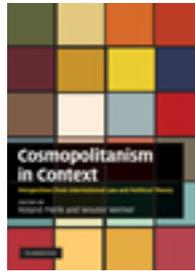


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### Cosmopolitanism in Context

Perspectives from International Law and Political Theory

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### Chapter

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## A distributive approach to migration law: or the convergence of communitarianism, libertarianism, and the status quo

THOMAS SPIJKERBOER

In this chapter, I will argue that the debate about cosmopolitanism vs. sovereignty can only be considered as a relevant debate if the wrong questions are asked – at least in my field of expertise, migration law. The question which is at the heart of this debate in migration law (under which circumstances should aliens be admitted) is a false one. In my view, the issue is not the just distribution of membership. Instead, the debate is mostly about the position of aliens who are in the community already, and whom the community prefers to consider as non-members, or even as non-entities. If it would be acknowledged that the aliens whose position is being discussed are already in the community, it would become clear that their position can either be debated under the rubric of admission, or under the rubric of redistribution. The obsessive way in which the redistribution option is ignored suggests that the (ideological, material, and/or other) stakes for debating migration under the admission rubric are high.

I will start out by sketching very briefly two poles of the debate, namely the communitarians who defend State sovereignty, and the libertarians who defend a basic human right of international migration. At first sight, the libertarians seem to be the real cosmopolitans, because they criticize migration control because it leads to a situation in which the interests of foreigners carry less weight than those of nationals. However, as soon as the libertarians are confronted with concrete border control issues, their initial moral position is compromised by the institutional setting.<sup>1</sup> On the other hand, the communitarians defend state sovereignty on the basis of the equal value of persons, i.e. on a

<sup>1</sup> It might be added that not all self-identified cosmopolitans share Carens' idea that a consistent application of liberal political theories to migration requires open borders, see the contribution of Valades in this volume.

central tenet of moral cosmopolitanism. In other words: both positions are fundamentally unstable.

I will then address two cases. The first one at first sight is about a quintessential admission issue, being the control of European borders. I will sketch the issue, and see what communitarians and libertarians might have to say about it. The second issue is more easily reconstructed as a redistribution issue, being the position of migrant domestic workers. I will again see what the two different approaches have to say about that.

In a final and tentative part, I will argue that the two approaches end up in the same place. They both legitimate existing immigration schemes. The suggestion that there is a principled debate between the two schools while, upon closer look, there barely is one contributes to this legitimation. I will then argue that immigration issues can also be considered as issues of redistribution within communities, and that this change of register substantially affects issues of legitimacy. In short: in the debate as it stands, we are asking the wrong question, and for a reason. The legitimacy of migration controls rests upon a particular construction of the debate.

## The debate<sup>2</sup>

### *Communitarianism: Michael Walzer*<sup>3</sup>

In many discussions about migration control from a political philosophy perspective, one chapter from Walzer's *Spheres of Justice* is taken as a starting point.<sup>4</sup> The attraction of his approach lies partly in its context. His view is part of a larger whole, promoting a progressive liberal agenda. Another part of the attraction lies in Walzer's style. He clearly indicates his hesitations and the limits of his theory. This combination

<sup>2</sup> See for another overview, focussing on asylum, Matthew J. Gibney, *The Ethics and Politics of Asylum. Liberal Democracy and the Response to Refugees*, (Cambridge: Cambridge University Press, 2004).

<sup>3</sup> Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, (New York: Basic Books, 1983). I have also relied on discussions of Walzer in J.H.M.M. Tholen, *Vreemdelingenbeleid en Rechtvaardigheid? [Justice in Migration Policy?]* Diss. KU Nijmegen (1997), esp. ch. 2; Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens*, (Cambridge: Cambridge University Press, 2004), ch. 3; Linda Bosniak, *The Citizen and the Alien. Dilemma's of Contemporary Membership*, (Princeton: Princeton University Press), esp. ch. 3.

<sup>4</sup> Walzer, *Spheres of Justice*, pp. 31–63.

of form and content gives him an eminently reasonable persona which is hard to resist.

Nevertheless, his approach is pretty straightforward. Walzer starts from the presumption that the political community, aka the State, is the appropriate framework for realizing a just society. He finds this presumption justified because redistribution presupposes a community within which redistribution takes place, and a community requires boundaries. If such boundaries are not maintained by States, they will be created by local communities. It is preferable that boundaries are put in place at the national level, because that increases freedom of movement compared to the local alternative, and because this allows for a wider community. A community is only a community if its members share a way of life, if it is a community of character. Because the maintenance of such a community requires closure, in principle States are free to control immigration in ways they think fit to maintain the community's nature. There is a limited exception in the case of forced migrants. Especially when they have already reached the territory of a State, they should not be returned to places where they face serious danger (except if they turn up in such numbers that admission would endanger the community). Walzer admits that he does not know why forced migrants who have not yet reached the territory of a country should not be protected. That does not prevent him, however, from concluding that "the right to restrain the flow remains a feature of communal self-determination."<sup>5</sup> The ethical principle he has identified "can only modify and not transform admission policies rooted in a particular community's understanding of itself." Walzer does address the question whether, if the differences in wealth between countries are enormous, communities may be required to admit necessitous aliens because these communities have more wealth than they reasonably need. He argues that if there were an obligation to admit aliens on that ground, communal wealth would be subject to infinite drainage and would, in fact, cease to be communal. Therefore, the obligation he is willing to admit is one to export superfluous wealth, not to limit the right of the wealthy community to decide about admission.

However, once aliens have been admitted, they should be treated as members of the community, and should be granted full rights. Immigrants should be at least potential citizens, and they should be able to become citizens after a relatively short period. Walzer finds it

<sup>5</sup> Walzer, *Spheres of Justice*, p. 51.

unacceptable that people are subject to political decisions in which they cannot participate. Walzer does not clearly address the issue of to what extent an interim status (between alien and citizen) is acceptable. He rejects the notion, but at the same time allows for it because he understands not every migrant can immediately be granted citizenship status.

Walzer's arguments have been debated extensively. Two main lines of critique can be distinguished. First, cosmopolitans have criticized the presumption that justice requires bounded communities. This presumption is a manoeuvre comparable to Rawls's claim that his construction of justice can only function within national States. But in fact, these critics hold, national States can be (and are) instrumental in an unjust distribution of resources among States.<sup>6</sup> A second line of critique accepts that communities are necessary for organized solidarity, but criticizes the thick notion of community Walzer uses. Less substantive, and hence more open notions would lead to different outcomes (Kymlicka<sup>7</sup>).

