

CHAPTER 9

Race, Populism, and Immigration: The Transactional Partiality Problem

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From this day forward, a new vision will govern our land. From this moment on, it's going to be America First. Every decision on trade, on taxes, on immigration, on foreign affairs, will be made to benefit American workers and American families We will seek friendship and goodwill with the nations of the world – but we do so with the understanding that it is the right of all nations to put their own interests first. (Donald Trump, Inaugural Address, 20 January 2017)

The aim is to create, here in Britain, a really hostile environment for illegal immigrants. (Theresa May, Hostile Environment Policy Speech, 2012)

Introduction

Within the dominant liberal-egalitarian political philosophy of the West we find two competing ideologies. Firstly, with roots as deep as Kant,¹ the ideal of

¹ Kant's supreme principle of the doctrine of virtue enjoins us to act in accordance with a maxim of ends that it can be a universal law for everyone to have: Kant, I.

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impartiality requires us to recognise that every individual and their competing personal viewpoints matters equally, and that we should therefore treat others in a way which respects that moral equality. By contrast, theories of partiality defend the idea that people may permissibly favour the satisfaction of their own concerns, desires, and interests over those of others.² This includes both the individual self-interest we are naturally disposed to, and the special preferences we often hold for the success of the lives of our family, friends, and loved ones over the lives of others. The central question which has motivated philosophical investigations of partiality theory over the years is not what do we all *desire* for the flourishing of our own lives, but rather what is *justifiable* for us to demand in pursuance of our own flourishing, given that everyone possesses an equal moral claim to flourish? On what moral grounds are people justified in showing special care and attention towards the success of their own lives over the lives of others if, in truth, we all matter equally?

This old philosophical debate is being tested anew in contemporary immigration policy in both the US and the UK. The inexorable pull of self-interest is clearly on display in one of ex-President Trump's most controversial immigration policies—the notorious Proclamation No. 9645;³ and again in the implementation and broadening of the 'Hostile Environment' and 'No Recourse to Public Funds' (NRPF)⁴ immigration policies under Theresa May's reign as UK Home Secretary (2010–2016) and subsequent Prime Ministership (2016–2019) respectively. Trump's Executive Order effectively instituted a travel ban against several Muslim-majority countries by barring immigrants from Iran,

(1996 [1797]). *The metaphysics of morals*. Edited by M. Gregor. Cambridge: Cambridge University Press. pp. 395–396.

² For debates on the moral permissibility of partial concern for the self, see Cottingham, J. (1991). The ethics of self-concern. *Ethics*, 101(4): 798–817; Scheffler, S. (2010). Morality and reasonable partiality. In: Feltham, B. and Cottingham, J. (eds.) *Partiality and impartiality: Morality, special relationships, and the wider world*, Oxford: Oxford University Press. pp. 98–130; and Nagel, T. (1991). *Equality and partiality*. Oxford: Oxford University Press.

³ <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/presidential-proclamation9645.html>. It should be noted that this Proclamation has now been rescinded under President Biden in Proclamation 10141 'Ending Discriminatory Bans on Entry to the United States', 20 January 2021.

⁴ Section 115 of the Immigration and Asylum Act 1999 states that a person will have 'no recourse to public funds' if they are 'subject to immigration control'. This means they have no legal entitlement to the majority of welfare benefits, including income support, housing benefits, and a range of other allowances and tax credits. This legal status includes those lawfully seeking asylum, and persists until they have obtained permanent settled status either by being granted Indefinite Leave to Remain or by becoming naturalised citizens. The Citizens Advice Bureau currently estimates that 1.4 million individuals are affected by this legal status, leaving them at risk and vulnerable within many different poverty indicators.

Libya, Syria, Somalia, and Yemen without individually granted Executive exception, while the UK's 'Hostile Environment' immigration policy portfolio, implemented largely via the Immigration Acts of 2014⁵ and 2016,⁶ aimed to make life so untenable for any immigrant without paperwork evidence of their Indefinite Right To Remain that they would voluntarily choose to leave. This included enacting measures blocking such immigrants from using vital NHS services, working, or renting property.⁷

These policies have not remained unchallenged by the law in either jurisdiction. In the 2018 case of *Trump v Hawaii and the Muslim Association of Hawaii* (*Trump v Hawaii and the Muslim Association of Hawaii* 585 US 2018) Hawaii's judicial challenge to Proclamation 9645 lost to a 5-4 majority in the US Supreme Court on the basis that the policy passed the 'rational review' basis for Constitutionality (*Trump v Hawaii* 32). In other words, the predominantly Muslim travel ban was upheld as Constitutional by the highest court in the US jurisdiction on the basis that it was 'plausibly related' to a legitimate government interest in protecting national security under the Immigration and Nationality Act (8 U.S.C. §1182 *Inadmissible Aliens*). Specifically, the US Supreme Court found that the travel ban was a lawful exercise of the broad discretion granted to the Presidency under §1182(f) of the United States Code to 'suspend the entry of aliens into the United States on the grounds of national security' (*Trump v Hawaii* 33–38). Nor did the Proclamation violate Section 1152(a)(1) (A) U.S.C., which bars discrimination based on nationality in the issuance of visas. The Court held that while that section prohibits discrimination, it did not limit a President's authority to block the entry of nationals of certain countries (*Trump v Hawaii* 21). Furthermore, the Supreme Court Justices observed that 'while that word "suspend" often connotes only a temporary deferral of normal immigration status, the President was not bound to prescribe in advance a fixed end date for his entry restriction' (*Trump v Hawaii* 13).

This decision was far from unanimous or uncontroversial. Justice Sonia Sotomayor filed a dissenting opinion in which Justice Ruth Bader Ginsburg joined, criticising the majority for 'ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens' (*Trump v Hawaii*, Sotomayor, J Dissenting, 1). Justice Sotomayor found that the majority had incorrectly chosen to apply the rational basis standard of scrutiny and that, in fact, a higher level of scrutiny

⁵ Immigration Act 2014, 14 July 2014.

