

## **What is Wrong with Border Fences?**

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In the last decade, states worldwide have built a growing number of border walls and reinforced fences. This trend in border politics has sparked a debate, but political theorists have yet to ask what is the moral problem, if any, with separation barriers at the border. Answering this question can help us advance the public debate regarding such barriers, and it can also further discussions in political theory. Particularly, it could help us evaluate the claim that territorial borders reveal an intrinsic tension between universal moral duties and special obligations to members of a democratic state. This paper argues that separation barriers are in principle justifiable. While accepting the universal character of moral duties, and acknowledging that territorial nation-states do not have a right to unilaterally control their own borders, I argue that a democratic people may justifiably build a wall around the territory in which its institutions have jurisdiction, and that this wall can be a legitimate institution. Hence barriers could be morally justified. However, justification obtains only under stringent conditions that are not met by any of the recent border walls.

“I hate to see a fence anywhere,” declared American First Lady Pat Nixon at the US-Mexico border in 1971.<sup>1</sup> She was referring to the skimpy barbed wire fence that forty years ago marked the division between the two countries, ending at the beach in the Pacific Ocean. She would be surprised if she saw the fence today: In 2006, the US Senate passed the Secure Fence Act which turned that wire fence into a full-fledged separation barrier, a double fence made of tightly packed rows of steel spindles that begins in Imperial Beach and stretches 700 miles into the desert. And this is not an isolated case. In the last decade, states have built or planned similar border barriers in as many as twenty international borders.<sup>2</sup> So, it seems that building separation barriers at the border has become an international trend. This trend contradicts the claim that increasing globalization implies the waning of sovereignty and the emergence of a borderless world.<sup>3</sup> Hence, students of borders are now seeking to understand why territorial boundaries have become so politicized in the last decade.<sup>4</sup> However, they have yet to explain the moral discomfort that many share with the former first lady. What precisely is wrong with border walls and fences? Political theorists have yet to analyze this trend from a normative perspective and state what is the moral problem, if any, with separation barriers at the border.

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<sup>1</sup> Jacobs 1971, G4.

<sup>2</sup> For references see section I, below.

<sup>3</sup> The claim has been made regarding different domains. Globalization can be understood in terms of social flows that challenge the state system (Shapiro and Alker 1996, xxii), or in terms of a borderless interlinked economy (Ohmae 1990, xi), or in terms of borderless threats to human security (Reveron and Mahoney-Norris 2011, 5).

<sup>4</sup> Andreas 2003; Andreas and Bierstecker 2003; Brown 2010; Sterling 2009,

Answering the question of the moral justifiability of borders can help us advance the public debate regarding separation barriers. It would help to better formulate the cases for and against walls; and it would move the discussion beyond the rehashing of legal arguments to authorize border reinforcement and policing. But answering this question could also illuminate an old problem in political theory: The border seems to show that a commitment to universal equality is incompatible with discrimination along geographic lines. Particularly, that rights to free movement clash with the state's right to exclude aliens from its territory.<sup>5</sup> And more importantly, that border walls reveal a tension between universal human rights and democratic law.<sup>6</sup> Further reflection on the morality of border barriers could clarify whether there is indeed an intrinsic tension between universal moral duties and special obligations to the members of a democratic state.

This paper argues that separation barriers are in principle justifiable. This conclusion is surprising because I do not make my case starting from statist commitments and assumptions; rather, I accept the cosmopolitan claim that there are universal moral duties to all other human beings, and also that there is no absolute right of territorial nation-states to unilaterally control their own borders. Yet, I reach the conclusion that a democratic people has the right to build a wall around the territory in which its institutions have jurisdiction, and that this wall can be a legitimate institution.

The paper is divided into four parts. Part I specifies the problem of a principled justification of border walls or border fences by distinguishing it from other problems related to borders and from consequentialist arguments for or against border walls. Part II sustains that in order to justify a border, and particularly to say that a border is a

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<sup>5</sup> Carens 1987; Cole 2000; Dummett 2004; Seglow 2005; Wellman and Cole 2011,

<sup>6</sup> Cole 2000; Mouffe 2000; Schmitt 1985,

legitimate institution, we have to explain why a bounded territorial state is necessary to uphold the principles that legitimize the state. This part argues that borders are necessary to sustain the ideals of liberal democracy, and that there is no contradiction between the need for borders and universal human rights. In fact, closed borders may be required to sustain universal moral duties and cosmopolitan commitments. However, this argument for the value and need for borders does not imply that border *walls* are justified. Part III makes this missing argument. The paper concludes that border walls could be justified and legitimate, but only when making a democratic-cosmopolitan case for them. This implies that they are only justified only stringent conditions that are not met by any of the border barriers that have been built in the last decade. It also shows that we cannot solve many moral problems connected to the wall solely by dealing with state legitimacy. This explains the moral discomfort that many experience when encountering border walls. It also shows that in order to tackle many moral issues related with the legitimacy of the territorial state political theorists must go beyond generalities. Instead, we should pay attention to particular territorial borders and their physical features: walls, fences and practices of governance.

