POLITICS & POETICS
A Journal for Humane Philosophy

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Author: Richard Ekins
Article ID: 839540
Article publication date: March 2017
Article version: 2.0

Appears in *Politics & Poetics* - A Journal for Humane Philosophy, Vol II
ISSN: 2543-666X

Part of Issue on

Compassion & Community
(2017 -)

Politics & Poetics is a peer-reviewed journal of the humanities with a focus on philosophy, seeking to contribute to a reconciliation of political and literary discourses. It offers a forum for discussion for the human person as both a political and a literary animal.

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The Bounds of Compassion and the Dissolution of Nations

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I.

This article considers how the virtue of compassion bears on questions about membership of the political community. The virtuous person *should* have compassion for others, including members of his or her political community but also for foreigners and strangers. And the virtuous state is one that is animated by compassion, in which public deliberation and action is not indifferent to the suffering of others. Still, like other justified emotions and dispositions, compassion may distort our public life if it is not disciplined by reason. The discipline of reason demands that one (as individual or group) not be indifferent to the foreseeable side-effects of the actions and policies that, motivated by compassion for A and B, one chooses (as individual or group);[1] for those actions' or policies' side-effects may include sufferings or deprivations for C and D. Parents are not morally free and entitled to choose, out of compassion for the poor, to allocate their home and their wealth to all-comers with the foreseeable side-effect of depriving their own children of education and even of security from neglect and assault. Compassion is a virtue only when it is compatible with justice, which involves among other things a prioritization (not absolute but real) of responsibilities. For the imposition of unjust side-effects upon those for whom one has a certain priority of responsibility *shows a want of compassion for them*.

Analogously, compassion is misunderstood if it is taken to undermine the moral significance of nationality – of the benefits and responsibilities reasonably involved in membership of a political

[1] On group intention and action, see my *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012) chapter 3.

community that forms a distinct nation – or to undercut the related proposition that a people cannot be a free people unless it maintains control of its borders and, with a view to sustaining the cultural and other conditions of internal peace and constitutional self-government, settles for itself who resides therein. Misunderstanding of all this – both of compassion and of responsibility – has informed much recent argument about how European states should treat refugees. Departing from the relatively narrow Refugee Convention 1951 (the limited scope of which the article defends), modern human rights law – animated by compassion for asylum-seekers and other irregular migrants – has disarmed states from securing their common good and from acting with compassion for the vulnerable among their own citizens. The scale of Europe's ongoing refugee crisis owes much to this incapacitation of states, as well as to the EU's unstable distribution of responsibilities amongst states for control of entry to, and movement within, Europe. In the unravelling of this supra-national scheme, one sees in action both misconceptions about compassion and the drawbacks of partly (but not wholly) limiting state sovereignty. Properly understood, compassion for others imposes significant obligations on well-ordered states but does not require their indifference to the dissolution of nations.

II.

One has compassion for another if one is moved by their suffering or distress – callous indifference to the suffering of another is the antithesis of compassion. One suffers with others in the sense of sharing in – almost participating in – their suffering, seeing oneself in their plight, experiencing sympathy for, and fellow-feeling with, them. Thus, compassion is recognition of a shared predicament and is an identification with the plight of another that should hold between fellow sufferers, between equals. But one might also understand compassion to be the emotion of being moved by suffering, and hence to desire to relieve it, to pity another such that one is moved to aid him or her. In this way, compassion is an emotion experienced not so much by a fellow-sufferer as by one who stands apart from the suffering, a superior rather than an equal, and is capable of providing relief. The virtuous person will often have compassion for others in both senses, sharing in another's distress and being moved by pity to relieve that

distress.[2] No person, whatever their advantages, truly stands to others as a type apart – we should all recognize our vulnerability and mortality. And *recognizing* the particular distress of the other is wholly reasonable – indeed it may be necessary if one is to be moved to consider whether one can or should come to the aid of that person. Because of the finiteness of our capacities and the consequent imperative to prioritize by reference to rationally ordered *responsibilities* of justice, not every instance of compassion should or can culminate in action, even when it has beneficially made one open to genuine consideration of whether one has a duty to aid, or an opportunity for charity.

The compassion that God has for His creatures is a central theme in divine revelation, entailing that we likewise should have compassion on our fellow creatures and on those over whom we enjoy a relative superiority, such that more is expected of us. These propositions are made out directly in the Scriptures, often in relation to how one should treat foreigners or strangers. The Jewish people were forbidden from oppressing the foreigner dwelling amongst them, including denying him justice, for they too had been foreigners in Egypt.[3] Likewise they were to love the foreigner, to recognize his vulnerability (as with the fatherless and widows), and to be hospitable to strangers.[4] These obligations help make clear the nature of God and the equality of all persons.[5] But note that they are articulated alongside the divine or inspired ratification of the establishment and maintenance of an otherwise exclusive form of religious and political community, in which there is a clear duty to maintain the distinct character of God's chosen people in and on its promised land.

