education was chosen for study because of its unique role in enabling capabilities for individuals, and in the movement towards a society that is increasingly conducive to capability enablement. The education of non-citizens is both a peculiarly emotive topic, and concerningly under-discussed. Although focus here was on institutional education, this does not just refer to formal inclusion in public education systems. This chapter demonstrated that mere formal inclusion in education is insufficient; the state’s obligation is really to educate, and thereby enhance the capabilities of, all under its effective control.

The level and type of this education depends upon the society in question. In a country where, to earn a living, it is necessary to be able to read and write and use a computer, the state is obliged to give all people in that space the real possibility of gaining these skills, where possible. This is because these are key capabilities for living in the state society that has been constructed in that space. That is, the obligation to educate non-citizens within the state is driven by both internal and external state justification. This chapter has only engaged with basic capabilities, but mentioned a wider sense of the capabilities derived from education. The form this will take will depend heavily on context.

Standard arguments against there being an obligation to educate non-citizens were shown to be unsuccessful. Most are circular (connected to taxation or future citizenship) or insufficient and incomplete (it will encourage more immigration, non-citizens’ special needs undermine general provision). However, the apparent importance of such arguments to members of society is important to acknowledge.
This discussion of education has provided a direct and practical example of how the arguments of this dissertation should be applied to a crucial policy area, and how they will evolve as real world contexts are considered. Based upon both internal and external justifications of its existence, the state has perfect and positive obligations to educate non-citizens within its borders to the same level of basic capability as citizens, including the meeting of special educational needs where relevant. This is both to enable individual capabilities and to help society perpetuate itself and to work towards an increasingly just state culture. Similar arguments can be developed to support state obligations in other sectors, but this will have to be part of a longer and more expansive project.

Education also highlights another crucial aspect of the importance of local contexts. The negative effects of immigration and the impact upon the states’ already most vulnerable inhabitants are accentuated by existing widespread inequality domestically. Addressing this must be central to any attempt to address the state’s obligations towards non-citizens, in education as well as in other policy areas.
Conclusion.

This dissertation has argued that a state identifying itself as liberal democratic has significant obligations towards non-citizens within its territory. It has developed it through comparisons with various sorts of relationship to the state, and then through a focus on education policy. This concluding section offers a summary of the argument drawn throughout the dissertation, bringing together its various strands. It then discusses limitations of the argument as it stands in this dissertation, considering ways to address them in future work. Finally, it proposes directions for further development in this area of research.

Chapter One presented the theoretical framework underpinning this dissertation. It explained what is understood by liberalism, as addressed in this dissertation, and then set out the underlying assumptions upon which the arguments in the dissertation would be based. It presented liberalism as a framework in which individualism, liberty and equality, and also fraternity, are important, and offered a discussion of what this might mean. The individualism element of liberalism was presented as central to the way in which a liberal theory measures justice. That is, it was argued that, according to liberal theory, the fundamental unit of measurement of justice is the individual person. This is not to preclude theories in which communities, for example, are important, but merely to require that it is the good of the individual human being that is the measure for justice, so that the community is valuable, only insofar as this is good for human individuals.

Liberty and equality were also shown to be important for liberalism, and it was noted that, although the interplay between these could be categorised in a variety of ways, the importance for this dissertation is to establish their scope. In many theories, the scope of those eligible for equal liberty is set by state citizenship. This dissertation argues that if this is so, then it cannot be assumed, but must be defended within the liberal framework being adopted. I argued that such narrowing of scope is not, in fact, defensible.

Chapter One also defended a fourth element of liberalism: fraternity, which is often ignored in liberal theories. Fraternity is important to liberalism because it is important to people. Ignoring the importance of groups and group membership, as well as the relationships between individual humans more generally, will lead to a theory that is unable to encapsulate what is important to humans, rendering such a theory unhelpful and unrealistic, especially in the discussion of non-citizens, where it is precisely fraternity that is being questioned.
Having established the core notion of liberalism to be developed, Chapter One also presented the world-view under consideration. It was argued that the world is currently in fact arranged according to a society-of-states, but that these states do not have independent normative justification. As a result, the worldview adopted in this dissertation is one of normative cosmopolitanism, with an empirical society-of-states theory.

Having set up the dissertation’s underlying framework, Chapter One went on to develop a theory that would enable discussion of non-citizens without normatively presupposing the world set up as it is, whilst also enabling discussion about the world as it actually is. The principle adopted is that of capability rights, deriving primarily from the work of Amartya Sen and Martha Nussbaum. It was argued that, while many versions of rights theory have difficulties in withdrawing from assumed norms of human need and obligation, capability theory is able to build upon a broader question about the human condition, namely: what a person is able to do and be. This, as Nussbaum explains, is a question that can be asked of everyone, and which most people probably do ask themselves. That people may in fact want to do and be very different things is not problematic for this theory.

