

The Right of a State to Control Immigration

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*NOTE: This is a revised version of one section in a longer paper dealing with arguments in support of a state's right to control immigration which appeal to the value of freedom of association or to an analogy between the rights of associations in the civil society of a domestic state and the rights of states conceived as political communities. In this longer paper, I consider in particular the arguments of Andrew Altman and Christopher Heath Wellman in the chapter on 'Immigration and Membership' in their *A Liberal Theory of international Justice* and of Michael Walzer in the chapter on 'Membership' of his *Spheres of Justice*.¹ In the section produced below, I try to give an account of what exactly the right they defend amounts to.*

I. The right of a state to control immigration

In their discussions of justice in immigration and admission to political membership, Andrew Altman and Christopher Heath Wellman, together with Michael Walzer, reach conclusions that centre on the claim that states, or political communities, have a certain right in respect of immigration. This claim – that states have this right – is the dominant idea in their respective theories of justice in immigration. But at no point do they give a canonical statement of the relevant right, nor is it entirely clear what conception of this right they hold. In this section, I will attempt to specify the *content* of this right, and also to give an account of what *conception* of this right these theorists hold. That is, I will try to establish what this right is a right *to* (or *from*), and also to articulate *what it would come to*, *normatively*, for a state to have such a right. Finally, I will suggest some implications of my findings for Altman and Wellman's and Walzer's respective theories of justice in immigration.

¹ See Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (New York: Oxford University Press, 2009), pp. 158-188 (hereafter LTIJ). Page numbers in the main text refer to LTIJ. Michael Walzer's argument is developed in his *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Martin Robertson, 1983), pp. 31-63 (hereafter SJ).

The right defended in the arguments of Altman and Wellman and of Walzer is best understood, I suggest, as *the right of a (legitimate) state to control immigration*. Here *immigration* should be understood to include both entry into and residence in the state's territory, as well as admission to its political membership, while *control* means decision-making authority to determine which particular applicants are granted or denied admission, for example according to policies granting admission based on certain criteria, or according to policies which seek to admit a certain number of immigrants over a certain period of time.

Consider the various formulations of the defended right found in the respective discussions. Altman and Wellman variously characterise the right their argument seeks to establish as '[t]he right of a state to control its borders and its membership' (p. 158), or 'each legitimate state's right to exclude others from its territory' (p. 167), or 'a state's dominion over its membership and borders' (p. 167), or 'a state's right to set its own immigration policy' (p. 187) or 'the moral right [of each legitimate state] to determine the criteria by which outsiders are permitted to enter their territory or become citizens' (pp. 187-8). In seeking to vindicate this right, Altman and Wellman set themselves against those who argue that 'the scope of a state's control [over borders and membership] should be seriously restricted' (p. 158). It seems clear that Altman and Wellman see the right to exclude prospective immigrants as simply an exercise of the more general right that a state has to exercise control over entry into its territory and admission into its political membership. Legitimate states, on their view, are *entitled to decide* whether to exclude or admit prospective immigrants.

Similarly, in his discussion of admission to the membership of political communities, Walzer reaches the conclusion that '[a]cross a considerable range of the decisions that are made, states are simply free to take in strangers (or not)', that a state has 'the right to choose an admissions policy', and that a political community enjoys 'self-determination in the sphere of membership'.² Again, it seems clear that the right Walzer seeks to vindicate in his theory of justice in immigration – or, as it puts it, in his account of 'membership rights' as the foundation of a 'theory of distributive justice'³ – is the right of a political community, through the state which is its agent, to exercise control and decision-making authority over admission to membership.