## I. Border Barriers as a Problem of Political Morality

In this section (part a) I distinguish the problem of border walls (I use this term interchangeably with border fences, border barriers, fortified borders or other physical barriers at international borders)<sup>7</sup> from other political problems related to the boundaries

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<sup>7</sup> These, in fact, are not the same, and it makes a difference whether there is one type of barrier. (See Matthew Longo's, Yale PhD Dissertaton) However, for the sake of this argument I will run them together.

of the state's jurisdictional authority, including immigration, territorial disputes, and the nature of state sovereignty; and explain why studying border barriers is necessary to fully understand those other issues. Then part (b), argues for making a principled (rather than a consequentialist) evaluation of border walls, and explains why we must start from a prior question: In order to know whether border walls are justified we first have to ask whether territorial borders are justified and on what grounds.

a) Detaching the problem of border fences from other issues.

Border walling seems to be a trend. Notable walls have gone up between the United States and Mexico and between Israel and the West Bank,<sup>8</sup> but others walls and reinforcements have been built or planned between Botswana and Zimbabwe,<sup>9</sup> Brazil and Paraguay,<sup>10</sup> China and North Korea,<sup>11</sup> Egypt and Gaza,<sup>12</sup> India and Pakistan,<sup>13</sup> India and Bangladesh,<sup>14</sup> Kazakhstan and Uzbekistan,<sup>15</sup> Pakistan and Afghanistan,<sup>16</sup> Saudi Arabia and Yemen, Oman, Kuwait and Iraq,<sup>17</sup> South Africa and Zimbabwe,<sup>18</sup> Spain (Ceuta and Melilla) and Morocco,<sup>19</sup> Thailand and Malaysia,<sup>20</sup> Turkey and Greece,<sup>21</sup> Turkmenistan and Uzbekistan, Turkmenistan and Kyrgyzstan,<sup>22</sup> and the United Arab Emirates and

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<sup>8</sup> Mark 2003, 2-3; Newman 2010, 96-101.

<sup>9</sup> Campbell 2006, 31.

<sup>10</sup> Dilla Alfonso 2008, 49; Turner 2010, 252-253.

<sup>11</sup> Nanto and Manyin 2010, 10.

<sup>12</sup> Helfont 2010, 431; Mark 2003, 2.

<sup>13</sup> Lakshmi 2003,

<sup>14</sup> Pant 2007, 241.

<sup>15</sup> Greenberg 2006,

<sup>16</sup> Saleem Mazhar and Goraya 2009, 209.

<sup>17</sup> Turner 2010, 252.

<sup>18</sup> Campbell 2006, 6.

<sup>19</sup> White 2007, 705.

<sup>20</sup> Borger 2007 .

<sup>21</sup> Daley 2011, A4.

<sup>22</sup> Dabykova 2005, 78.

Oman,<sup>23</sup> thus adding to the already existent walls in Cyprus and the Korean peninsula. The fortification of all these walls has been polemical, but for different reasons. Some have been built to defend a state from its enemies or terrorist incursions, others to prevent immigration or illegal trafficking of goods and persons. Is there an underlying moral problem common to all?

Several scholars have found a common thread in current debates about borders and border walls. They have noticed a contradiction, or at least a tension, between the celebration of universalism and economic globalization after 1989, and the proliferation of walls along territorial borders that began more or less at the same time. It seems ironic that states fortify their borders, while they partake in the waning of Westphalian sovereignty by allowing increased trade and flows of information across borders. Seyla Benhabib, for example, has argued that “the irony of current political developments is that while state sovereignty in economic military and technological domains has been greatly eroded, it is nonetheless vigorously asserted; national borders, while more porous, still keep out aliens and intruders.”<sup>24</sup> Wendy Brown has also remarked that the more state sovereignty wanes, the more states display symbols of force such as border walls. These serve as defense mechanisms for fragile egos built around national and religious identities.<sup>25</sup> Peter Andreas has made a similar point regarding the escalation of policing at the US Mexico-Border: “the escalation of policing is less about deterring the flow of drugs and migrants than about recrafting the image of the border and symbolically reaffirming the state’s territorial authority.”<sup>26</sup>

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<sup>23</sup> Borger 2007

<sup>24</sup> Benhabib 2005, 674.

<sup>25</sup> Brown 2010, 39, 129.

<sup>26</sup> Andreas 2000, x.

However, even as many scholars remark on the phenomenon and try to explain it, they move away from the study of borders walls and territorial jurisdictions. They do not ask questions about walls; rather, they concentrate on how the relative permeability of existing territorial boundaries influences other issues of concern. For example, they are concerned about changes in the politics of border control,<sup>27</sup> state security,<sup>28</sup> sovereignty,<sup>29</sup> and immigrant access to social, economic and political rights.<sup>30</sup> Reading these discussions, it soon becomes apparent that the tension between globalization and borders has very little to do with territorial borders *per se*.

