

## A THEORY ABOUT THEORIES OF IMMIGRATION, AND A COMMENT ABOUT MICHAEL TREBILCOCK'S THEORY

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A few years ago, I was chatting with Michael about his keynote address as president of the American Law and Economics Association. His topic was immigration, and his working title (playing on the classic liberal defense of free movement) was something like “Why We Should Treat People More Like Things”. I’m pretty sure he giggled when he told me. He eventually opted to go with the more anodyne “The Law and Economics of Immigration Policy”. I happen to prefer the first title, mostly because it better captures the mischievous way in which Michael simultaneously provokes skeptics of law and economics with his methodology and conservative law and economics proponents with his outcomes, in this case a more liberal immigration policy.

I consider that kind of provocation entirely salutary, and I think it springs from the same source as the remarkable intellectual generosity that Michael has displayed for as long as I have known him. His willingness to engage with other methodologies, other perspectives, and other disciplines is among the qualities that I admire most, speaking as a direct beneficiary. To skip from the personal to the professional, it does not surprise me that one so open to the intellectual movement across disciplinary borders would also incline toward the free movement of labour – and not just goods – across geopolitical borders.

Michael’s important contribution to immigration scholarship spans the positive and the prescriptive. *The Making of the Mosaic*, which Michael co-authored with Ninette Kelley, is a lucid and indispensable account of the evolution of Canadian immigration policy from Confederation to the present. His normative intervention is elaborated most fully in the aforementioned “Law and Economics of Immigration Policy” and “The Political Economy of Emigration and Immigration”.

Michael’s historical analysis and normative project speak in different registers. Certainly, no one could explain better to normative Michael than historical Michael the reasons why policy makers might resist his prescriptions. I do not mean that as a criticism, but rather as evidence of Michael’s admirable versatility and depth.

My own scholarship in immigration probably bears a greater superficial affinity to Michael’s historical policy analysis than with the law and economics framework that informs his normative project. This observation, however, seriously understates the influence that his work has had on me, though not in immediately apparent ways, and perhaps not necessarily in ways that Michael would endorse. Certainly, I have profited from Michael’s supple and compelling scholarship as an intellectual whetstone for sharpening my thoughts. And that is what I hope this brief comment will illustrate. Using Michael both as foil and as inspiration, I want to first advance tentative thoughts about how to approach a theory of justice in immigration and secondly, to inquire into Michael’s specific proposal contained in “The Law and Economics of Immigration Policy.”

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Let me announce at the outset that I do not actually believe that answers exist to the theoretical question (what is the correct theory?) or the prescriptive problem (what is the correct policy?). Problems of this scale and this complexity defy such *hubris*. I think the better question to ask is whether a given theory or policy produces a preferable set of problems than the various alternatives. We rarely solve problems, but if we are wise and fortunate, we might choose better ones. This might sound like an evaluative standard with a serious self-esteem problem, but I consider it appropriately modest to the task, and consistent with the virtue of intellectual generosity that Michael embodies so well.

Like Michael, I support more liberal migration regimes than what currently prevails among the wealthy industrialized states. This is unremarkable. Across a range of disciplines and orientations, the overwhelming drift of serious academic literature supports, with varying degrees of qualification, borders that are more open than at present<sup>1</sup>. Political philosopher Michael Walzer is probably the most famous exponent of the view that immigration falls outside the domain of justice, while social scientist George Borjas is identified as championing greater restrictions on migration, at least in the US context. And while their general positions probably enjoy greater popular support than the contrary views, they do not dominate in the scholarly domain.

Liberal theories about justice in immigration fall roughly into one of two categories: The first casts freedom of movement as an individual liberty right that flows from the recognition of each person's inherent moral equality. The other evaluates the virtues of migration in terms of the outcomes it will produce. This typically (but not necessarily) takes the form of a utilitarian calculus that asks whether aggregate welfare will be maximized under a regime of free or freer migration. Typically, but again not necessarily, utility is measured in economic terms. A cosmopolitan calculus weighs the welfare of each individual (citizen and prospective migrant) equally. A state-centric calculus takes as given the existing organization of the globe into states for whom sovereignty subsists in the entitlement of existing members to decide whether to admit non-members. This may be articulated as a hard-headed concession to reality, or defended as legitimate for purposes of protecting the institutions of the welfare state or the democratic polis. Either way, the implication is that the welfare that must be demonstrably improved by liberalized immigration is that of existing members.

The argument from freedom of movement corresponds roughly to a deontological, rights based theory, while the other contenders might be described as consequentialist. The theoretical merits of deontological versus consequentialist theories of justice lie beyond the scope of this paper, as does the conceptual stability of the dichotomy itself<sup>2</sup>. Rights based theorists (such as Joe Carens) who favour a right to migrate do accept the legitimacy of limits when the risks or consequences for the host state are too dire (however that threshold is defined and measured). The obverse is that utilitarian theories usually limit what can weigh in the welfare calculus by eliminating illiberal preferences (such as racism). In other words, it is common to observe that almost everyone incorporates side constraints borrowed from the other approach. This may explain why almost every theory about immigration converges on the point that states ought to accept some unspecified number of imprecisely defined refugees.

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<sup>1</sup> Even Walzer acknowledges a duty to admit refugees, though he erroneously and unaccountably assumes their numbers to be small.

<sup>2</sup> Wayne Sumner.

This may also partly explain why utilitarian models tend to focus on economic consequences. The relevance of economic impact is uncontroversial, though there is considerable disagreement on whether it ought to be determinative in each case, or only in the aggregate. Economic impact also presents as more amenable to objective measurement, although what ought to be measured, the inferences one draws from the data, and the policy implications, are all contested. In addition, recent literature in sociology and political science has attempted to devise a credible metric for quantifying and measuring the squishier idea of ‘social cohesion’.

