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Reconsidering the claim to family reunification in migration

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Introduction

At a time when entrance to and residence in western states is a scarce resource, a high proportion of legal immigration is based on family reunification.* It has recently been proposed that, rather than giving such weight to family members, the claims of refugees should be given at least equal consideration. In *The Ethics and Politics of Asylum*, Matthew Gibney argues that, on the basis of a humanitarian duty to alleviate suffering when the costs are not excessively high, a much greater number of refugees than at present should be admitted. He maintains that this could be achieved without increasing overall immigration if refugees were given at least as high a priority in entrance decisions as regular (economic) and family migrants and by differentiating between various kinds of family applicants, in particular between immediate and extended family members (Gibney 2004, 232-4). He argues '[i]f residence in liberal democratic states is a scarce good, the distribution of which raises questions of justice, we can't ignore the question of how states should rank the claims of family entrants against those of refugees' (Gibney 2004, 14).

Rather than dismissing claims for family reunification entirely, he argues that some balance needs to be struck between universal claims, based in need, and partial claims, based in special relationships, and between impartialist views such as utilitarianism and global liberalism that do not distinguish between individuals, and partialist views that focus on particular relationships. He concedes that '[f]amily entrants represent the partial argument at its most forceful', while characterising the arguments for family unification as based in a partialist view giving priority to fellow citizens (Gibney, 2004: 243). In fact things are somewhat more complicated, as we shall see.

In this paper I examine the arguments for giving family reunification significant consideration in claims for admission; I do not attempt to establish exactly how we might balance or rank

the claims of family members and refugees against one another. My objective here is to address whether we should reconsider the importance of family claims in the light of other needs and rights by analysing the reasons why family membership may be an important claim for entry, and by clarifying whether, and in what sense, we should see these as partialist grounds contrasted to the impartialist grounds on which refugees are admitted. Finally I discuss whether it is permissible or just to discriminate among family members in migration, and, if so, how?

The dominance of family reunification in migration

In 2005 family immigration of one kind or another accounted on average for half of all legal immigration to OECD countries (SOPEMI, 2007). The proportion varies from over two-thirds in the USA, a little less in Canada, Australia and France, just under half in Germany, to less than one-third in the UK.¹ Family migration as a proportion of total immigration depends not only, as one would expect, on the size of the existing population of immigrants, but also on states' policies, which vary considerably. In the USA, citizens can introduce immediate family (including parents) without restriction, and can sponsor a range of other family relationships according to capped preference categories, including siblings and adult (non-dependent) children.² The preference entry system also allows permanent residents to sponsor family members (after the adult children of citizens), but this is a much slower process, subject to considerable backlogs.³ Family migration is somewhat less dominant in European states, which tend to have a more restrictive definition of family as spouses and dependent children.⁴

Refugees and other humanitarian admissions, by contrast, represented on average one tenth of all legal immigration in 2005, rising to as high as 16% in Canada, 19% in the UK, and 29% in the Netherlands. The largest number admitted in a single country was 143,000 in the USA, but this represented only 12% of total legal immigration. These four countries accounted for over three-quarters of the total numbers of humanitarian immigrants into OECD countries for which data is available.⁵

So the situation in the USA, where family migration represents a considerably higher proportion of immigrants, and refugees a lower proportion, is rather different from that in Europe. There may be more room in the USA for the substitution that Gibney has in mind. Moreover, the vast bulk of family reunification is of immediate family. Therefore (with the

partial exception of the USA) restricting extended family entry would not greatly reduce the numbers admitted. Such a measure would then have limited potential for creating space for more refugees.

Family migration has come to constitute such a significant a proportion of overall migration because of limits on other grounds for entry, and follows from a long-term pattern of individual migration. But contemporary family migration does not conform to the conventional image of a single male worker being joined by wife and children. It includes simultaneous whole family migration in settler states; female-led migration where husbands are joining, and (where policies allow) cohabiting partners, both hetero- and homosexual; parents and grandparents; other dependants of various ages and degrees of relationship; the parents of minor children who are citizens (born in *ius soli* countries); and members of dissolved or reconstituted families. It gives rise to a range of issues thrown up by the fact that migration is no longer typically a single movement but a 'transnational' process involving repeated mobility, both circular (between receiving and original countries) and to third countries.

For the purposes of this paper I will assume, with Gibney and others, that entry to and residence in a state are matters of distributive justice (setting aside the question whether membership is). Secondly, I assume that while some kind of limits on entry may be justified, not all limits on entry are equally justified; thus whom states admit or reject is not to be understood just as a matter of choice (Carens, 2003). States may have obligations to admit immigrants within certain limits of social and political integration, and to give priority in admission to certain kinds of people.

In what follows I first review arguments in favour of awarding substantial weight to family reunification in admissions from the point of view of citizens and denizens, the state, and incomers in turn. These include: the intrinsic value of and right to family life, the possibility of integration, and the agent-specific nature of the obligations involved. I next examine some arguments we might consider for reducing the weight given to family considerations in migration, namely the anachronistic nature of the family claim, the voluntary nature of migration, the contemporary prevalence of transnational family relationships, and, finally, the inheritance of privilege and the multiplier effect of family reunification. I then address the questions whether and how it might be justifiable to discriminate among family members for

admission, and if so, on what basis? I ask if restricting family reunification to immediate family is culturally discriminatory, or may run counter to our fundamental reasons for respecting family life. Finally I outline some sorts of changes in current family reunification policies that may be justified on the basis of these considerations.⁶ Here I discuss only family reunification strictly speaking, that is, the immigration of members of already established families, and not families in formation, or immigration for marriage, which now constitutes a significant, growing and controversial part of family migration. While important, this raises different issues, some of which have been interestingly addressed by Trappenburg (Trappenburg, 2005).

