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What marriage, religion and tennis clubs tell us about the ethics of immigration and border controls. Re-evaluating the right of freedom of association

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What marriage, religion and tennis clubs tell us about the ethics of
immigration and border controls

Re-evaluating the right of freedom of association

Bachelor Thesis B.Sc. International Relations and Organisations

Bachelor Project: Justice and Equality in a Globalized World

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Introduction

Rights protect the freedoms we argue to be fundamental to our ability to live a decent life. One of those freedoms concerns our engagements, interactions and special obligations to others, like the freedom to marry, freedom of religion - or more broadly speaking, the freedom of associate. The right to freedom of association, has been used to defend a range of related claims such as a state's right to exclude "outsiders". For example, Christopher Heath Wellman (2008) has argued in favour of a state's right to control immigration on the basis of the right to freedom of association. This thesis will investigate whether his argument can survive the criticism it has faced and convincingly defend a state's right to exclude all potential immigrants from its territorial borders.

It is a common practice for states to coercively control their territorial boundaries and many view it as a basic feature of the sovereign state. This conventional view maintains that liberal states are morally free to restrict immigration at their own will, with little discretion (Wilcox, 2009, p. 813). Yet as Sarah Fine puts it, "many of us just take it for granted that sovereign states should be free to control the entry and settlement of non-citizens in their territories, and hardly consider or evaluate the moral justification for immigration controls" (2013, p. 254). Despite its theoretical and practical significance, political philosophers dedicated little attention to the question of whether states have this right to exclude (Fine, 2010; Wilcox, 2009, p. 813). Likewise, relatively little attention has been paid to the freedom of association argument (Gutmann ed., 1998, p. 3). With various perspectives defending or opposing a state's right to close its borders unilaterally - ranging from liberal nationalist accounts to cosmopolitan egalitarianist arguments, no clear consensus has been established. This research will therefore re-evaluate the argument of freedom of association in order to contribute to the wider philosophical debate on border controls and immigration ethics.

This research is not merely motivated by its academic relevance, it also obtains significant societal importance. Debates on immigration policies continue to invoke impassioned and heated debate, resulting in a polarised public discourse (Fine, 2013, p. 254). The continuously increasing flow of immigrants due to political unrest and climate change, combined with increasing support of far Right parties that use the "issue" of migration to push for racially exclusive and fascist agendas, has played a larger role in this (Miller, 2014, p. 193). While the question whether states even have the right to unilaterally control their borders has been taken for granted, popular discussion shows how controversial the topic of immigration

has become. Moreover, before evaluating which type of border policy a state ought to pursue, it is vital to establish whether they even have the unilateral right to control their borders in the first place (Fine, 2013). As immigration controls may be deemed unacceptable if they are legislated by a group that does not have the right to decide on this, for the same reasons that a laudable law may be deemed illegitimate when imposed by a dictator (Lepoutre, 2016, p. 309). The state of the social and political landscape, as well as the academic debate, therefore demonstrate the dire need for moral justification and academic deliberation on the claimed authority by states over the admission and settlement of non-citizens (Fine, 2013, p. 254). Following the aforementioned, the research question is:

Can the argument of freedom of association convincingly defend a right in favour of the state to close its borders to potential immigrants, including refugees?

To answer this question, I will respond to several sub-questions. Chapter I will attend to the question, what does Wellman's freedom of association argument entail? What exactly are the premises underlying the argument? What does Wellman not argue for? Chapter II focuses on the criticism against Wellman. Asking, which objections are raised against Wellman's argument? What do they call into question and why? Finally, in Chapter III, I assess whether the objections have any significant bearing on the freedom of association argument in favour of a state's right to unilateral border control. Do these objections misconstrue Wellman's argument or do they raise valid criticism? What are the implications of these objections? Are their alternative conclusions to be drawn? Using critical analysis, I will argue that while the premises presented by Wellman initially seem appealing and raise important issues, he does not seem to tell the whole story and his argument is therefore in need of further justification.

Chapter I *Wellman's Freedom of Association argument*

In his article “Immigration and Freedom of Association” Wellman (2008) puts forward a novel and intriguing argument in favour of a state’s right to control its own borders. He defends his position by appealing to the argument of freedom of association, expressing its importance and highlighting its exclusionary implications. He concludes that “every legitimate state has the right to close its doors to all potential immigrants, even refugees desperately seeking asylum from incompetent or corrupt political regimes” which are unable or unwilling to protect the basic moral rights of their citizens (2008, p. 109).

First, the author elaborates on the premises to establish a state’s presumptive right to exclude potential immigrants. He then moves on to demonstrate how this *prima facie* case is not outweighed by competing egalitarian and libertarian considerations (Fine, 2010, p. 340; Wellman, 2008). In this paper, I shall focus on the first step of his defence, in which he uses various examples to illustrate why freedom of association is widely thought to be important, how it includes the right to dissociate, and ultimately, why it defends a state’s right to control its own borders.