In our context, however, the most problematic aspect of Walzer's theory is that he stops short of the crucial issue. His picture of some communities possessing infinite wealth, while many other communities face destitution is an accurate description of the background of today's mass migration. He argues that wealthy communities should export wealth. But what if they don't? Walzer develops a plausible approach for a non-existing situation, being a situation in which wealth is distributed among countries in a more or less justifiable way. That is not a situation which actually exists.

Another problem is that Walzer presumes that Western countries are based on Keynesian presumptions. His approach is plausible if one of the main aims of States is the equitable internal distribution of wealth among its members. However, many argue that around 1980 (ironically, the period in which Walzer wrote his book, which was published in 1983) this ceased to be the dominant paradigm. Since then, States have increasingly sought to make their economies competitive compared to others, often at the expense of internal redistribution (e.g. Sassen<sup>8</sup>). If the communities within which redistribution takes place

<sup>6</sup> E.g. Peter Singer and Renata Singer, "The Ethics of Refugee Policy," in *Open Borders? Closed Societies? The Ethical and Political Issues*, ed. Mark Gibney (Westwood: Greenwood Press, 1988).

<sup>7</sup> For example Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995).

<sup>8</sup> Saskia Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

are not predominantly or not only national, then Walzer's arguments lose much of their force.

*Libertarianism: Joseph Carens*

In his plea for open borders, Joseph Carens has responded to the main objections to free migration.<sup>9</sup> The first, based on the property rights of settled citizens, is incorrect because the property approach is based on the *individual* right to property. Restrictions on free migration have to be based on the property right of citizens as a collective; as individuals the regulation of migration restricts them in their property rights because in many cases they cannot sell their property to foreigners, they cannot enter into labor contracts, and so on. Individual property cannot legitimate collective protection. Second, a Rawlsian position cannot justify migration controls, because if we did not know our place of birth, or the particular society we are members of, we would agree that there should be no restrictions on migration (because we may fall in love with a foreigner, seek better opportunities abroad, and so on). However, thirdly, if we move from the ideal world of Rawlsian theory to the non-ideal world, Rawlsian ethics may allow for restrictions if there is a reasonable expectation that unlimited migration would damage public order. The exclusion of people on the basis of national security may be justified, according to Carens, but it should be applied restrictively. Also, restrictions on migration may be justified in order to limit the number of immigrants. Free migration might lead to rich countries being overwhelmed by migrants from poor countries. Carens states that this justifies some restriction, but writes (without any indication of the basis of that statement) that this would surely imply a much less restrictive policy than the one currently in force.

In fact, Carens accepts the two crucial arguments for restricting immigration: national security; and economic well-being, including presumably the protection of national welfare arrangements. He seems to find existing migration-control regimes illegitimate, but this seems to be first and foremost an empirical issue. National security should not be used expansively; the economic well-being of Western countries requires less restrictions than the ones that presently apply.

<sup>9</sup> Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," *Review of Politics* 49 (1987), pp. 251–73.

Carens' approach is vulnerable to two criticisms. First, he presents his critique of existing legitimations of immigration restrictions as a matter of principle. In fact he agrees on the principles but has some reservations about the empirical arguments for the present arrangements. Second, because he does not acknowledge his objections as empirical ones, he does not deign to give empirical arguments. Thus, his critique is unfounded in the sense that he does not provide us with arguments to follow him in his conclusions. Although his tone is quite radical, he accepts the grounds on which immigration is restricted. He thinks they do not apply, but does not explain why. However, the context of his theory becomes clearer when one realises that the focus of his argument seems to be on migration between rich countries. He has argued that the situation for Wisconsin and Illinois (no migration restrictions) is comparable to the situation between the United States and Canada (where there are migration restrictions).<sup>10</sup>

### Two cases

After this outline of the two dominant normative approaches to the legitimacy of migration control, I want to look at two concrete instances of migration control, and investigate how communitarianism and universalism relate to them. The two cases are radically different, and intentionally so. The first case concerns the rising number of fatalities resulting from increased border control in Europe. Can these human costs of border control be justified by either approach? The second case concerns the position of domestic workers in Dutch migration law. Migration law weakens their positions vis-à-vis their employers; can this be justified by either approach?

#### *The human costs of border control*<sup>11</sup>

Traveling to Europe without the explicit consent of European migration authorities has become increasingly difficult for people who do not have the nationality of a limited number of countries, such as the US,

<sup>10</sup> Joseph H. Carens, "Migration and Morality: A Liberal Egalitarian Perspective," in *Free Movement: Ethical Issues in the Transnational Migration of People and Money*, ed. B. Barry and R. Goodin (New York: Harvester Wheatsheaf, 1992), as quoted in Gibney, *The Ethics and Politics of Asylum*, p. 74.

<sup>11</sup> See more extensively my "The Human Costs of Border Control," *European Journal of Migration and Law*, 9 (2007), pp. 127–39. I will refrain from footnoting this paragraph;

Canada, New Zealand, Australia, and Japan. The introduction of visa obligations for a large number of countries, combined with immigration controls before departure (typically by airline personnel), has made irregular long-distance travel by air difficult, and therefore expensive. This leaves two options: travel by land, which is the obvious route for those coming from the former Soviet Union and the Near East; and travel by sea, which is the obvious route for those coming from Africa. Migrants from places farther away, like Asia, may travel to Africa or the Near East first, and then use the land or sea route for crossing the European border. I will focus on the sea route, because of the availability of data (which are very hard to get by).