‘Home is where when you go there they have to take you in’: reasons for favouring family reunification

The reasons for giving very significant weight to family reunification in migration are not difficult to reconstruct. As Gibney himself acknowledges,

few things are more important than being allowed reside with one’s spouse and dependent children. To require a state to curtail their entrance would be to ask it to bear a very heavy burden. Even refugees would be hard pressed to deny the force of the claim of families to be together (Gibney, 2004: 243).

These claims may be considered in terms of the interests not only of those seeking to be joined by family members, who may be either citizens, permanent or temporary residents (referred to here as citizens/denizens, and defined as those subject to the state’s authority), but also of the state, and of the incoming family members (referred to here as incomers).⁷

a) The claim of citizens/denizens may be considered to rest in the widely held principle that family life is a human right, and one embodied in many written documents. Thus Articles 12 and 16 of the Universal Declaration of Human Rights declare the right to found a family and to respect for one’s family life, and Article 8 of the European Convention of Human Rights lays down an obligation for states to respect the family life of all individuals present in its territory, be they nationals or aliens.⁸ Yet these do not constitute a right to family reunification as such.

However, as we have seen, many states do recognise certain claims of families to live together. The EU grants mobility rights to the families of citizens,⁹ and in 2003 it adopted a directive on the Right to Family Reunification for third country nationals. A UN Convention on Protection of Rights of all Migrant Workers and Members of their Family was ratified in 2003 (though without being ratified by any net immigration country (John, 2003: 1)).

The importance such instruments attribute to family life may be best understood as based on a fundamental human interest in and need for what is sometimes called affiliation (Nussbaum, 1992, 2000). In the case of the family, this lies specifically in establishing and living in intimate relationships of affection and support that entail giving and receiving care in those aspects of our lives that involve necessary dependence, including childhood and old age (Kittay, 1999).¹⁰ While there are other kinds of important affiliation, the family is distinguished by its intimacy and long-term personal commitment that characteristically involve its members living together. The value of family life may be seen as a matter of personal intimacy as much as physical support, of giving and receiving ‘care’ in the broadest sense. Care is characterised by a concern that permeates family relationships; thus it entails performing duties as much as exercising privileges. But it is not constituted by duties alone, and the exact obligations it entails vary with relationships, circumstances and need. Thus, for example, the concern that grandparents will feel for their grandchildren (and vice versa) will entail different kinds of obligations of substantial support depending on particular circumstances. The reason a state may be considered to have a *prima facie* obligation to admit family members lies in the importance of such relationships, in which members have agent-specific obligations of care to one another. The right to family life may be thought of as a universal right to discharge special obligations, which recognises the value of particular relations. In what follows, I assume that family members have certain special obligations to one another by virtue of their relationship, and I characterise these in terms of a broad notion of care. I address the distribution of such obligations within families, which may be less easy to determine, and their detailed content, which may be liable to considerable cultural variation, only insofar as they directly affect the grounds for admission.

b) The state too (if it is open to accepting any new entries) may have a valid interest in admitting the families of existing residents. One basis often considered legitimate for regulating immigration is the possibility of integrating immigrants into the wider society. In

the case of settled or former migrants, it can be argued that if joined by their families, they will be more likely to integrate or adapt successfully to life in the host country and to avoid the social and psychological problems of isolation. Furthermore these new immigrants themselves are likely to settle in more quickly than entirely unconnected newcomers, since they will be able to make use of the established support and networks of the sponsoring denizen. And families, especially children, themselves constitute channels for wider interaction through school and other activities. (Against this, it has been argued that such connections may tend to create enclaves, but this is a risk that is not specific to family reunification, but to any kind of chain migration, in which large numbers of a particular nationality or religion immigrate and settle in with people from the same background.)¹¹

At least as much as between refugees and family members, there is a current tension in immigration policy debates between family migration and the 'skilled' labour migration currently favoured by many western states, who seek to give preference to immigrants likely to benefit the economy, and to limit the numbers of those who are likely to be unproductive or dependent. However, the assumption that family members will be unskilled and necessarily dependent may be true only under particular circumstances.¹² In addition, family members often contribute indirectly through, for example, unpaid child-care. Furthermore, it may be argued that this could be a short-sighted policy for states concerned with social cohesion, given the role in integration and family stability that family reunification may play.

These arguments are more instrumental and less important than the intrinsic value of the family as reasons for admitting family members. In practice, moreover, it must be acknowledged that states have other interests and that the rights of family migration, rather than being recognised voluntarily, have often been imposed on governments by courts implementing international or national constitutional law.¹³ When states grant family reunification, they do so on differential grounds, not only between citizens and immigrants, but also among immigrants.

c) Family migration represents a claim not only of citizens or denizens, but also of the incoming foreigner, who (as Gibney points out), also has a claim based on the right of families to live together.¹⁴ First, foreign family members may under some circumstances be considered to have a claim to entry on their own account, since it has been observed that migration is often a collective, not an individual decision. Thus the initial migrant may

represent an advance party, or family investment, whose migration the incomer may already have significantly assisted. Thus many young Chinese who work in Ireland represent the savings and hope of their whole families. Insofar as residence is granted on the basis of contribution to the economy or society, some element of this should be taken into account in considering the admission of families. In other words, it may be argued that families of established immigrants are often part of the migration process, and thus part of the contribution to society or the economy the immigrant makes. However, it is not necessarily clear that family migration is the appropriate form of compensation for these costs; they might equally or more appropriately be repaid by the sending of remittances or the support of the returning skilled migrant.