⁶ Immigration Act 2016, 12 May 2016.

⁷ Joint Council for the Welfare of Immigrants. (2020). The hostile environment explained. www.jcwi.org.uk/the-hostile-environment-explained; Kirkup, J. and Winnett, R. (2012). Theresa May interview: We're going to give illegal migrants a really hostile reception. *The Telegraph*, 25 May. <https://www.telegraph.co.uk/news/0/theresa-may-interview-going-give-illegal-migrants-really-hostile/>

was required in this case (*ibid.*: 15). She further noted that even if the rational basis test had been appropriately applied here, the Proclamation should still have failed on the grounds that, in the President's own words, it was originally and continues to be 'a total and complete shutdown of Muslims entering the United States' (*ibid.*: 4). Nonetheless, in the wake of this decision, on 31 January 2020, the then President Trump doubled down on his immigration restrictions with Proclamation No. 9983, which added to the existing travel restrictions under Proclamation 9645 by further limiting the issuance of Immigrant Visas, including Diversity Visas, to nationals of Myanmar (Burma), Eritrea, Iran, Kyrgyzstan, Libya, Nigeria, North Korea, Somalia, Sudan, Syria, Tanzania, Venezuela, Yemen, and Sudan.⁸

What makes the US Supreme Court's decision in *Trump v Hawaii* especially remarkable is the extent to which the legal interpretation of the highest court in the US jurisdiction departed from both academic and popular opinion on the fundamental question of what constitutes discrimination. As a spokesman from the Urban Justice Centre in New York said of Proclamation 9645, 'the borders are closing and they're closing fastest on people of color and the Muslim religion' (Siddiqui 2018), while the director of the American Civil Liberties Union immigrants' rights project gave a statement saying, 'this ruling will go down in history as one of the Supreme Court's great failures ... [they] are not upholding this country's most basic principles of freedom and equality' (McCarthy & Siddiqui 2018). Indeed, wider academic opinion seemed not merely strongly opposed to Proclamation 9645, but genuinely horrified by the failure of US Constitutional law to redress this seemingly straightforward violation of its own 14th Amendment non-discrimination guarantee. So where in truth does the fault, if any, lie? Did US constitutional law fundamentally fail to guarantee equal protection for some of the most vulnerable racial and religious minorities in the world? Or is the President's latitude to restrict immigration in the interests of national security under S1182(f) USC a reasonable exercise of political partiality at the national level, towards American citizens?

Returning to the UK immigration context, in May 2018 the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Professor E. Tendayi Achiume, found that the 'Hostile Environment' affected not just 'irregular' or illegal immigrants, or those simply without the correct documentation, but was in fact significantly overbroad, also catching 'racial and ethnic minority individuals with regular immigration status' including many who are 'British citizens and have been

⁸ <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/presidential-proclamation-archive/presidential-proclamation9645.html?wcmode=disabled>. It should be noted that both Proclamations 9645 and 9983 have now been rescinded under President Biden's Proclamation 10141. See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-ending-discriminatory-bans-on-entry-to-the-united-states/>

entitled to this citizenship as far back as the colonial era' (Achiume 2018: paras. 33–34, 37). She concluded that the policies were 'destroying the lives and livelihoods' of ethnic minority communities, including people with rightful citizenship status, and those who had been long-term settled residents in the country: 'where a strategy for immigration enforcement is so overbroad, and foreseeably results in the exclusion, discrimination, and subordination of groups and individuals on the basis of their race, ethnicity or related status,' she wrote, it 'violates international human rights law' (ibid.).⁹

Further to this, the UK's 'Hostile Environment' directly resulted in the national shame of the Windrush scandal, in which Caribbean migrants arriving in the UK between 1948 and 1973 as Commonwealth citizens with full rights to settle, live, and work in the UK without restriction, and with a statutory guarantee of a permanent right of abode in the UK enshrined in the Immigration Act 1971,¹⁰ were denied these rights due to the lack of paperwork explicitly recognising these entitlements. As the 'Hostile Environment' really began to bite between 2012 and 2018, many of these original Windrush generation (named after the ship HMT Empire Windrush which docked in June 1948, bringing workers from Jamaica, Trinidad and Tobago, and other islands, to help fill post-war UK labour shortages)¹¹ found they lacked now-essential paperwork after the Home Office had destroyed thousands of their landing cards and other vital records of their arrival.¹² By 2018, many of the original Windrush generation, now aged 60 and over, were told they must 'prove they had lived in the UK since before 1973, and must show at least one official document from every year they had lived here'¹³ – an impossible task, which then resulted in hundreds of distressing wrongful detentions, deportations and the irreparable disruptions of lives. The crisis eventually became the subject of an independent report published in March 2020, the 'Windrush Lessons Learned Review', which, although it shied away from declaring a full finding of institutional racism on the part of the Home Office, did conclude that 'these failings demonstrate an institutional ignorance and thoughtlessness towards the issue of race and the history of the Windrush generation' (Williams 2020).

Thus, parallel questions arise in both the US and UK contemporary immigration context: to what extent is it justifiable, or merely morally permissible

⁹ See also Luh, Shu Shin. (2018). We will continue to challenge the 'hostile environment' policy, whatever name the government gives it. *Legal Action Group*. <https://www.lag.org.uk/article/205494/we-will-continue-to-challenge-the-‘hostile-environment’-policy--whatever-name-the-government-gives-it>

¹⁰ Immigration Act 1971, 28 October 1971.