1.1 Freedom of Association

The relation between freedom of association and a state’s right to exclude immigrants from its territorial borders may need elaborating. Freedom of association can be described as “a morally privileged position of domination over our self-regarding affairs” (Wellman, 2008, p. 110). To explain, in nearly all human activity some interaction or engagement with another is present, our experiences are fundamentally associative (Brownlee & Jenkins, 2019). Freedom to choose if and which associations to engage with, or the prevalence of that choice over other matters, constitutes a freedom of association. In this sense, Wellman claims it can be viewed similar to a veto power that is only invalid in extraordinary circumstances (Blake, 2012, p. 758).

Wellman emphasizes that the right of freedom of association is grounded in, and an integral part of, the right to self-determination. It is relatively uncontested that a central feature of a *sovereign* state is (some measure of) self-determination (Fine, 2013, p. 254). A legitimate sovereign state is thus widely viewed as an entity that has domination over its self-regarding affairs – including a state’s immigration policy and border control. (Abizadeh, 2012, p. 3; Carens, 2016, p. 251; Fine, 2013, p. 258). Arguments that aim to defend this right - and

particularly its reliance on self-determination, differ in nature. Michael Walzer (1984), for example, bases his defence on a communitarian approach which stresses “the community of character”, which he argues to be at stake if such right is not maintained. Wellman, on the other hand, explicitly excludes arguments of cultural distinctiveness from his defence, he wishes to avoiding these “controversial” claims, building on the argument of freedom of association instead (Cole, 2011, p. 242). Nevertheless, he presents a similar idea. Citizens have an interest in controlling the state’s membership as members shape its future (Wellman, 2008, p. 115). In other words, he argues that the state’s “self” – its members, must be able to determine itself – who can obtain membership (Fine, 2013; van der Vossen, 2015, p. 278).

Additionally, Wellman defends a deontological right to limit immigration (2008, p. 116). Meaning, he not does advocate that closed borders would be the best policy approach. On the contrary, while Wellman believes that there should not be one singular immigration policy for all countries, his personal preference lies with open borders (2008, pp. 116–117). Thus, his account discusses who has the right to decide on the immigration policy (arguing in favour of states) and on which grounds (that of freedom of association). Finally, he limits his argument to legitimate states only and includes refugees into the category of immigrants (Cole, 2011, p. 234; Wellman, 2008, p. 219). He stresses that the justice we owe to those in desperate need can be exported, that is, fulfilled by other means than open borders and that states are not obligated to provide shelter to refugees in their own territory (Wellman, 2008, pp. 128–129).

1.2 The Marriage-Immigration Analogy

Wellman (2008) illustrates the relevance of “ (a collective) right to freely choose with whom to associate” through our views on marriage and religion (Abizadeh, 2012, p. 2). Wellman claims that we highly value the right to marry, if and whoever one wants with the consent of the other party involved. Or as David Gauthier puts it, “I may have the right to choose the woman of my choice *who also chooses me*, but not the woman of my choice who rejects me” (Wellman, 2008, p. 110). Therefore, one may reject any marriage proposal if they do not wish to marry. Thus, this right to associate freely inherently includes the ability to dissociate, i.e. to not associate, with others.

Similarly, we now highly value the freedom of religion, which allows one to freely choose if and what religion to assign oneself to. Ultimately, Wellman uses this to argue that “whether, how, and with whom I attend my humanity is up to me as an individual” (2008, p.

110). Wellman then uses these examples to make the jump from an individual's right of freedom of association – with the example of marriage, to a group's right of freedom of association – through the examples of religion and tennis clubs, to a state's right to choose whether, how and with whom to associate. With this analogy he concludes that, just as individuals have a right to determine whom and whether to marry, a group of fellow-citizens has a right to determine whom and whether they want to invite others into their political community (Wellman, 2008, pp. 110–111). He concludes that “just as an individual's freedom of association entitles one to remain single, a state's freedom of association entitles it to exclude all foreigners from its political community” (2008, p. 111).

Thus, Wellman's argument builds on an analogy between an individual's marital rights and a state's right to immigration control. Drawing from the common convictions regarding marriage and religion to demonstrate a widespread agreement on the importance of freedom of association. Explaining that freedom of association includes a right to disassociate, and from this he arrives at his “more controversial” inference which compares an individual's right to marry to a state's right to exclude immigrants (Fine, 2010, p. 340).

1.3 Potential Objections

Wellman is well aware that his marriage and immigration analogy may feel counterintuitive, for a matter of reasons. He therefore brings forward the two (most obvious) potential objections to his argument and responds to each in turn (2008, p. 111). He addresses the issues that may arise from comparing individual rights to group rights, and the potentially relevant difference between the associations of spouses and those between compatriots.