But the more general claim of the incomer is the right to live with their family. Gibney sees the basis of this claim as different in kind from that of the citizen/denizen. According to him there is a dual aspect to the claim for entry: a *universalist* basis for the incomer, and a *partialist* basis for the person being joined.

These entrants claim to be admitted on the grounds that they should be allowed to join - to be reunited - with their family members, their spouses, children, siblings, etc.

While refugees and other economic migrants often base their claims for entrance on need alone, the situation of the family entrant is more complicated. In their case, the state is faced with a claim on two fronts: not only does the foreigner concerned have a claim for entry based on *universal* considerations - 'Take me in because families should be together'. But the state's members, many of whom are former immigrants, also have a claim of a *particular* sort: you owe it to me as a citizen to allow my cousin, daughter or spouse to enter (Gibney, 2004: 13-14).

Note that he uses the term 'members', while including former immigrants who have become citizens. This assumes that the claim is based on membership. On my formulation, it is not membership, but subjection to the state that gives rise to the claim. I agree that the claim of the incomer is different. The state does not have the same kind of obligation to allow incomers to be united with their family in the state as it has to denizens and citizens already under its authority. Thus, it is easier to say why the latter should be allowed to live together with their families *here*, for example. But the difference is not, I argue, necessarily the one that Gibney identifies. If it is the strongest partialist case, we might look at just in what way it is partialist.

For Gibney the modern state 'is at base a particularistic agent, defined by a responsibility to privilege the interest and concerns of its own citizens' (Gibney 2004, 197). Indeed, if we take states seriously, we have to take integration, and the possibility of maintaining democratic structures and practices seriously. We may think there are some special obligations among citizens of democratic states that stem from their being members of a potentially self-governing political community, obligations, for example, of consideration, communication and trust.¹⁵ But it is not necessarily the case that they, and the state as their agent, owe one another global preference in all areas of life. Even as members of a democratic community, obligations may be more differentiated. My argument is that it is not clear that there are good reasons for a *special* obligation among *citizens* based on national or state 'membership' to admit their family members.¹⁶ Instead we may see it as an obligation on the state to those under its authority, whose family life it obstructs or facilitates through its immigration laws. Rather than seeing the state's obligation to allow the reunion of the citizen/denizen's family as based on partialist grounds that treat group members more favourably than outsiders, this should be understood as a universal obligation on states to allow those within the ambit of their authority to pursue family life.¹⁷

Where a prospective incomer has family in several countries, the state may argue that there is no reason why they should be admitted to this one. But we might consider that each of these states has a *prima facie* obligation to admit. A combination of other factors, including personal and cultural considerations, may tilt the balance towards particular family members and the state in which they live. In this case it seems reasonable to think of this as at least equally a matter for the family to determine as the state. This gives states less room to dismiss claims on the basis that there are equivalent relatives elsewhere with whom a migrant could live.

Rather than favouring co-citizens on the basis of membership, the state thus allows those who are subject to its authority, whose lives and actions it controls, to enjoy the affection and support of intimate relations just as other citizens/residents. Not to do so would be to dominate them arbitrarily on the basis of their status. This is a universal obligation to allow others who are vulnerable to us to observe *their* justified special obligations, or claims to care for particular others - obligations to one another that fall particularly on them in virtue of their

relationship, which means that only they can fulfil them. Thus special obligations are nested within overall universal obligations.¹⁸

Thus far we have seen that there is a strong argument in favour of family reunification: because family life is generally recognised as a human right, based on the fundamental interest of giving and receiving care in intimate relations; and (secondarily and more practically) because it promotes the integration of immigrants, and clearly identifies which state has the obligation to admit in certain cases. It is supported by universalist arguments, and is not merely the strongest example of a partialist case. But there is another side to the story.

Arguments against favouring family reunification

As well as the more urgent need of refugees, there are other arguments that might make us reconsider the weight given to family reunification. These include: the anachronistic nature of the family claim, the extent to which migration is voluntary, the contemporary prevalence of dispersed family life, and, finally, the problem of inherited privilege and the multiplier effect. The first three arguments question the strength of the ‘value of family life’ argument as a support for family reunification, while the third identifies positive injustices that the priority of family reunification in migration entails.

a) The family claim as anachronistic: friends are the new family?