In Christian thought, the incarnation of Christ makes God a fellow-sufferer with us, such that the maker of all has pity for us and shares our plight. This divine humility transforms the nature of persons, such that each, no matter how broken or corrupted, is of ultimate significance and is the image of God present before us. It is this that grounds the radical claim that what one does (or does not) for the least

[2] Often one is under a duty to relieve another's suffering, in which case compassion supports duty. But in other cases, one has no duty to aid any particular person and could not have a coherent duty to aid all. Rather, one has an imperfect obligation to aid some, an obligation that compassion helps support and perfect.

[3] Deuteronomy 10:18-19; Exodus 23:9; Malachi 3:5.

[4] Leviticus 19:33-34; Job 31:32.

[5] The obligations are partly duties of justice, but their foundation is the relative weakness of the stranger in one's midst, one's corresponding dependence in all things on the forbearance of God, and especially the force of recognizing one's shared plight as persons who were also foreigners in a strange land (Egypt). Hence, the passages in question invoke compassion, which should spur justice and hospitality and so forth.

amongst you, one does also for or to Christ.[6] As St Paul confirms,[7] the incarnation grounds the basic equality of all persons.[8] This equality, and the universality of the Gospel of Christ, puts membership of political communities in a radically different light.[9] It is no surprise that the premises of the Christian faith have been thought to support cosmopolitanism. [10] Still, while Christianity certainly derails the pretensions of many a ruler or polity it does not itself mandate a unique political form. Christ's recognition of secular authority and the history of the Church as a community that does not collapse to such authority are consistent with a range of political forms. It is taken for granted by St Paul,[11] and articulated with care by others,[12] that there should be particular, non-universal, non-cosmopolitan secular authorities that effectively restrain wrongdoers and that Christians ought to work for the good of the city (polity) in which they find themselves.[13] The political community is not the Church and that the latter is universal does not entail the same for the former.

The well-ordered political community is characterized by compassion. Members of the community should understand themselves to share a common predicament, viz. how to live well together in the face of the various challenges that may or do confront them. They should participate in the suffering of other citizens in the sense that they see the others as fellow-sufferers and as persons whose suffering they may have a particular duty to alleviate. The rulers of the polity (officials and ruling elites) should have compassion for those they rule, both in the sense of seeing themselves as implicated in the plight of the ruled and in the sense of being moved by pity for those to whom they stand as superiors. The conjunction of the two senses helps avoid condescension and/or contempt. A detached ruler may nonetheless secure justice but the risk of indifference or ignorance is high: for this reason, government should be representative, even if only in the thin

[6] Matthew 25:34-45.
[7] Galatians 3:28.
[8] See also Jeremy Waldron, *Locke, God and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002).
[9] Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (London: Allen Lane, 2014), 51-78.
[10] For (critical) discussion, see Nigel Biggar, *Between Kin and Cosmopolis* (Cambridge: Cascade Books, 2014), 1-25.
[11] Romans 13:3-5.
[12] For example, see Biggar, *Between Kin and Cosmopolis*, n10 above and Oliver O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (Cambridge: Cambridge University Press, 1999).
[13] Jeremiah 29:7 and St Augustine, *The City of God*.

sense that the rulers understand themselves to personate the whole, to be drawn from among those they rule.[14] Though foreign rule may sometimes be justified, the prospect that such rule may fail to be enlivened by compassion, in equality and in pity, is a powerful reason to avoid it.

It is clearly possible for particular persons, whether rulers or ruled, to have compassion for one another. Is it possible for the polity itself to be compassionate? At its core, a political community is a purposive group, the members of which jointly intend to secure their common good together, by way of common institutions.[15] This joint intention is the foundation that makes self-government possible. The subsequent action over time of representative institutions, which make provision for the people plural to share in lawmaking, makes it possible for the people singular to govern itself. The reasoned choices of these institutions, framed by ongoing public deliberation, are the choices of a self-governing people. The central institutions in this community (the executive, Parliament, the courts) are themselves capable of acting as intentional agents. And their coherent action makes it possible for the people as a whole to act as an agent.[16] The choices of any individual person constitute his or her character over time. So too, the choices of the political community form its character,[17] of which any individual citizen may feel proud or ashamed and which he or she may aim to maintain or abjure (in whole or part).[18]