When the Schengen Implementation Agreement entered into force in 1995, aliens could circulate more or less freely among the participating European Community states. Border controls between these countries were abolished (and later reintroduced to some extent, but that is another story). The Schengen states felt vulnerable as a result of the abolition of internal border controls, and put more emphasis on controls at their joint external borders. Initially, this was aimed primarily at preventing air travel. At the time, airlines had little incentives to prevent irregular migrants from boarding their planes, because their gains (price of tickets) were larger than the costs (potential of being forced to transport an alien back to the place of embarkation). The Schengen Implementation Agreement contained an obligation for Schengen states to introduce carrier sanctions – penalties for airlines who transported an undocumented migrant to a Schengen state. After some false starts, the practice now seems to be rather effective. Airlines are obliged to make photocopies of the documents of all passengers on so-called “risk flights,” i.e. flights on which normally a substantial number of undocumented migrants arrive. Upon arrival, they must submit these photocopies. If they can’t, they have to pay substantial fines. This has created

all sources are from this article, unless indicated otherwise. See for more empirical data on the issue Jørgen Carling, “Migration Control and Migrant Fatalities at the Spanish–African Borders,” *International Migration Review* 41 (2007), pp. 316–43; Derek Lutterbeck, “Policing Migration in the Mediterranean,” *Mediterranean Politics* 11 (2006), pp. 59–82. The issue has been discussed during a hearing of the European Parliament on 3 July 2007, for which the materials were my briefing paper “The Human Costs of Border Control,” IPOL/C/LIBE/FWC/2005–32-SC1; Consiglio Italiano per I Refugiati: *CIR Report Regarding Recent Search and Rescue Operations in the Mediterranean*; and Commission of the European Communities: *Study on the International Law Instruments in Relation to Illegal Immigration by Sea*, Brussels, 15 May 2007, SEC (2007) 691. Available at: [www.europarl.europa.eu/hearings/default\\_en.htm](http://www.europarl.europa.eu/hearings/default_en.htm), (accessed 3 July 2007).

an incentive to check whether passengers on such flights actually have travel documents; and to prevent passengers from being smuggled into an airplane by circumventing the regular check-in counter.

When the things which could reasonably be undertaken in this field had been done, European states turned their attention to land and sea borders. The land borders are difficult to guard, in part because they are so long, and in part because there is so much small-scale trans-border traffic. A considerable amount of measures has been taken (x-rays of freight trucks; night glasses at places where people walk or swim across borders at night).

Another area of attention was sea travel. Statistics about interceptions suggest that, when border authorities intensify their controls at particular points, migrants shift their travel routes to other places. One example is Italy. In 1998 and 1999, a large number of Kosovars fled to Italy by crossing the Adriatic Sea. Among the migrants who were intercepted, however, there were large numbers of other nationalities as well. In 1999, more than half of them were not from Kosovo. Controls at sea were intensified, and the number of intercepted persons fell, even if the data are corrected for the Kosovo migration flow (which more or less ceased after the NATO intervention in 1999). However, the number of people who were intercepted near Sicily rose, suggesting that they shifted from one route to another. The same phenomenon can be observed in Spain. The number of interceptions in the Strait of Gibraltar peaked in 2000; those attempting to enter Spain via its enclaves in Morocco then peaked in 2004, after which the number of migrants arriving at the Canary Islands peaked in 2006. Because of increased controls by Moroccan coast guards, departure from Morocco became increasingly difficult. Migrants took longer sea routes, sailing from Mauritania and Senegal. Studies show that, whereas earlier people intercepted on sea routes from Africa originated from Africa, in more recent years this route has also been used by Asian migrants (from Pakistan, Bangladesh, India).

Border control has not only been intensified, it is also changing in character. Controls are increasingly high tech and military in nature. For example, the Spanish Integrated System for External Patrols (SIVE) was started in 2002, and was completed in 2008. There were to be 25 detection stations, 71 patrol boats, and 13 mobile radars, along the coasts of Southern Spain and Fuerteventura.

Nothing in the available data suggest that the increasing border controls have the effect of scaring off potential migrants. Intensification of

Table 1: *Documented deaths at the European Borders 1993–2006*

1993	57
1994	123
1995	179
1996	457
1997	361
1998	390
1999	516
2000	652
2001	444
2002	820
2003	1309
2004	898
2005	769
2006*	207
total	7182

\* until 3 May 2006

Source: United, Amsterdam 2006, available at: [www.unitedagainstracism.org](http://www.unitedagainstracism.org)

border controls does not seem to lead to less migrants, but to them circumventing border controls by the use of ever more dangerous routes. On the basis of an analysis of the scarce and incomplete data about the number of people who die at the European borders, I conclude that more and more people do not survive the risks they take. The data collected by the Amsterdam based European NGO United are the most comprehensive available. This registry is based on press clippings, and is fairly detailed both on the number of persons, their identity, and the sources of the registry. It also includes, for example, people who have committed suicide pending deportation, who are not of interest in the present context. However, it is the most precise set of data available, and it is very precise as to the identity of the persons concerned, the way in which they died, dates, and the sources. Also, the overwhelming majority of the persons on this list did die while trying to cross the European borders. It should be noted that this list is based on press reports. As a result, the larger incidents (such as the 58 people found dead in a truck in Dover in June 2000, or the 283 people who drowned near Malta on Christmas day 1996) will be reported in the list; but for

the smaller incidents, press reporting is all but systematic, and depends on the space available on a given day for *faits divers*.

How incomplete these data are, is shown by comparison to other data. For 2003, United reports 1,309 deaths for all of Europe. An Italian study reports 411 deaths in the Sicily Channel alone. For 2004, these numbers are 898 for all of Europe, and 280 for the Sicily Channel. Both sources are based on the same methodology, namely press reports. This means that there is a considerable dark number, which is hard to quantify however. Nonetheless, the trend is clear. If we stick to the data of United, we can conclude that, before the Schengen Implementation Agreement entered into force, border deaths documented by United were below 200, in the first years after they were below 500, and now they are below 1,000 with the exception of 2003. Once more: this is the trend in deaths reported by United. Although it seems plausible that the trend in actual deaths is the same, the level at which the actual numbers are is unclear. The actual numbers may be over half more, but it cannot be excluded that they may be double, triple or quadruple of the United numbers.

I feel that reporting these facts is a decent thing to do in itself. They are barely known, and merit attention just for their own sake. The least we can do as European citizens is to take notice of the people who are dying for the sake of the control of our borders. So although I mention them out of naked moralism, they are also part of my overall argument. The first question I will raise in this respect is to see in which way the two approaches outlined above impact legal reasoning, and whether even apart from legalism they can justify border controls. The second is to see whether European states are accountable for these deaths under human rights instruments, in particular the European Convention on Human Rights.

### *Legitimacy*

How can one assess the European border policies from the communitarian and libertarian perspectives, respectively? From both perspectives, it seems obvious that the number of fatalities has to be as low as possible. However, the problem is precisely that effective border control seems to lead to an increasing number of fatalities. If States would be under an obligation to do whatever they can to reduce the number of fatalities, they should abandon border controls. Hence, the crucial question is whether these border controls in themselves are legitimate.