It may be argued that the importance of the institution of the family has declined, and that other less formal kinds of relationship or partnerships have succeeded the legally or genetically defined family. Identifying the family with care romanticises it, when it would be better understood as an economic than as an affective unit. Whereas it might have been appropriate to give family reunification a significant weight in the past, families are now not as central to people’s lives in a world of late-forming and early and frequently dissolving partnerships, small nuclear families, increasing numbers of one-person households with broad groups of friends and support groups, and so forth.¹⁹

But while the legal and genetic aspects of family relationships may be less important than in the past, the fundamental significance of the family, more than friends, remains as a locus of relatively permanent or durable relations of shared affection and support, of joint projects

over time, characteristically relations of intergenerational care and concern across a lifetime.²⁰ Such relationships may be found in cohabiting and same-sex partnerships (and other relationships) that do not all fit under the legal or genetic conceptions of family (though some are working to put them under the same or comparable legal footing) but they constitute a reconceptualisation of, rather than superseding, the family. Thus there is a problem if states recognise as families only those falling into the strict legal or genetic category, rather than including these other kinds of intimate relationships. And only some states recognise partnerships other than formal marriage for family reunification, including both heterosexual and homosexual cohabitation.²¹

Indeed just as the state has reasons for facilitating family reunification, it may also have reasons not to expand its understanding in this way. One pragmatic reason (apart from a simple interest in limiting numbers) for states to discriminate between family members is that it is easier to identify genetically and legally-connected family members than less clear-cut ties, and thus to distinguish those who may be thought to have justified claims to enter from those who do not.²² Though this may not be the best basis for exclusion, it has the merit of being transparent and non-dominating - those who apply can know what their chances are, rather than having to try to conform to an array of other more nebulous conditions. There is some point to this argument, given the implications of extending relationships to include all kinds of partnerships or co-implicated lives. Yet if the family has changed its form, to the extent that people live in relatively durable relationships of care, immigration policy needs to take account of these.

b) The extent to which migration is voluntary

A second argument is that migration is a voluntary decision, in which migrants balance the benefits of migration against its costs, including separation from their families. Therefore they must bear those costs, and have no strong claim to family reunification. This might possibly be true to the extent that migration is strictly voluntary. But it is not clear that it is involuntary only in the case of refugees (to whom family reunification is often more readily granted than to other categories of migrant). Economic migrants fall at different places on the spectrum from voluntary to involuntary, depending on considerations such as the degree of deprivation. One approach would be to favour family reunification only where migration is clearly more involuntary than voluntary.²³ An alternative approach would query whether people should

have to choose between moderate prosperity and life with their family. It may be argued that certain costs of migration have to be borne; for example, arguably, the loss of a familiar cultural milieu, so that a person cannot reasonably claim that this should be replicated (though cultural difference may be accommodated in various ways) in the receiving country. But family is both more possible to bring and, if left behind, tends to cause a more immediate and pervasive sense of loss. Those who migrate without their families often do so because it is the only way they can migrate at the time, not because they have chosen to leave them

c) The prevalence of dispersed families

Whether voluntary or otherwise, it may be argued that family dispersal is not such a disadvantage, and family reunification not as pressing a need as it once may have been. Today migration is typically not a once-off, one-way movement, but often a continuing process, and many families are internationally dispersed as a matter of course. This is not a problem only of 'guest workers' from disadvantaged societies. The expectation that family members should always live together (or in close proximity) is reduced. The fact of better communications and cheaper travel make it less onerous to carry on family relationships at a distance. So, it is less obvious that obligations to family (in the broadest sense) need always to be discharged by bringing them to live with you - or even the same country - but may often be met by keeping in contact, visiting fairly regularly, and providing financial support.

This may be partly true, but it tends to overlook those kinds of family relations that require more immediate intimacy and support: for the very young, the old and the ill and incapacitated, and the difficulties of caring at a distance where family members try to provide or organise this immediate care when they are not continuously present (Kofman, 2004: 246).

It has often been acknowledged, including by communitarians (and defenders of controls on migration) such as Walzer, that time is a significant factor in considerations about immigration and membership. Even if we consider that a state has a right in general to decide whom to admit and whom to reject, a person who has lived (arguably even illegally) in a country for a long time may be deemed to have become part of that society, and the cost to them of deportation may be considered too high, so that they should be allowed to remain and indeed to become members (Walzer 1985, Carens 2005). A different dimension of time may be important in considering whether (and which) family members have a strong claim to be

admitted. There are 'critical times' in family relationships - between spouses, between parents and young children, and arguably between adult children and elderly parents - when the rights and obligations of family relations more urgently require that they be together. Some kinds of family relationships at certain times depend on immediacy to be sustained. In others, having to be absent, for example, during one's children's early years or at the end of a parent's life will, at the very least, give cause for serious regret to the parent or adult child, and equally to the child or old person deprived of their care. If entry is refused or a delay of years imposed, something is lost forever.

This suggests a basis for prioritising family reunification especially at these critical times. (And indeed Australian immigration law recognises this, and has a provision for admitting family members on the basis of care for an existing resident, independent of the specific legal or genetic relationship.) Such an argument extends to temporary migrants, if they are separated longer than the minimum period which it is reasonable to expect families to live apart, and especially at those 'critical times' in family relationships (where this period may be shorter). But before we can consider this, it is necessary to address a more substantial objection to giving priority to family members.

d) Inheritance of privilege

If entry or permanent residence in prosperous liberal democratic states is a scarce resource, why should those who happen to be related to others have privileged access to it? Even if we accept that citizens/denizens have a claim on universal grounds to be joined by their families, the incomer's claim to join the family does not necessarily constitute a valid claim to the good of residence in a western state. The state cannot grant one without the other, and (as governments often argue) other alternatives are often available, that may include returning together to the country of origin, or going to a third country where one of the family members has associations. On this basis, it could be argued that, for the incomer, access to residence through the mere fact of genetic relationship is an unearned privilege, analogous to a form of property; and that one should not be able to inherit simply on the basis of one's birth and relationship to others. This has been argued about forms of access to citizenship based both on parentage and place of birth (Carens, 1987, Shachar, 2003). As Cole puts it '[t]he problem here is to show how the liberal state can distinguish between 'insiders' and 'outsiders' without appealing to some feature that is morally arbitrary from a liberal point of view: where one is

born or who one's parents happen to be are not things under one's control, and therefore under the central liberal theories of justice should not determine where one stands in the distribution of any good.' (Cole, 2000: 13)