¹¹ BBC. (2021). What is Windrush and who are the Windrush generation? 27 July. <https://www.bbc.co.uk/news/uk-43782241>

¹² <https://www.jcwi.org.uk/the-hostile-environment-explained>

¹³ Joint Council for the Welfare of Immigrants. (2020). The hostile environment explained. www.jcwi.org.uk/the-hostile-environment-explained

perhaps, for nation States to grossly restrict immigration entitlements in pursuit of their own national self-interest before the moral duties we owe to others from outside our own political community? In this chapter, I will argue that while there are good reasons for recognising the moral legitimacy of partial reasons for action at the individual level, this does not necessarily endorse, nor logically imply, that the same is true of strongly self-preferencing, partial behaviour at the political level. The moral account of partiality at the individual level does not extend to justify nationally protectionist policies at the political level, nor does it legitimise a State in abdicating its moral responsibilities towards vulnerable non-citizens, for example lawful asylum seekers and refugees, in preference for protecting its own national interests first. As such, this leads to significant conclusions about the moral justifiability of a State acting to prioritise their citizens' interests above those of non-citizens. This is both a useful refinement of earlier work on the justifiability of partiality in general, and a clarifying moment regarding the many legal and moral objections to the rise of nationalistic and protectionist immigration policies in contemporary US and UK foreign policy.

The Kantian Nature of Partial Value

In previous work I have argued for a Kantian account of the moral legitimacy of a certain degree of partial reasons for action at the individual level (Smith 2014). It may be helpful to repeat the basics of this argument here. Kant writes of the supreme principle of the doctrine of virtue:

A human being is an end for himself as well as for others, and it is not enough that he is not authorized to use either himself or others merely as means ... it is in itself his duty to make the human being as such his end ... Humanity in one's person is the object of respect which he can demand from every other man, but which he must also not forfeit. Hence he can and should value himself ... And this self-esteem is a duty of man to himself. (Kant 1797, 6:395–396)

On this grounding, I support a particular conception of partiality theory which justifies individuals acting in self-preferencing ways on the grounds that taking seriously the equal objective importance of all lives (as the doctrine of impartiality requires us to do) also therefore requires us to recognise the objective importance of our *own* lives. As such, we have an ethical responsibility to live well for ourselves (see also Dworkin 2011: 202–210). Our ability to form, revise, and pursue our own individual conceptions of the good life is an intrinsic part of what it means to take seriously the impartial ideal that every individual life is of objective equal moral worth, because our own subjectivity is an irreducible part of that objectivity. I suggest that once this is recognised, the philosophical

issue is no longer *whether* the moral legitimacy of partiality can be justified within an egalitarian moral theory which respects the equal moral worth of all, but rather to recognise that it is actually *required* by it. The next question in this line of inquiry, which this chapter seeks to engage with, is to what extent might it be permissible to show the kind of national self-interest US Proclamations 9645/9983 or the UK's 'Hostile Environment' endorse at the political or State level? Could this Kantian account of the moral legitimacy of partiality at the individual level also ground and justify a State's right to favour its own citizens by excluding others through immigration restrictions?

Such a suggestion faces immediate issues, for it is far from self-evident that a theory of partiality at the individual level could simply be scaled up to the national or State level for a number of reasons, not least the heightened moral imperative on political governance to display a good faith interpretation of impartiality towards the governed at the public level. A further problem is that, without additional qualifications, this Kantian vision of the moral value in individual partiality could become a rather unwieldy tool, and especially so at the political level. Johann Frick has argued recently that it is generally accepted in the political realm that States, 'as the primary organs of our collective self-governance, frequently pursue policies that strongly favour the interests of citizens over those of foreigners, including restricting immigration on grounds of legitimate partiality towards the national self-interest' (Frick 2020: 1). Indeed, he says, this is often viewed not merely as morally permissible behaviour but, in fact, as morally *required* of States to give some measure of priority to the interests of citizens over non-citizens (ibid.: 1–2). However, interestingly, Frick goes on to suggest that while it may be morally permissible for a State to show a degree of priority towards its own citizens over foreigners in the same way that one might give priority towards one's friends and family under a Dworkinian conception of associative obligations (Dworkin 1986), it is not permissible if that very partiality towards the national 'in-group' is practised under conditions where eligibility for membership of that in-group is unjustly restricted in the first place. He writes:

If we illicitly exclude a person from the in-group then we cannot licitly appeal to the fact of that exclusion, and that they do not stand in associative relationships with us, to justify giving their interests less priority in a way which disadvantages them. (Frick 2020: 9)

This would seem to suggest certain moral limitations on a State's right to enact restrictive immigration policies in furtherance of their own citizen's interests—but just what are these moral constraints that should operate on the interplay of self-preferencing reasons for action when issues of foreign and immigration policy are at stake? Are there any particular moral limitations on the value of partiality that would prevent, for example, the kind of national or political self-interest of the US Immigration Proclamations 9645/9983 or the UK's 'Hostile

Environment', and if so what are they? Or does the Kantian account of individual partiality actually pave the way for the abdication of our moral responsibilities towards others, particularly those immigrants who are most vulnerable and excluded from full citizenship and even mainstream society, that these kinds of policies seem to endorse?

*Utilitarian theory and the heightened justificatory burden
for political policies*

The Kantian account of individual partiality outlined above is a characteristically anti-utilitarian one. Utilitarianism, as a moral theory of the right, advocates for a flat equalitarian landscape in which nothing and no one has a stronger moral claim over one's reasons for action unless and until it directly speaks to the issue of maximising utility overall. So, for example, utilitarian principles of justice would indict you for saving your last £5 to buy your own child the best nutritious meal possible instead of using that money to buy a quick and cheap warm meal for a homeless person in the street. Clearly, by utilitarian calculations, the Pareto-efficiencies in utility gained by giving the homeless person their only hot meal of the day significantly outweigh those of feeding your own child again when they have already been eating like royalty at nursery all day. Against that view, the Kantian account of individual partiality constructs a moral recognition of the fact that while we do indeed have strong impartial moral duties to aid the homeless person with a hot meal, the utilitarian theory nevertheless makes a fundamental moral mistake by failing to recognise the special moral character of the parent-child relationship. Part of this argument includes recognition of the fact that it is natural to us as humans to favour feeding our own children before we feed others; but that naturalism by itself is not, and cannot be, the whole story. Rather, it is that nourishing and cherishing special partial relationships, for example with our children, should be recognised as part of what makes human life valuable—and not just for the particular individual involved.