From a communitarian perspective, border controls are legitimate if they serve to preserve the way of life of the countries involved. Hence, ordinary migrants can legitimately be refused entry. The admission of refugees can be an obligation, unless their numbers threaten the existence of the settled community. The problem is that border controls do not, and cannot make this kind of distinction. The distinction between forced and “voluntary” migration can be made when a person applies for admission; it cannot be made when a person tries to evade the application process by irregular border crossing. In principle, this solves the issue: these migrants evade the procedure in which a legitimate decision can be taken, and therefore they can be subjected to policies which are necessary to prevent this.<sup>12</sup> I can think of one way to modify this conclusion. One may argue that there is no realistic alternative for migrants, whether they are forced migrants or not, to present themselves to the authorities of Western States in order to apply for asylum. The refugee crises in former Yugoslavia apart,<sup>13</sup> forced migrants do not originate from countries adjacent to Western States. By means of visa obligations, carrier sanctions, and other policy measures, States have made it increasingly difficult for forced migrants to reach the West. If forced migrants turn to Western consulates in order to apply for asylum in poor countries to which they have fled, they will be turned away because they already have found protection in those countries. Hence, only irregular means for reaching Europe are available, and it cannot be held against migrants that they use them. However, I do not think this train of thought can affect the communitarian legitimation for border control. If migrants already reside in a third country, they do not need admission to a Western country in order to escape persecution. Their reasons for wanting to migrate will be comparable, from a moral point of view, to those of “voluntary” migrants. Therefore, it is legitimate that they face effective border control if they try to evade the legitimate migration restrictions they encounter at Western embassies.

How would the libertarian perspective address the issue? Unlike the communitarian, this perspective does not start with the idea that

<sup>12</sup> A peculiar thing is that in one passage, Walzer seems to presume that migrants present themselves at our borders, *Spheres of Justice*, p. 51. This suggests that he is not aware of the intricacies of (forced) migration. Because of the unclarity of this passage, I will not try to construct a position on the basis of it.

<sup>13</sup> See on the border policies of European States in that context Nils Coleman, “Non-Refoulement Revised: Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law,” *European Journal of Migration and Law* 5, no. 1 (2003), pp. 23–68.

migration control is legitimate and then enquires as to its limitations, but begins with the notion that border control is illegitimate, and then enquires where it might be legitimate. However, from there on the reasoning is similar to that in the communitarian view. The legitimacy of border control depends on the legitimacy of the migration restrictions it seeks to enforce. European border-control policies are justified by economic well-being, in particular by the aim to maintain the systems of solidarity which require some form of closure of the settled community. Whether the particular level of migration restrictions can be justified in this way is a matter of legitimate debate, but the principle of border control can be justified in this way.

To sum up: the different perspectives of sovereignty (communitarianism) and cosmopolitanism (libertarianism in its Carensian form) have different starting points because one presumes the legitimacy of the protection of settled communities, while the other presumes the legitimacy of international migration. They also lead to different rhetoric, because communitarianism is widely accepted, while libertarianism seems to be more radical. But, at least in the versions of Carens and Walzer, they both end up legitimating the on-the-ground phenomenon of effective border control, including its increasing death toll.

### *Legality*

Border control does not constitute a wrongful act because, in itself, it is a legitimate activity. Under specific circumstances, States may be responsible for the consequences of acts which are not contrary to international law. Specifically, this can be the case if States undertake “an activity which involves a risk of causing significant harm.”<sup>14</sup> However, I think the causal relation between border controls and border deaths is not direct enough to allow us to say that they *cause* the fatalities. There are too many other contributing factors (the behavior of the migrants themselves, the behavior of smugglers, the weather) to allow for holding the States involved responsible.

A parallel that is often drawn is that of the Iron Curtain. Between 1961 and 1989, many people lost their lives when attempting to cross the border between East and West Germany because of anti-personnel mines or automatic fire systems or after being shot at by East German

<sup>14</sup> International Law Commission, U.N. Doc. nr. A/CN.4/L.686, 26 May 2006.

border guards. While the official death toll according to the Federal Republic of Germany was 264, other sources quote a number as high as 938. On account of this, East German leaders were convicted as indirect principals to intentional homicide.<sup>15</sup> Analogizing this to the fatalities at the EU's borders, however, is flawed. Anti-personnel mines and automatic fire systems, as well as orders to shoot at fugitives (*Schiessbefehl*) were conscious, affirmative measures that directly led to the deaths of people who tried to cross the border between the two Germanys. There is a distinction to be made between measures that directly result in fatalities and tightening border controls, the effect of the latter being that migrants will use travel routes that are riskier.

The above parallel does suggest, however, that States can be held responsible for fatalities that occur as a direct consequence of particular border control measures, such as shooting at migrants who attempt to cross the border or placing landmines at the border.<sup>16</sup> Because of this, the authority to shoot at irregular migrants should be cancelled, and the minefields between Greece and Turkey should be dismantled. One could argue that this parallel is mistaken. East Germany killed when people tried to leave their country; that is an established human right. Greek minefields kill when people try to enter the country, which is not a human right. The parallel I draw indeed is another one. I argue that, regardless of whether border controls are used to prevent exit or entry, they may not be enforced by using lethal force. Rather than using lethal force, an enforcement deficit should be accepted.

<sup>15</sup> European Court of Human Rights, 22 March 2001, application nr. 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v. Germany*.

<sup>16</sup> As indicated above, this is not the focus of the present paper. It should be noted, however, that such fatalities occur regularly. According to press reports quoted by United, migrants were shot on 29 March 1995 (Greece), 20 August 1995 (France), 5 September 1996 (Spain), 17 August 1998 (Italy), 10 May 2000 (Turkey, nine people), 15 November 2000 (Turkey), 3 December 2000 (Spain), 16 July 2001 (Turkey), 12 January 2002 (Turkey, two people), March 2002 (Macedonia, seven people), 22 May 2002 (Turkey), 19 June 2002 (Turkey, two people), 23 September 2003 (Greece), 3 October 2003 (Spain), 11 April 2004 (Spain), 17 April 2004 (Slovakia, two people), 10 September 2005 (Greece), 19 September 2005 (Turkey) and 29 September 2005 (Morocco, five people). Migrants died in the minefields between Turkey and Greece on 13 September 1995 (four people), 30 June 1996 (two people), 15 September 1997 (three people), 16 April 1998 (two people), 26 August 1999 (three people), 31 October 1999 (five people), 1 May 2000, 29 August 2000, 1 September 2000 (two people), 29 March 2001 (two people), 21 May 2001, 22 May 2001 (two people), 30 September 2001, 23 December 2001 (four people), 20 March 2002 (two people), 27 March 2002, 28 August 2002, 4 January 2003 (two people), March 2003, 29 September 2003 (seven people), 5 August 2004, 14 November 2004 (three people), 4 April 2005 (two people), 29 May 2005 (two people) and 9 December 2005 (two people).

