

# Book Review

*Justice and Authority in Immigration Law* by Colin Grey  
(2015) Hart Publishing, 254 pp, ISBN 9781849465991

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Those interested in immigration justice or, more broadly, in liberal political theory will want to read this tightly and forcefully argued book. Colin Grey, the author of *Justice and Authority in Immigration Law*, is well read in contemporary writings on these topics. Further, as a legal adviser to the Immigration and Refugee Board of Canada he brings something else to the task, as he knows of the many practical difficulties of applying a principled approach to immigration law and policy (for example, cap setting, selection criteria, processing, settlement and enforcement). Many philosophical accounts of immigration explore the subject matter by way of two issues: (1) arguments as to the value of states; and then, assuming states, and thus borders, (2) a discussion as to the reasons why states may adopt a policy of partially closed borders, consistent with liberal principles. This book offers the reader so much more than this.

As to the overall argument of the book, it presents itself in two parts. The first part refutes the plausibility of ‘absolutism’, the view common to law (plenary power over migration) and political theory (State sovereignty) that reduces immigration governance to national interest and denies any constraining role for questions of social justice. The second and longer part develops a principled alternative.

The author combats ‘absolutism’ at the level of philosophy, though acknowledging that it may be an attitude based not on reason, but on fear of others or pessimism that anything at all can be done.<sup>1</sup> He considers in some detail the absolutist accounts provided by Michael Walzer and Thomas Nagel and, in my view, persuasively shows their instability. To maintain the legitimacy of their arguments and avoid brutality both assume at some point that basic moral criteria must apply to the treatment of immigrants. In other words, in both accounts, at some point there is a shift from absolutism to a system of immigration governance that has within it some principles. The question then becomes, how should we think of a principled alternative to absolutism? And, as this book is a work of philosophy (that is, about thinking about thinking), what is an appropriate framework for structuring this thinking?

This is the animating question for the second part, in which Grey presents a framework for bringing together numerous divergent and often conflicting viewpoints. First, the claims of the governing authorities based on the need for

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<sup>1</sup> Colin Grey, *Justice and Authority in Immigration Law* (Hart Publishing, 2015) 214.

stability. Second, the legitimate expectations of its members (that is, its citizens) — a difficult idea explicitly left under-theorised by Grey,<sup>2</sup> but exemplified by such things as the citizens' expectations as to the basic political structure of the State, or to a certain scheme of social welfare. Third, the interests of migrants in escaping what is often a precarious and vulnerable position. Grey argues that this is a just combination of the relevant interests that both members of the nation State and migrants can accept, if they are reasonable. To be capable of having legitimate authority 'immigration regimes must strive to carry out their policies justly or non-oppressively by taking into account the interests and viewpoints of migrants, as it were, in trust'.<sup>3</sup> In words familiar to readers of John Rawls (if not their application in this context), both members and migrants are jointly engaged in a project of just immigration governance.<sup>4</sup>

It is necessary to say a few words on how Grey understands the notions of justice and authority, the key terms in this approach (and in the title of the book). Here he follows the later Rawls of *Political Liberalism*<sup>5</sup> in making the basic framework of his book a search for legitimacy (legitimate political authority or 'political justice'), rather than distributive or social justice; for it is assumed that there will be no substantive theory of justice that all the members of the State agree to, let alone members of the State on the one hand, and immigrants on the other. As Grey puts it, the task is to show how *in certain circumstances* the immigration governance of a liberal State can have justified political authority over migrants. This justification has the additional complexity that unlike members (who are assumed to be free and equal), migrants are governed through notions of status (permanent entrant, temporary entrant, refugee, etc) and, in this context, the usual liberal justifications (namely, participation in the political process) are obviously not available to migrants. What are these *certain circumstances*? Essentially, it is circumstances where immigration governance takes account of the legitimate interests of migrants in a principled way. Or to restate this in the language of Rawls, liberal immigration regimes only have authority if they strive to be governed according to a reasonable conception of justice; a conception about which (reasonable) persons (both citizens and non-citizens) who hold different substantive conceptions of justice could nonetheless agree.