This argument, like other partialist theories before it,¹⁴ suggests that that caring more for oneself and one's loved ones is not necessarily or automatically morally illegitimate, as utilitarianism leads us to conclude. On the contrary, it is part of what leading a human life not only often does but indeed *should* involve, as a matter of ideal. Partial and self-preferencing reasons for action add value to a human life; nourishing a child is part of what gives life meaning, purpose, and value, through that special relationship. These kinds of self-interested ends do therefore have a degree of moral legitimacy at the individual level. Significantly, however, this can only be so provided that our self-preferencing

¹⁴ See Cottingham 1991; Scheffler 2010; and Nagel 1991.

reasons for action are developed and interpreted in accordance with our objective moral duties towards others first, as lexical priority.¹⁵ So to subscribe to wholly impartialist moral theories like utilitarianism, which deny the moral permissibility of engaging in partial relationships or pursuing partial ends in one's life, is to miss (or rather to mistake) the larger part of what moral theory is supposed to achieve: a blueprint for how real human beings, as opposed to self-less, utilitarian automatons, ought best live their lives (Cottingham 1991: 801).

Regarding the theoretical possibility of justifiable partiality at the national, State, or political level, the methodological shortcomings of utilitarian theory are again instructive. In *A Theory of Justice* Rawls (1971) argues that utilitarianism is a teleological theory which prioritises maximising utility due to a unique feature: a methodological extension from the manner of rational choice appropriate for an individual to that of a theory of social choice. In other words, utilitarian principles of justice hold that since it is rational for an individual to seek to maximise her overall utility by trading off alternative options and opting for the best overall net gain, it must therefore also be rational for society to trade off individual interests and concerns against each other at the public level as well. Rawls writes:

The most natural way of arriving at utilitarianism is to adopt for society as a whole the principle of rational choice for one man ... the [utilitarian] impartial spectator is the perfectly rational individual who identifies with and experiences the desires of others as if these desires were his own. In this way he ascertains the intensity of these desires and assigns them their appropriate weight in the one system of desire the satisfaction of which the ideal legislator then tries to maximize by adjusting the rules of the social system ... The correct decision is essentially a question of efficient administration. This view of social cooperation is the consequence of extending to society the principle of choice for one man, and then, to make this extension work, conflating all persons into one through the imaginative acts of the impartial spectator. (Rawls 1971: 26–27)

The most important part of Rawls's analysis to draw out here is what I call his 'extension critique'. This is the claim that because utilitarian theory extends the method of rational choice from the individual to the social, by subjecting discrete individuals' interests to a social aggregate in pursuit of maximising utility overall, it therefore fails to take adequate moral account of the due plurality and distinctness of individuals and their separate moral identities. In other words, the utilitarian extension of the methodology of rational choice from that of an individual to the social *illegitimately* distributes utility gains and losses: while utility trade-offs might be acceptable if rationalised and borne within

¹⁵ This is a significant qualification of the general partialist thesis.

one individual life, they become illegitimate when distributed across different individual lives. This is why Rawls concludes as he does: that 'utilitarianism does not take seriously the [moral] distinction between persons' (ibid.: 27).

Thus, we have learned a more detailed lesson about the moral permissibility or otherwise of self-preferencing immigration policies at the State level: while it may be understandable that an individual might go about making purely self-regarding decisions by seeking to maximise their net utility gain overall, it is a mistake of rational practical deliberation to replicate that social aggregating, utility-maximising methodology at the public level. This is because by doing so we ascribe utility losses across different individual lives *without full justification*. In other words, to borrow Scanlon's (1998) famous phrase: we 'owe each other' an independent justification for public decisions which is accessible to all who must live with the consequences of that decision, especially when it affects the success or failure of different individuals' morally discrete and equal claims. Utilitarianism cannot provide this kind of independent justification to those individuals who stand to lose the satisfaction of their claims as a result of the decisions it endorses, because its very methodology views discrete individual interests as commensurable—and, therefore, ultimately overridable. It preserves no methodology for ensuring each morally discrete individual claim is rightfully treated with equal moral respect. So, when judging a particular political decision, we should look first for the reasons we can offer those who must live with that decision in order to justify it. Or, to put it another way, we should first ask ourselves: what reasons there are that undermine its justifiability to all those who stand to be affected by it? In what ways might a particular political policy be unjustifiable to those who must live with the consequences of it?

Along these contractualist lines, Nagel (1991) argues that the ideal of political legitimacy requires that political principles are those no one could reasonably reject. 'If such a hypothetical unanimity were discoverable,' Nagel writes, 'it would explain the rightness of the answer' (ibid.: 34–36). This would mean that political decisions ought to be justified in ways the individuals who are expected to comply with them could not reasonably reject. If an individual might reasonably reject a particular political policy it would, in Nagel's view, demonstrate a lack of political legitimacy. On this account of political morality, political decisions which simply reflect a commensurate aggregate of individual interests alone do not, and indeed cannot, provide that kind of legitimacy. This is because we can only arrive at legitimate political decisions if, and when, we take seriously our heightened explanatory and justificatory burdens towards those who will have to live under the decisions we make, and who stand to lose out if that decision fails to pay due regard to the equal moral claims of all. Crucially, when we do fail in this way to offer fully justified political decisions, and when States do fail to treat those subject to their decisions with a good faith account of moral equality regarding their personal interests, they not only lose political legitimacy but, significantly, to borrow Dworkin's phraseology,

they also fail to generate the kind of associative obligations within that political community that are necessary in order to justifiably require citizens to obey the laws they put out (Dworkin 1986: 188).