The inheritance of privilege is compounded by the multiplier effect whereby those, such as siblings, who gain entry on family grounds may in turn be joined by their family members, thus exacerbating the scarcity of places. In addition to taking up available places, family migration has given rise to powerful political lobbies that skew future immigration policy in favour of family reunification (Gibney 2004: 225). The strength of this objection applies not only to citizens, but also to permanent residents. Is there any reason why those who have been fortunate enough to gain entry and residence in a western state should be able to pass on this privilege simply on the basis of kinship? They may owe their family a great deal, and have an obligation and desire to remain in contact with and support them. But it is not clear why they should be able to hold places in the queue, or present their relatives with a fast-track to residence and all the advantages over others that this brings. This central claim to family reunification does not make entry any less of a privilege for the incomer. To the extent that systems of family reunification function simply as a form of property - admitting people with whom there are very limited relations of affection and support, they may be considered less justifiable.²⁴

However, while there may be an element of arbitrariness for the incomer (who has a priority in the affections of the citizen/denizen, but is not owed anything by the state), the claim of the citizen/denizen on the state is not arbitrary (even if their original standing as citizens and denizens of a western state itself may be arbitrary in certain respects). Once they are living under that state's authority, their interest and right in family life is valid. The claim of citizens/denizens to be joined by their family is stronger than that of the incomer to enter. The obligation and privilege of caring for and being cared for by one's own family is based in a well-grounded interest. And sponsoring a family member often entails a considerable degree of commitment, at least to their initial support.

Having considered these objections to prioritising family reunification, we may conclude that there are arguments for a more flexible, less narrowly-defined conception of the family for immigration purposes, and for giving particularly significant weight to reunification claims at the critical periods of family life; conversely claims to family reunification that in substance

mainly facilitate access to a prosperous society, or which contribute to the multiplier effect, are less justified.

Distinguishing between immediate and extended family members

I next turn to the question whether a just solution to reducing family migration is to discriminate among family members – between immediate and other relations, or on criteria such as residence status or the characteristics of incoming family members? Or are there other more justifiable kinds of distinctions we might make? This raises questions about how we define the scope of family obligations.

Gibney argues that

the entrance practices of liberal democratic states would be morally superior if the claims of refugees were considered as important as those of family entrants. The conclusion gains added force if we distinguish between two types of family members commonly allowed to enter western states - immediate (spouses, dependent children, etc.) and extended (siblings, non-dependent children, etc. family members).

(Gibney, 2004: 14-15).

He admits that ‘These people may also have some moral claim to enter. But it is reasonable to believe that their claim lacks the force - the necessity - that lies behind the claim for entry of the refugee.’ (Gibney, 2004: 243)

We should note that in fact most states do not operate very indiscriminating family reunification policies. In recognising a right to be joined by family, states differentiate among citizens and non-citizens, permanent and temporary residents, and among these according to length of residence permit. They cite alternative options for reunification in the country of origin or a third country, they require conditions of minimum income, quality of the denizen’s housing or other resources, and they impose long waiting periods. With respect to incomers, states discriminate on the basis of age (with upper age limits for dependent children that vary within Europe from 12 to 21), health, educational level, dependency/ability to work or be self-supporting, and, increasingly, capacity for integration (including but not limited to language

abilities). They impose restrictions on length of stay, access to the labour market, and access to social benefits. For partners (depending on the relationships recognised), they limit entry, and demand cohabitation after arrival; they require long prior residence for granting continuing residence status in the case of divorce (e.g. up to 4 years in Germany and 6 in Denmark). Finally, they exercise wide discretionary powers to allow or refuse family reunification (SOPEMI 2000: 11). I have already noted that European states (while working with more legally effective provisions for family reunification) are rather more restrictive than the USA in the definition of family. They do not give preference to siblings, they limit rights in many categories to dependants, and they distinguish between rights of EU-citizens and others (even if born in the country).²⁵ Though since 2003 the right of family migration for spouses and children of third-country nationals is granted in principle, this is with a considerable degree of conditionality.²⁶

I do not have space here to examine all these distinctions and conditions, but it seems clear that some and not others can be justified on the basis of the more valid reasons for exclusion (integration and maintaining a democratic state) and accord better with the grounds identified here for giving substantial consideration to the family claim (engagement in continuing relationships of care and support) rather than being driven mainly by economic considerations of the apparent balance of cost and contribution to the receiving state.

Before we agree that, in order to limit the volume of family migration, we should accept for migration purposes a restriction of family to immediate relations, taking spouses and dependent children under eighteen as a shorthand for those relationships of substantial commitment, intimacy and need for care that we should allow to live together, we need to consider some objections. Is this a culturally biased definition of the family, and does it run counter to the value of the family, and the scope of family obligations, identified here?