Michael’s law and economics approach to immigration policy plays in the consequentialist league, utilitarian division; Free movement of labour would improve global economic welfare. Freer movement -- though more restricted than under a cosmopolitan calculus – would still be welfare-enhancing on a national calculus. Michael’s distinctive contribution takes the form of a response to the objection that lowering barriers to entry will result in catastrophic levels of fiscally induced migration. I will return to this below.

A rights-based theory does not take state sovereignty as equal or superordinate to the individual’s freedom to migrate: the migrant asserts her right to enter, and the state must justify refusal. This leaves a much diminished scope for sovereignty. A cosmopolitan utilitarian calculus that weighs each person’s welfare also devalues sovereignty. But many utilitarians (Michael included) go on to concede the sovereigntist predicate and argue that the state’s self-interest will in fact be better served by choosing to admit [many] more migrants given a contingent set of postulates about the benefits that will ensue<sup>3</sup>.

Leaving aside disagreements about the content of any particular theory, I am uncomfortable with the idea that there is a fundamental, liberty-based human right to migrate, versus a more complex, contextualized, consequence-focused analysis. I admit to this somewhat reluctantly, since the alternative of a free standing mobility right holds considerable appeal as an aspirational ideal. My hesitation does not arise from apprehensions about the cultural, political or economic survival of western liberal democracies inundated by a deluge of exotic, subversive, and destitute immigrants exercising their right to enter. Rights permit limits, and legitimate limits designed to avert genuine risks would still result in vastly more porous borders than what currently obtains. Rather, my diffidence arises from the conviction that migration cannot be extracted from the matrix of forces and phenomena that produce it and packaged as a free standing right.

People migrate because they love to move, in search of adventure, in pursuit of education or experience unavailable at home, or to make an adequate life into a better life. But those who preoccupy me from the perspective of justice are not these people. The people who preoccupy me are the people described by the narrator in Yann Martel’s *Life of Pi*,

Why do people move? What makes them uproot and leave everything they've known for a great unknown beyond the horizon? Why climb this Mount Everest

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<sup>3</sup> Michael’s proposal delegates more direct authority over selection from state to market in relation to labour migration. This devolution of authority is more operational than political since almost by definition, the selection of economic migrants has always been about serving the needs of the labour market. cite.

of formalities that makes you feel like a beggar? Why enter this jungle of foreignness where everything is new, strange and difficult?

The answer is the same the world over: people move in the hope of a better life.

People move because of the wear and tear of anxiety. Because of the gnawing feeling that no matter how hard they work their efforts will yield nothing, that what they build up in one year will be torn down in one day by others. Because of the impression that the future is blocked up, that they might do all right but not their children. Because of the feeling that nothing will change, that happiness and prosperity are possible only somewhere else<sup>4</sup>.

I realize that a quote from a fictional character is not hard data, but I think there is a truth to it that the data supports. Most of the would-be immigrants shut out by the immigration regimes of countries like Canada, the US, Australia/NZ and Europe, want go elsewhere to make a decent life, to provide a decent life for family left behind and more importantly, to make possible a decent life for their children and for them<sup>5</sup>. In other words, they are pushed by the absence of conditions at home that make these goals attainable, and pulled by the hope of conditions elsewhere that will at least allow their children to flourish. They believe they must emigrate so that their children will not feel that they must emigrate.

The right under international law to seek asylum and protection from *refoulement* hinges on demonstrating an egregious and blameworthy failure or refusal by the state of citizenship to respect a narrow set of rights. That is to say, it is a right to seek the surrogate protection of another state from persecution by one's state of citizenship. It is contingent in its formulation, and falls far short of a mobility right as such. The same might be said of migration for purposes of family reunification. Family unity is what underwrites the right, not mobility as such.

To strip away motive and characterize migration as such as a dimension of liberty seems simple enough in the literal, physical sense – if detention is a paradigmatic violation of liberty, then free movement must be the quintessential expression of it. Indeed, it is difficult to imagine how one might exercise other rights without some literal capacity to move about. And if one's entitlement to move freely seems self-evidently compelling within the territorial confines of a state, why not across borders too?

To explain free movement across borders as an instantiation of liberty is seductive, given the literal association of mobility with liberty, and the value we place on liberty. But I fear that this equation of migration and liberty is too nice. Consider the obverse – the freedom not to move. One might as easily talk about a right to stay home as a right to migrate. The problem is not that it is wrong so much as it is unhelpful. The injury caused by characterizing mobility in isolation links up to the injury experienced by migrants, namely deracination.

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<sup>4</sup> cite.

<sup>5</sup> It is trite to observe that being born into citizenship of a stable, wealthy and peaceful state confers incalculable advantage, is morally arbitrary, and is also the formal legal device for excluding the unlucky.

The direction I'm moving in is by now apparent -- I think that the concern animating theoretical debates about migration is less about liberty than about some version of equality. After all, to observe that the accident of birth into citizenship of a prosperous, functioning, democratic state is a morally arbitrary event that confers enormous and undeserved advantages is surely to offer a penetrating glance into the obvious. Even proponents of the most minimalist and qualified conception of equal moral worth of individuals cannot but be troubled by the grotesque gap in well-being and life chances attributable to where on the planet one happens to be born, or what my colleague Ayelet Shachar calls the "birthright lottery".