Another advantage of the capability approach is that it can be developed to allocate those who have the capability to help as burden bearers. Moreover, it is able to motivate a two-level theory of rights/obligations, whereby there is an obligation, first, to promote increased capability rights; and second, to promote a situation where someone, in promoting their own capabilities, in fact promotes those of others. To lead to such a situation, I argued, it is necessary to have institutions which direct preference evolution such as to make this part of how people want to act. The core importance of preference evolution in the theory developed was a key reason for the decision to examine education policy in Chapter Five, as a concrete policy area to test out the theory developed in this dissertation.

The subsequent chapters then developed this theory, in different directions, by considering groups with particular relations to the state, and comparing their situation with that of non-citizens within a liberal democratic state. Chapter Two considered citizens and non-citizens, Chapter Three looked at non-citizens abroad and non-citizens within the state, and Chapter Four looked at the ramifications for non-citizens more generally of discussions of irregular immigrants in particular. I will now discuss the arguments of each of these chapters in turn.

Chapter Two advocated the *jus nexi* principle of citizenship, whereby the citizenship relation is based upon participation within a state community. It argued that, if we are to retain the citizenship relation, which seems unlikely to change in the near future, then it is necessary that it be adjusted to
represent more accurately what most citizens of liberal democratic states regard citizenship to be. That is, a relationship of participation in a community, based around the state. Having advocated a notion of *jus nexi* citizenship, Chapter Two argued that the special rights usually associated with citizenship are in fact misplaced. Through considering presence, contribution, need, vulnerability, and the fiduciary/waqf relationship with the state, I argued that the bases for special rights often coincident with citizenship rights are not, in fact, shared only by citizens. Indeed, each is shared also with non-citizens within a state. It was also argued that this may have ramifications for citizens when they are overseas, especially as when citizens are overseas, they are in fact non-citizens within another state. Thus, Chapter Two offered two main conclusions. First, it argued that the citizenship relation as it currently often exists legally, does not reflect how citizenship is generally understood by citizens of those states. Second, bases for special rights for citizens (even within a *jus nexi* system) do not apply only to citizens. As a result, many of the basic capability rights currently associated with citizenship cannot be justifiably withheld from non-citizens within the state.

Chapter Three then considered the implications of discussions of non-citizens overseas for obligations towards non-citizens within a state. It was argued that there are in fact some bases for a liberal democratic state having special obligations towards specific groups of non-citizens overseas. It was argued that, in most cases, once these special obligations are held towards a person they do not disappear when that person traverses a state border. These special obligations may derive from a variety of factors, which may be classified as: the enclosure of territory, of resources, and of persons. The modern state is dependent on the enclosure of a certain space of territory. However, that territory is part of the total land available to the world’s human population. As a result, the enclosure of a certain space of land gives rise to obligations towards those who are thereby excluded, to ensure that they have access to equal and as good a territory. Some persons may have special claims on a particular territory (consider, for example, Tibetans, for whom the very land of Tibet is important for the practice of their religion), because it plays a special part in their capability for well-being. This must not be ignored in considering matters of territory. The damage of resources overseas, meanwhile, gives rise to special obligations towards those who are thereby left wanting. Finally, the enclosing of persons has two aspects. There is the enclosure of the human capital of the persons already within the state, and there is the exclusion from participation in the human community within the state. Both of these exclusions give rise to obligations towards those thereby excluded, as indeed, the creation of the state makes necessary specialist forms of human capital for certain capabilities to be possible.
Chapter Four examined the specific case of irregular immigrants into a liberal democratic state. It explored implications for the obligations that the state has towards non-citizens within its territory generally, of specific obligations towards irregular immigrants. Irregular immigrants provide a useful example because they are both inside and outside the state. They are inside its territory, but are excluded from its institutions in many ways. Further, they are often among the most vulnerable and capability-deprived individuals in society. Furthermore, irregular immigrants are symbolically problematic for states which are trying to assert control over both their internal and external borders. Moreover, if a state has obligations towards irregular immigrants, some have argued that this gives rise to a problem for the state that had, until that person crossed into their territory, been attempting to exclude them. Another problem that the discussion of irregular immigrants brings out, is the problematic moralisation of immigrants, so that a person’s immigration status leads to prejudice about the person’s moral status. Indeed, developing a moralising immigration regime in this way can further lead to the un-defended exclusion of non-citizens from the scope of capability rights introduced in Chapter One, and can lead to problems such as the prevention of asylum.