Most scholars tackling the issue from a normative perspective do not dwell long on the border wall itself either.<sup>31</sup> Normative research on borders has often been only an excuse to move into questions of the nature of state sovereignty, immigration, and the boundaries of citizenship.<sup>32</sup> Some of the debates that hover above borders without ever touching the question of territorial jurisdiction are the debate about “open borders,” about self-determination, and about “boundaries” (of identity, or membership). The debate on “open borders” is in fact a discussion on whether states have a duty to receive immigrants or a right to exclude aliens,<sup>33</sup> and it is related to a parallel debate on the nature and justification of state coercion.<sup>34</sup> Those who ask “can borders be rightfully changed?” often care little about the actual border and focus on whether there is a right to collective

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<sup>27</sup> Bosworth 2008,

<sup>28</sup> Adamson 2006; Andreas 2003,

<sup>29</sup> Brown 2010,

<sup>30</sup> Benhabib 2005, 2006,

<sup>31</sup> As George Gavrilis has remarked: “Debates on interstate boundaries focus on where the boundary ought to lie” rather than on how it is governed. (Gavrilis 2008, 1).

<sup>32</sup> Note that I am referring to normative work. There is excellent recent political, historical and sociological work that deals primarily with borders. Excellent examples are Andreas 2000; Diener and Hagen 2010; Gavrilis 2008; Sahlins 1989,

<sup>33</sup> Carens 1987; Wellman 2008,

<sup>34</sup> Abizadeh 2008, 2010; Miller 2010,

self-determination, including the right of a group to secede,<sup>35</sup> or to make good on territorial claims.<sup>36</sup> Discussions about “boundaries” often refer to the boundaries of political identity and they generally tackle questions of citizenship and allegiances.<sup>37</sup> For example, do foreigners or “others” define the political identity of a community?<sup>38</sup> Talk about borders may lead into even more fundamental debates about the essence of politics as defined by the notions of “us and them” or “inside-outside.”<sup>39</sup>

All these discussions seem at first glance to be about “borders,” but in fact say next to nothing about territorial borders, and nothing at all about the moral appropriateness of border walls. This is clear from the fact that we could have both fortified borders and “open borders” if a country opened its doors to all persons carrying a passport and coming through official points of entry, while at the same time heavily policing the rest of the border and not permitting the traffic of other goods. The same would be case in those arguments that hinge on the justification of state coercion: in current discussions coercion is a concern because it constrains an individual’s autonomy by preventing her from crossing to the other side of a given border without justification.<sup>40</sup> So, a border could be heavily fortified and policed and yet, not be coercive. As long as aliens have the choice of entering, it does not matter *where* she crosses. However, precise location of border fortification *does* matter: border walls are not just symbolic and their

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<sup>35</sup> Beran 1993; Dahbour 2005,

<sup>36</sup> Buchanan 2003,

<sup>37</sup> Bauböck and Rundell 1998; Benhabib et al. 2007; Hastings and Wilson 1999,

<sup>38</sup> Honig 2001,

<sup>39</sup> Lindhal 2008; Schmitt 1976,

<sup>40</sup> Abizadeh 2008,



physical features matter greatly to those who live in their shadow.<sup>41</sup> But what precisely is the moral problem with fortified borders, then?

b) A principled argument for evaluating border fences

Most discussions about the appropriateness of border walls so far have taken place in the media, they refer to specific boundaries, and they focus on the consequences of having or not having one. The US–Mexico wall is a case in point. The fortified barriers that run across the California–Sonora border and on the banks of the Rio Grande/Bravo are a constant reminder that the physical features and the exact location of the jurisdictional boundary do matter. The main concerns of those who reject the barriers at the border is that the wall disturbs the landscape, that it may be an environmental hazard, that it interrupts the economic life and culture of the borderlands, that the wall is unfriendly, and that it may also be xenophobic and insulting, and finally that the border fence is inefficient and thus, a waste of money.

However, this list does not allow us to conclude that, overall, it is a bad thing to have a fortified barrier, because there are at least three important problems with this focus on specific harms. The first is that when we concentrate on the consequences of particular walls, we have to measure their effects empirically. However, given that this is such a polarizing issue, unbiased scientific data is hard to come by (this is the concern that the calculations about border walls are always “political.”) The second problem is that such focus makes it difficult to draw generalizations. As pointed out above, there are about 25

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<sup>41</sup> Moreover, the physical boundary shows that there may be state coercion even when international movement of persons is not restricted, and for these reason the wall may have big consequences in debates about “open borders.”

recent cases of fortified barriers, and it is quite difficult to estimate whether the walls are effective, let alone determine all the particular harms that they inflict.<sup>42</sup> The third, and more important difficulty of this approach, is that the consequences experienced at the borderlands must be weighed against other important concerns that affect the rest of the country, and also other countries. In the case of the United States these are foremost immigration and national security. How can policymakers choose? Does state security outweigh environmental concerns at the border? Does the state's right to exclude aliens outweigh the need for border dwellers to a shorter commute?

To elaborate on this point we can focus on the question of border effectiveness, which is one of the main criticisms of the border wall in the Southern border of the United States. According to the Department of Homeland Security the purposes of the border fence along the Southwest border of the United States are to increase national security by “establishing a substantial probability of apprehending terrorists seeking entry into the United States; disrupting and restricting the smuggling of narcotics and humans; preventing violence against border residents and illegal immigrants; promoting better environmental health along the Southwest Border; restricting potentially harmful diseases (both human and agricultural) from crossing the border.”<sup>43</sup> It does not take an expert to see that today's fence has been insufficient to accomplish such goals.<sup>44</sup> The fence is not sufficient to stop terrorists. Those who have potential to become terrorists in the US can enter with visas, and have done so in the past. The fence fails to disrupt the

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<sup>42</sup> Hassner and Wittenberg, 2009.