So when we talk about open (or more open) borders, I believe that what is doing most of the normative work is an idea of equality, though this leads directly onto the terrain of competing conceptions of equality. This issue lies beyond the scope of my comments, but as a preliminary move, I will rely on Amartya Sen's capability approach as a helpful framework for identifying what is at stake. Sen's capability approach does not supply a recipe for distributive justice, but does offer an evaluative space within which to answer the question 'equality of *what?*'. His approach is pertinent here because it orients attention toward the kind of information that ought to be relevant for evaluating individual well-being<sup>6</sup>.

Sen's answer to the question 'equality of *what?*' is that well-being is best evaluated in terms of human functionings and capability. Human functionings describe achievements of doing or being. Capability refers to the set of achievable functionings that a person holds as valuable: "It represents the various combinations of functionings (beings and doings) that the person can achieve. Capability is, thus, a set of vectors of functionings, reflecting the person's freedom to lead one type of life or another ... to choose from possible livings"<sup>7</sup>. Sen's framework does not prioritize achieved functioning over capability or vice versa, nor does it assume one is replaceable or collapsible into the other.

As GA Cohen explains, "capability is good not only [] as a space of choice, but also because free choosing, a process that requires such a space, is itself good"<sup>8</sup>. Yet it does not follow that a more expansive capability set will necessarily generate greater well-being, so one should not assume a one-to-one correspondence between the size of the field of choice and well-being. Cohen provides a sympathetic (though ultimately critical) reading of Sen's capability approach that helpfully situates capability as metric for equality between income/resources and utility/welfare:

Capability lies, causally, between income or primary goods or resources on the one hand and utility or welfare on the other. Focus on capability means emphasizing not goods as such, but what they enable a person to do, and it also means deemphasizing the (often vaguely induced) utility associated with his doing it. The trouble with a metric of goods or resources or income is that the

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<sup>6</sup> Although Martha Nussbaum leverages Sen's approach into a set of norms suitable for constitutional entrenchment – and included on the list the 'right to move freely from place to place', I do not subscribe to this elaboration of Sen's theory.

<sup>7</sup> Pinpoint cite. In some iterations, a capability refers to a potential functioning, such that one can refer to multiple capabilities.

<sup>8</sup> cite

point of goods (and so forth) is to generate possibilities of choice for the individual: much better, then, Sen argued, to look not at their generators but at those possibilities themselves, which do not vary uniformly with what generates them, because of variations in people's physical (climatic, topographical, etc.) and social circumstances, and in their biological constitutions. And the trouble with a metric of utility is that it is blind to the fact that people adjust their expectations downwardly when in poverty and upwardly when in wealth. This and other subjective vagaries mean that utility is not the right quantity to focus on....What matters centrally is the causal intermediary, the effect of goods that causes utility: functioning, and capability, as such.

A person's functionings matter because they *are* his life, considered apart from the utility he gets out of it. And capability matters at least instrumentally, since functionings matter, and adequate functioning can obtain only if it lies within a person's capability set. (pp. 40–2, 51–2).<sup>9</sup>

Mobility can certainly be understood as a functioning, and so migration policies clearly have an impact on people's capabilities. The capability to move may be an end in itself, but it is also a means to other functionings (work, security, political or religious engagement, providing a context in which family can flourish, creativity etc.). While the availability of migration enlarges the space of choice, I do not understand Sen to regard that as determinative.

One can readily see how mobility is an intrinsically valuable functioning for members of certain nomadic and indigenous peoples, such as the Roma or Bedouins, but I find it more difficult to imagine that it holds this intrinsic value for most people who contemplate emigrating to another country. I rather expect that it is a capability that is instrumental in achieving certain other functionings. The less achievable those functionings are at home, the more crucial mobility becomes as a capability. Mobility may then assume extraordinary value as a capability, but that still does not give it intrinsic value as an end itself. Among other things, its achievement requires deracination, which in turn will likely involve surrender of other achieved functionings – intact family and kinship networks, ability to communicate in one's language, community support and respect, and so on<sup>10</sup>. The obverse proposition is that the capability to migrate diminishes in significance in terms of advancing well being where the disparity between the set of achieved and achievable functionings at home and abroad is smaller.

Let me restate my conclusion in a slightly different way. If we lived in a world where deep inequality between states was not endemic – where the heft of citizenship did not vary so radically -- I suspect that the moral force animating a right to migrate would

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<sup>9</sup> GA Cohen, "Amartya Sen's Unequal World", *New Left Review*, <http://www.newleftreview.org.myaccess.library.utoronto.ca/?view=2031>

<sup>10</sup> The geographic, linguistic and legal proximity between the home and host country may significantly affect the range and depth of the damage to pre-migration functionings. To give one illustration: Mexico and the US are geographically close, but a non-status worker may be unable to re-connect with family by visiting because of the risk of detection. The distance between Poland and the UK is relatively small, and recirculation is more viable.

be significantly deflated<sup>11</sup>. One could still insist on a derivative right to migrate, as a means to some other end of intrinsic value (such as family unity or freedom from persecution), but our assessment would depend and vary according to the inter-relationship between mobility and range of other achieved or achievable functionings. One might still advocate open borders as a great idea for many reasons, but I am less confident that mobility would possess the tensile strength to stand alone as a right. Nor would it need to.

After all, a quick reality check suggests that the contribution of mobility to one's capability is negatively correlated with mobility as an achieved functioning: The more one needs to move, the less able one is to do it. Consider the European Union. Citizens of the original fifteen member states (EU15) enjoy more or less full *de jure* mobility for residence and employment throughout the EU. The walls are down, the doors are open. The outcome? These Europeans hardly relocate at all<sup>12</sup>. Mobility as capability weighs little to them because the aggregate of the freedoms or valued opportunities attainable through migration will not apparently or significantly improve their well-being<sup>13</sup>. At the same time, the story of the recent EU accession countries is still being written: Original EU states that granted full mobility and employment rights to citizens of the accession countries certainly witnessed a major inflow of workers (captured by the British stereotype of the "Polish plumber") during the economic boom. The recent economic downturn appears to have precipitated the return of many. The freedom to move within the EU clearly enhanced the capability set of many central Europeans.