This study of utilitarianism's moral failings is able to demonstrate two important conclusions regarding the value of partiality at both the individual and the political level. Firstly, that it is a mistake of individual moral theory to rule out permissible partiality at the individual level because doing so forces an unnatural, inhuman, and virtue-less flat moral landscape upon us, which misses the special value partial ends and relationships have for human lives. Secondly, it would be a mistake of social and political theory to think we can simply reflect and replicate an aggregate sum of discrete individual partial interests at the general or State level, because doing so ignores the heightened burden on political governance to explain and justify political decisions to all those who stand to lose out under them. Returning to the context of the US and UK immigration policy examples discussed above, this theoretical grounding suggests an identical problem of practical deliberation. While it might be cognitively understandable that individual citizens concerned with protecting national jobs, economic development, or national security may personally favour restricting immigration in order to increase *their* chances of interest satisfaction, in fact, to simply replicate and aggregate those subjective partial interests at the political level by enacting restrictive immigration policies, without further effort at independent justification of those policies to those who stand to lose the right to enter, or to claim the international legal right to asylum, makes the very extension mistake Rawls warned us of.¹⁶ It does not take individual moral claims to equal respect seriously, and fails to establish the requisite independent justification necessary to command political legitimacy.

Transactional Partiality Theory

The philosophical issues of partiality at the political level may be described as a problem of transactional partiality which, I suggest, paints a particular account of the democratic voting process which problematises the suggestion that individual voters may rightfully cast their ballots in predominantly self-interested ways. The hypothesis that individuals do, in fact, vote in self-interested ways is not new, and has been criticised on a number of grounds in prior work (Shabman & Stephenson 1994). Nonetheless, it is generally true that individual endorsement of particular political policies is frequently inextricable from individual self-interest. For example, someone with a personal investment in a particular conception of national sovereignty might justify their vote for Brexit on

¹⁶ This argument identifies a similar need for independent justification of immigration restrictions as Frick (2020) argued for on the basis of illicit discrimination in granting 'in-group' membership.

these grounds; a CEO of an international company is more likely to favour voting for a candidate promising vast corporate tax cuts; and someone who lacks comprehensive medical insurance because of pre-existing medical conditions might foreseeably be inclined to vote for legislative reform promising a regulated private medical insurance market. Indeed, some theorists have claimed that self-interest and ‘external preferences’ about the success or failure of others’ interests are inevitably inextricably linked, since no voting methodology is able to separate out preferences regarding the assignment of social goods, opportunities, and resources to others from preferences regarding one’s own allocation of these goods.¹⁷

My suggested theory of transactional partiality proposes that when particular demographic groups vote for strongly nationalistic or protectionist political candidates on the basis of their own strongly held partial interests, for example in protecting jobs, domestic economic development, or national security, they then become willing to engage in a political transaction. In return for political policies which replicate their subjective partial concerns, they become willing to countenance (or perhaps overlook as necessary ‘collateral damage’) serious discriminatory practices and racial injustices which result from those nationalist and protectionist political policies—including those they might not otherwise have condoned were it not for the fact that their own deeply held partial interests are felt to be at stake. For example, according to the Gallup Polls, political supporters of the Trump presidency since his successful election campaign in 2016 appear to fall into several main categories of subjective partial interest-holders: tax-cut advocates; social conservatives; anti-immigrationists; religious evangelicals; supporters of an absolutist interpretation of Second Amendment rights for unrestricted gun ownership; and libertarian advocates of State deregulation of business and economic interests (Newport 2018).¹⁸ According to data gathered by the Voter Support Group in June 2017, ‘voters who held views of immigrants, Muslims, minorities, and feminist women as the undeserving “other” were particularly susceptible to Trump’s appeal in both the Primaries and the 2016 General Election’ (Griffin & Teixeira 2017). Furthermore, the Views of the Electorate Research (VOTER) survey found that Trump did very well among white individuals without a four-year college degree, who tended to be dependent on low-skilled jobs, and were particularly vulnerable to structural economic change and relatively poor physical health and high mortality

¹⁷ For a theoretical exploration of the inextricable relationship between self-interest and other-regarding preferences about distributive justice in social goods, see Dworkin 1977: 234.

¹⁸ There is obviously the possibility of a substantial degree of overlap amongst these groups, as well as some outliers who are harder, if not impossible, to categorise in any general way. Extensively evaluating empirical data on this is not within the primary scope of this chapter, and so these categories here should be taken as speculative only, for the purposes of exploring the main theoretical arguments.

(*ibid.*). By contrast, white voters with four years or more of college level education were a relative point of weakness for Trump (*ibid.*). Even more interestingly, Trump supporters stood out in the survey for displaying a preference for making immigration harder: 52% compared to 38% among supporters of other candidates in the Republican Primaries, and 51% compared to 32% among Clinton voters in the 2016 General Election (*ibid.*). Trump Primary supporters also registered the highest level of agreement that rising diversity would put too many demands on government services. The survey also included questions regarding perceptions of short-term economic pessimism: one asked respondents whether they and their family were better off, worse off or about the same financially as they were a year previously; the other asked them whether they thought the economy was getting better or worse. On both these measures, Trump supporters were notably pessimistic (*ibid.*). Long-term pessimism was also widespread among Trump supporters, with two thirds of Trump primary supporters agreeing that 'life today for people like them is worse than it was 50 years ago', compared to about half of other candidates' supporters (*ibid.*).