Firstly, if there is a morally relevant difference between individuals and groups it could be argued that individuals have a right to freedom of association, while groups may not. Wellman responds that it is uncontroversial to posit a group's right to freedom of association. Drawing on the example of the Boy Scouts of America and the Augusta National Golf Club, Wellman explains that even groups whose right of freedom of associations are in question - due to their discriminatory selection, are still viewed to have a presumptive right to freedom of association (p. 111-113). The question is not whether these groups have the right of freedom of association or not, but whether this right is vulnerable to be overridden by another principle like non-discrimination. Wellman continues highlighting the “unpalatable implications” that follow from denying a country's freedom to associate (2008, p. 112). Like countries having to

forcibly join regional associations like NAFTA or the EU, and a country's unilateral decision to annex another country. According to Wellman, the wrongness of these actions cannot be explained unless one assumes countries have autonomy and therefore the right of freedom to associate. With these examples he claims to have defended the presumptive right of a state to control immigration against the objection that individual rights are different from state rights.

Secondly, another response that Wellman anticipates calls into question the suggested similarities between the marital association and the political association. To elaborate, freedom of association is of far more importance for individuals in the marriage context – which is far more intimate, than for a group of citizens in the political realm – whom they may never meet. That is, the levels of impact on the individuals differ. Therefore, if we care about the right of freedom of association in the context of marriage, it does not necessarily follow that we should apply it to the question of immigration controls.

Wellman concedes that freedom of association in the case of individuals in the marriage context is far more important (p. 113). However, he holds that simply because the group rights are less important does not mean we can throw freedom of association out of the window. First, he gives the example of freedom of association in the religious realm, this too is far less important than the marital context, however, it is still relevant. Wellman continues by stating that if golf clubs have a presumptive right to exclude others, then there is no reason to suspect a group of citizens not having that right (p. 114). The lack of intimacy, or the fact they never meet does not take away from the fact that fellow citizens remain political associates and that new members will get a say in how things are organized (p. 115). Wellman therefore concludes that the comparison between marriage and immigration, and thus the state's presumptive right to control its borders, stands.

Chapter II *The Criticisms against Wellman's account*

Wellman's argument of freedom of association has faced a number of critiques from several authors (Abizadeh, 2012; Blake, 2012; Brown, 2019; Wellman & Cole, 2011; Fine, 2010; van der Vossen, 2015; Wilcox, 2009). Most criticism takes issue with the various aspects of the main analogy between the right to freedom of association for individuals in the marital context and the right to freedom of association in the political realm. Opponents have pointed out shortcomings and inconsistencies in order to demonstrate that freedom of association need not lead us to Wellman's "stark" conclusion in favour of a states right to exclude (Blake, 2012; Brown, 2019).

One of the main criticisms is that by Sarah Fine (2010). In her work "Freedom of Association Is Not the Answer" she raises multiple objections against Wellman's argument. She discusses issues of external harm, the distinctive character of the state, and how a right to exclude others from ones territory cannot solely rest on an appeal to freedom of association – but requires a justification of a state's territorial rights (Fine, 2010, p. 340). In her critique, she therefore calls into question the citizen-focused perspective taken by Wellman, his leap from group rights to state rights, and, his conflation of the civic boundaries with territorial borders. Each of these critiques shall be discussed in Section 2.1 to 2.3. Section 2.4 focusses on the question who is the self that is entitled to political self-determination? This question is closely linked to the democratic boundary problem which Arash Abizadeh (2008) re-introduces. The works of Abizadeh (2012) and Maxime Lepoutre (2016) present the counterargument that all those coerced by the state are entitled to democratic justification, not just citizens. In Section 2.5 the content of the right of freedom of association is investigated. Using the works of Abizadeh, Michael Blake (2012) and Phillip Cole (2011) it discuss the various functions of the right, how it relates to other (opposing) rights and its conditional nature.

2.1 Issues of external harm

In Wellman's discussion of a right to exclude he pays little attention to the effect on the potentially excluded, i.e. immigrants. Sarah Fine (2010) exposes this by highlighting what she calls "issues of external harm" (p. 340). Fine draws on Wellman's work "The Paradox of Group Autonomy" in which he states that we should all have "domination over ones self-regarding affairs" to the extent that it does not cause harm to others (2003, p. 265). The idea is that we should "let [people] be" as long as no one is harmed by the other's actions (Fine, 2010, p. 345). Fine points out that this harm-clause has been omitted in the immigration piece while it possess an important obstruction to its conclusion. Using this harm argument, she illustrates how group rights - as opposed to individual rights, are far more complex and problematic for two reasons.

First, the group can harm its own members by illegitimately restricting their autonomy. The solution would be to give members the right to exit the group. Nevertheless, the group can harm non-members too. Fine introduced the example of noisy club, where non-members could be "unwillingly exposed to the effects of the group's decision". Here, a right to exit provides no relief. Thus, Fine states "the potential for harm represents a good, if not a conclusive, reason for intervening in the group's affairs in order to prevent the harm" (2010, p. 346).