Academics and global professional elites might be tempted to romanticize border crossings and migration, but we should not forget that the overwhelming majority of people who possess the capability to migrate do not follow that path. The lesson I reluctantly draw is that freedom of movement coincides with, but does not actually capture, my intuitions about the normative underpinnings animating concern about justice in immigration<sup>14</sup>: While I desire a world where people can choose to migrate, I despair at a world where people resort to it. I hesitate to apparently endorse the parochial over the cosmopolitan, but to do otherwise would be to indulge the romanticism I cautioned against earlier. And so, I find myself broadly oriented in the same direction as Michael insofar as justice in immigration is contingent on impact, on consequences, on effects. We would disagree about the relevant impacts, consequences and effects, but on this occasion, I'd like to recognize the commonality rather than focus on the divergence.

To his credit, Michael's contributions advance not only the objective of freer migration, but also the goal of reducing the necessity of migration. His work on

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<sup>11</sup> Who is the Citizen's Other (explain 'heft of citizenship')

<sup>12</sup> cite.

<sup>13</sup> The story is still unfolding for the EU citizens from 2004/07 accession states (EU10) is still unfolding; between the fact that several EU15 states have delayed according full residence and labour rights, and the global recession, the picture remains fuzzy.

<sup>14</sup> I have not formulated a response to the question of why there might be a right to free movement within but not between states; I suspect that a fuller elaboration of the concept of rootedness and deracination might provide clues.

immigration merits appreciation in its own right, but should also be valued in tandem with his scholarship on law and development<sup>15</sup>.

The Making of the Mosaic is a diachronic undertaking confined to Canada. Michael's normative undertakings "The Law and Economics of Immigration Policy" are synchronic. They take a snapshot of the present, and use the picture as the informational base from which to formulate policy prescriptions. His prescriptions are not confined to any single country – though US and Canada figure prominently as sources of data, policy instruments and critique -- and I take it they are meant to apply broadly to the prosperous liberal states and regions of Canada, the US, the EU, Australia/New Zealand.

Reading *The Making of the Mosaic* also confirms the persistence of certain preoccupations about the economic and social impact of migration: Migrants will steal jobs and/or impose fiscal burdens on the state, and they will not integrate or assimilate. When we hear these fears expressed today, we look to the distinctive characteristics of today's immigrant population to prove the legitimacy of the fears. But one lesson I take from a diachronic reading of Canadian immigration policy as Michael and Ninette narrate it, is that the source of these fears cannot be located in the specific features of any group of newcomers, but rather have more to do with a resilient quality of the native born, which is the need to project certain recurrent anxieties onto the foreigner.

The *Making of the Mosaic* refutes the nativist claims in two ways. First, by recounting the almost liturgical incantation of negative themes, motifs, personages, plot-lines, tropes about migrants, we come to see that maybe the critique of today's immigrant is not actually generated by who today's immigrant happens to be. It is, instead, just the latest staging of a long-running drama where the cast changes, but the roles do not. Secondly, the reader is implicitly invited to look around at the present and conclude that the nativists of the past were simply wrong: Canada's pluralist society flourishes economically, politically and culturally.

And this brings me to Michael's contribution on reform of immigration policy. In "The Law and Economics of Immigration Policy", he defends the cosmopolitan claim that global welfare (measured in economic terms) would be maximized by free movement. For what I presume to be pragmatic reasons, he shrinks his frame to the national, and argues that the welfare of insiders will also be improved by freer movement, if managed appropriately. His proposal is

centrally motivated by the idea that there is a compelling case for devolving and decentralizing power over immigration decision making to private parties to a much greater extent than currently prevails... This reorientation would allow the international movement of people to be much freer and would promote a more efficient mix of international movements in goods, services capital and labour (p. 298).

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<sup>15</sup> On a practical level, there is little evidence that discrete development policies correlate with reduced migration. For example, Chantal Thomas describes how trade liberalization between the US and Mexico appeared to have the opposite effect on migration. Of course, this may demonstrate Sen's point about the inadequacy of the metrics used to predict the beneficial effects of certain policies of trade liberalization. I am less persuaded than is Michael that remittances adequately compensate for the 'brain drain' of skilled emigration from less developed countries, but I take it that Michael would not overstate the role of remittances as a tool of development in any case.

Michael's idea is that more privatization of migration selection would promote greater efficiency and freer movement: Dispense with government imposed quotas and selection criteria. Instead, let employers recruit foreign labour, family members unite with relatives, private citizens nominate refugees. Rich people can self-select (298 – 302). Confine the state to health, criminality and security checks, and operating an asylum system. Although I harbour doubts that his proposal is feasible across the range of advanced economies, let me clearly and unambiguously say that it is an act of bravery to attempt to devise a national immigration policy when so many of the practical constraints defy national control, much less a rational policy when so many of the political constraints defy rational argument.

Michael recognizes that in order to be politically viable, his proposal must address the recurrent objections: Migrants drive down wages and steal jobs from existing workers; migrants impose fiscal burdens by not working and drawing welfare, and migrants corrode the character of the national community through non-integration.

True to his overarching law and economics framework, Michael dispatches the first concern in short order: The requirement that employers demonstrate they are unable to attract domestic labour at prevailing wages

are protectionist and inefficient because they impose additional costs on hiring foreigners (making domestic workers arbitrarily more attractive). Under a decentralized approach, the labor market would regulate the inflow of persons congruently with demand. Employers would sponsor immigrant workers as frequently as is deemed to be cost justified (299).