<sup>43</sup> [http://www.cbp.gov/xp/cgov/border\\_security/ti/about\\_ti/ti\\_history.xml](http://www.cbp.gov/xp/cgov/border_security/ti/about_ti/ti_history.xml)

<sup>44</sup> The inefficiency of the American wall is a well-known fact. Back in early 2001, an article in Foreign Affairs explained in detail why in order to secure the United States the country would have to forget about border walls and develop a different kind of policing, one that controls flows where they actually cross. (Flynn 2000,

flow of illegal immigrants. Many overstay their visas, and those who enter illegally who would have ordinarily crossed the border in California now cross the border in the Arizona desert. The fence, moreover, has given more business to organized human smugglers, or *coyotes*, as immigrants now fear crossing on their own. And most importantly, it is now clear that immigration flows are responsive to the pull of the economy rather than changes in border control. The fence has also failed to deter smuggling. It has fostered the creation of better and more complex networks of organized crime employing sophisticated mechanisms to avoid border control. In short, the wall seems to have made narcotic smuggling more streamlined and sophisticated.<sup>45</sup> The question of violence is murky, but many would contend that border fences *produce* rather than reduce violence. For example, in 2008-2009 the numbers of deaths of would-be immigrants along the border remained steady, even though the absolute number of illegal immigrants decreased.<sup>46</sup> On the issue of health hazards: a wall cannot stop most health and environmental threats, like the H1N1 virus because they spread from person to person and they usually come in through airports and seaports.<sup>47</sup> In sum, it appears that the U.S.-Mexico border fence is ineffective.

However, inefficacy alone is not a good argument against the US border fence. Supporters of the fence often claim that existing inefficacy is in fact a reason to demand a better border control. The US government has enough resources to create a border zone similar to the Demilitarized Zone that divides North and South Korea, which effectively stops all human crossing. A very determined state *could* seal off the border to stop all

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<sup>45</sup> Flynn 2003, 112-114.

<sup>46</sup> Ted Robbins, "US Mexico border crossing turns more dangerous", National Public Radio, September 21, 2009.

<sup>47</sup> <http://www.cdc.gov/H1N1flu/qa.htm>.

types of crossing by investing millions of dollars in installing concertina wire, constructing moats, stationing armed sentinels, providing underground control, unmanned drones, thermal infrared imaging, motion sensors and night vision cameras, together with stringent airport and seaport security, wave blocking, and internet firewalling. If there is something morally disturbing about such fortification, it cannot be solely the *degree* to which a barrier blocks human crossing. It is the very aim to coercively prevent crossing that demands a moral explanation.

This means that a *prima facie* case for or against the fence should be made regardless of its efficacy. It is true that we should also be concerned about the morality of the means that are used to attain the end in question. It is obvious that it does not have the same moral implications to have pillars or barbed wire along a territorial border, than to have an electrified fence, or snipers ready to shoot. But an argument about the permissibility of the means presupposes a prior argument about the value and permissibility of the end. So for the sake of this argument, let us imagine a fortified border similar to the one I have just described, and then make a principled, rather than a consequentialist, case for the fence. Are there principled reasons to defend such a fence? Could such fence be a legitimate institution?

Yet, in order to ask this question about principles we cannot simply assume that there are state borders and that the state has a right to defend them (this would beg the principled question at hand). A principled argument for border walls must be built on the basis of individual rights, and given that individual rights are universal, such discussion has to take seriously the possibility that borders themselves (i.e. jurisdictional boundaries between countries) are not justified. This means that we cannot simply assume the

legitimacy of bounded nation-states, nor take them as an inevitable fact of political reality.<sup>48</sup>

A discussion about border fences, as well as a discussion about open and closed borders presupposes a rightful jurisdictional boundary, but first we need to know whether the very existence of this boundary is justified and on what grounds. In the following sections I will argue that the justification of border walls is tightly related to the legitimacy of the state. (For this purpose I will use the terms justification and legitimacy following John Simmons's analysis. In his view, 'Justifying an act, a strategy, a practice, and arrangement, or an institution typically involves showing it to be prudentially rational, morally acceptable, or both.'<sup>49</sup> Legitimacy, in contrast, refers to the state's legitimacy "the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties and to use coercion to enforce the duties."<sup>50</sup>) In what follows I ask a question that is normatively prior to the debates about immigration, citizenship, political identity, group rights, and secession. What are the moral reasons one could give to justify a [closed] territorial border (understood as a jurisdictional boundary)? And more specifically: Are fortified borders a legitimate institution?