An agent's pattern of choices helps frame dispositions to act in certain ways and the agent is virtuous to the extent that he or she has a stable and standing willingness to act rightly. To the extent that they attain agency, political institutions and the state as a whole will adopt a set of dispositions, which may be vicious or virtuous. Consider mercy.[19] The state is merciful if it makes provision, in its lawmaking choices, for courts to temper the rigour of the criminal law in response to an offender's genuine contrition and for the executive to pardon some offenders. The extent to which the state is merciful may turn on

[14] Ekins, *The Nature of Legislative Intent*, n1 above, 146-154; see also John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 264.
[15] Richard Ekins, 'How to be a Free People', *American Journal of Jurisprudence*, 58 (2013), 163.
[16] *Ibid.*
[17] On the intelligibility of group intention and choice, see Ekins, *The Nature of Legislative Intent*, n1 above and Philip Pettit and Christian List, *Group Agency* (Oxford: Oxford University Press, 2011).
[18] See further Roger Scruton, 'Corporate Persons' *Proceedings of the Aristotelian Society*, 63 (1989), 239 and John Finnis, 'Persons and their Associations', *Proceedings of the Aristotelian Society*, 63 (1989), 267 (reprinted as essay 5 in his *Intention and Identity: Collected Essays Volume II* (Oxford: Oxford University Press, 2011), 92).
[19] John Tasioulas, 'Mercy', *Proceedings of the Aristotelian Society,* 103 (2003), 101.

whether these capacities are exercised by courts and executives and how such exercise is received by the public, viz. as a justified manifestation of the character of the state or as a scandal. The political community acts well, displaying some virtue (here, mercy), when its actions, led by its institutions and received and maintained by its subjects, follow from such choices.

Is compassion a political virtue? It is an essential element in the moral psychology of any decent, stable political community, which helps motivate acts of justice and charity. Perhaps it is the latter that are virtues and compassion is an emotion that spurs one to be virtuous in this way. But the virtuous person cultivates compassion, eschewing indifference, striving to recognize the suffering of others and to pity those who warrant such. And this holds for rulers, for the ruled and for the political community as a whole. Thus, compassion is a virtue, but like other virtues it risks becoming a vice if not properly delimited – if not attentive to the side-effects of good intentions and their impact on *all* those for whom one should have compassion, not merely those by whose here and now plight one is moved.[20] The pity that is rightfully felt towards those whose position is pitiable can easily become haughtiness or high-handedness. And the impulse to relieve the suffering of some other person may lead one to act unjustly, as in 'mercy killing'. Some evils are done in the name of compassion. Each virtue thus takes its proper place in relation to other virtues, with each and all tracking some truth about how a reasonable person should act in this or that circumstance.[21] Thus, compassion should be leavened by prudence and by justice,[22] not in the sense that one trades them off against each other but rather that reflection on each in relation to the other aids discernment.

The members of a political community should aim jointly to share the emotion of compassion and should, in their institutional actions and in the political culture in which those actions are taken, received and contested, seek to manifest the virtue of compassion. Each citizen should have compassion for other citizens, and the state – the artificial, institutional form of the whole – should have compassion for each and all. This shared emotion and the disposition in which it consists (to identify with, to pity) are essential if citizens are to secure their

[20] St Augustine, *On Christian Doctrine*, I, 27-28.
[21] Terry Penner, 'The Unity of Virtue', *The Philosophical Review*, 82 (1973) 35.
[22] Cf. Lawrence Blum, *Friendship, Altruism and Morality* (London: Routledge, 1980) and Annette Baier, 'The Need for More than Justice', in Virginia Held (ed.), *Justice and Care: Essential Readings in Feminist Ethics* (Boulder CO: Westview Press, 1995).

common good together, if they are to recognize the needs of the other as such, and if they are to be disposed to sacrifice to aid them. The practice of trust, compassion and sacrifice makes a people (like other groups) capable of action, of mobilizing behind common projects efficiently and effectively.[23] The demands of the common good require such effective action and hence provide very good reason for a people to be formed and thence to be maintained.

The bounds of compassion and the duty of charity are certainly not confined by borders but there are particularly strong reasons for compassion and for charity (and justice) amongst some people. The sharing of a common life together, the history of past shared actions and experiences and the whole treasury of common culture and language and so forth, all help make possible this kind of relationship amongst compatriots.[24] This is a relationship that seems to be vital for peaceful self-government in which rich share with poor. The strength of the bond amongst citizens carries risks, not least of contempt for or aggression towards other peoples. But even without flagrant injustice, compassion for compatriots may risk indifference to the plight of those who are not compatriots, for whom one should have compassion. One may owe more to compatriots than to others (as to one's children than to one's neighbour's children),[25] but still the virtuous person shares in the plight of all persons and the relative proximity of some with whom one otherwise has no connection or associative relationship (say, shipwrecked strangers) may often require charity.[26]

III.