He tackles the integration objection less peremptorily, but with equal decisiveness. Michael Walzer is the most credible proponent of the view that states are entitled to exclude non-members in the name of preserving a "community of character" that give shape, meaning and value to the lives of members. Michael responds by suggesting that external norms of international law might constrain liberal states in relying on invidiously discriminatory bases of exclusion. Unfortunately, I am not sure Michael is correct about the obligations imposed by international law in this regard. In any event, his more compelling claim is that to the extent that liberal states can plausibly be described and defended as 'communities of character', their character is constituted thinly by an adherence to common liberal principles – including non-discrimination – and not by a thick rendition of ethnic or racial identity. Michael's broader aim – with which I sympathize -- is to delegitimize the assimilation objection as a basis for limiting immigration into liberal states. At the same time, Michael also values integration into liberal values enough to exclude public education from the costs that migrants should have to internalize.

Only the fiscal concern is left standing: private selection would facilitate the arrival of large numbers of people who, given the opportunity, would suck the welfare state dry. Unlike the other objections, Michael regards this as unyielding to argument, and so his proposal is designed to ensure that migrants or their sponsors internalize any fiscal costs arising during the period prior to citizenship eligibility (usually 3-8 years, variable by state). Interestingly, he demurs on whether he regards the fiscal argument as

empirically valid in relation to his selection model, or whether he accommodates it as a gambit to buy the consent of misguided policy makers.

I note this ambivalence for a few reasons. First, if the fiscal concern amounts to a recurrent but unsubstantiated perception, it is not obvious why it merits accommodation, while the other recurrent negative perceptions do not. Secondly, if one believes that global welfare would be maximized by open borders, but concedes a national calculus for pragmatic reasons, I'm unsure why one would insist on a policy that requires that each migrant impose zero fiscal costs during a stipulated period. Instead, why not opt for a more generous compromise that sets a goal of fiscal neutrality *in toto* and across subcategories? This is effectively the *status quo* for most advanced economies<sup>16</sup>. Finally, I am less confident than Michael that the fiscal complaint stands apart from the others. The history of discourse around immigration suggests that the objections are braided together by a deeper, non-rational anxiety. And so, for instance the skeptic is apt to look at Michael's proposal, which limits the internalization of fiscal costs to pre-citizenship, and complain that the proposal simply delays but does not deter welfare dependence, because immigrants will simply begin collecting welfare after naturalization. This is precisely what critics allege as the explanation for a spike in US naturalization rates after a 1996 federal law denied lawful permanent residents (LPRs) access to most federal benefits.

The basic elements of Michael's proposal consist of privatized selection combined with a mandatory private insurance scheme that covers the risk that the immigrant will draw on public assistance. He presents the proposal as follows:

1. Employers recruit foreign workers, and the workers enter as permanent residents. The employer is required to enroll in a mandatory private insurance scheme (the cost of which would presumably be passed on to the worker in the form of a wage penalty) to cover the risk of claims by the immigrant against social programs. The duration of the insurance obligation would correspond to the minimum eligibility period for citizenship.
2. Family member sponsors family member from abroad. The sponsor is required to enroll in the mandatory private insurance scheme under the same terms as #1.
3. Private individuals sponsor overseas refugees. The sponsor insures against the risk of the refugee relying on welfare under the same terms as #1.
4. Employers recruits foreign workers, and the employer decides that the transaction costs involved in insuring them are higher than employing the worker illegally. However, employers could sponsor these workers for temporary worker visas, during which time the workers are ineligible for social programs. After a specified period of continuous employment (e.g. three years), the worker automatically transitions to permanent resident status. It is unclear what happens to the insurance requirement for these permanent residents.

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<sup>16</sup> Cite to OxfordJEconPolicy

The difference between option 1 and 4 seems to turn on the designation of the worker as high or low skill. Michael contemplates option 1 for the former, and option 4 for the latter, a distinction to which I will return.

As a preliminary matter, how far is Michael's proposal from what currently prevails in Canada and the United States? First, immigration selection is already significantly privatized in both countries. Indeed, family migration is entirely private insofar as it depends on an individual choosing to sponsor a relative. The state's role consists of demarcating the boundaries of what constitutes a family, confirming the authenticity of the relationship, and imposing the sponsorship obligation to repay the state for welfare expenditures on the sponsored immigrant for 3-10 years. As Michael observes, existing policy regarding family reunification already attempts to ensure that fiscal costs are internalized, and so Michael's insurance scheme refines more than reforms. Secondly, the vast majority of US skilled-worker immigration operates roughly like option 4, whereby an employer sponsors the worker on a temporary visa, and the worker applies for employer-sponsored adjustment of status to lawful permanent resident at some point. The system is bogged down by Congress-imposed quotas on the number of temporary and permanent visas available annually. In Canada, option 4 more or less describes the Live-In Caregiver Program, as well as the recent Canada Experience Class for foreign graduates of Canadian Universities and high-skill workers on temporary work visas. Canada, however, relies on a points system for selecting principal applicants in the skilled worker class. It grants points based on a weighted combination of factors relevant to future labour market performance and economic integration. These include age, education, occupational attainment, job experience, language ability, Canadian job offer, and spousal education/experience. Notably, an offer of employment is only one factor among many, and most entrants do not have one. Michael rejects a points system as a cumbersome and futile attempt by the state to micromanage the labour market. It is worth noting that the points system has vacillated between a broader approach that attempts to predict general labour market integration, and a narrower one that purports to match applicants with specific occupational niches in demand. While I share Michael's cynicism about the latter variation (re-introduced by the present government), I am less hostile to the former.