Second, as determining itself requires some measure of exclusion, non-members can be harmed by the group by being excluded from it. The exclusion of people can interfere with their interests, making them worse off. While Fine states that we should not prohibit every action with potentially harmful effect, she stresses that sometimes the interest in question are so important that ignoring them significantly harms the well-being of the excluded (Fine, 2010, p. 347). To elaborate, people may not be able to live a minimally decent life in their current country, creating a strong interest in migrating. As the group interest to close borders is accompanied by potential harm to others, no clear presumption lies on the side of this group. Rather, the potential harm represents an equally - if not more, valid reason for interference with group interests than its right to associate freely. Or as Chandran Kukathas puts it:

"[...] very good reasons must be offered to justify turning the disadvantaged away. It would be bad enough to meet such people with indifference and to deny them positive assistance. It would be even worse to deny them the opportunity to help themselves" (Kukathas, 2005, p. 211).

This argument ultimately demonstrates that while the right to exclude might be relatively weak for states (for reasons we shall elaborate on in the next sections), the case *against* the state right is rather strong (Cole, 2011, p. 244).

2.2 The distinctiveness of the state

The second strand of criticism focusses on how the character of the state distinctively differs from that of (private) groups or individuals. The question being, “to what extent the analogies with marriage, private clubs, religious associations, or even state annexation, illuminate the case of immigration” (Abizadeh, 2012, p. 13). Moreover, if one accepts that private groups have a right to freedom of association it does not necessarily follow that they accept this same right for entities such as states.

As Sarah Fine points out, arguing in line with Amy Gutmann (1998) and Stuart White (1997), “the presumption lies with the excluder in the marriage and religion cases [despite the external harm] because there is something special about certain forms of associations, which gives them this privileged status” (2010, p. 349). She investigates whether modern liberal states similarly enjoy this privileged status, and hence the presumptive right to exclude. According to Fine, two features are vital for this privileged status. First, the association is either intimate – like individuals in the marriage context, or expressive – like groups in the religious context. She explains that “the idea is that it would be objectionable to compel individuals to form or maintain intimate attachments against their will or to betray their own consciences” (2010, p. 349). Additionally, exclusion from the association must be “ordinarily reasonably harmless” (Fine, 2010, p. 352). As these features are not present in states, Fine concludes that they do not enjoy this privileged status.

Michael Blake (2012) uses a similar language in his work “Immigration, Association, and Antidiscrimination” in which he uses two United States Supreme Court cases to demonstrate how we view the right to freedom of association. Blake compares the 1984 *Jaycees*’ case regarding the right to exclude women, to the 2000 case on the Boy Scouts of America’s (BSA) right to openly exclude gay men. In the first case the court ruled in favour of the anti-discrimination norm, while the second ruled in favour of the BSA’s right to freedom of association. More importantly, in both cases these judgements were passed through an assessment of the organisations character. Moreover, “The Supreme Court held that the right to freedom of association required [...] an intimate association, of a sort with intrinsic value

for its participants, or an organization whose value was derivative of the [...] expressive rights of its members” (Blake, 2012, p. 753). Blake’s examples show how the right of freedom of association is granted by assessing a group’s intimacy and expressive character, two characteristics that the state does not obtain.

While Wellman does not defend an absolute right, by highlighting the distinctiveness of the state, the general awkwardness of the analogies is exposed. Fine and Blake therefore call into question the proclaimed “very natural and straightforward case [...] in favour of freedom of association in all realms” (Wellman, 2008, p. 114).

2.3 Required justification of the state’s territorial rights

Wellman discusses the right to exclude immigrants from the political community, i.e. state membership, which critics have pointed out, is not the same as a right to exclude would-be residents from state *territory*. As Abizadeh puts it, “Wellman does not, it seems to me, adequately distinguish between the territorial boundaries regulating movement and the civic boundaries regulating membership” (2012, p. 12).

Fine (2010) elaborates on this critique by presenting her own analogy. She illustrates that a yoga group in Central Park does not have the right to exclude others from the park if they do not have ownership of the space. Due to their freedom to associate, the yoga club can exclude certain individuals from their group however not from the public park in which they conduct their practices. Thus control over membership differs from control over territory. Similarly, states need to prove the right over their territory in order to control immigration into it. Fine constitutes that Wellman does not claim that the state obtains this required ownership over its territory. On the contrary, in his argumentation regarding tourists and temporary visitors seems to suggest that the state has no right to stop these individuals from entering the territory. Yet the question then becomes, if not through ownership, in what way does the state enjoy the territorial rights that allow it to ban long-term residents? (Fine, 2010, p. 354)