The concern with an entitlement to exercise control or decision-making authority over an area of policy or law is in line with the thought, which runs through both arguments, that the defended right is closely connected with state sovereignty, or a legitimate state's self-determination. Thus, Altman and Wellman claim that the right of a legitimate state to control immigration is 'a central element of [a state's] sovereignty' (p. 158) and 'one component of the self-determination which is owed to all individuals and legitimate states' (p. 162). Indeed, this connection with state sovereignty or political

2 SJ, pp. 61, 62.

3 SJ, p. 63.

self-determination helps explain their insistence that only *legitimate* states enjoy this right to control immigration: in their wider discussion of sovereignty and self-determination, Altman and Wellman argue that the right of 'political self-determination' is an 'irreducibly collective moral right' held only by 'legitimate states and groups that are willing and able to become legitimate states' (p. 11). States which fail the test of legitimacy do not enjoy the right of political self-determination and therefore do not enjoy the right to control immigration that is a component of this more general right.

Walzer, too, sees a state's right to control immigration as an exercise of its sovereignty and self-determination. On the one hand, he takes the right to control immigration as simply an instance or exercise of the wider right of sovereignty or self-determination: the free choice of states in admitting or excluding immigrants is much like their free choice in choosing their trading partners, or in deciding whether to enter into collective security arrangements with foreign states.⁴ On the other hand, a state's free choice in deciding admissions to membership constitutes an especially important and foundational form of self-determination, for such decisions will determine the composition of the very 'self' that is to be self-determining, such that self-determination in terms of immigration policy will be prior to all other spheres of self-determination:

[T]he right to choose an admissions policy is more basic than any of these [other areas of decision], for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty, and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.⁵

II. Specifying the scope of the right

Despite his assessment of its foundational importance, Walzer does not think that the right to control immigration has an unlimited scope; the right he seeks to vindicate, he insists, is a '*(limited)* right of closure'.⁶ The state's moral right to self-determination extends to setting the immigration policy of its

4 SJ, p. 61.

5 SJ, pp. 61-2. This argument about the special importance to political self-determination of the right to control admission to membership is echoed by Altman and Wellman in *LTIJ*, p. 163.

6 SJ, p. 63, emphasis added.

choice, but the scope of this area of free choice is subject to certain moral constraints:

[S]elf-determination in the sphere of membership is not absolute. It is a right exercised, most often, by [political communities], but it is held in principle by territorial states. Hence it is subject both to internal decisions by the members themselves ... and to the external principle of mutual aid. Immigration, then, is both a matter of political choice and moral constraint.⁷

As suggested in the passage above, on Walzer's view, one of the moral constraints on the scope of the right is a duty of mutual aid which is owed to non-members. In particular, Walzer recognises that asylum seekers have a right to be admitted that is 'virtually undeniable'. This stems from a more general right possessed by all individuals to membership in a political community where the individual can live 'a reasonably secure life', which presumably generates a remedial right to asylum – and hence a duty of mutual aid on the part of the host state to grant asylum – where that right is violated in the refugee's country of origin.⁸

In light of the preceding discussion, we might characterise Walzer's specification of the content of the right according to two broad elements:

- (a) The right of a state to control immigration specifies a range within which a state is entitled to a free choice regarding which immigration policy to adopt.
- (b) This range of free choice is not unlimited, being constrained by duties of mutual aid owed to certain prospective immigrants, for example asylum seekers.⁹

7 SJ, p. 62.

8 See SJ, pp. 50-1.

9₁ The other constraint, that decisions made as exercises of the right be 'internal decisions' of all the members, does not constrain the scope of the right, but ensures that it is genuinely an exercise of self-determination. Thus, rather than constraining the scope of free choice specified by the right, this constraint functions as a criterion for a decision to qualify as a *bona fide* exercise of the right.

This *constrained range of free choice* specification of the right is also found in Altman and Wellman's account. For example, in concluding their argument, they characterise the right they are defending as follows:

Legitimate states have the moral right to determine the criteria by which outsiders are permitted to enter its territory or become citizens, as long as the criteria are consistent with its obligation to treat its citizens as equal members of the political community.¹⁰