On the question of privatizing fiscal burden, it would appear that Michael is thinking of income support, or welfare. For example, he exempts from the insurance requirement public education, and publicly funded healthcare. On the other hand, he later expresses support for "more effective public and private resettlement assistance programs and credential equivalency determination mechanisms" (p. 312). In Canada, most resettlement programs (general and job-specific language training, work placements, skills upgrading) are publicly funded, and in limited cases, may even include a measure of income support to enable participation. The rationale behind the public expenditure on settlement – including income support -- is that it is an upfront short-term public investment that pays off in the long run by optimizing labour market and social integration, which in turn is fiscally beneficial. Indeed, Canadian data suggests that newcomers tend to draw from the public fisc more than the native born within the first few years of arrival, but comparatively less over time, with a more positive net contribution than the native-born over the long haul<sup>17</sup>. Should public expenditure on

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<sup>17</sup> see comparative study by Trejo

settlement be part of the insurance or should it be exempted? If the latter, should it be financed by the various fees that the government extracts from migrants to obtain visas or funded out of general revenue? What about unemployment insurance? If immigrant workers pay into an employment insurance scheme on the same terms as native workers, should they be denied access to it during periods of unemployment if, to pick a hypothetical scenario, the economy tanks within a year of arrival and their employer lays them off?

I pose these questions not because these apparently technical details matter in and of themselves, but because they tug at the underlying assumptions behind the fear of “fiscal abuse” that animates Michael’s insurance proposal.

Putting these preliminary concerns aside, I turn to consider Michael’s proposal on its own terms. Will it lead to significantly freer migration? If so, at what cost? Are the costs better than the costs of alternatives? When I speak of alternatives, I am thinking at those policy prescriptions that register approximately the same mix of idealism and pragmatism.

Certainly, if quotas were removed from employer sponsored visas in the US, one would expect a spike in numbers of foreigners recruited from abroad or from US universities when the economy is growing, and a decline in numbers during recession. Frankly, I do not think these are the people that critics of immigration have in mind when they complain about fiscal abuse by immigrants. This group tends to attract the criticism that they steal jobs and drive down wages, but Michael has already deemed these objections unworthy of accommodation. I am doubtful whether Michael’s mandatory insurance proposal is necessary (because the fiscal concern does not apply to them) or sufficient (because it does not respond to the job substitution/wage depression complaint).

A system that relies exclusively on private recruitment presumes an economy where large scale overseas recruitment is viable for the various sectors of the labour market. It may be true for an economy of the size and power of the United States. It may also only be true for certain sectors, such as the resource extraction industry, the IT industries, and the health professions. But could it replace the points system in Canada?

A serious shortcoming of the points system is that skilled immigrants are admitted to Canada on the strength of their education, credentials and experience, only to find that employers do not recognize or value their education, credentials and experience. The consequence of un- or underemployment of skilled immigrants is the subject of much research and, more recently, various public and public/private initiatives to remediate it.

Michael’s proposal goes a long way toward obviating the ‘brain waste’ concern. Immigrants arriving with a job have already surmounted the biggest obstacle to labour market integration, and they are guaranteed Canadian experience that will serve them in the pursuit of future employment. This may support the development or expansion of privatized or at least decentralized selection models alongside the publicly administered point system, but it does not demonstrate that one can fully replace the other. It is not self-evident that the Canadian economy, which is dominated by small and medium-sized enterprises, is situated to recruit as many, or more, independent applicants than the publicly administered points system. In order to properly assess the viability of privatized recruitment, one needs to know more about how and why certain industries and employers enthusiastically recruit skilled workers trained and living abroad, while other employers and sectors seem much more resistant to hiring skilled workers trained abroad,

even though they already live in the country. It seems unlikely that the explanation lies solely or mainly in a chasm lying between objective job specifications and relevant qualifications among the latter group. I suspect that there are many factors in play, and that the answers will be contingent, sector specific, and variable<sup>18</sup>. Nevertheless, I would hope that the answers might have policy implications in relation to alleviating the problem of brain-waste.

If Canada abandoned the points system in favour of one that depends exclusively on job offers, migration would be freer for those who work in specific sectors, but less free for highly skilled people from other sectors, or who lack the social capital or network to secure a job offer with an overseas employer. Even if one is agnostic regarding the composition of the group, I remain doubtful that the total number of skilled workers would meet, much less exceed, the numbers admitted under the points system. One could well imagine that a mixed regime would alleviate some of the inefficiencies and delays of the public system. That is indeed the *raison d'être* of the Canadian Experience Class, and various provincially-run programs that expedite the admission of immigrants who undertake to live in the province that nominated them. My point here is that the economic, political and institutional setting matters for understanding not only how we got to where we are (and indeed, how *we* got to *we*), but also for anticipating how policies might operate in different national contexts. I say, with some trepidation, that this is a point where historical Michael poses certain challenges to normative Michael's methodology.

To suggest that what could work for the US might not make sense in Canada is also true in the obverse. George Borjas argues that a more highly skilled migrant pool will impose fewer costs and confer greater economic benefits on the US, that the skill level of immigrants to Canada and Australia exceed those of US immigrants, and that this discrepancy is attributable to the use of a points system in Canada and Australia<sup>19</sup>. A study released by the Institute for the Study of Labour indicates that Borjas' empirical claim is accurate regarding the relative skill level of immigrants to the US versus Canada and Australia. However, if one removes Latin American migrants from the data, the skill level of immigrants to all three countries is roughly the same. The US manages to attract 'the best and the brightest' without a points system. The high proportion of Latin American immigrants in the United States is largely due to contingencies of history and geography, and unalterable unless one adopts draconian restrictions on family reunification. Again, context matters.