The fact that States generally cannot be held legally responsible, however, is not the end of the story. Consider the European Court of Human Rights' decision in *Osman*, which involved Article 2(1) of the European Convention on Human Rights. According to Article 2(1):

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

*Osman* involved a stalker who had harassed a family for a number of years and ended up killing a father and wounding a son. The Court held:

The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. The United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.<sup>17</sup>

As in the border control cases, *Osman* did not involve a causal relationship between failing to take preventive measures to protect individuals' lives and those individuals' deaths. The obligation of a State to take appropriate steps to safeguard lives is not conditioned on a causal relationship between the State's actions and someone's death. Rather, the

<sup>17</sup> European Court of Human Rights, 28 October 1998, appl. nr. 23452/94 *Osman v. United Kingdom*. Comp. ECtHR 1 March 2005, appl. nr. 69869/01; *Bône v. France*; ECtHR 9 June 1998; *L.C.B. v. United Kingdom*, 23413/94; ECtHR 24 October 2002; *Mastromatteo v. Italy*, 37703/97; ECtHR 14 March 2002; *Edwards v. United Kingdom*, 46477/99; ECtHR 17 January 2002; *Calvelli & Ciglio v. Italy*, 32967/96; ECtHR 21 March 2002; *Nitecki v. Poland*, 65653/01; ECtHR 7 June 2005; *Kilinc v. Turkey*, 40145/98; ECtHR 30 November 2004; *Öneryildiz v. Turkey*, 48939/99.

obligation is triggered by the State's knowledge that a particular life is at risk and that same State's ability to do something about it.

Increases in the number of fatalities of irregular migrants are related to the tightening of border controls. Thus, these fatalities are a foreseeable consequence of this policy. Although this does not lead to State responsibility, it does trigger a State's positive obligation to take preventive measures to safeguard the lives of those who are put at risk. In the context of border control measures, because States' policies foreseeably increase the loss of lives of irregular migrants, they are obliged to exercise their border controls in such a way that loss of lives is minimized. One can doubt whether States have lived up to that obligation.

From a legal perspective, States arguably fail to live up to a positive obligation to minimize the number of fatalities which are the indirect consequence of their border policies. It requires a slightly innovative (but by no means revolutionary) means of interpretation to argue this. For the rest, border control in itself is not a wrongful act, and therefore its collateral damage is not a violation of a fundamental right of its victims.

### Domestic work

Domestic work used to be done by housewives and daughters. The extent to which this is still the case is only surprising for those who take the tales of women's emancipation being finished in the West at face value. However, as women increasingly enter the market of paid labor in Western countries, families increasingly rely on domestic workers. Whereas, at least in the Netherlands, child care is arranged for mostly either informally (granny), outside the home (nurseries, after school child care centers), or by classical babysitting arrangements; and the preparation of food is outsourced in some form (take away, delivery, prefab food); laundry and housecleaning are performed increasingly by domestic workers. These are predominantly live-out domestic workers, who work for half a day or one day per week in one household, and combine several 'addresses' in order to make a living.

Of course, live-ins also exist, as do the specific kind of live-ins called au pairs. A live-in is someone with a labor relation with the employer. The specific nature of the live-in is that she resides in her employer's home. This has considerable effects on the relation (in terms of pay in kind, overwork, and the like). An au pair is a young person who stays abroad for a while (usually something like a year) in order to get to

know the world better; in order to allow her to do this, she stays with a family, and in return contributes to running the household (she is a temporary member of the family).

Domestic work is predominantly done either in the informal economy, or by migrant women. In the informal economy, migrant women (both with and without residence rights) work along with autochthone women and young people. In the formal economy of domestic work, women who have migrated with the aim of becoming a domestic worker have a prominent place. I will focus on migrant women performing domestic work, both in the formal and in the informal economy.

It is possible for domestic workers to get a working permit, and hence a residence permit. However, in practice this requires they have a full-time job with one single employer. This kind of full-time domestic work job in the formal economy is expensive for the employer even if the work is done for a low wage, hence this is a rare phenomenon, mostly restricted to diplomats and expats. If the work is full time, the domestic worker often is a live-in. Both the live-in nature of the relationship, as well as the fact that the worker's residence permit is dependent on the continued existence of the labor relation, increases the dependency which exists between employer and employee. The position of live-ins is notoriously bad in terms of labor standards.<sup>18</sup>

The other formal possibility is work as an au pair. Under Dutch law, the relationship between the "guest family" and the au pair is not considered to be a labor relation. The au pair lives with the family in the framework of cultural exchange. The residence of the au pair has a predominantly cultural character. The "guest family" provides facilities, in exchange for which the au pair does "light domestic work." This means the au pair should not work more than eight hours per day, for not more than 30 hours per week, and should have at least two days off per week. S/he should not have sole responsibility for domestic chores to the exclusion of members of the "guest family." The au pair should be between 18 and 26; unmarried and not have responsibility for children of her own. The residence permit will be granted for at most one year. The au pair can exchange one "guest family" for another, but will have to request for a change of her residence permit.<sup>19</sup> Thus, au pairs are tied

<sup>18</sup> See *inter alinea* Guy Mundlak, "Gender, migration and class: why are 'live-in' domestic workers not compensated for overtimes," in *Women and Immigration Law. New Variations on Classical Feminist Themes*, ed. Sarah van Walsum and Thomas Spijkerboer (London: Routledge-Cavendish, 2007), pp. 123–41.

<sup>19</sup> Vreemdelingenbesluit (Aliens Decree) 2000, art. 3.43, Vreemdelingendecret (Aliens Circular) 2000, B7/2.

to their employer because in practice it is very hard to change “guest families.” They get little pay (only pocket money is allowed) and after expiry of their year they will have to choose between either returning home, or staying without residence rights.