Rawls, of course, wrote a great deal about reasonable conceptions of justice but, famously, his State-based account was addressed to the citizens of a closed domestic society and did not extend to questions of immigration justice. While Grey cannot adopt the content of Rawls' *Theory of Justice*,<sup>6</sup> he makes use of Rawls' familiar methods of justification — for example, reflective equilibrium, constructivism, overlapping consensus, public reason, legitimacy, stability for the right reasons and, as the addressee of the account, reasonable persons (that is, persons open to argument and with a willingness to abide by fair terms of cooperation).

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<sup>2</sup> Ibid 77, 212ff.

<sup>3</sup> Ibid 83–4, 144.

<sup>4</sup> Ibid 141.

<sup>5</sup> John Rawls, *Political Liberalism* (Columbia University Press, expanded ed, 2005).

<sup>6</sup> John Rawls, *A Theory of Justice* (Oxford University Press, rev ed, 1999).

The strength of the book is that it departs from our present understandings of the subject matter. It is a matter of reflective equilibrium as we move backwards and forwards between, on the one hand, our specific intuitions and judgements about the proper treatment for migrants and, on the other, the proper principles of immigration governance. One of the best features of Grey's book is his detailed discussion of these starting points, which he calls, following Rawls, our 'considered judgements'.<sup>7</sup> I cannot set these out here, but Grey convincingly lists eight matters we would regard as oppressive (for example, returning refugees to where they are likely to be tortured); two matters we would usually accept as justified (for example, exclusion of migrants who are a security or public health risk); and three matters in between, where our intuitions are less secure (his example is whether it is *per se* unjust to make no provision for the unification of citizens and their prospective (that is, future) spouses).

Further, Grey adds to the richness of this account by distinguishing here between first-order and second-order injuries. A first-order injury may follow from the basic decision to admit or exclude. A second-order injury could be generated by the way this processing is done: for example, via an unjustified restriction of rights (due process rights in processing, say) or imposition of burdens (detention, for example, of migrants who are not a health or security risk), or through the injustice of a repressive system of compliance (through excessive penalties for immigration offences) or through having policies that allow third parties to exploit migrants (such as traffickers or employers). Grey argues for what he calls 'an indirect principle of freedom of migration'; namely, that a State can only impose first-order immigration policies that do not result in second-order oppression.<sup>8</sup> Again, this is a way of giving concrete content to what political justice might mean in this context — for secondary injuries, he argues, can rarely be justified.<sup>9</sup>

In the concluding chapters, Grey reflects on the legitimate interests and viewpoints of migrants. In moving from the 'considered judgements' mentioned above to areas that are less secure, Grey provides a careful discussion of such matters as: the value of migration from the standpoint of migrants; family migration; economic migration; the inadequacies of an approach based on global distributive justice; the relationship between selection principles and second-order injuries caused by the way we restrict or regulate migration; whether migration is a basic liberty; and the appropriateness of an admissions policy based on letting in the worst-off migrants, rather than those more skilled or more moneyed. I cannot elaborate upon these matters here, except to note that the first matter, the value of migration from the standpoint of migrants, is based upon a careful discussion of migration as a protection of individual agency or purposiveness, a discussion now given content via the often discussed capabilities approach of Martha Nussbaum and Amartya Sen.

Grey has written a fine book and it is perhaps a little uncharitable to note in conclusion the one part of his discussion of justice which, for reasons I outline below, I found less convincing. This discussion is in the opening chapters where,

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<sup>7</sup> Grey, above n 1, 40–57.

<sup>8</sup> *Ibid* 150, 172ff.

<sup>9</sup> *Ibid* 180.

to give some content to the idea of justice, he turns to Adam Smith and his *Theory of Moral Sentiments*<sup>10</sup> and to Immanuel Kant's *Metaphysics of Morals*.<sup>11</sup> This criticism does not undermine the rest of the book; for despite the use made early on of Smith and Kant, the book is all the better for relying, ultimately, not on a theoretical account of justice, but for starting with our present-day intuitions and judgements about immigration justice.