This right, on Altman and Wellman's view, is constrained not only by the duty to uphold the equal citizenship of its members, mentioned above, but also by duties owed to non-members. These include duties of global distributive justice, and duties of rescue owed to refugees. But because they hold the view that the relevant duties to non-members can be discharged in ways that do not affect immigration controls, Altman and Wellman conceive of the constraint as operating in a *conditional* way – *if* these duties to non-members are not discharged in other ways, *then* they constrain the scope of the state's protected options over immigration policy. The substantive scope of the right they defend is therefore (conditionally) far greater than the scope of the right defended by Walzer. Indeed, apart from the duty to respect the equal citizenship of its members, which Altman and Wellman believe rule out immigration policies which exclude based on race and other categories of invidious discrimination, on their account the scope of the right – that is, the range of free choice regarding immigration policy – is almost maximally wide. This leads them to the stark conclusion that 'legitimate states are entitled to reject *all* potential immigrants, even those desperately seeking asylum from tyrannical governments.'¹¹

III. Moral rights of sovereignty and the justification of legal rights of sovereignty

Notice that in taking the right of a state to control immigration to be an exercise of its sovereignty, neither Altman and Wellman, nor Walzer, have in mind a *de facto* or even *de jure* conception of sovereignty. That is, the claim that states have a right to control immigration is not a claim about one of the state's many legal powers, powers which flow from its legally-recognised or *de facto* sovereignty; rather, it is a claim about a *moral right* which legitimate states hold, which specifies correlative moral duties that legitimate states are owed. For example, when they speak of 'a state's sovereign right to determine its affairs', Altman and Wellman are clear that they are referring to what they call a state's right to 'political self-determination', which is a 'collective *moral right*' to which legitimate states are entitled¹². The criteria they propose for legitimacy, again, are not legal or *de facto*

10 LTII, pp. 187-8.

11 LTII, p. 188.

but moral, relating to the adequate protection of human rights.¹³ As for Walzer, he is also careful to distinguish the legal from moral conceptions of sovereignty and the rights that flow from it. Consider for example his examination of the idea that states have ‘perfect ... sovereign power over their own selection processes’. He notes that while this may be an accurate description of the law, it is false as an account of ‘the moral life of contemporary political communities’ – for Walzer the moral right of states to set their admissions policies, as we have seen, is narrower in scope than their corresponding legal powers.¹⁴

I do not want to dwell here on the well-worn distinction between legal and moral rights. Rather, I am concerned with a slightly different question: the *relationship* between the two classes of rights, which is a different question from how to distinguish between the two as concepts. The distinction between the two concepts is understood well enough.¹⁵ But what I am concerned with here is the relationship between moral rights and the *justification* of legal rights. It is clear that a legal right can be justified by moral reasoning, but we should notice that this reasoning need not be rights-based. It might be that we should recognise a legal right of individual citizens to ϕ because there is a corresponding individual moral right to ϕ . But we might also mount a moral justification of a legal right to ϕ by arguing that individuals are morally permitted or even required to ϕ , or alternatively we might argue that the recognition of a legal right to ϕ will promote what is impartially best, which is – so we might argue – the goal at which morality aims.

Now, of course, neither Altman and Wellman’s nor Walzer’s theories of justice in immigration are consequentialist theories; indeed, the former are explicit in insisting that their claims are made within

12 LTII, p. 13, emphasis added.

13₇ Altman and Wellman’s defence of the collective moral right of a political community to self-determination is developed at length in Ch. 2 of LTII.

14 SJ, p. 41.

15₇ To rehearse my view, the clearest distinction I believe we can make concerns different *tests of validity*. The validity of a claim that an agent has a legal right will come from the law’s recognition and enforcement of the duties correlative to that right. In contrast, a valid claim that an agent has a moral right will come from the fact that the content of the right specifies certain moral duties which are owed, from the moral point of view, to the agent. The distinction is not well captured, in my view, by differences in the *content* of moral as opposed to legal rights.

a deontological moral theory – what they defend is a ‘deontological conclusion about how legitimate states are *entitled* to act’.¹⁶ But this should serve to remind us of what is distinctive about their arguments; they are not, certainly, making a legal argument but neither are they particularly offering a moral justification – even a rights-based justification – for according states any specific set of legal powers; though of course their arguments, if sound, will have implications for any such justification. Their main concern is quite different: it is to tell us what to think, from a moral point of view, about the restrictions on immigration that states may impose. The answer they give is distinctive: states have a moral right to control immigration which confers on them a free choice (within a constrained range) about what kinds of restrictions, if any, to impose.¹⁷