It is good that all persons are members of *some* people, in which form they may help secure their common good and exercise self-government. It is this truth that grounds the international legal prohibition on rendering persons stateless, on exile as a punishment. The Refugee Convention 1951 is also framed around recognition of that truth. The Convention was devised to address the problematic aftermath of the

[23] Ekins, 'How to be a Free People', n15 above, 171; Richard Ekins, 'Constitutional Principle in the Laws of the Commonwealth,' in John Keown and Robert P. George (eds), *Reason, Morality, and Law: the Philosophy of John Finnis* (Oxford: Oxford University Press, 2013), 396, 408-9.
[24] David Miller, *Citizenship and National Identity* (Cambridge: Wiley, 2000); Biggar, *Between Kin and Cosmopolis*, above n10; John Finnis, 'Nationality, Alienage and Constitutional Principle', *Law Quarterly Review*, 123 (2007), 417, 442-445.
[25] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge MA: Harvard University Press, 2011), 311-317.
[26] Jeremy Waldron, 'Who is my Neighbor?—Proximity and Humanity', *The Monist*, 86 (2003), 333.

mass movements of peoples in Europe at the conclusion of the Second World War, providing protection for persons who found themselves driven from their country of nationality.[27] Its protections apply to refugees, who are defined as persons who are outside their country,[28] and who are unable or unwilling to return to their country, due to a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group.[29] Importantly, the Convention does not entail an individual right, having left one's country (where one is undergoing persecution), to demand entry into another, nor a duty on the part of any signatory to the Convention to admit into its territory any and all persons fleeing persecution.[30] Obligations under the Refugee Convention arise only when the person is present on one's territory.[31] It will often be right or even morally obligatory for a state to admit persons fleeing persecution, notwithstanding the Convention's limited scope. But there is no legal obligation so to do under the Refugee Convention, partly because there is a moral difference between refusing to return some person who is within one's power to his persecutors and refusing to allow someone arguably fleeing persecution to enter one's territory and there to enjoy refuge. And the Convention is not a scheme for the relief of suffering in general. It is a partial remedy to the particular evil of persecution, to the effective rejection of some person by his or her polity.

The 1951 Convention was limited to European refugees after the War. These temporal and spatial restrictions were lifted in 1967,[32] but the definition of refugee otherwise remained unchanged. By signing the Convention, states undertake not to return refugees to their persecutors, save in exceptional circumstances, to consider each particular application for asylum (for recognition as a refugee), and to provide various substantive rights to refugees, rights that increase over time. The requirements of the Convention are supported and complemented by

[27] See the UNHCR's introductory note to the text of the 1951 Convention.

[28] To be clear: one is not a refugee, for the purposes of the Convention, until and unless one has fled from one's country (such that one is outside the country of nationality). Intending to flee, and having good reason to flee (being subject to persecution), does *not* make one a refugee in terms of the Convention.

[29] The Convention Relating to the Status of Refugees 1951, Art. 1 'Definition of the Term "Refugee"'.

[30] John Finnis, 'Judicial Lawmaking and the "Living" Instrumentalization of the ECHR', in N. Barber, R. Ekins and P. Yowell (eds.), *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016), 73, 110-112.

[31] Various articles in the Convention make this explicit. Consider Art. 4: 'The Contracting States shall accord to refugees *within their territories* treatment at least as favourable as that accorded to their nationals with respect to
freedom to practise their religion and freedom as regards the religious education of their children' (my emphasis).

[32] Protocol Relating to the Status of Refugees 1967, Art. 1.

national asylum and refugee law and, in Europe, by the European Convention on Human Rights (ECHR) and EU law. The legal regime in question has been criticized for failing to provide the protection that refugees in the true sense require.[33] The concern is that the law fails to show compassion for the plight of desperate persons and that it either causes or tolerates far too much suffering.

For many scholars, the Convention's definition of refugee is too narrow.[34] At a minimum, they argue, it should include persons attempting to flee from their country of nationality, rather than being limited to those already outside that country. The focus on persecution is taken to be arbitrary and is contrasted unfavourably with the UNHCR's broader definition of refugees as those fleeing war and disaster. Matthew Gibney argues that refugees are those who move because their states fail to meet their basic human rights, whether from malice or incapacity.[35] The need for protection from other states is not limited to persecution (or to exposure to violence), hence the category of refugees should not be limited either. The argument would seem to entail that persons escaping from extreme poverty, from states that fail to secure basic public goods, also warrant recognition as refugees.