I would like to know more about how Smith may be put to work in this context of immigration justice, but 'back to Smith' does not appear here to be a promising move. For one thing, Smith ties the idea of injustice to those *motivations* that would be rejected by an impartial spectator. And although there is a long tradition of thought that links injustice to a character flaw (Aristotle on *pleonexia*, the desire for gain, for instance), is it really helpful in the context of immigration justice to be speculating about the motive of the lawmaker or legal official? All you can say with any confidence is that the perpetrators of unjust acts were not concerned with justice (whatever the reason: desire for self-advancement, fear, laziness, etc), where justice is given a meaning in other ways. For another thing, Smith, unsurprisingly, is considering commutative or corrective justice — the unjustified injury wrought by human agency of crime or tort or breach of contract — not distributive justice. Grey faces this problem head on and argues that no distinction should be drawn here between personal and social justice (that is, between corrective and distributive justice).<sup>12</sup> For both injustices are caused by human agency, he argues: the first by an identifiable agent, the second by impersonal, but human made laws, practices and structures. True as this point may be, is it helpful here to blur the two types of justice? A quick look at the legal practices, or the distributive practices, of liberal states shows that our orientating ideas still pay high regard to the distinction between corrective and distributive justice — for example, to the distinction between wrong caused by misfeasance and wrong caused by nonfeasance, and to the difference between deliberate wrong and structural harm.

Grey's return to Kant, as I understand it, is motivated by two matters: the desire, first, to show why we should strive to govern immigration in a just way and, second, to provide the basis for a discussion as to what injury to migrants might mean in this context. Again, I can only be brief, but it is not obvious that Kant is helpful with these two matters. Grey makes use of Kant's argument that private right can only be secure if it can be agreed to by others (that is, if it is backed by what Kant calls 'omnilateral will' and not unilateral will) and enforced (by police) and adjudicated upon (by courts). In other words, to secure private right, according to Kant, we have a moral duty to leave the state of nature and enter a State with legislative, executive and judicial institutions. The State, in other words, is a rightful condition and it is only here that we can decide upon and enforce the Kantian 'principle of right'. However, this is a rightful condition for Kant from the perspective of corrective justice (not distributive justice) and it is

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<sup>10</sup> Adam Smith, *Theory of Moral Sentiments* (Cambridge University Press, 2002).

<sup>11</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1998).

<sup>12</sup> Grey, above n 1, 16.

hard to find in this account, as Grey puts it, ‘the formative role that a state’s conception of justice can have in developing its members’ sense of justice’.<sup>13</sup> Clearly for Kant, self-interest was sufficient to motivate the creation of a legitimate State (for, famously, it can be achieved, we are told, even by a race of devils). In other words, there is no need for the State to educate the citizens’ sense of justice and if it attempted to do this, for Kant this would be despotism. And I note that it is a longstanding and central criticism of Kant’s approach to the State that Kant did not understand the crucial role that the State plays in educating and inculcating values in the citizenry, if the State is to be stable.

As to what injury to migrants might mean in this context, Kant’s ‘principle of right’ (the source, for him, of just law) is based not on avoiding harm or producing benefits, but on the protection of the self-determining agent. According to Kant, we should be free to do as we want, as long as we do not wrong others — where the only wrong is diminishing another’s freedom to choose, by denying another the use of his or her body or property (that is, crime, tort, or breach of contract). It is hard to see how we can get from here (that is, the protection of the ability to choose) to what Grey would like us to consider — namely, the many ways that migrants are harmed by an unjust immigration system.

To conclude with the many positives of Grey’s account. Immigration is now an ever-present political issue in wealthy liberal constitutional democracies (and, of course, elsewhere). *Justice and Authority in Immigration Law* is an excellent guide as to what sort of immigration practices these States should adopt. It provides, in clear terms, an attractive and useable framework for structuring our judgements about these matters.

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<sup>13</sup> Ibid 70.