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<sup>48</sup> It is common for political theorists to bracket the discussion of the value or necessity of borders because borders are such an important fact in modern politics (See, for example Margalit and Raz 1990, However, this is not sufficient reason to dismiss the question. To do so would be similar to saying that given that injustice or poverty are facts of the world and already there, there is no need to ask whether they are good or bad, or whether we should try to get rid of them. For a similar effort to challenge long held background assumptions in political theory see Näsström 2007,

<sup>49</sup> Simmons 2001, 123.

<sup>50</sup> Simmons 2001, 130.

## II. Are territorial borders valuable or necessary?

A rightful border wall presupposes a rightful border. So In order to justify an effective border barrier, we have to explain why the border, or jurisdictional boundary, is itself justified. There are at least two reasons why. First, it would be hard to justify a barrier if the border was not itself justified, because the walls, fences or moats must be built *somewhere*, and this, in turn requires a good case for why this land is public (in order to justify eminent domain, etc). Second, the barrier prevents the movement of populations and goods, and these restrictions on movement demand an explanation that is specific to *this* place.

This does not mean that the border has to be a rightful border in the sense that it had to be acquired following rules of just transfer, or according to any one particular view of territorial rights, or principle of international law, but it does presuppose that the state can provide reasons why the border (understood as the limit of territorial jurisdiction) is currently morally permissible or prudentially justified to be *there*. What, then, counts as a good reason to claim that a political authority has exclusive jurisdiction up to that limit?

A good reason would have to explain why the border is necessary to sustain the principles that legitimize the state. The establishment of the territorial boundary goes hand in hand with the claim to territorial sovereignty, so a good reason for establishing borders has to reproduce the reasons given to legitimize the state in a given place. Most arguments advanced today would argue for the legitimacy of the state on the basis of the intrinsic worth and equal value of all persons.

Justifying borders on the basis of equal respect for all persons seems to be a contradiction. For on the one hand, a border closes off a state and protects only *that* state. On the other hand, we cannot justify state borders for the sake of state security or integrity alone, for state security is morally valuable only to the extent that it provides security for individuals—understood as free and equal persons worthy of moral respect. Given that freedom and equality applies to *all* human beings, we cannot justify borders on the basis of special obligations to the members of a specific state. If the borders are justifiable they must be justifiable to individuals everywhere. Can we overcome this apparent contradiction? Can we argue that borders provide security for all and protect their basic rights?

- a. Justifying the border on the basis of equal respect for all persons.

Can we say that borders are necessary or valuable while accepting universal rights and moral duties to all other human beings? A commonly used argument for this claim is that individuals can only realize their rights and fulfill their duties within bounded communities. Based on this claim, one can make the liberal case for a right of self-determination of nations, or independent communities.<sup>51</sup> For example, Michael Walzer argued that in order to realize her life plan, an individual needs to be a member of a “*community of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.”<sup>52</sup> Raz and Margalit also argued that only in groups with common culture one may

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<sup>51</sup> Margalit and Raz 1990; Meisels 2003; Miller 2005; Tamir 1993; Walzer 1981; Wellman 2008,

<sup>52</sup> Walzer 1981, 33.

attain individual well-being, given that this well-being depends on goals and relationships that are culturally determined.<sup>53</sup> There are other types of arguments for this claim: From an Arendtian perspective, for instance, one could argue that boundaries allow for human plurality, and plurality is a good for all humans (if not a good in itself).<sup>54</sup>

However I believe there is a deep problem in this type of argument for borders. In each instance the value of borders is derived from borders' ability to preserve cultures, communities, or associations.<sup>55</sup> However, cultures, communities and associations cannot be equated to sovereign nation-states, the proper subject of territorial borders.

Communities and associations need *boundaries* (or membership), perhaps even political autonomy, and this may grant a right to self-determination and a right to a homeland—but these boundaries are not the same as territorial borders. A *bounded* territory is not a precondition for attaining the goods that communities provide. This equivocation between membership and clearly limited territorial jurisdiction is clear in Wellman's argument, for example. He transitions from saying that a group has a right to choose their own members, to claiming that *modern states* have a right to close their borders.<sup>56</sup>

However, closing off a border does not correlate precisely with the ability to include or exclude foreigners. A boundary establishes group membership; a border, instead, specifies the politico-geographical relation of a territorial jurisdiction. There is no necessary connection between group boundaries and territorial borders. While nation-states need territorial jurisdiction, cultures, communities or associations do not. They may need a homeland, but there is no obvious reason why it should require exclusive

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<sup>53</sup> Margalit and Raz 1990, 448.

<sup>54</sup> Williams 2002,

<sup>55</sup> Respectively Walzer, Miller, and Wellman. (Miller 2008; Walzer 1981; Wellman 2008, )

<sup>56</sup> Wellman 2008, 131.



territorial jurisdiction. So, one cannot justify borders on the basis of the rights of communities unless one specifies the relation of the social group in question to a given territorial jurisdiction.

Territorial jurisdiction cannot be justified on the basis of communitarian claims alone, for a border does not protect a community, but the land in which the state has jurisdiction. The impermeable wall that keeps foreigners out cannot guarantee national, ethnic or cultural homogeneity inside the borders. Borders often leave foreigners and members of other nations inside the wall; they also leave nationals and members of the national community outside the perimeter of the state. Territories often enclose traces of alien institutions (such as the personal jurisdiction that churches, associations and foreign states have over their members) and leave out subjects of the country's jurisdiction (such as expatriates, and goods and moneys subject to taxation). So one can protect the borders of the state and still affect the community, just as one can seal off the community without touching the borders of the state. Thus, the argument for borders based on the value of community can establish that communities have a right to a homeland, and a right to self determination, but not exclusive territorial jurisdiction or border walls.