It is often assumed that the Refugee Convention requires states to admit refugees (or, as their status is often not immediately apparent, those applying for asylum). It is true that a central duty that the Convention imposes on states is 'non-refoulement', the duty not to *return* a refugee to his persecutor.[36] Hence, expelling the refugee *whom one has earlier admitted*, by *returning him* to the frontiers of the persecuting state, is forbidden. But expulsion to other states is permitted, and even the principle of non-refoulement is expressly qualified in relation to persons who have been convicted of a serious crime and persons who pose a risk to national security.[37] Some argue, or assume, that expulsion should *never* be permitted and that the principle in question entails not only a duty not to expel but also a duty to admit.[38] The UNHCR's gloss on the Convention seems to imply as

[33] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: Oxford University Press, 2015).
[34] Alex Betts, *Survival Migration* (Ithaca NY: Cornell University Press, 2013), 19.
[35] Matthew Gibney, 'Refugees and Justice Between States', *European Journal of Political Theory*, 14 (2015), 448, 453-457.
[36] Refugee Convention, Art. 33 (1).
[37] Refugee Convention, Art. 32, Art. 33 (2).
[38] David Miller notes the narrowness of the legal affirmation of the principle but adopts 'a somewhat wider interpretation that would prohibit a person being returned to a country where her human rights would be seriously threatened, which I think captures the spirit if not the letter of the international law principle.'

much.[39] However, the Convention clearly provides otherwise, and its drafting history confirms its intention to limit and qualify the principle of non-refoulement.[40] Accordingly, all Western states have sought to reduce the numbers of persons who might enter their territory and claim asylum by adopting restrictive measures, including strict visa conditions to limit legal entry of persons from troubled states, financial liability for air or sea carriers who transport illegal (or irregular) migrants into the jurisdiction, and sometimes deeming part of the territory on which an airport is located not to be the state's territory.

Main parts of this legal regime have come under effective assault from international human rights law. The European Court of Human Rights (ECtHR), adjudicating disputes about the ECHR rather than the Refugee Convention, has recently imposed sharp limits on the capacity of states (a) to refuse to admit or otherwise to deter would be asylum-seekers or (b) to deport those who are then admitted (even if their claim for asylum fails). The ECtHR (and to some extent the European Court of Justice (ECJ)) has made it very difficult for states to deport illegal migrants, including those convicted of serious criminal offences, if they have any kind of family life in the state (say, having fathered a child),[41] or if the deportation of the migrant in question would expose him to a risk of treatment by another state that the ECHR would proscribe were it carried out by a signatory state.[42] Admitting an asylum-seeker to one's territory thus carries with it a very real risk that he will stay even if the original asylum claim turns out to be baseless, for deportation is costly and faces multiple legal challenges.

The ECtHR has asserted a wide and categorical ('absolute') prohibition on expulsion of asylum-seekers, (even those whom the Refugee Convention would certainly permit to be expelled) on the grounds that exposing a person to a risk of inhuman or degrading treatment is to flout Article 3 of the ECHR. Likewise, the ECtHR has effectively created a right to enter, for intercepting boats on the high

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David Miller, 'Border Regimes and Human Rights', *Law and Ethics of Human Rights*, 7 (2013), 1, 10, n15.

[39] 'A refugee seeking protection must not be prevented from entering a country as this would amount to refoulement', UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Geneva, 2011), 5. See www.unhcr.org/4ec262df9.html.

[40] See discussion in Finnis, 'Judicial Lawmaking and the "Living" Instrumentalization of the ECHR', n30 above.

[41] Per Art. 8 of the ECHR; for discussion of the British case law on point see T.A.O. Endicott, 'Proportionality and Incommensurability' in G. Huscroft, B. W. Miller, G. Webber (eds.), *Proportionality and the Rule of Law* (Cambridge: Cambridge University Press, 2014), 311.

[42] *Chahal v The United Kingdom* (1996) 23 EHRR 413, [1996] ECHR 54; *Saadi v Italy* (2009) 49 EHRR 30, [2008] ECHR 179.

seas, say, and turning them back to their port of origin is deemed by the Court to be an exercise of jurisdiction over the passengers on the boats, which entails a duty not to turn them back if this creates a risk of their suffering inhuman or degrading treatment. This jurisprudence is *not* limited to persons fleeing persecution and indeed applies with almost equal force to economic migrants, especially those who choose to travel to Europe by way of a dysfunctional state (like Libya) where they would be at risk of violence. Further, the ECtHR is making signatories to the ECHR responsible to avoid the risk that the state to which one turns a boat back, say, might deport the persons in question to some other state where there is a risk of inhuman or degrading treatment. The resulting responsibility is to accept *whoever* arrives on one's shores or even whomever one rescues or intercepts at sea.[43]