Arguments against discriminating between immediate and non-immediate family:

a) Discriminating between immediate and family members is culturally biased

The first objection we might consider is that limiting admission to immediate family members is culturally biased, and privileges the particular conception of the family prevailing in Northern European (rather than even all Western) cultures. It thus discriminates against cultures in which members of the extended family are closely interconnected and

interdependent. Even in Mediterranean countries, adult children tend to live near and interact extensively with their parents, and cousins and other relatives can be part of a living family unit. In some cultures adult unmarried women live with and remain dependent on their parents. In China, despite many cultural changes under communism and now under the rapid growth of capitalism, one abiding central feature of social life is the expectation that children will support their parents in old age.

Even if good reasons (to do with individual autonomy) can be offered not to recognise all existing family practices - for example, for prescribing a minimum age for marriage and ruling out polygamous marriage (Trappenburg, 2005), it is not so clear that western states can justifiably deny that in some cultures extended family life may be as valuable, and its members as psychologically and socially interdependent as those of nuclear families in western societies. No doubt, immigrants have to make certain adjustments to the societies to which they have moved, but the distinction between what is expected of people in public and in private life would suggest that these adjustments might be less with respect to aspects of family life of which we have otherwise no good reason to be critical. Against this, it may be argued that extended family life is a substitute for many of the associations and benefits provided by civil society and the state in western societies, and so neither so necessary (or even possible) there.²⁷ Moreover, not all the reasons for extended family networks may be ones that support a need for close proximity. Even if differences in family structures should be taken into account in constructing policies on family reunification, to the extent that living with or in the same country as one's extended family is more a matter of preference than of real need, a greater range of restrictions on admission of family migrants would be acceptable. Whatever we might conclude on this, it requires more argument than can be developed here.

b) The importance of relationships beyond the immediate family: parents and grandparents

Even without going culturally very far afield, we may identify ways in which restrictions on family migration beyond the immediate family appear to run against the basic values on which the claim to family life is recognised. Thus current provisions for immediate family reunification appear to undervalue some central relationships of affection and support. To take an example that highlights the narrow conception of family at work in immigration policy, ascending relatives (parents and grandparents), although they represent an important dimension of family life in most societies, are not standardly given a priority in terms of family reunion. Canada and Finland are among the few exceptions here. In the USA, while

citizens can be joined by ascending relatives, there are no provisions under the family preference scheme for *residents* to be joined by parents. Within the EU, only dependent parents (and not grandparents) of citizens count as family for mobility purposes, and the 2003 directive applying to third country nationals allows rather than requires Member States to admit ascending relatives.²⁸ Thus one commentator has observed that in Europe, '[t]he generally limited conceptualisation of the family leaves little consideration for problems generated by caring at a distance... cultural differences in familial relations, and the role of grandparents or other collateral relations in providing nurturing and support for different members of the family' (Kofman, 2004: 246).²⁹

Again, courts have been more likely to promote this, the European Court of Human Rights determining in *Marckx vs. Belgium* (1979) that '[f]amily life under Article 8 of the European Convention covers at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life' (John 2003: 49). States have obvious reasons not to want to admit those (like the older people that grandparents typically are), who are unlikely to be economically productive, who are a potential burden on the state, and who may face language barriers and other difficulties in integration. But excluding grandparents overlooks both the impact on those responsible for their care, and the variety of roles that grandparents may play in families. If they are not admitted, it makes it difficult for their families to discharge their duties of care. Recent authors have highlighted 'the problems of exercising the right to join for elderly dependants and the impact of these forms of dependency on the primary carer in the host state' (Ackers, 2004: 385). Such restrictions also overlook the way in which grandparents provide a framework for families: 'the instability of marriages and partnerships has turned grandparents into important representatives of stability and continuity' (Wilk, 2000: 26 cited in Ackers, 2004: 389). This is not only a matter of psychological support; grandparents may play a significant practical role in child-care and domestic affairs.

While transnational families have to deal with the problems of caring at a distance, some kinds of long-distance caring are more feasible than others – for older children, grandparents with other supports, and indigent family members, depending on the trade-offs between difficulties of movement and difficulties in their current living conditions. Just as there are arguments that adequate aid to the needy where they already they live may be as good and better than facilitating migration, so too there are arguments that people may sometimes be

better cared for where they are (if they can study, if they are old and have social contacts, etc.) rather than moving to join other members of their family. (This is independent of whether there are other family members who can fulfil the obligation of care.) Certain kinds of economic dependence, for example, do not require physical presence or interaction. In some cases the child or parent will fare better on the basis of material support, such as remittances, which go further in the country of origin, and will be less subject to social dislocation, given language and other difficulties.

But, like the relationships between partners, and between parents and young children, those of adult children and elderly parents often fall into a different category. We may conclude that priority in family admission should be given to those with a duty and a right to care, a significant part of which only they can discharge in person - at that particular time: namely partners, young children and elderly parents. Not only should these be admitted for citizens, permanent and temporary workers alike, but they should not be subject to the sorts of waiting periods or integration tests that are often imposed, since these run counter to the provision of such care.³⁰

Thus the importance of allowing the exercise of care for elderly parents does not depend on their needing to live with, and be directly materially cared for by their children. The element of material support in care may be in private or public care institutions; but this is separate from the personal contact and specific affection that only family members (or direct equivalents) provide, as well as crucial mediation and advocacy in the delivery of material care itself, all of which require proximity.³¹

Giving priority on this basis still gives certain people privileged access. But in the case of elderly parents and grandparents, it does not have a significant multiplier effect (unless adult non-dependent children are also favoured in admission). Young children clearly raise a more substantial problem in this respect, but in this case their interest in being with their parents carries a heavy weight relative to other considerations. Justifiable distinctions among family members would give greater priority to those in dense networks of support and care that arise at critical periods of youth, illness, age and disability. This would be different from the legal categories given priority in many liberal democracies, but would not coincide with the immediate nuclear family either.