Another argument establishing that exclusive territorial jurisdiction is valuable in attaining goods that all human beings need has recently been made by Thomas Pogge, who sees no contradiction between the need for borders and universal moral obligations, as long as the principle of equal respect for persons applies beyond borders. Moreover, borders may be valuable to achieve universal justice and to actualize human rights. He argued that we may need borders and border control of immigration for reasons of global

justice.<sup>57</sup> Even though there may be, in principle, no right to exclude immigrants from coming into wealthier countries, there may be a need to do so for the sake of feasibly achieving global justice. Border control may provide a fairer and more cost effective way to mitigate injustices in the world, such as poverty and oppression, than permitting free flows of immigration. For example, border control together with resource transfer may be a more efficient way to help the poorest people in the world than allowing free immigration, because the poorest people are often not the ones who can immigrate. Also, it may be easier to actualize the rights of all subjects of an oppressive regime by changing their government than by allowing the whole population to go elsewhere as political refugees (think of the recent woes of Zimbabwe, for example). Borders, then, can be instrumentally valuable when they allow the global community to fulfill their obligations towards their most needy or unjustly treated members.

According to this argument, borders are *valuable* because and to the extent that they allow you to better comply with universal moral obligations derived from the principle of equal respect. One may need borders because they can help to sustain and actualize the assumption of equal moral worth of all individuals. But this conclusion only tells us that borders are useful. That is, it provides a temporary justification for specific borders, but it does not translate into an unqualified right to establish jurisdiction over the territory that would be required to legitimize border walls, and to exercise the coercion required to close them. In order to establish this right we would have to show that borders

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<sup>57</sup> Thomas Pogge, "The Morality of Borders", Beyond Borders: Immigration Policy in the New Century, Robert L. Bernstein International Human Rights Fellowship Symposium, Yale Law School, 2009.

are legitimate institutions. That is, we would have to show that they are also required to achieve the justificatory aim of the state.

- b. Justifying the border on the basis of popular sovereignty and democratic process.

Borders may be useful then, but can we claim they are necessary to legitimize the state? Here I argue that borders are necessary to actualize equal respect for persons in a polity. Equal respect requires equal access to the political processes that govern a group of individuals, and, I argue, such equality can only be achieved through popular sovereignty in a democracy: a type of political process that requires borders.<sup>58</sup>

Democracy is that form of government that makes possible the principle of equal respect for persons through popular sovereignty.<sup>59</sup> Equal respect requires that you are treated equally in public and with respect to government, so in order to have equal respect one must be able to have a say in setting the most fundamental laws and mechanisms of rule in one's polity. Popular sovereignty actualizes this requirement, by making the people the supreme authority in a democracy. That is, according to the principle of popular sovereignty, those who are equals under the authority of the state all have an equal say in creating such authority. So, to actualize equal respect and other rights and duties deriving from this principle, popular sovereignty is necessary. Given that popular sovereignty is an integral part of democracy and vice versa, we can conclude that in order to actualize equal respect for persons we need democracy.

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<sup>58</sup> A different argument for territorial rights established on the basis of popular sovereignty can be found in Stilz 2009,

<sup>59</sup> For a theoretical justification of democracy on the basis of equality of persons see Christiano 2004,

The people who are the ground of popular sovereignty are defined only by the freedom and equality of individuals partaking in self government. So a democratic people cannot exclude individuals on the basis of morally irrelevant criteria such as race, religion, ethnicity, or place of origin. A democratic people is in principle unbounded, and it could extend to encompass the totality of mankind. This implies that even if a particular group of people has a right to govern itself, it does not have a right to exclude aliens from democratic governance if the rules that they produce importantly affect the interests of these aliens, and particularly if they coerce them.<sup>60</sup> Thus popular sovereignty has the corollary that no democratic state has a right to unilaterally control its own borders.<sup>61</sup>

These considerations on the nature of democracy give rise to two important questions regarding borders: First, if the people is in principle unbounded, why would a democracy *require* territorial borders? (Is democracy necessarily bound in space?) And, second, how can a particular people or democratic state claim a right to *this* territory? (What is the principle underlying territorial claims and territorial rights?) We can answer both questions on the basis of popular sovereignty. However, this requires that we qualify the concept of “the people.” Rather than thinking of the people as a well-determined collection of individuals, we can think of the people as an unbound institutional process unfolding over time.<sup>62</sup> This understanding of a people as an institutional process unfolding in time is common among constitutional thinkers,<sup>63</sup> and it has received

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<sup>60</sup> Goodin 2007,

<sup>61</sup> Abizadeh 2008,

<sup>62</sup> Ochoa Espejo 2011, 13.