Undocumented women (and men) who perform domestic work will do so often at different addresses. Therefore, their dependency vis-à-vis individual employers will be less than that of au pairs for example. They can risk a conflict with an employer without risking their income (they will have other addresses), and without risking their residence right (their employer is not necessarily aware of their identity and address; familiarity with a mobile phone number will do). However, they will have to put up with low pay, no job security, and no social security (except the social security provided by their own networks, such as colleagues, churches, family). In respect to undocumented domestic workers, enforcement of migrant labor law is often formally absent.<sup>20</sup> It is debatable whether the grant of a residence right would improve their position vis-à-vis their employers. Most likely, they would have a position comparable to that of others on the informal domestic labor market, which is not radically different from theirs.<sup>21</sup> However, a residence right would give them alternatives to working in the informal economy. This could enable them to choose other work, and to get an education to the extent that the welfare system allows them to. It is unclear to me why temping agencies do not hire domestic workers full-time who are then contracted out to families for a few hours per week; this might allow migrant women to do domestic work with a residence permit, provided no labor supply is available on the domestic market. Possibly, the formal nature of such an arrangement makes the option unattractive to employers, because the informal market is cheaper and more flexible.

Summing up: au pairs and full-time domestic workers get a residence right which ties them to their employer (aka “guest family”). This weakens their position vis-à-vis their employers. This creates a situation in which unpaid overwork, underpayment, harassment, etc. are more likely to occur than in more horizontal relationships. In the case of au pairs, immigration law facilitates a situation which, if the

<sup>20</sup> Dennis Broeders, *Breaking Down Anonymity. Digital Surveillance on Irregular Migrants in Germany and the Netherlands* (dissertation Erasmus University Rotterdam, 2009), p. 89–90.

<sup>21</sup> I am not aware of studies comparing incomes of domestic workers along lines of gender, age, ethnicity, and residence rights.

persons concerned were not migrant women, would be considered exploitative (compare doing “light industrial work” for a maximum of thirty hours per week, with at least two days off in exchange for housing and pocket money). Undocumented domestic workers are part of an informal economy where low pay, lack of social security, and lack of job security are part of the game. It may well be that they are not more vulnerable to this than their documented colleagues. However, their undocumented status makes them more vulnerable to the risks such a situation involves. They do not have access to social security, and they will have trouble in choosing options other than the informal economy.

### *Legitimacy*

What would communitarians have to say about the position of domestic workers? The position of documented migrant domestic workers at first sight seems unacceptable from Walzer’s perspective. Their residence position makes them vulnerable in their labor relations, and that is precisely the kind of transfer of inequality which Walzer opposes. A weak residence right may be acceptable, but it should not influence the migrant’s position in other spheres – and that is precisely what happens here. However, labor migrants are bound to their labor for a reason. The live-in character of the work implies not only labor standards under the level acceptable in European countries, but also implies a serious limitation of private life. Live-ins cannot bring their own families into the home; the attraction of live-ins is their availability, so working time will be counted in evenings off, not in hours to be available. Workers who have better options will take them, so if one grants a residence right for the purpose of domestic work, tying the worker to the employment is necessary. In this way, the alternative for domestic workers is not a job in Europe, but a life in the country of origin. Immigration law is crucial in manipulating the exit option.<sup>22</sup> If this would not happen, there would not be enough live-in domestic workers, which would affect the attractiveness of European countries for international business. It is conceivable that under those circumstances, the interests of the national community would prevail over the interests of the domestic workers.

<sup>22</sup> Cf. Audrey Macklin “Public Entrance/Private Member,” in *Privatization, Law, and the Challenge to Feminism*, ed. Brenda Cossman & Judy Fudge (Toronto: University of Toronto Press, 2002), pp. 218–64.

Some changes might be indicated, such as tying the residence right to the work, not the employment (which might enable workers to change jobs); and allowing workers to change employment after a number of years of legal residence.

For undocumented domestic workers, the illegal nature of their residence disqualifies them from a communitarian perspective. The only way to do away with this source of weakness would be to grant residence right, which would equal abolishing the possibility to protect the community. That is not an acceptable option.

For libertarians, the reasoning on documented migrant domestic workers would run parallel to that of the communitarians. They would start out by finding their position unacceptable. But because of their acceptance of migration control, and hence the right of States to make residence conditional on fulfilling particular conditions (such as performing a particular kind of job), they would end up understanding the present arrangements all too well, while suggesting some changes in the details. Libertarians would take the side of undocumented workers to start with, but would then have to accept that remedying their weak position by granting a residence right would undermine the concept of migration control.

### *Legality*

The legality of the residence position of documented domestic workers is not subject to debate. The legality of the position of *au pairs* is subject to limited debate. It is argued that they always perform work, hence should be granted a residence right on that basis, which would elevate their residence position to that of documented domestic workers.<sup>23</sup> However, these suggestions have not been received well by NGO's, including trade unions; no litigation has followed. The legality of the position of undocumented domestic workers is not subject to debate. The European Court of Human Rights has found a violation of Article 4 of the European Convention on Human Rights in a case where a state did not take any action when faced with the extremely exploitative labor condition of an undocumented migrant domestic worker.<sup>24</sup>

<sup>23</sup> T.P. Spijkerboer, *Het VN-Vrouwenverdrag en het Nederlandse vreemdelingenrecht*, Adviescommissie voor Vreemdelingenzaken, Den Haag (2002), pp. 31–37.

<sup>24</sup> ECtHR 26 July 2005, *Siliadin v France*, application 73316/01.

## Convergence

In their actual application to the two cases, we have seen that communitarianism and libertarianism may well end up supporting the status quo by and large. Despite their different starting positions (communitarianism requiring justification of migration's infringement on the community, and libertarianism requiring justification of the community's restrictions on migration), communitarians and libertarians will probably agree on the legitimacy of border control, including the fatalities that go with it; and they will probably agree on the legitimacy of the present day regulation of labor migration. I am not arguing that they will necessarily agree on the details. But the significant conclusion in the present context is twofold. First, they will roughly agree with the actual arrangements. Second, libertarians will not necessarily advocate a less restrictive policy than communitarians. The crux in both perspectives is not the starting position. No communitarian will argue that the exclusion of any alien can be legitimate, regardless of the circumstances. And no libertarian will argue that migration control can never be legitimate. The crux of both positions is in the qualifications which can be made to the starting position. The central question for a communitarian will be: is a restrictive policy in this particular case illegitimate (because the communitarian starts out from the presumption it is). The central question for a libertarian will be: is a restrictive policy in this particular case legitimate (because the libertarian starts out from the position it is not). The substantive difference between these two questions is minimal, if there is one at all. In addition, the factors to be taken into account are identical from both perspectives. The main factors are the interests of the receiving society (economic well-being, security) and the interests of the migrant (existential interests of refugees, intimate interests of family migrants, economic interests of others). So, because the two perspectives focus on the same question, and look at the same factors in answering it, it is unlikely that the perspective makes much of a difference. The perspectives do not determine the outcome of the debate, but the starting point from which the different factors are evaluated. For this evaluation, the perspective makes no clear difference.