One of the puzzles raised by Michael's proposal concerns the relationship between market regulation and political membership. Michael initially describes a regime whereby sponsored foreign workers would enter as permanent residents. In other words, individual employers would directly confer entry into the labour market and into the citizenship lane. Some commentators specifically object to this as an inappropriate delegation of public authority to private decision-makers, but I am willing to remain provisionally agnostic<sup>20</sup>. However, Michael later returns to the question of non-status (illegal) and low skill workers. Here he recognizes that employers might resist undertaking the transaction costs associated with insuring low-skill workers (though they

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<sup>18</sup> cite to Hiebert's survey.

<sup>19</sup> cite.

<sup>20</sup> See, eg. Naomi Alboim

would presumably pass these on to the workers anyway). Rather than simply binding them to the same regime as earlier described, he offers an alternative program of 3-5 year temporary visas for low-skill workers. During this probationary period, the immigrant is simply ineligible for social assistance. It is a proposal that is repeatedly raised in the US for dealing with non-status workers, only to be resoundingly defeated by public opinion. It is as sensible as it is politically unpalatable. While I certainly support Michael's proposal regarding non-status workers as just, I am not certain what purchase the insurance scheme retains. Neither non-status workers nor temporary workers can access social assistance anyhow, so the fiscal concern does not arise unless and until they transition into permanent residence. At this point, Michael is silent about whether the mandatory insurance applies and, if so, who pays. Presumably, the same employers who did not want to pay in the first instance (because of transaction costs) would not want to pay it three years later. Would we require the permanent resident to pay for the insurance, or might we credit the immigrant for the fact that he or she has already participated for several years in the workforce (and paid taxes) while ineligible to access income assistance?

If one lines up option 1 (permanent residence/mandatory insurance) next to option 4 (temporary worker visa with no social assistance/transition to permanent residence) one might ask whether and why employers ought to be able to opt out of the mandatory insurance regime with respect to certain immigrants and not others. In so doing, employers' self-interested calculus directly determines not only which workers will be admitted into the domestic labour market, but also who will be admitted and on what terms to political membership. We might then understand permanent resident status as an employment benefit that individual employers could offer to, or withhold from, individual candidates as part of their recruitment and bargaining strategy.

But why would employers not prefer that all non-citizen recruits – high or low skill -- enter as temporary workers for three years, during which time they will pose no fiscal burden because they will be denied access to social assistance? This is *de facto* how the US system currently operates, insofar as the overwhelming number of skilled workers enter initially on temporary worker visas and then adjust their status to lawful permanent resident. Of course, because of the quotas on both temporary and permanent visas, the transition to permanent resident status is delayed by a ridiculous backlog and delay. But one could plausibly argue for the removal of caps and arrive at a universal system of temporary status which imposes no fiscal costs (because of ineligibility), followed by transition to permanent residence.

Though prospective immigrants to the US would probably prefer to arrive with the security of permanent residence – as they could in Canada or Australia – the other attractions of the US are substantial. Countries that compete with the United States have incentives to be more welcoming than the US, but the United States is enough of a magnet that it seems difficult to construct an argument from a starting point of domestic welfare-maximization about why it ought to do so. The incentives for employers' to employ non-status labour at the low-skill end of the labour market are well known. But it appears to be the case that across the spectrum of employment, employers understand that the relative insecurity of temporary immigration status also confers economic advantages. During the IT boom in the 1990s and into this century, US firms recruited tens of thousands of foreign professionals from abroad (mainly India) on renewable temporary

worker visas (H1B). A former CEO of a high-tech firm recently explained why large employers such as Intel and Microsoft, lobby the US government for more temporary visas, followed by more efficient and timely transition to permanent resident status, rather than for immediate conferral of permanent resident status:

Perhaps because workers on these visas are desirable, [because] they are less likely to leave their employers during the decade or more they are waiting for permanent residence. Moreover, I know from my experience as a tech CEO that H-1Bs are cheaper than domestic hires. Technically, these workers are supposed to be paid a “prevailing wage,” but this mechanism is riddled with loopholes. In the tech world, salaries vary widely based on skill and competence. Yet the prevailing wage concept works on average salaries, so you can hire a superstar for the cost of an average worker. Add to this the inability of an H-1B employee to jump ship and you have a strong incentive to hire workers on these visas<sup>21</sup>.

While I strongly favour a regime that minimizes the vulnerability of immigrants by providing the security of permanent residence, I am uncertain how, within the normative framework of a national law and economics analysis, one would arrive at Michael’s bifurcated model. I expect that employers across the spectrum would choose to avoid the transaction costs of insurance, and reap the benefits of a more compliant and cheaper workforce. One might opt for the permanent residence/insurance route if intra-industry or inter-state competition so militates, but the notoriously embedded asymmetries of information and power between employers and non-citizens with precarious immigration status – even highly skilled and sophisticated non-citizens – do not make that inevitable.

On the question of family migration, Michael’s proposal does not alter the status quo regarding the basis for admission. After all, family migration is already privatized to a large extent. Family members select family members. Michael proposes that instead of allowing family class sponsors to self-insure, they would be obliged to enroll in the insurance scheme. If insurance premiums remain low, one might predict that the insurance regime would have a negligible effect; if premiums escalate due to significant drawings by sponsored family members resorting to social assistance, then poorer families would be less able to sponsor in the future. This opens into the question of how the risk of resort to social assistance would be assessed. In other words, how would insurers calculate the premiums?