Here, it should be noted that Wellman accepts what Walzer (1984) calls “the principle of political justice”, namely that long-term residents, i.e. settlers, should be granted citizenship rights as they are systematically subjected to the state’s political power. However, by accepting this principle Wellman creates a puzzle for himself. He suggests that states do not have the right to block freedom of movement for temporary visits (these do not have consequences for the future of the political community). Thus, states do not have the right to exclude others from

the territory all-together. States, according to Wellman, have the right to exclude people from membership. However, he also concedes to the democratic principle that long-term residence should result in membership. Yet if the political community does *not* have the right to block outsiders from entering based on territory rights, but *does* have the right to control who becomes a member of the community, they cannot also be committed to the idea that if one resides in the territory that they must retain membership. Ultimately, a state cannot control its membership and commit to the principle of political justice without any territorial rights. Maxime Lepoutre outlines that due to the demands of the principle of political justice a group's right to determine its boundaries entails a right to control who resides in the territory and thus entails a right control its territorial borders (2016, p. 310). Thus, to conclude that a state has the right to control immigration over its territorial border requires a justification of a state's territorial rights, without which Wellman's account is deemed insufficient (Fine, 2010; Lepoutre, 2016; Moore, 2016).

2.4 The boundary problem & coercion

According to Wellman, legitimate states are entitled to political self-determination and therefore have the right not to associate with others, including potential immigrants (Cole, 2011, p. 232; Wilcox, 2009, p. 259). However, this begs the question, who is the self that is entitled to political self-determination? Whose freedom of association should be protected? And who has the right to participate in deciding the entry policy? Wellman's state sovereignty view suggests that a state's citizens are the ones entitled to this right. Nonetheless, Cole emphasizes, Wellman demonstrates why we should value the right to freedom of association, however, does not show why (only) citizens qualify for this right (2011, p. 242)

A strong opponent to this state sovereignty view is Arash Abizadeh who rejects the idea that state are entitled to the unilateral control of their borders (2008, p. 37). Supporting the so-called, "democratic border thesis", he argues that a state's border regime must result from political processes involving both citizens and foreigners to be democratically legitimate (Abizadeh, 2012). Moreover, both state members and non-members are owed democratic justification as both are subject to state coercion. As Frederick Whelan famously demonstrated, determining the boundaries of "the self" through democratic procedures causes vicious circularity as it requires a "pre-political group"(Abizadeh, 2008, pp. 44–45; Lepoutre, 2016, pp. 311–312). To elaborate, democracy as a form of decision-making cannot take place unless

some entity has decided who can decide, which in turn, has to be decided democratically. This is what Abizadeh refers to as the “Democratic Boundary Problem”, or what Lepoutre calls the “the Problem of the Self” (2016, p. 311). It is caused by the fact that the act of determining civic boundaries is always an exercise of power over both members and non-members that deprives the non-members of political rights. However, Abizadeh’s demonstrates that while democratic procedures may not offer a solution, democratic principles do. His solution to this boundary problem, namely the “Coercion Principle”, demands that all those subjected to the state’s coercion should be included in the demos (Lepoutre, 2016, p. 312). Following this logic, *the demos* in democratic theory – when “properly” understood, *is* in principle *unbounded* (Abizadeh, 2008, p. 39).

Nonetheless, David Miller (2010) has critiqued Abizadeh’s account, arguing that border control regimes are not coercive and therefore do not require democratic justification to all. He argues that they are preventative acts instead, the closing of a one particular border leaves immigrants with an adequate range of options and therefore the autonomy of the immigrant remains intact (Miller, 2010, pp. 115–117). Abizadeh (2010) disagrees, responding that acts involving (threat of) physical force violate the independence of the potential immigrant and thereby their autonomy. Regimes of border controls therefore always invade the autonomy of potential immigrants, and hence, require democratic justification to all, according to Abizadeh. Through these pattern of thought both Abizadeh, and by extension Lepoutre (2016), conclude that Wellman misconstrues the proper collective subject of a right of self-determination.

2.5 The content of the right to associate

Another range of criticism calls into question what the content of the right to freedom of association truly entails. To explain, various authors have investigated the nature of the right, how it relates to other rights, and how one’s social position influences it (Abizadeh, 2012; Blake, 2012; Brown, 2019; Cole, 2011; Vinx, 2015; White, 1997).

Firstly, Abizadeh (2012) argues that the right of freedom to associate is actually a set of distinct rights concerning human interactions and the mutual special obligations that result from these (p.13). This set of rights serve three different functions in order to protect freedom of association, namely: regulation of coercion *against* the right-bearer (1), regulation of coercion *by* the right-bearer (2), and a project enabling function (3). Connecting each to an

example, (1) protects against forced marriage or being forbidden to marry, (3) would allow one to be able to choose who to marry, and (2) allows one to use coercion *against* others *to prevent* them from associating with one or using coercion to *compel* others to associate. The relevant point is not which of these takes precedence, rather it is about distinguishing the components of this right to illustrate that Wellman's argument conflates function (1) and (2), which by nature are in tension with one another. Furthermore, he concludes that while Wellman's argument defends a right to use coercion *against* the right-bearers – such as against annexation by another state, his conclusion asserts a right to use coercion *by* the right-bearer – coercively preventing association with immigrants (Abizadeh, 2012, p. 19).