Conclusion

Both theoretically and more pragmatically it is not clear that we can easily improve the justice of migration by reordering priorities between family migration and refugees. Solving the problem of scarce resources of access to western liberal democracies by restricting the priority of family migration, more particularly by limiting it to immediate family members, seems implausible, since the bulk of family migration is that of spouses, followed by dependent children.

None of this is to deny the strength and urgency of refugees' claims – but to show that balancing their claims and those of others requires further consideration. Before we try to rank the priority of admission of refugees and family members, it is worth first thinking about what it is that makes family life valuable, and the priorities we might thus recognise among family members. Family reunification is justified not in terms of a partial preference towards fellow citizens (and residents), but as a universal obligation (to insiders and outsiders in different ways) to allow people to establish and maintain intimate relationships and practices of affection and support. It stems from a more basic obligation to those subject to the authority of the state, whose need for family life we are in a unique position to support.

The idea that family migration should be restricted gains its greatest force from the systems in which family is defined in terms of legal and genetic relationships rather than those of continuing care. If we understand the family as a relationship of care, we might recommend a different reach for family migration, one that calls for an adjustment to most states' provisions in this area. In particular this would place a premium on the admission of partners, of young children and their parents, and of old people and their family members - those who give or depend on receiving immediate care at critical times of life. It would involve reducing differences in the treatment of citizens, permanent and shorter-term residents with respect to family reunification. At the same time, it would be reasonable to restrict the entry of those who are less mutually interdependent, as in the case of siblings and still more so of broader extended family. This would be more restrictive than the USA and EU in some respects, but more generous in others. It would require a restriction of the family preference system in the USA, where spouses and children of permanent residents come behind adult children of citizens. But it would involve an extension there to include the ascending relatives of permanent residents. And nearly everywhere it would require giving more consideration to

established cohabiting partners. Before we try to balance the admission of refugees and family migrants, the principle of family reunification needs to be applied more even-handedly.

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¹ These figures and those of refugees are standardized statistics taken from SOPEMI 2007, National Tables.

Family immigration and refugee figures include accompanying families.

² The four capped categories are: 1) unmarried sons and daughters of citizens (over 21); 2) spouses and unmarried children (under 21) of permanent residents; 3) married sons and daughters of citizens; 4) siblings of adult citizens.

³ For example, of those admitted to permanent legal residence in the USA in 2005, immediate relations of citizens constituted around 40%, and family sponsored preferences around 20% (which also includes some immediate family of permanent residents under category 2).

⁴ Statistics for established family as distinct from family-formation/marriage immigration are not readily available, as the two categories are usually grouped together as 'family reunion/formation'

⁵ The numbers admitted to these other countries were 67,800 (UK), 42,200 (Canada), 17,900 (Netherlands), and 15,400 (France).

⁶ See important discussions of family reunification in Motomura (1997) and Carens (2003) pp.96-99, on which this paper builds.

⁷ See Bauböck's (2005) discussion of citizenship policies in terms of international, state, migrant and domestic interests, which this approach follows in part.

⁸ States do not always recognise the right even of their citizens to live in the state with the company of their immediate families, notably in the case of children born citizens to illegal or even temporary migrants in *ius soli* states. See the US *Perdido* case (*Perdido v. I.N.S.*, 420 F.2d 1179 (5th Cir. U.S. App 1969)) and the Irish *Lobe* (*Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 1 (23 January 2003) See also Forder (2005).

⁹ These have been somewhat reformulated in Directive 2004/38; they are interpreted differently in different states. See Alexovicova (2005).

¹⁰ 'To grow, flourish and survive or endure illness, frailty and disability each individual requires a caring relationship with significant others who hold that individual's well-being as a primary responsibility and a primary good-together with the principle of *doulia* - that just as we have required care to survive and thrive, so we need to provide conditions that allow others, including those who do the work of caring, to receive the care that they need to survive and thrive - point to an approach that authorises the use of social resources for the support of relationships of dependency' (Kittay, 1999:186-7).

¹¹ Feasibility is also a state concern. Arguably, a state wishing to admit more of those in need could sell this electorally more easily on the basis of family reunification than other grounds, as people identify with the need for family life and its implications for admission. A striking feature of recent Irish experience of immigration and specifically of asylum seeking has been the support by neighbours for families threatened with deportation, even where their remaining would involve significant charges on the state. The breadth of support for the six-year old autistic twin Great Agbonlahor between 2005 and his deportation in 2007 contrasts sharply with the silence on the mainly adult male Afghan hunger strikers who occupied a Dublin cathedral in 2006.

¹² For example, where work is not permitted, where qualifications are not recognised, where up-skilling is made difficult or impossible, or where language training is difficult to access.

¹³ Courts have deemed constitutional protection of the family to extend to both nationals and aliens and (in France) to extend to family reunification. The European Court has been active on matters of rights of citizens of member states; but may not be able to be so active with respect to Third Country nationals.