One might argue that the default option makes the difference between the two. If justification of an exception fails, restrictions are justified for communitarians, and not for libertarians. However, because at the core of both perspectives lies a balance of interests, justification of either

free migration or restrictions will only fail if one wants it to fail. A balance of interests makes an outcome somewhere in the middle highly likely, and that is precisely what we see. Therefore, the default option is unlikely to make a difference between the two perspectives, except in the improbable event that justification would fail.

In actual politics we also observe that these positions can change place. Restrictive immigration policies are usually defended in communitarian terms, and liberal ones in libertarian ones. However, campaigns for the regularization of undocumented migrants often rely on communitarian rhetoric (these people are part of our communities, go to school with our children, come to our church), while objections against them are often universalistic (impartial application of rules). This shows that who is a member of the community can be subject to contestation, just as the beneficiaries of universalism can be. Another example of the categories trading places is that many argue that upon closer inspection, asylum law (accepted as a universalistic strand in communitarianism) may serve to select migrants with a view to their adaptability to Western societies,<sup>25</sup> or may be dominated by foreign policy concerns,<sup>26</sup> or may be a covert labor migration channel, not only for the migrants but also for receiving States (Prakash Shah; Hathaway).<sup>27</sup> On the other hand, in fields where national sovereignty seemingly reigns supreme, such as in the regulation of labor migration, one can barely argue that this serves the national community. Since the competitiveness of national economies has replaced full employment as the prime target of economic policy, the regulation of labor migration is dominated by neoliberal concerns, not by community-oriented social democratic ones (Sassen, Harvey).<sup>28</sup> These are further examples undermining the idea that the libertarianism/communitarianism debate about the regulation of migration has much relevance for the actual policies which are found to be legitimate. Communitarianism, libertarianism, and law justify something quite close to existing immigration regimes.

<sup>25</sup> Robert F. Barsky, *Constructing a Productive Other. Discourse Theory and the Convention Refugee Hearing*, (Amsterdam and Philadelphia: John Benjamins, 1994).

<sup>26</sup> Gil Loescher and John A. Scanlan, *Calculated Kindness. Refugees and America's Half-Open Door, 1945 to the Present*, (New York and London: The Free Press, 1986); Thomas Spijkerboer, *Gender and Refugee Status* (Aldershot: Ashgate, 2000).

<sup>27</sup> Prakash Shah, *Refugees, Race, and the Legal Concept of Asylum in Britain* (London: Cavendish, 2000); James C. Hathaway, *Reconceiving International Refugee Law* (The Hague: Martinus Nijhoff, 1998).

<sup>28</sup> Sassen, *Territory, Authority, Rights*; David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005).

### Admission or distribution

Communitarianism and libertarianism are hard to tell apart when applied to two radically different migration law issues. Additionally, their outcomes and the legal status quo overlap considerably. This is possible because the question that is asked (should we admit these people to our communities) is based on a metaphor which is dubious both empirically and normatively. The metaphor is that these people are knocking on our doors, and waiting outside for the answer. In the case of border deaths, this is an applicable metaphor only at first sight. Migrants know the answer to their question already, and therefore try to rush into the door through the gaps; the door is then fortified in such a way that this becomes potentially lethal; yet migrants keep trying to find the gaps (which indeed are still there), and often die of the fortifications if they fail. It turns out to be a fact that migrants are willing to run considerable risks. Apparently what they stand to gain is so considerable that the risk seems worthwhile (no doubt, they will underestimate the risk as well). Given this fact, is it acceptable that the risk is actively increased?

In fact, the heart of the matter is what one takes as dependent variable. Does one take migration control as a fixed variable, and is the aim to influence the migration behavior of people from poor countries? Or does one take migration as a given, and is the question how to adapt migration control in such a way that the number of victims can be minimized? Behind this choice lies, I think, the perception of the wider situation. One possibility is that the gap between rich and poor countries is considered as so enormous, that irregular migration will always remain a realistic option. The risks of border crossing are only part of the assessment potential migrants have to make, hence draconic border controls will not scare people off but merely increase the likelihood, and the number, of fatalities. Another possibility is that one is so focused on the protection of European welfare systems, that intentionally reducing the effectiveness of migration control is no option, hence the option has to be enforcement of migration control and influencing migration behavior.

The same is true, in a more blatant way, for migrant domestic workers. If we choose to let migration control considerations dominate our thinking about the position of domestic workers, their situation will remain roughly as it is. However, we might consider the issue primarily as a labor standards issue, or as a gender issue, and then the perspective changes.

However, can one reasonably argue that one should treat migrants as members of a community, as a perspective change presumes? In the footsteps of Linda Bosniak, I want to point out that we already do so in many respects.<sup>29</sup> Migrants within the jurisdiction of a European State (which means: in any case if they are on the territory of a European State) have the right to life, the right not to be tortured, to be free from slavery, not to be detained arbitrarily, the right to a fair procedure, to private and family life. The extent to which they can benefit from these rights is influenced by their residence status, but they are considered as insiders, as community members from a legal point of view. If this is the case in so many instances, then the idea that migration control should take into account the right to life of its subjects, and their right to be free from slavery, to humane labor standards, is not anathema.<sup>30</sup> Of course this is something one may disagree about, but it is not out of bounds. Normatively, the problem with the separation of insiders and outsiders is that the prior existence of the insider group is taken as a given. From a normative point of view, this is arbitrary.