Overall, the study concluded that 'the broad picture that emerges from these data is that Trump supporters were distinctively hostile to Muslims, opposed to immigration, critical of modern feminism, worried about rising diversity, and unenthusiastic about free trade agreements' (*ibid.*). This is true of Trump supporters across both the Republican Primaries and the General Election. Furthermore, it concluded that 'this descriptive portrait of political support for Trump is consistent with an influential explanation for Trump's appeal particularly among white working-class voters in communities that have seen better days ... Such a toxic interaction between economic frustration and cultural reaction would be consistent with the historical record on the rise of right populisms' (*ibid.*). Thus, against this background of latent racial and cultural resentment in the US electorate, my theory of transactional partiality suggests that, for example, in order to secure the satisfaction of their partial interests in having stronger border controls, voters from the anti-immigration demographic become increasingly willing to overlook or tolerate the enforcement of hard-line 'zero-tolerance' immigration policies, regardless of the discriminatory effect on vulnerable racial minorities that such policies have or, indeed, the destruction of the traditional 'family unit' that social conservatives frequently vaunt (Monico et al. 2019).

One such zero-tolerance immigration policy was announced by the US Department of Justice on 7 May 2018. According to this policy, all migrants who crossed the US-Mexico border without permission, including those seeking asylum, were detained and criminally charged. Prior to the Trump 2016 administration, it was common practice to parole families together, as a unit, to await their immigration cases (Southern Poverty Law Center 2022). However, the Southern Poverty Law Center reports that no exceptions were made to this new policy for parents crossing the US border with young children (*ibid.*). Undocumented asylum seekers were imprisoned and any accompanying chil-

dren under the age of 18 were handed over to the Department of Health and Human Services, which held them either in Office of Refugee Resettlement shelters or other care arrangements across the country (ibid.). Hundreds of these children, including infants and toddlers, were under the age of five (ibid.).

Tragically, parents have since been unable to track or reunite with their children because the US government failed to create a formal tracking system coordinated among the agencies involved. As a result, reliable figures for the number of children separated under the policy are, at the time of writing, unknown. However, by 11 October 2018 Amnesty International had published a report citing US Customs and Border Patrol data indicating that 6,022 ‘family units’ had been separated between 19 April 2018 and 15 August 2018 (Amnesty International 2018). By 18 January 2020 the *Los Angeles Times* was reporting that the official government count of children separated from their parents or guardians under the policy had reached 4,368 (Davis 2020). Reports also emerged of cases of paternal suicide in jail, after suffering a nervous breakdown upon being separated from family at the border (Southern Poverty Law Center 2022), and that children were being kept in a series of cages made of metal fencing (ibid.). The *Associated Press* reported that overhead lighting in the detention centres stayed on 24 hours a day, that children were sleeping under ‘large foil sheets’, older children were forced to change younger children’s diapers, and that children had no books or toys (Merchant 2018). On 22 August 2019 *The New York Times* reported that detained migrant children held in a Texas facility had not been able to bathe since crossing the border, that their clothes were soiled, and they lacked access to soap, toothbrushes, or toothpaste (Dickerson 2019). Even more shocking, on 27 February 2019 came reports that the Federal Government had received more than 4,500 complaints of sexual abuse of immigrant children held in detention between October 2014 and July 2018. Of the 1,303 cases considered to be the gravest, 178 included accusations of sexual assault by adult staff, including rape, fondling, kissing and watching children shower (Haag 2019).

While the policy has now thankfully come to an official end, after ex-President Trump signed an Executive Order declaring that it was now the policy of his Administration ‘to maintain family unity, including by detaining alien families together where appropriate’,¹⁹ the period during its operation marks the darkest stain on the US humanitarian record. As lawyers from the NYU Reiss Center on Law and Security have argued, the criminalisation of those seeking asylum is not only deeply unethical but actually unlawful under the UN Convention and Protocol Relating to the Status of Refugees (UNCSR 51)—even if those seeking asylum enter the country illegally (Satterthwaite & Riddell

¹⁹ Executive Order, affording Congress an opportunity to address family separation, 20 June 2018, <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation>, although reports allege that it was still in unofficial practice for a lot longer.

2018). Furthermore, the separation of children from their families may cause such mental and emotional trauma as to amount to torture (*ibid.*), contravening US obligations under the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT 1984).

It speaks to the depth of anti-immigration feeling in the voting electorate that such extreme policies as this were even countenanced, let alone put into practice and tolerated for so long; and yet it appears to be the result of a political bargain struck between individual voters and their elected representatives. As long as the Trump Administration could guarantee its demographic supporters the satisfaction of their core partial interests through strongly protectionist immigration policies, their political allegiance remained with him. Evidence from the Gallup Polls seems to corroborate this theory of transactional partiality, showing that if the Trump Administration had failed to secure his voters' partial interests, for example, as it had failed to do regarding his 2016 campaign promise to repeal the previous Administration's Patient Protection and Affordable Care Act 2010 ('Obamacare') which overhauled national medical insurance coverage, those demographic voter groups who cast their ballots on the grounds of that particular partial interest basis are far more likely than others to become swing voters in retaliation—highlighting the highly transactional and partial nature of voting preferences in practice.