Secondly, Michael Blake (2012) demonstrates that while Wellman presents the right to freedom of association as a “trump right”, it should actually be viewed as part of a more complex deontic right which is inherently in tension with other principles (Blake, 2012, pp. 750–751). He uses the history of antidiscrimination law to demonstrate this (pp. 752-758). While Abizadeh stresses that freedom of association consists of a set of rights - internally, Blake argues it to be part of a set of contested political rights that make up the larger moral principle of equality. He stresses the need to weight each right per case. Thus, rather than an human right against torture that trumps all other justification, he sees freedom of association closer to procedural democracy which is a right that even when fully respected does not necessarily proscribe a final verdict (p. 752). His argument being that we value freedom of association, because we value “people's equal entitlement to pursue meaningful projects and relationships” (Blake, 2012, p. 751).

Finally, Phillip Cole (2011) presents a different argument which stresses the conditionality of the right to freedom of association, one that is limited by human rights and dependent on one's role in society. Cole demonstrates that individuals never have the right to refuse association with *anybody* as the obligations that arise from their positions in society may (legally) force them to associate, or disallow them to discriminate (2011, pp. 238–240). He uses examples like the doctor that cannot select their patients and the professor who is not permitted to refuse particular students. One's role in public might conflict with one's private right to associate freely. Or as Joseph Carens puts it, “while the right of freedom of association may be appropriate in the private sphere, the principle of equal treatment holds in the public sphere” (Cole, 2011, p. 240). Citizenship, he then argues, can be viewed as such a public role with certain duties attached to it. Cole argues that similarly, the right of a state to associate freely is constrained by its role as state. And simply because it may hold that “states have the right to refuse association with other states and multistate organizations, it does not follow that

they have the right to refuse association with individual migrants”. Not having the right to refuse associations would have palatable implication for states according to Wellman, however, following Cole’s approach means this argument no longer holds.

Chapter III *Evaluating the debate*

I believe it to be evident from the various and extensive criticism to Wellman that the inference he presents may not be as intuitive and straightforward as he proposes. As Cole comments, “the right to freedom of association is [...] more complex than Wellman seems to assume” (2011, p. 240). Nonetheless, we cannot simply dismiss his argument due to some criticism. We must evaluate it in order to decide whether these objections lay any bearing to his conclusion. To briefly reiterate, Wellman appeals to the freedom of association argument to defend a state’s right to control immigration over its territorial borders. He concludes that every legitimate state obtains the right to exclude all potential immigrants, including refugees (Wellman, 2008, p. 109). He uses the following analogical reasoning to arrive at his conclusion:

*P*¹: Freedom of association is widely thought to be important (in the case of marriage and religious self-determination).

*P*²: Freedom of association includes the right to reject a potential association, or to disassociate.

*P*³: Just as an individual has a right to determine whom and whether they would like to marry, a group of fellow-citizens has a right to determine whether it would like to invite non-citizens into its political community.

C: This establishes a presumptive case in favour of a state’s right to control its borders.

Wellman argues that an individual’s freedom to marry is sufficiently similar to a state’s freedom to control its membership. Nonetheless, upon closer inspection, the potentially relevant differences between the association within marriage and that of a political community appear. Thematically grouping the objections to his argument shows that they comment on either one of the following questions: Who is entitled to the right of freedom of association? And, what does it entail to have the right to freedom of association? The first question investigates the different entities and types of associations who (do not) have this right and the problems that arise from establishing the scope of the right. The second focusses more on the content of the right itself, discussing principles that may conflict with the right to freedom of association and how we should view it.

3.1 Who gets the right to freedom of association?

The Distinctiveness of Immigration

To assess whether the analogy succeeds we must establish whether the differences between the cases (of marriage and state membership) that critics have pointed out are *relevant* to Wellman's argument (Weston, 2017, pp. 20-21). Wellman claims that for his argument, it does not matter that a group's interest in controlling immigration does not weigh as heavily as an individual's interest in choosing their spouse. The relevant similarity for Wellman is that both legitimate states and individuals have a right to autonomy and hence freedom of association.

Wellman argues that freedom of association in marriage grounds freedom of association in state membership, as the cases are relevantly similar. In order to evaluate this we must ask why we value freedom of association in the case of marriage and religion, and see if this applies to the case of immigration. According to Blake and Fine, the characteristics in question are that of intimacy and expressiveness (2012, p. 755; 2010, p. 349). However, the state lacks both these characteristics which are vital to the valuation of freedom of association above other norms, and crucial for the privileged status of the excluder over the excluded (Fine, 2010, pp. 349–353). To elaborate, Wellman claims that the right to exclude immigrants can be derived from the importance of freedom of association. However the very reason we find this right important is precisely because of the intimate and expressive characteristics which the state lacks. As Blake's court case examples persuasively point out, it is these very characteristics that we weigh in order to establish whether the right to freedom of association establishes a right to exclude.