<sup>63</sup> Ackerman 1998, 187; Habermas 1998, 486.

attention in the recent past because it allows us to answer questions related to democratic governance.<sup>64</sup>

Regarding the first question: the reason why a democratic state requires borders is that, while the democratic people may in principle be unbounded and universal, the democratic *process* that actualizes freedom must take (specific, finite) place. A finite place is limited by definition; and in practice, it tends to overlap with jurisdictional boundaries. As a normative ideal and a form of government, democracy is an abstract entity. But when the ideal is applied, it produces concrete democratic processes occurring in specific places over concrete periods. Any concrete instantiation of democracy occurs when normative ideals are embodied in practices of rule, and the practices are themselves repeated instantiations of particular kinds of events that *take place*.

As a process, a democratic people is comprised of a series of events that create institutions over time.<sup>65</sup> This means that individuals living in a particular places have practices that become the basis of political communities. They make laws and sanction patterns of land use, they shape the land through private and public work, and they give political and religious meaning to specific places. Now, given that these events must happen *somewhere*, the events that make up a democratic process have a spatial expanse and limits. The spatial boundaries of events in this process are defined by convention. That is, they are defined by practices that create institutions, as well as by the actual recognition of the legal jurisdiction of these institutions over certain events and persons.

These institutions and the recognition of their legal jurisdiction defines the spatial boundaries of the democratic process: They create an exclusive legal jurisdiction because

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<sup>64</sup> Ochoa Espejo 2011,

<sup>65</sup> Ochoa Espejo 2011, ch. 6.

the practices and the recognition together generate political authority, understood –in the sociological sense--as the capacity to impose duties on others, and it may also generate legitimate political authority if this authority is democratic.<sup>66</sup> Given that these practices and the territorial expanse wherein they occur are what makes a people (a people, recall, is a process), then a democratic process requires the territorial jurisdiction of a set of institutions. This means that democratic processes require jurisdictional limits, or territorial borders.<sup>67</sup> So in order to actualize the principle of popular sovereignty, we require the geographical limits of a bounded legal jurisdiction, or a territory.

Territorial jurisdiction does not imply that the individuals involved in a democratic process must be confined only to a given space. Rather, it is the institutional process that requires such territorial contiguity. Thus, in order to actualize the principle of popular sovereignty we do need some type of territorial borders. From this, it follows that to actualize the principle of equal respect for persons you require borders. In a global democracy these borders would be the limits of the inhabited areas of the planet. In all other cases there would be interdependent democracies with defined territorial borders, even if these democracies have no right to control their borders unilaterally.

Regarding the second question. Why do particular peoples have a right to specific territories? The claim that the democratic people and the democratic state are processes has important implications for a theory of territory, because in this conception, the political rights over territory are not reducible to individual rights. If the people and the state are processes, then the relation of people and territory is mutually constitutive. In

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<sup>66</sup> Appropriate pages of Christiano.

<sup>67</sup> Notice that these territorial borders may be fluid in the case of nomadic democratic peoples; but they still require the physical contiguity of the community over time and space. On the issue of nomadism and spatiality of a group see Bauböck 1998, 24-25.

this view, the spatial aspect of the democratic people is a necessary component: The democratic people has a “terrestrial character.”<sup>68</sup> This character makes peoples bound to particular territories, and makes political boundaries necessary in order to actualize popular sovereignty, and the principle of equal respect that it entails. Moreover this engenders certain rights with regards to the territory that is part of the political process, but given that political processes may overlap, they do not create exclusive legal jurisdictions.

We now have an argument for why borders are valuable and necessary for legitimacy: Borders are valuable because they facilitate the attainment of global justice, and they may protect free associations, as well as distinct cultures, and human plurality. They are necessary for legitimacy because they are required to actualize the principle of equal respect for persons in a democracy. This argument legitimizes borders. But what about border walls?

### III. When are border *walls* justified?

Democratic processes are territorial, and this territoriality implies borders. To the extent that we need democracy to actualize the principle of equal respect for persons in politics, we have to deal with territorial boundaries. But, even if it were true that the physical aspect of democracy is unavoidable, this does not say anything about the *kind* of borders that would be justified. Why would a world of potentially unbounded democratic polities want to wall off territorial borders? And if they did, would they be justified in doing so? Here I argue that we can justify border fences, but only under stringent

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<sup>68</sup> Kolers 2009, 99.

conditions that do not obtain in present circumstances. Therefore, my conclusion has the corollary that all *current* border fences are unjustified.

An aspect of border fences can be justified on the same grounds as borders. A border fence is justified if physically closing off borders is necessary to sustain the equal worth of all individuals. This obtains only when it is highly probable that external flows crossing to a territorial jurisdiction would destroy the democratic process enclosed, and would imminently threaten other democratic processes. The reason why this criterion to justify border walls is so stringent is that closing off a border is a type of transgression of the principle of equality that justifies the state. Closing off the border establishes an important moral inequality with those on the other side, because the coercive restriction of movement and cultural contact signals that the differences of the enclosed people from other peoples are not only a matter of having different cultural and political practices, but that there is a moral hierarchy that justifies the strict separation. For example, if a country closes off a border because some outsiders are potential terrorists, the country in question is in fact treating all members of the external communities as potential threats and all insiders as potential victims. Thus the wall generates both a real and a perceived political inequality by failing to treat those affected by the border as deserving of equal respect. More importantly, the wall establishes an unjustified inequality regarding the management of border itself; which, as a shared governmental institution should offer those on both sides of the border a say in its creation. So a physical separation and the accompanying expressive element (perceived racism or xenophobia) can undermine the justification of the state in terms of freedom and equality. This undermining could only be compensated if a grave ill threatens the ground principle itself.