Objections

It may be objected here that perhaps there is nothing particularly wrong with the idea of transactional partiality. After all, is it not the point of the democratic process to vote for what we individually think best, and to find the 'best fit' political candidate to take action in response to our concerns? What exactly is the flaw in a political transaction between individual partial interest holders and their elected representatives who promise to act on behalf of those interests? To this objection it may be responded that the problem identified by the transactional partiality theory appears at two levels: at the public and at the individual level. Firstly, at the public level, and as previously noted, simply replicating an aggregate of individual partial, self-interested views in a political policy, without subjecting it to the heightened explanatory and justificatory burden that political decisions need to meet in order to command legitimacy, is to make the mistake of practical deliberation that Rawls highlighted in his extension critique of utilitarianism. The democratic political process must find a way of justifying the political decisions it puts out to the individuals who are expected to comply with them. It must go further, and do more work, than merely reflect a simple commensurate aggregate of individual interests alone. While individual citizens who may be concerned with protecting national security might favour restricting immigration in the way hard-line, zero-tolerance policies do, simply to replicate and reflect their subjective partial interest

at the political level, without independent justification of it to those who lost their legal right to claim asylum, or to those who are still unable to find their separated children, makes the very extension mistake of practical deliberation Rawls warned us of.

The second flaw in any objection against my theory of transactional partiality on the grounds that this is simply how voters are entitled to cast their ballots, identified at the individual level, is that this kind of objection misses the crucial civic responsibility we hold when we exercise our democratic right to cast our ballots. While there are many different theories of voting ethics, it is a common thread amongst them that part of our civic duty is to identify relevant political issues, gather political information, and to deliberate responsibly about that information towards a decision point when we exercise our right to vote (Brennan 2016a). Democratic theory positions individual citizens as partial authors of the laws their elected representatives put out. Accordingly, every citizen has a duty to vote in ‘publicly-spirited ways’ (ibid.). It has been argued that: ‘To cast a ... ballot is to *identify oneself* in a morally significant way with the ... policies that the organization espouses’ (ibid.). This, it is suggested, is grounds for holding voters to a form of associative moral liability for the moral failings of their chosen political representative, regardless of whether that representative ever actually succeeds to political office, or whether the particular voting individual’s exercise of their ballot had any appreciable material effect on the overall election result (Brennan & Lomasky 1993: 186).

It has been suggested that this account of individual voter’s civic responsibility is analogous to that of a doctor’s responsibility to their patients, or a parent’s responsibility towards their children (Brennan 2016b). In much the same way that doctors and parents have a responsibility to promote their patient’s or children’s interests, and to do so in a sufficiently informed and rational way, it may be said that voters owe similar duties of care to the governed. Voters should certainly vote for what they perceive individually to be the best alternative, but they should also make their political decisions in a reasonably informed and rational way (ibid.). Altruism should therefore also play a vital part in this decision-making process. The choices voters make have a significant impact on political outcomes, and can help determine matters of peace and war, life and death, prosperity and poverty (ibid.). For this reason, voting can be said to be a ‘morally charged activity’, bringing with it a degree of moral responsibility for the effect one’s voting choices have on others under the jurisdiction of those elected (Brennan 2011). As Professor Jason Brennan argues, ‘to the extent it is wrong for me to express sincere support for illiberal, reckless, or bad ideas, it would also be wrong for me to vote for candidates who support those ideas’ (Brennan 2016a). As such, it does therefore make the kind of morally flawed bargain my theory of transactional partiality highlights when individuals exercise their democratic right to vote in pursuance of strongly self-interested grounds without further serious effort to recognise that by taking part in the democratic process, and by actively participating as co-authors of the law, they are choosing a political

distribution of social and public goods not just for themselves but for everyone, including dissenting minorities, children, non-voters, resident aliens, and non-resident individuals coming from other countries who stand to be affected by their decisions (ibid.). To take one's civic responsibility in voting seriously is to cast one's ballot in a way that communicates a reasoned choice about how best the State should work for all, not just for oneself.

A second potential objection might mistake my position with that of cosmopolitanism. To deal with this objection immediately, it should be noted here that my argument so far does not adopt a fully blown cosmopolitanist position, nor does it deny that there is a legitimate space for States to act in their citizens' best interests, or that States owe their own citizens a special duty of care. Cosmopolitanism, in brief, is derived from the Greek word *kosmopolitēs* (meaning 'citizen of the world'), and broadly encompasses the idea that all human beings should be considered citizens of a single world community, and as such are entitled to equal consideration and respect regardless of their physical location or political jurisdiction. In its more stringent forms, cosmopolitanism might be interpreted as calling for the denial of the existence of special obligations within national or local political organisations (Kleingeld & Brown 2019). My theory of transactional partiality does not endorse such a position, and fully allows that States, as leaders of political communities, may be said to owe their own citizens a species of special obligation to promote their interests. This special obligation comes with certain moral parameters, however, to moderate State protectionism with due regard for the ideals of impartiality and moral equality. Thus, while this chapter should not be taken as a call for full cosmopolitanism, it does put forward an argument for better understanding the nature and extent of permissible national partiality in a world with vast inequalities and growing global injustices. There is a significant difference between populist political policies adopting a utilitarian methodology to maximising their voters' individual preference-satisfaction, and true majoritarian democracy which operates above a baseline of fundamental protections and guarantees for universal individual rights. Populist political policies, which aim to appease the most interests of 'ordinary voters' without subjecting the expression of those interests to the heightened justificatory burden, cannot be said to have met this basic requirement of political morality.