This development of human rights law is highly problematic. It is not justified by the terms of the ECHR itself, which provide, in Articles 2-3, that states may not intentionally deprive a person of life and may not subject a person to torture or inhuman or degrading treatment or punishment. The ECtHR's recent judgments, which are intended to undercut state responses to the refugee crisis, explode these narrow and reasonable propositions. Instead, the Court imposes responsibility on states to make it the case that no one is ever at risk of some other party, including the state from whence the irregular migrant comes, acting wrongly. This is an impossible burden to place on states which are responsible, primarily and directly, for the security and good of their citizens, which some of those admitted may threaten.[44] The Refugee Convention makes clear and reasonable provision for such risk, specifying that no one has a right to be admitted and that persons who are otherwise entitled to asylum may be expelled if they commit serious crimes or if they threaten national security. The ECtHR's intervention shatters this provision and imposes vast, if unquantifiable, risks on signatory states. This new legal regime is an incoherent and dangerous act of judicial fiat. It collapses the principled distinction between what the state chooses and the unintended (and often unwanted) side-effects of its actions.

[43] The judicial imposition of this responsibility has the perverse consequence of discouraging states from standing ready to rescue persons at sea, that is from mounting expensive and far-ranging maritime operations, for if one does not rescue those in need then one has no responsibility to admit them to one's territory.

[44] As John Finnis argues, the Court's extension of absolute norms beyond negative prohibitions makes incoherence and self-contradiction inevitable. See further John Finnis, 'Absolute Rights: Some Problems Illustrated' *American Journal of Jurisprudence*, 62 (2016), 195.

IV.

The scholarly-judicial critique of the limits of the Refugee Convention is driven by compassion for the desperate plight of others. The very real suffering of persons fleeing war, disaster or poverty invites and warrants compassion. But the critique and especially its juridical realisation demonstrate vividly why compassion should not be reason's master. It is not the case that states should do whatever will alleviate the suffering of others. The state exists to secure the common good of its people and this is its primary responsibility. It will often be right for the state (and its people) to act for the good of foreigners, including at considerable cost, and justice always imposes limits on what the state may choose to do to, or reasonably cause to befall, foreigners. But no state is responsible for alleviating the suffering of one and all and it is hubris to think otherwise. The imposition (or assumption) of this responsibility for the common good of all persons is self-defeating to the extent that it sacrifices the common good of those who are the state's direct charge.

The ongoing expansion (or collapse) of refugee and asylum law undercuts the capacity of the state to secure the common good. The mass movement of peoples has consequences for the security and prosperity of the states into which they enter and may strain the state's capacity to provide public goods, including civil order and the rule of law. The effectively permanent settlement of large groups of persons in states who have not chosen to admit them risks ongoing social discord, or worse, and the fraying of the bonds of sympathy and fellow-feeling (of compassion) that make it possible for citizens to live well together and to act jointly in protection of their common good, whether in welfare provision or military action. These risks are vast and may threaten the continuing life of the nation if, as the ECtHR baldly asserts, the state is wholly incapable to stop any mass movement of peoples, however large this may be or however problematic the reception of such peoples will be. The 'life of the nation', to use again the operative term in Article 15 of the ECHR,[45] is not an ultimate good and does not sanctify all means. It is thus right that states should eschew murder and torture even if the cost of this eschewal is military defeat and tyranny. But the denial of entry to one's territory, or the

[45] Art. 15 permits derogation from some of the rights in the ECHR in time of war or 'other public emergency threatening the life of the nation'. It does not permit derogation from Art. 3.

turning back of a boat to its port of origin, is not a choice that no person or state should ever make: on the contrary, it is a choice that may often be justified and which is not to treat others unjustly.

The critique of the Refugee Convention is an argument in effect for open borders. The jurisprudence of the ECtHR increasingly prevents the state from determining who may enter and who may remain. This erosion of border control encourages the mass movements of peoples, not only from countries where these persons face violence and persecution but also from relatively safe but much less prosperous countries. Many of those entering Europe are not escaping directly from warzones but are instead travelling from one country to another, in search, understandably enough, of a better way of life. In this way refugees become economic migrants. But the clear upshot of the ECtHR's case law is that all such persons must be admitted, for turning them away would be irresponsible. Inevitably, this legal provision tempts people to leave a safe place, where they are no longer in a warzone for example, and to undertake a dangerous journey, during which they or their family may perish, in hope of an improved standard of living.[46] Repealing visa restrictions and carrier liability would make the journey safer, and would increase still further the numbers who travel. But the point of these restrictive measures is not to endanger those who choose to evade them but rather to limit the mass movements of peoples, and the state is not thereby responsible for the deaths of those who nonetheless choose to travel by irregular (illegal) means.[47]