In the course of his critique of current immigration policy, Michael lambasts public, centralized immigrant selection practices as bureaucratic, unwieldy, and utterly futile exercises in forecasting the future needs of the domestic labour market. I believe he accurately characterizes and skewers the points system that Canada used pre-2001 and reintroduced in 2008. However, from 2001-2008, the points system did not attempt to identify specific occupations in demand and assess individual applicants against that list. Instead, it relied on indicators of adaptability to a changing economy, such as age, language ability, education, experience etc. These are among the criteria Michael lists as ‘observable characteristics’ relevant to premium calculations (p. 300).

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<sup>21</sup> Vivek Wadwa, “America’s Other Immigration Crisis”, *The American*, July/August 2008, at X. Michael’s proposal would preserve mobility of workers on temporary employment visas.

But I worry that a private insurance scheme would not merely replicate the points system, but would do so without the normative constraints imposed by the public version. That is to say, to the extent that the operation of the labour market is tainted by preferences that might be variously described as discriminatory, misguided, ill-informed, or excessively cautious, one would have reason to anticipate that these would factor into actuarial calculations that correlate immigrant profile to the probability of reliance on social assistance<sup>22</sup>. Highly skilled immigrants who arrive with job offers would presumably fare well. But what about their accompanying spouses?<sup>23</sup> Skilled immigrants who arrive as members of the family class would face the barriers to entry described earlier under the rubric ‘brain waste’. Would sponsors who are members of the ‘working poor’ be assessed as higher risks for default than wealthier sponsors? If and when premiums reach a level that prevents a person not presently in receipt of social assistance from sponsoring a spouse or child, or if a sponsored family member is deported for non-payment of premiums (p. 301), this model will have exceeded its normative budget.

Michael does hint at an important way in which his insurance scheme might provide a rationale for freeing up family migration. If fiscal impact is what we care about, states need not invest as many resources into scrutinizing ex ante or ex poste whether marriages or adoptions are relationships of mere ‘convenience’? If I am willing to sponsor a person and prepared to pay the insurance premiums, the legitimacy of the state’s interest in limiting the range of eligible relationships diminishes<sup>24</sup>? Of course, this argument has not gained any traction in Australia, where the fiscal retrieval system is even more onerous than Michael’s proposal. Sponsors must post a bond in advance of sponsorship that can be used to indemnify the state for the costs of any social assistance expended on family class immigrants (p. 308).

I find it difficult to assess whether Michael’s proposal will result in freer family migration. If the premiums are low enough, and the class of eligible family members is widened, perhaps a net increase in family migration will result. Otherwise, I would anticipate a neutral or negative impact on family reunification. I would consider this deeply problematic, especially in cases of close kinship. (The current Canadian practice is to deny persons on social assistance the ability to sponsor family members, and to have no outstanding debt as a pre-requisite to future sponsorship.)

The impact of Michael’s proposal on family migration brings into relief a formidable fact of all migration regimes, even those (like Canada’s) that ostensibly prioritize selection of skilled workers: The vast majority of lawful immigrants gain entry

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<sup>22</sup> Of course, Michael’s scheme already builds in the requirement that the immigrant have a job offer and, based on the emphasis employers place on local experience, one might anticipate that the acquisition of domestic labour market experience would enhance the prospects for subsequent employment.

<sup>23</sup> Cite to report that accompanying spouses of economic class principal applicants fare worse than people admitted as family class because of lower social capital.

<sup>24</sup> The Canadian government commissioned report “Not Just Numbers” (1997) explicitly recommended that the government refile from defining the range of relationships eligible for sponsorship. Canada and the US exhibit interesting differences in approach: The US sets no ceiling on the admission of immediate family members of citizens, but does set quotas for family members of US lawful permanent residents (LPRs). Canada does not discriminate between permanent residents and citizens for purposes of family reunification, nor does it set explicit quotas. The Canadian definition of the family includes same-sex and common law partners but excludes adult siblings, whereas the US excludes same-sex and common law partners, but does permit citizens to sponsor adult siblings, subject to quota.

not because of their skills, not because they have a well-founded fear of persecution, but because of kinship. Over two thirds of US immigration is family reunification. In Canada, the economic class of immigrants comprises roughly 60% of those entering as permanent residents, while approximately 40% are members of the family class. However, this masks the fact that statistics for the economic category include accompanying spouses and children of the principal applicant. Only the principal applicant is assessed against the points system (or the criteria for investors or entrepreneurs). Only about a quarter of the economic class consists of principal applicants. All this to say that close to three quarters of immigrants admitted to Canada as permanent residents annually gain entry because of their kinship to someone already in Canada, or the person selected for entry by Canada. In the United States, relatively fewer family members accompany skilled immigrants because, as described earlier, the vast majority of economic class immigrants do not arrive as permanent residents. Instead, they begin on temporary employment visas, and these typically restrict a spouses' authorization to work in the US. As a result, many people on temporary work visas spend considerable time in the US before they can sponsor their family members.

I earlier described how the skill composition of the US immigrant population is skewed by the large number of immigrants from Mexico and further south. History and geography are unalterable, and the impact of past immigration ramifies into the future via family migration, just as it does through reproduction.

Which brings me back to *Life of Pi*, and the reasons people move: for themselves, and for their families, and for the next generation. Indeed, if we focused attention on the next generation, we might realize that what states are getting when they recruit skilled and educated workers as immigrants is not so much a guarantee of plug-and-play economic actors, but people who might struggle to adapt, face insurmountable obstacles, and may never prosper. These immigrants will in turn sponsor their kin, who will also have children. Given their background, these adult immigrants will probably also transmit to their children the values and aspirations that the state endorses for all its members: education, career achievement, self-sufficiency -- and the importance of family. And how these immigrants' children, raised and educated, fare in the advanced economies that admitted their parents, will reveal at least as much about social policies beyond admission as it does about immigration policy.