A third potential objection to my theory of transactional partiality might proceed along the lines that the Trump Administration has indeed met the heightened justificatory burden for immigration Proclamations 9645/9983. National security, it might be said, is an entirely justifiable reason for restricting immigration from certain States, perhaps even those 'pre-identified as deficient in information-sharing practices' by the Department of Homeland Security, and on that basis already known to present a national security concern (*Trump v Hawaii* 4). Indeed, the rationality of such measures forms the key part of the judicial Constitutionality review of the Supreme Court, which found that the immigration Proclamation was indeed 'plausibly related' to a legitimate

government interest in protecting national security under the Immigration and Nationality Act (*Trump v Hawaii* 32). One's view on the success of this objection will necessarily depend on one's prior view of conflicts of rights, a full investigation of which is beyond the current scope of this chapter. However, in brief, it can be observed that there is a putative conflict here between one legal entity's right to restrict immigration and to protect national security and several other legal entities' rights to find safe refuge from violence and persecution; to non-discrimination in the administration of immigration and asylum status; to access to family members within the immigration system; and to the timely legal reviewability of Executive decisions to limit immigration. In essence, one legal entity appears to have a right to dictate that others can no longer enter the country, while other legal entities appear to have a right that entitles them to claim an assortment of entry rights, and both entitlements appear to be in fatal conflict with one another. One could argue that prioritising national security in the way ex-President Trump did, without a legal right of review, is a violation of legal proportionality requirements. Or one might suggest that legislating to keep certain ethnic, religious, or national demographic groups out of the country wholesale is ultimately indefensible, given State legal obligations of equal protection before the law and the international legal right to claim asylum and have one's family life respected. Ultimately, one's answer to these questions will inevitably depend not just on the legal interpretation of US and international immigration law, human rights guarantees, and the correct degree of Constitutional oversight of the exercise of Executive discretion, but also a prior theory of the conflicts of rights—and unfortunately it is not within the scope of this chapter to posit a fully legalised analysis of Proclamations 9645/9983. Rather, the purpose of this chapter's argument is to use the Supreme Court litigation over their Constitutionality to highlight the crucial and important extra work that is being done by the heightened justificatory burden for the legitimacy of political policies.

If it really was necessary to restrict immigration in the way Proclamations 9645/9983 did in order to protect US national security, then our heightened explanatory and justificatory burden will have been successfully met. But the precise benefit of the heightened justification burden to explain and defend this kind of policy fully to those who stand to lose under it, is that it requires more from our legal system than the US Supreme Court's rational review test provided. It requires more than just a declaration from the Executive that a Muslim travel ban policy furthers a legitimate State interest in national security, or that a particular State has been blacklisted for substandard information sharing. Rather, the full heightened justificatory burden proposed here requires proof not only that national security is a 'genuine' interest legitimately at stake here, and that restricting immigration is rationally and proportionately linked to it, but further that such measures can be fully justified to those who stand to lose the fundamental human right to claim asylum under it. What measures have been taken to mitigate or compensate for the loss of the invaluable and universal fundamental legal right to claim asylum to those imprisoned and separated from their families at the border? Such mitigation and compensation measures

might entail, for example, some inquiry into the veracity and effectiveness of the Executive's national security claims; perhaps a mandatory end date to the travel suspension, rendering it truly temporary rather than indefinite; perhaps a full right to timely legal review and appeal of Executive refusals to make exceptions to the suspension in individual immigration cases; perhaps even a proportionality assessment, which would take into account more than just the originating nation State as the decisive factor in refusing immigration status; or perhaps the decriminalisation of those seeking asylum, even where they have crossed the border unlawfully; and the preservice of the international legal right to seek asylum as a family unit. Any number of further measures like these might go some way towards mitigating the effect of hard-line immigration policies like Proclamations 9645/9983, and thereby make a better case that such political measures have met their heightened justificatory burden and do indeed command the political legitimacy they claim.

Conclusion

This chapter has argued for a Kantian account of individual partiality, on the grounds that human beings are ends for themselves as well as for others, and as such we owe ourselves a particular ethical duty of self-respect which permits us to act in certain self-interested ways. The study of the moral failings of utilitarian theory was then used to show that not only is it a mistake to rule out the idea of permissible partiality at the individual level, but further that we cannot simply aggregate and reflect a sum of individual partial preferences at the political level. This theoretical grounding was used to identify what I have called a 'heightened justificatory burden' on political governance to justify political policies to all who stand to be affected by them. The ability to provide justifying reasons for a particular political policy which render it reasonable and unrejectable by those who stand to lose out under it, is a function of basic political legitimacy. Populist political policies, which commit to a sort of political transaction with subjective individual voters by seeking to maximise their partial, self-interested concerns in return for their committed political support, makes a fundamental mistake of practical moral deliberation. It wrongly extends the utilitarian methodology of rational choice from the individual level to the public, and by doing so illegitimately, and ultimately unjustifiably, ascribes utility losses across individual lives, thereby failing to generate fully justified political decisions. Lacking this degree of political legitimacy, populist laws and policies fail to generate political obligations on the part of citizens to obey them.

This chapter has also argued that just because partiality may be justified as having a certain degree of moral legitimacy at the individual level, as a matter of personal moral theory, the same is not necessarily true for States and political institutions. This is because the latter have no parallel reasons to individual moral agents regarding the special value in self-respect, or the ethical responsibility to live well by forming, revising, and pursuing individual conceptions

of the good. By contrast, their value is political legitimacy, and their standing obligation is to improve and build upon that legitimacy. Thus, while the moral legitimacy in partiality at the individual level still stands, it requires careful further nuancing before it becomes too unwieldy a tool at the public level. Specifically, it is imperative that we recognise that the value in individual partiality does not necessarily or logically imply, endorse, or tolerate political populism at the national level.

This argument is not a call for cosmopolitanism, and it does not deny that there is a legitimate space for States to act in their citizens' best interests, nor does it deny that States owe their citizens a special duty of care. This remit to promote the interests of a State's own citizens does, however, come with distinct moral parameters to moderate national protectionism with due regard for the ideal of impartiality, equal moral respect, and global justice. Thus, while on the one hand it may indeed be not merely permissible but, in fact, morally required of individuals to entertain their own partial reasons for action, on the other hand it is far from straightforward for States or political institutions to do the same at the public level. The salient difference is of the requisite moral parameters for practical deliberation at the personal as opposed to the political level, and that is a lesson we should have learned from Rawls nearly 40 years ago.

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