Most refugees reside in territories directly adjacent to their country of origin. This has the advantage that when conditions improve they are more likely to be willing and able to return home. The permanent resettlement of refugees in countries far distant undercuts the prospect of return and of the restoration of the broken nation in question, especially if it is the most prosperous and industrious in the group that are most likely to depart. Inviting the mass movement of peoples, such that refugees in adjacent territories are encouraged to travel to Europe in hope of betterment, undermines the continuing life of those nations. All this holds too, perhaps with even more force, in relation to economic migrants, who may leave their country of origin in search of

[46] See Paul Collier, 'If you really want to help refugees, look beyond the Mediterranean', *The Spectator*, 8th August 2015

[47] There are likely some circumstances in which the imposition of (certain) restrictive measures is irresponsible. This proviso may hold if, for example, the country in question has special responsibilities to some class of irregular migrant, say by having helped cause those persons to flee their homes or by reason of some past historical association.

prosperity in the West, entering Europe illegally, perhaps securing entry to the jurisdiction as purported asylum seekers. Again, the damage to the country of origin may be very real.

Many states choose freely to admit migrants to work for a time and/or to settle permanently. But the forced admission of large groups of migrants, often from very different cultures and traditions, is very different. The resulting changes in the character of the community have not been freely chosen and the new arrivals are therefore much less likely to be welcomed than in planned, orderly migration. For the arrival of these new inhabitants of the land is not an exercise in love or charity by the prior inhabitants thereof, but rather is the exercise by the new arrivals of an opportunity provided by an absence of restraint. Disabling states from limiting the mass movements of peoples in this way is to abandon the continuing life of the nation to happenstance. All persons warrant compassion. But persons share cultures, traditions and institutions that matter in introducing and maintaining political order. Opening the doors to the mass movements of peoples threatens to do very real damage to the integrity, autonomy and security of the polity.[48]

V.

One might reasonably point out, in answer to the contentions outlined above, that no European state retains full control of its borders. True, member states of the EU, as well as those in the European Economic Area, have undertaken treaty obligations that provide some 500 million persons with freedom of movement across the continent of Europe. In most of continental Europe this freedom has been exercised in the Schengen Area, in which states even eschew checks at the border: movement is (or was until the recent migrant crisis) free indeed. Relatedly, the EU has adopted common asylum laws, which overlay and complement the requirements of the Refugee Convention, such that, while there is still national immigration and refugee and asylum law, one may say that European nations no longer control their borders. However, whatever the merits of free movement and European integration, the arrangement in question was largely chosen by states and is limited in its scope to the citizens of other somewhat similar states who have agreed to the terms of this exchange.

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[48] David Miller, *Strangers in Our Midst: The Political Philosophy of Immigration* (Cambridge MA: Harvard University Press, 2016); David Goodhart, *The British Dream: Successes and Failures of Post-war Immigration* (London: Atlantic Books, 2013).

The EU is plainly a supra-national arrangement, a partial state that, notwithstanding the treaty commitments to move towards 'ever-closer union', is not grounded in the will of a robust, integral people. The project is grounded in the continuing will of the institutions of many robust peoples but in contrast to those institutions, and the states they lead, is wholly artificial. At best, the EU is a remarkable joint endeavour to address common problems; at worst, it is an oligarchic technocracy that aspires to subsume the continuing life of the nations on which it rests. Probably both are true. The supra-national action of the EU intersects in interesting ways with the continuing capacity of member states qua states. In relation to the refugee crisis, the mismatch of responsibilities and liabilities has been disastrous. National authorities in the main points of entry to the EU – Greece and Italy – were nominally charged with registering and processing irregular migrants. But the incentive to discharge this onerous and expensive duty was minimal if such migrants thereafter made their way to the more prosperous countries in Northern Europe. Once within the EU, the relative absence of restrictions in movement in the Schengen Area made this straightforward. Strictly, the Dublin Regulation requires asylum applications to be processed in the country of entry to the EU, such that border-states would bear the burden of the would-be refugee's attempt to reach Germany or Sweden. This problematic sharing of responsibilities was rendered impossible by Germany's unilateral decision to flout the Dublin Regulation and to agree to process applications for asylum by persons who reached German soil.[49] Chancellor Merkel's fateful decision transformed the crisis, providing an overwhelming incentive to asylum-seekers to travel unlawfully to Europe and then through Europe to Germany. The decision was an abdication of reason for compassion, failing to consider the likely consequences of the decision for German citizens or, especially, for further movements of peoples.