Charles Maier argues that the notion of territoriality as such is something of the past. In his analysis, the world is now entering a post-territorial phase.<sup>31</sup> Around 1860, in various parts of the world a development began in which four related phenomena occurred, which marks the beginning of what Maier sees as the high period of territoriality. First, central government gained strength at the expense of regional or confederate authority; second, internal and external military capacity became continually mobilized as a resource for governance; third, a new ruling cartel emerged, in which the old landed elite was joined by new leaders of finance, industry, science, and professionals; and fourth, an industrial infrastructure was created, based on technologies of coal and iron, characterized by long-distance transportation of goods and people, and mass output of industrial products assembled by a factory labor force. In the bounded space in which these phenomena occurred, “identity space” (the space which is the basis for collective allegiance) and “decision space” (the space in which physical,

<sup>29</sup> Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006).

<sup>30</sup> See in this sense the Inter-American Court of Human Rights’ Advisory Opinion OC-18/03, 17 September 2003, on the Juridical Condition and Rights of Undocumented Migrants.

<sup>31</sup> Charles S. Maier, “Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era,” *The American Historical Review*, 105, no. 3 (2000), available at: [www.historycooperative.org/journals/ahr/105.3/ah000807.html](http://www.historycooperative.org/journals/ahr/105.3/ah000807.html) (accessed 3 July 2007).

economic, and cultural security seems to be assured) coincide. Within the boundaries of the newly reconstituted territory, land and population were crucial assets. Territories also had a center and a periphery. Lines of force, consisting of diverse phenomena such as bureaucratic hierarchies, and telegraph, steamboat, and railroad networks, knitted together the territories in unprecedented ways. Although this system began to fall apart around 1970, historians still consider boundary issues (both in the geographical, and in the social and political sense) crucial.

However, territoriality in Maier's analysis now has a different role than it had until around 1970. Present day metropolises are not linked primarily to their hinterland, but to each other; in this way, they constitute a global network of capital and labor. Coal and iron have been replaced by semiconductors, computers, and data transmission. The concept of the hierarchically organized Fordist production in a national territory was replaced (in image, if not always in reality) by the idea of globally-coordinated networks of information, mobile capital, and migratory labor. The major political division of our times, Maier argues, is not between that of capital and labor any more, but that between those who see their future as based on non-territorial markets or exchange of ideas, and those who insist that territoriality be reinvigorated once again as the basis for economic and political security, "Whether by virtue of direct migration or competitive economic exchange, the well-off and educated residents of the West are fated to live in proximity to, and without territorial protection from, peoples of other traditions."

My thesis in this paper is that normative discourse, both in ethics and in law, is caught in the territorial metaphor. The debate presumes distinct national systems, and debates the possibilities of the transfer of people from one system to another. My analysis suggests that the outsiders are inside already, both in fact (undocumented migrants within national systems) as well as normatively (even those who are physically outside territorial space are within the jurisdictions of states of destination). In order to understand the proximity of places which are distant in a territorial sense, new metaphors have to be developed.

Saskia Sassen offers an analysis which may well be compatible with Maier's<sup>32</sup>. She argues that since about 1980, Western states have not been oriented primarily towards full employment (as they had been since at

<sup>32</sup> Saskia Sassen "Territory, Authority, Rights," in *Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

the latest World War II), but to giving their economies a competitive position in the global economy. The primary Keynesian focus on citizens welfare has been replaced by a primary focus on global capital. This has led to less rights (think of the downsizing of the welfare state) for citizens vis-à-vis their state, and to a thinner bond between state and citizen. Also, the unitary nature of citizenry has been put into question, partly by subnational claims (Quebec, Northern Ireland, Basques); partly because migration has led to more diversity; and partly because citizenship has been criticized as partial along lines of class, gender, and race. In her analysis, the national state is not losing importance<sup>33</sup> but its function is changing. It now has a crucial role in the functioning of the global market, while before it had a role in the international coordination of national markets. Territory now is less a place than a function.

In the normative debate about migration control, Seyla Benhabib has pleaded for what I take to be a permanent lack of balance on the issue.<sup>34</sup> On the one hand, she is sympathetic to the idea that the democratic ideal of self-governance requires a bounded community. However, she has argued for constant deliberation about the way in which undocumented migrants can be included. In her view, the ideal territorial autochthony should be replaced by the ideal of public autonomy, which allows for more flexibility.

I want to contribute to this debate by pointing out that any choice one makes, both at the abstract-normative level of ethics, and at the concrete-normative level of legislation, has clear and pretty direct distributive consequences. These consequences should be central to the choices that are being made, instead of being ignored, taken for granted, or blamed on the victims. A choice for a distributive approach to the regulation of migration would not per se lead to a plea for 'free' migration. 'Free' migration tends to mean that the State should to a large extent withdraw from the regulation of migration, and leave migration to the other two main institutions involved: the family and the market. In the neoliberal perspective, the role of the State should be restricted to facilitating the workings of a transnational labor market. This would arguably lead to a deterioration of the position of those worst off in rich

<sup>33</sup> As, in our context, among others Soysal has argued, see Yasemin Nuhoglu Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (Chicago/London: University of Chicago Press, 1994).

<sup>34</sup> Seyla Benhabib. *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2006).

countries. But even if one takes a distributive approach to migration control, one may argue that the State's intervening power, which the neoliberals propose to use for the benefit of the market, may be used to mitigate the effects of the family and the market for those worst off. The choice is not one between State intervention or freedom; maintaining the market requires considerable State intervention, while the family is a Statist structure for human relations. The choice is about the way in which State power is to be used. For this, it is not fruitful to frame the issue as one of admission. The issue is how to regulate the position of people who, whether we like it or not, are already within the reach of our communities. This implies a different imagining of the conflict. The conflict of interests is not between us and them, but runs through the receiving societies. If domestic workers are given a secure and independent residence status, some will lose, and some will profit. I advocate to analyze issues of migration control in such a concrete, non-totalizing way, as to their distributive effect.

The debate between moral cosmopolitanism (in our context: Carens' universalist, libertarian position) and institutional cosmopolitanism (here: Walzer's communitarianism) cannot be resolved. The purely universalist will be contaminated by particularism as soon as it addresses institutional issues of border control. The purely particularist will be contaminated by universalism as long as it is justified by the equal value of each man's life. The impossibility of closure may not be a bad thing. The resulting instability of our position allows us to discuss the consequences of the concrete ways in which migration is regulated. How will a policy affect the number of fatalities at our borders? How will another policy affect the bargaining position of a domestic worker vis-à-vis her employer? The impossibility of resolving the debate on an abstract level forces us to confront what we do to whom. Migration control cannot be, and should not be, something on which we have a moral position which puts our conscience to rest.