But in order to justify a border fence in this manner we would have to show that the flows that could destroy the process are not only a threat to a particular democracy, or even to democracy *per se*, but a threat to the principle that sustains it: equality of persons. Consequently, to justify a fence one would have to show that there is a high probability that the flow of goods and persons would disrupt, not only a given process, but *all* democratic processes. Therefore, the act of closing off borders with fences may be justified, but only if it could be justified to both those inside and outside a given democratic process; and the reason given must be such that a fence saves the principle of equal respect itself. Saving a democratic process in a particular liberal polity does not suffice for legitimization.

Needless to say, if this principle became a necessary pre-condition for justifying a border wall, a wall would be justified in very rare occasions. These might be circumstances of extreme danger to the principle of equality, or circumstances that give rise to a clear-cut democratic consensus across borders. For example, one could imagine such a consensus among democratic polities opposing the Nazi regime in the 1940's. One could imagine situations in which, without fences, all democratic processes, and hence the principles of individual freedom and equality, would be endangered. However, to evaluate which such situations deserve a fence, one should keep in mind that borders are not simply an extension or limit to territories and jurisdictions.

Borders have at least two particular features that should be taken into account when formulating a justification. First, one needs to consider the physical aspect of borders and how this affects individuals' rights and participation in the political process. Recall the type of border that would be necessary to stop flows of goods and persons; in

order to effectively isolate a territory a border must be both low-tech (concrete walls, concertina wire, moats, etc) and high-tech (wave blocking, firewalling, etc). A fortified physical border has a special symbolic weight, which, as part of an ideology, can affect individuals' rights. For example, the idea that border walls are necessary is often part of an ideology that fosters nationalism or is motivated by unconscious racism.<sup>69</sup> The material qualities of borders can have an important role in fostering or deterring such ideological constructs and they must be taken into account when evaluating the merits of the justification. Second, borders are not only the point of contact between two territorial limits; borders are themselves transnational institutions that engender independent political processes, or boundary regimes.<sup>70</sup> In order to evaluate situations that would deserve a wall one should also consider these independent institutions and the individuals involved in the process of creating and governing them. For example, a bridge or a land border crossing intensely affects those who live by the border, as well as those for whom the crossing of goods and persons is particularly important --such as immigrants and their families--, and those who are directly affected by trade. In order to fulfill the requirement for justifying border walls and fences, these border political processes must themselves be governed democratically from both sides of the fence.

In sum, if we consider the democratic people and states as a political process, we can say that a border fence could in principle be justified. However all those borders listed at the beginning of this paper are built unilaterally, and the reasons given to build them are not often ones that could be accepted by people on both sides of the fence.

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<sup>69</sup> Brown 2010, ch. 4.

<sup>70</sup> Gavrilis 2008, 14.

## Conclusion

A border wall is justified if physically closing off borders is necessary to sustain the equal worth of all individuals. Moreover, justified border walls require participation of all those who are affected by the government of the wall, through democratic institutions. This means that a fence is only justified under very stringent conditions, which do not include keeping people or goods out of a state in order to protect a particular people, culture, religion or language. Neither do they include keeping people out of a region to protect state security, national integrity, private property, or freedom of association. The only conditions that do warrant a border wall do not obtain now-a-days and this carries as a corollary that present border walls *are not* justified. It is not hard to understand Pat Nixon then: what is hateful about walls and fences is that they often establish a unjustified moral inequality with those on the other side.

Of course, this conclusion engenders other questions. In order to determine whether this justification-condition is actually satisfied we would have to determine what precisely are the material conditions required to establish and keep up a democratic process. Only if we understand what material resources are required to have democratic governance and foster equality within and outside a given territory will we be able to make the complete normative case for opening or closing borders. We would also have to understand how democratic processes relate to each other and whether disrupting flows with walls is more dangerous than the flows themselves.

Moreover, a principled justification of the wall on the basis of democratic legitimacy cannot solve all the moral problems related to borders. State legitimacy is only

one aspect of political morality, and saying that a state institution is legitimate does not solve all other moral problems or settle all prudential concerns. The legitimacy of the state only addresses some aspects of the justification of walls, and it does not necessarily harmonize with every other answer to moral questions related to them. That is, there may be genuine moral dilemmas that, for example, pit political equality against environmental conservation. We can only understand these dilemmas if we pay attention to the particularity of specific borders. In order to deal with the moral difficulties surrounding borders and borderlands we have to consider the material aspects of democratic governance-- features that we often put aside. In sum, normative work on borders could benefit from more empirical work on the role of borders conceived as institutional zones within democratic processes, on how borders actually work, and how they look. Political theory owes the borderlands a visit.

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