Chapter Four argued that the state has obligations towards irregular immigrants, and that this is as a result of, and results in, obligations towards non-citizens within the state more generally.

Having established that a liberal democratic state has significant obligations towards non-citizens, Chapter Five developed this with regard to one particular policy area – that of education. Education is important for the examination of obligations towards non-citizens within a state for a number of reasons. First, it is important in terms of the evolution of the state society. Second, it is particularly emotive because of its impact upon children. Third, education in the skills needed for society is crucial to developing capabilities within that society, and within global society. Fourth, education policy designates what skills are needed for society and who can have access to them. In terms of societal evolution, it was argued in Chapter One that a just society must be directed towards the promotion of capabilities in two ways: the promotion of individuals’ capability rights, in itself; and the promotion of a society where, in pursuing the development of one’s own capabilities, one thereby promotes those of others. Education is crucial in both of these areas. It is central, in modern liberal democratic societies, for the development of individual capabilities. It is also vital in the engendering of the desired state. Education policy is a central part of the direction of preference evolution that the state participates in and the state has substantial obligations, based on the capability rights of both non-citizens and citizens, to educate non-citizens.

The argument in this dissertation was directed at the audience of liberal democratic theorists, and particularly, those theorists who can broadly accept the basic framework described in the first half of
Chapter One. Although this was necessary in order to contain the scope of the PhD project, future work will need to explore the ramifications of these arguments for other liberal frameworks, as well as non-liberal viewpoints. This must be part of a much larger project of examining state obligations towards non-citizens more generally. This project was also limited in terms of the number of policy areas that could be explored. Future work must examine the implications of the arguments of this dissertation for other policy areas, including a more detailed look at health, access to the labour market, and an in-depth examination of the franchise.

Whilst carrying out research for this dissertation, I realised that it was necessary to dedicate substantial time to establish the obligations of a state towards its own citizens outside its borders. My priority for the next large project would be to examine the links between states' obligations towards their own citizens elsewhere, and states' obligations towards non-citizens within their own borders. I would do this through the study of particular cases where this comes into conflict, such as in the case of refugees, where the obligation is being wholly transferred, or cases like those already discussed in the dissertation, where home countries try to interfere for their own citizens within foreign jurisdictions. Part of this will include the consideration of persons working for international agencies.

The problem this dissertation posed was to find a way to discuss the obligations of a liberal democratic state towards non-citizens within its territory, and to make tentative conclusions about the nature of these obligations, and how they affect public policy. The dissertation has developed a vocabulary for liberal theorists to talk about such obligations, based upon a framework of capability rights. It has concluded that a state defining itself to be liberal democratic has substantial obligations towards non-citizens within its territory, and has demonstrated how this may play out in concrete policy terms.
References.


Bloom, Tendayi (2011) ‘Contradictions in formal Commonwealth citizenship rights’, *The Round Table*.


Buchanan, A (1982) *Marx and Justice: the radical critique of liberalism*


Eckenwiler, Lisa (2009a) 'The WHO Code of Practice on the International recruitment of Health Personnel: We have only just begun', pp99-v in Developing World Bioethics 9(1).


Fabre, Cécile (unpublished) 'War and Subsistence', unpublished paper used with consent of author.


Finch, Tom and Holly Andrew and Laura Chappell and Maria Latorre and Jill Rutter (2010) Making the Most of the British Diaspora, IPPR, UK.


Goodin, Robert (1988) 'What is so special about our fellow countrymen?', pp 663-686 in Ethics 98


Harman, Gilbert (1999) 'Virtue Ethics without Character Traits', unpublished papers


Hart, HLA (1955) 'Are there any Natural Rights?' pp175-191 in *Philosophical Review* 64.


Miller, Fred (2009) 'Aristotle on the ideal constitution', pp540-554 in Anagnostopoulos.....


Nyers, Peter (2006) 'The accidental citizen: acts of sovereignty and (un)making citizenship', pp22-41 in Economy and Society 35/1


Pujol, Adriana (dir) (2005) Aguaviva, Alea Docs and Films


Raad, Raymond, Karlawish, Jason and Appelbaum, Paul (2009) 'The Capacity to Vote of Persons With Serious Mental Illness', pp624-628 in Psychiatric Services 60/5.


Schepers-Hughes, Nancy (2011) 'Mr Tati’s Holiday and Joao’s Safari – Seeing the World through Transplant Tourism', pp55-92 in *Body and Society* 17.


Sen, Amartya (1979) 'Equality of What?', pp197-220 in *The Tanner Lectures on Human Values*


Suri, Sandhya (2005) I for India, Fandango and YLE Teema and ZDF/Arte an Zero West GmbH.