The Chancellor acted out of compassion for refugees striving to reach Germany. In one sense she spoke for Germany, choosing to welcome those seeking refuge. Her decision was not (and has not yet been) reversed by those other officials with authority so to do, viz. her parliamentary colleagues or even voters in recent elections. And the decision was taken up and adopted by other elites and the public, with the German people (or at least the vocal fraction thereof: an important

[49] See Wolfgang Streeck, 'Scenario for a Wonderful Tomorrow', *London Review of Books*, 31st March 2016.

caveat) adopting the mantle of conscience of Europe and having compassion on those in need. However, the decision was ill-considered, unjust (in view of responsibilities owed to other EU states, by way of the Dublin Regulation, and to the refugees thereby tempted to travel to Europe), probably unlawful,[50] and reckless. It was not the stable choice of a free people squarely confronting the realities before it.

The Chancellor's compassion outpaced, and supplanted, the German people's free choice. Two main measures taken since have compounded the problem. First, Germany has made use of EU majority voting procedures to impose refugee quotas on other member states, in effect attempting to force those states to share in Germany's fateful choice. And those states, often in Eastern Europe, who have objected to the imposition of such changes, have been dismissed with contempt as hard-hearted and prejudiced. Second, the EU has reached an agreement with Turkey in an attempt to limit the mass movement of peoples, an agreement which contemplates 75 million Turkish citizens in time enjoying free movement in the Schengen Area. The agreement is unstable and risks accelerating the tensions that already exist, straining the willingness of states to continue to participate in Schengen, and making entry into Turkey (and purchase of a Turkish passport) a way to enter Europe.

The ongoing refugee/migration crisis confirms the problems of emotion overwhelming reason and the difficulties of supra-national control of free movement and borders. Quite likely the status quo, in which member states and the EU uneasily share responsibility for securing the borders, and for controlling the movement of irregular migrants within Europe, is the worst of all possible solutions. For no one is truly responsible and the unilateral action of any state, especially a state as significant as Germany, may disrupt the scheme. The structure of the EU has invited the mass movement of peoples and yet has proven relatively incapable of limiting such, especially in combination with the misguided ECtHR case law (and its ECJ counterpart). In this context, compassion for the plight of those on Europe's shores is of course understandable. But compassion is not a master virtue and its distortion of the German elite's deliberation and action risks disaster and self-refutation, for its fruit is and looks ever more likely to be a manifest

[50] One might argue that the German suspension of the Dublin Regulation was lawful, as the Regulation makes provision, per Art. 17, for states to consider applications for asylum from persons who are not their responsibility. But this provision seems clearly limited to particular applications, and does not permit the wholesale abandonment of the scheme at large by opening the doors to all comers.

failure of compassion for other German citizens, for citizens in other EU states, and for many would-be asylum seekers themselves.

VI.

The signal failure of a stress on compassion to anchor reasonable action in the refugee crisis does not at all impeach compassion itself. The members of any decent, free political community should share in the sufferings of others (including, but not only, of one another) and should have pity on those whom they may (jointly or singularly) aid. But as for individuals so too for states: compassion should be subject to the constitutional rule of reason and should not distort the intelligent realization of the common good. The establishment and preservation of nations, of political communities that share with one another and are capable of acting jointly over time, is a great good. The restoration of broken nations, where institutions and groups have turned on one another, is a good also. Compassion for the desperate does not obviously justify or require the dissolution of nations. Rather, measures taken to alleviate the suffering of others, which are often required, should presumptively aim to maintain and to restore nations, to avoid their collapse or erosion.

The virtuous person has compassion for all, not only his compatriots with whom he shares a particular history and future. The plight of refugees and impoverished migrants should move us and should often move us to action, including joint action as peoples. The integrity of one's own nation licenses neither disdain for the humanity of others nor complacency in the face of their needs. There are very strong reasons for European states to treat migrants on their shores justly, to meet their immediate needs for food and shelter, and to deliberate about their future in a way that does not neglect their good. Likewise, European states should have compassion for the plight of states adjacent to warzones, who serve as places of refuge to hundreds of thousands of refugees. And this compassion should be a spur to justice, not least support for the costs of meeting the needs of these refugees and action (diplomatic, military or economic) to make it possible for them to return home.

It may be that resettling some persons in Western states forms part of the discharge of this imperfect obligation to provide aid to other states and to refugees. But standing open to receive and settle however

many asylum-seekers succeed in making the dangerous and expensive journey from their country of origin to the West is unwise, for it encourages people to put themselves in harm's way, it hollows out nations that should be restored, and it risks undermining the nations that provide refuge. Worse still is being forced by a supra-national court to stand open in this way, such that the community loses for itself the capacity to be a people and to decide how it shall live. There is too often an absence of compassion in our public life, too little fellow-feeling between elites and citizens, between competing social groups, and between nationals and foreigners. Properly understood, compassion should support justice and love within and between communities. It would be unfortunate indeed if it were taken to require their effective dissolution.