Additionally, Fine highlights how exclusion should be reasonably harmless, or in other words, should not infringe upon someone's autonomy. One could take Miller's position, which argues that a state's border controls are preventive rather than coercive and thus the immigrant's autonomy remains intact due to the adequate range of options that remain available. However, this adequate range of options is only maintained if states multilaterally decide that some states shall keep their borders open. Additionally, the case of family reunion, when excluded from the particular state in which one's family resides, demonstrates that one may not be left with an range of options that adequately allows the ability to live a decent life (Miller, 2005, p. 195). Nevertheless, by illustrating how justice could be exported, Wellman concludes that this decrease in options does not infringe on the immigrant's autonomy whilst also admitting to the coercive nature of the state (Wellman, 2008, p. 131). Abizadeh, in

response, has argued that due to the threat or deployment of physical force excluding acts are inherently coercive (2010, p. 122). Due to these matters, the state struggles to fulfil the second “reasonably harmless” criteria. Evaluating these criticisms suggests that states lack the characteristics that entitle them to this right to disassociate.

However, in defence of Wellman, he does not argue that the importance of freedom of association is derived from the notion that it must be reasonably harmless. Instead, he proposes the reason why we value the right to freedom of association, in the case of the state as opposed to the case of marriage and religion, is the effect that immigrants will have on the future of the political community (Cole, 2011, p. 242). And while one cannot deny the effect of new members to a country’s future, by invoking this argument Wellman contradicts himself. To elaborate, Wellman repeatedly highlights that the right he argues for is deontological, not consequentialist. However, this argument invokes (hypothetical) consequentialist concerns. And if we do accept this consequentialist argument we must also include opposing consequentialist accounts such as the harm-clause presented by Fine (Cole, 2011, p. 243). And while Wellman does not propose to draw a line as to when this right is outweighed, we could plausibly argue that one’s right to do as they please limits itself to the condition that others are not harmed by it (Fine, 2010, p. 346; Wellman, 2008, p. 117).

Thus while Wellman claims to have covered the relevant similarities for his analogy to succeed, I argue that some relevant differences are overlooked, making his argument significantly less persuasive. The different characteristics that we find in the case of marriage and religion, and not in the case of the citizenship, are relevant to his argument because the importance of freedom of association comes from these very characteristics. On top of this, his account is consequentialist which makes the ‘issues of harm’ argument against his account increasingly difficult to resolve. I therefore would like to demonstrate how an alternative analogy may avoid these analogically relevant differences.

The Family: An Alternative Analogy

There are fundamental differences between the association we find between spouses and the one between compatriots. A more relevantly comparable association to that of the state is that between family members. To elaborate, the political community of a state is a non-voluntary, non-intimate (nor expressive) group of individuals who as a collective are entitled to (some measure of) self-determination. A family can be described similarly. While it often remains far more intimate than the political community, it is not *necessarily* an intimate association. Where

individuals and private groups could have full membership control, legitimate states and families can only block or invite newcomers. We could argue that the family has a right to freedom of association as new members will get a share in the family's future, or even become shareholders in the inheritance fund, affecting the whole family. In defence of Wellman, we can argue that just as a family does not have to open its door to everyone, a political community is not obliged to do this either. Both have freedom of association which ensures that people who have an interest in migrating, or want to join a family, cannot simply do so at their own will. The case of the family controlling its membership could thus strengthen the autonomy argument and avoid the need for an intimate, expressive or harmless character. It could therefore provide a better analogy to illustrate the presumptive right of the state than that of marriage.

However, this analogy might fail to support Wellman's conclusion if Miller's argumentative style is applied. To elaborate, a state's right to exclude can never democratically, or morally, enforce *full* membership control (Fine, 2010, p. 353). Membership controls by legitimate states – thus under the absence of immoral birth regulations, and while upholding the “political principle of justice” – referring to one's right to citizenship upon long-term settlement, is inherently limited or inconclusive. One could therefore argue that the right to exclude immigration could be limited without being violated. To explain, Miller, arguing against the case for open borders, illustrates that the right to freedom of movement cannot adequately defend it. He argues that it is intuitive that one cannot just enter another person's house without their consent, thus domestically we do not have full freedom of movement. Yet we do not see this limitation as an infringement on the right to freedom of movement. Therefore, restrictions on international movement do not necessarily infringe upon the right of freedom of movement either. This logic suggests that freedom to associate may not persuasively defend a right to completely closed borders. To explain, the right to domestic membership control by legitimate states never implies full control. However, if we do not believe that the absence of birth regulations infringes on membership control, perhaps in the same manner, we could uphold that the admission of refugees does not infringe upon membership control, as the deportation of individuals with a right to refuge, like birth regulations, would be immoral.