¹⁴ Family membership may be at least as valid a basis for discriminating as skills, health, income and so on, that are often applied, and indeed added to, conditions for family reunification.

¹⁵ See e.g. Honohan 2001, 2002 for a characterisation of the special obligations of citizens in these terms.

¹⁶ What is similar between citizens and families is that they are both valuable relationships that generate special obligations. While we may (arguably) see a duty of citizens to fellow citizens and residents to be concerned for one another's welfare and to allow them to develop family life, the mutual concern of citizens is different from that of family members.

¹⁷ There is, however, no clear connection between an emphasis on family migration and an ethnic conception of citizenship. Though ethnic preference would be the epitome of partiality, ethnic states (defining membership in ethnic terms) have no reason to be more favourable to family reunification. While the nation is often portrayed as a family, this analogy is limited, as the immediacy of family relationships distinguish them from those between co-nationals. While an ethnically discriminatory state could favour family migration in order to maintain the existing racial composition of the country, if there are other pathways to immigration, this may work in other

ways – leading, for example to an increasing Vietnamese population in the USA (Gibney, 2004: 223). See also Walzer 1985: 41, where family reunification and ethnic preference are discussed.

¹⁸ There is a further (if more pragmatic) point. If liberal democracies should increase the numbers admitted, but have some valid reasons to regulate admission, and when more seek admission than they are willing to accept, family reunification has one advantage: in certain cases it clearly identifies those with the responsibility to admit. While all states may be obliged to admit refugees (and, arguably, economic migrants) based on their urgent need, it is not clear which state is obliged to admit *which* refugees (except in the case of asylum seekers - and possibly those whom a particular state has had some responsibility for making refugees). But in family migration it is clear which state should admit people (who may also warrant entry on other grounds. Thus many who might otherwise enter as refugees do so under family reunification provisions (Gibney, 2004), and the same is surely true of economic migrants).

¹⁹ A point trenchantly made in another context by Wendy Brown (Brown, 2004: 90).

²⁰ A contemporary natural law philosopher can define the value of the family as resting in ‘a common stock of uncalculated affection, physical and psychological rapport, of shelter and means of support and material bases for new projects, of memories and experience, of symbols, signs, and gestures to bear moods and meanings, of knowledge of each other’s strengths and weaknesses, loves and detestations and of formal and informal but reliable commitment and devotion’ (Finnis 1980 145).

²¹ Cohabiting partners are recognised for family reunification purposes only by Canada, Australia, New Zealand, South Africa and six EU countries (incl. Scandinavian) Netherlands (including homosexual partners), and the UK (since 2002) (Kofman, 2004: 245) (Edwards 1999). France does not, but has introduced the PACS. Germany, Italy, and USA do not. The European Court of Human Rights has recognised long-term partnerships as coming under the heading of family life (but only when recognized in national law). (John, 2003: 48) (SOPEMI Table II 3, 2000)). From 2006, same-sex partners of EU citizens have rights of entry when coming from a state where marriage or civil partnership is recognised (April 2006).

²² This itself is a controversial measure, as evidenced by the proposal, passed in October 2007, to apply DNA testing on children coming to join parents in France.

²³ Such a distinction would presumably most affect migration between relatively prosperous countries, and migrants from countries with low prosperity-differentials for equivalent skills from the destination country.

²⁴ This is to set aside fraudulent cases where no real relationship exists at all.

²⁵ Directive 2004/38/EC 29 April 2004. (See Alexicova, 2005) . In Ireland thousands of spouses of EU citizens were issued with deportation notices in 2007, on the basis that they had not lived together in another EU country before settling in Ireland.

²⁶ In 1993 the EU passed a resolution on family reunification for third country nationals with permanent status (not refugees). In 2003, with reference to Article 8 of ECHR, it issued a directive concerning those with residence permits for more than one year, and a reasonable hope of permanent residency for spouse and children (and, in cases where countries choose to recognise these, other partners, and first degree ascendants in the direct line (Council Directive 2003/86/EC 22 Sept 2003 Europa 2003)), These are intended to ‘grant them rights and obligations comparable to those of citizens of the EU’. This directive does not apply in the UK, Ireland or Denmark.

²⁷ These kinds of extended family relationship, often of an economic and social nature, may be subject to a trade-off against other kinds of affiliation in a way that intimate family life is not.

²⁸ The provisions for admitting ascending relatives vary among European countries. In some it is available only for those with no other family, or with no other support, only if they are dependent (Denmark, Spain, UK), on humanitarian grounds (Germany), in cases of serious difficulty (Netherlands), though up to 2002 Italy counted parents (as well as siblings (Kofman, 2004: 245) (SOPEMI 2000)). On a more discretionary basis, physical, financial, emotional and psychological ties may be taken account of in the EU (ExCom Standing committee (cf. John, 2003: 63)); see also Alexovicova 2005, Schneider and Weisbrock 2005.

²⁹ This harm is exacerbated when parents and grandparents with no intention of remaining are standardly refused even tourist visas to visit their emigrant children because of fears that, once admitted, they will not leave.

³⁰ Prohibiting family reunification for temporary workers has been particularly incongruous where, as in Ireland, workers are specifically recruited from the Philippines, for example, to fill jobs such as nursing and child care.

³¹ Whether the receiving state has an obligation to provide institutional care for elderly family members is a separate question which will not be addressed here.