Finally, the “Problem of the Self” requires some justification. If not through the ‘all those affected’ principle, as Abizadeh suggests, then through other means. Yet if Wellman does not appeal to an argument of cultural preservation, nor to territorial rights that establish the rightful right-bearer, his consequentialist arguments in favour of freedom of association must

still respond to the works of Abizadeh (2012) and Lepoutre (2016), which include non-citizens into the political community.

3.2 What does the right to freedom of association mean?

The Case of Refugees & A Web of Competing Rights

Wellman takes what some have called a stark stance by incorporating refugees into his conclusion (Blake, 2012; Brown, 2019). He stresses that “a right can be independent of, and largely immune from, consequential calculus without being entirely invulnerable to being outweighed” (Wellman, 2008, p. 117). To illustrate, he gives the example of Prince Charles, whose right to choose whom to marry would be defeated if the marriage would start a World War. Wellman admits that he offers no account to say when this rights would be defeated, yet as Blake (2012) correctly puts it, Wellman’s right would only be outweighed under catastrophic circumstances. Nevertheless, refugees have a right to refuge, resulting in a “clash between two moral institutions” (Miller, 2005, p. 203). While it is true that justice can be exported and the right to refuge is a “general right”, not an obligation for a particular state to provide, without any multilateral arrangements it cannot be ensured (Cole, 2011, pp. 250–252; Miller, 2005, p. 203). And as Miller states “simply shutting one’s borders and doing nothing else is not a morally defensible option here” (2005, p. 198). The right to freedom of association has therefore been proven to clash with other valuable rights and principles. Due to these obstacles, Blake’s account offers a more persuasive view on what the right to freedom of association entails. That is, that the right to freedom of association isn’t merely a trump card, rather it is part of a web of inherently competing rights, or as he calls it, a deontic complex right. While this does not fully go against Wellman’s initial proposal, which stresses that the right to exclude is not absolute and could be outweighed, it is Blake’s conception that does incorporate the dynamics that Wellman leaves undiscussed.

Conclusion

In his work “Immigration and Freedom of Association” Christopher Heath Wellman appeals to freedom of association to construct a presumptive case in favour of a state’s right to close its borders to all potential immigrants, including refugees (2008, pp. 109–141). He does so with an analogy that compares an individual’s right to marry freely, to a political community’s right to exclude whomever they wish (2008, pp. 110–119). Against his argument, several criticisms have been raised. Objections highlight the issue of potential harm to the excluded, the distinctive character of the state, the need for territorial rights, the democratic boundary problem and coercion principle, as well as the content of the right of freedom of association and its relation to other rights (Abizadeh, 2008, 2012; Blake, 2012; Cole, 2011; Crider, 2014; Fine, 2010; Lepoutre, 2016). This research has therefore investigated whether the argument of freedom of association convincingly defends the right of the state to close its borders to potential immigrants, including refugees.

Wellman’s argument is initially appealing. By invoking the example of marriage he illustrates why we value freedom of association. Nevertheless, as this research shows, this case does not translate as easily to the case of immigration controls and the analogy he puts forward does not do the work that Wellman requires. Critics rightly point out the relevant differences between the individual right in the marital realm and the collective right in the political one. Associations vary in nature and type, and depend on one’s social position. The right to associate is often in tension with other weighty rights or principles, and is it not always clear who the rightful right-bearer is. To therefore conclude that a certain context, in which full freedom of association is intuitively justified (marriage), should grant freedom of association in more complex contexts (immigration), requires further justification.

Consequently, Wellman’s conclusion is in need of clarification as the right he proposes either clashes with the general right to refuge, or requires multilateral coordination between states and lacks any substance without territorial rights. By highlighting that the right he defends is merely presumptive, Wellman’s account is able to resist some of its criticism. That is, it allows for the right to be outweighed in certain circumstances. Nevertheless, the works of Abizadeh and Lepoutre, which highlight the boundary problem, coercion and freedom of association’s conflictive nature, present a rather complex puzzle that Wellman’s account does not easily escape. Wellman’s argument of freedom of association in favour of a states

right to close its borders is therefore in need of deepening and further justification in order to be persuasive.

That being said, there are several limitations to this research. Firstly, not all aspects of Wellman's article have been discussed, including his responses to libertarian and egalitarian accounts, as well as his views on immigration selection criteria. Similarly, while the most prominent critics are featured, not all objections are interrogated in this work. Moreover, arguments in favour of open borders are not considered. Finally, works on which policy ought to be pursued also fall beyond the scope of this research. Further research could investigate whether including these matters changes the conclusion drawn here. Additionally, if not freedom of association, which deontological argument in favour of a state's right to exclude would better defend it? That is, of course, if it can be defended at all. Finally, future research could attempt to respond to the puzzles presented by Abizadeh, Fine and Lepoutre to conclude whether Wellman's account can be saved. As the question now becomes: if marriage, religion and tennis club do not tell us what we need to know about border control and immigration ethics, then what does?

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