IV. Conceptions of the right to control immigration

Unfortunately, this answer, as it stands, is not fully satisfactory – even when we leave aside the question of whether the case for the right, as presented by Altman and Wellman and by Walzer, is successful. If we are to know what to think, from a moral point of view, about state restrictions on immigration, we need to know what the claim ‘A state has a moral right to control immigration’ amounts to. If we were concerned solely to offer a moral justification for states’ possession of particular legal powers and rights, the successful establishment of the claim may be sufficient. But, as we have seen, that is not the primary concern of the theorists under discussion, and it cannot be our concern if we are asking what, morally, we should think about state restrictions on immigration.

To see the problem, consider the following propositions:

(1) A state, *S*, has decided on a policy of restrictions which will exclude the prospective immigrant *P*.

(2) *S*, as a legitimate state, has a moral right to control immigration which entitles it to decide,

16 LTIJ, p. 165.

17 I do not mean that their answer is distinctive in that it is unusual. Indeed, as Altman and Wellman themselves notice, this answer is basically in keeping with popular views about the question (LTIJ, pp. 187-8). It is distinctive in that it offers a distinct claim about the morality of state restrictions on immigration; it is distinct of course from global egalitarian arguments in favour of minimal restrictions, but it is also different from arguments which permit or justify restrictions for specific reasons, such as those that tie the justification of restrictions to their necessity to achievement of certain valuable social goals within domestic states.

within a range, which immigration policy to pursue.

(3) The relevant policy falls within the range specified by the right.

This may plausibly be taken to imply

(4) *S* is morally justified in excluding *P*.

or

(5) *S* is morally permitted to exclude *P*.

or

(6) *S*'s exclusion of *P* is morally protected.

The problem I think the above brings out is that the specification of the *content* of the right is ambiguous between different *conceptions* of the right. For the purposes of our discussion here, I will assume that (4) and (5) amount to the same thing, based on the principle that we are morally permitted to do what we are morally justified, all things considered, in doing.¹⁸ We can therefore primarily identify two rival conceptions of the right in question. One conception understands the range of free choice concerning immigration policy to which the right entitles a state to be a range of *morally*

¹⁸ I distinguished them earlier because I believe there may be cases where what I am justified in doing and what I am permitted to do may diverge. I am thinking of cases where the morally wrong actions of others affect what I should do, such that what I am justified in doing in the absence of their wrong actions, and what I am justified in doing all things considered, diverge. For example, it may be that I am morally justified in publicly championing the rights of some oppressed sectarian minority, but if I do so, it will merely irritate the majority and cause them to inflict further oppression on the minority. In that case, I ought not to champion the rights of the minority – one might say that I am morally forbidden from doing so. Despite this complication, it seems that what I am morally permitted to do, and what I am morally justified, *all things considered*, in doing amount to the same thing.

protected decisions which may be constrained by certain (weighty) moral duties owed by the state. This conception adheres to a view about the general nature of moral rights which I will call the *protected options thesis*. Another conception understands the range of free choice to be the set of all and only those *morally justified decisions* that the state may make concerning immigration policy. On this view, which I will call the *justified options thesis*, duties of mutual aid owed to non-members, or duties to maintain equal citizenship owed to members, constrain the state's right to control immigration in the sense that they mark out options that are morally unjustified, and which therefore fall outside the scope of the right.

Consider first the protected options thesis. This thesis fits in well with some of Walzer's remarks elsewhere about the nature of moral rights in general. Walzer has suggested that rights – both individual and collective – have to do with specifying an area of protected decision-making authority:

[Rights] distribute decision-making authority. When we describe individual rights, we are assigning to individuals a certain authority to shape their own lives, and we are denying that officials, even well-meaning officials, are authorized to interfere. The description of communal rights makes a similar assertion and a similar denial. In the individual case, we fix a certain area for personal choice; in the communal case, we fix a certain area for political choice.¹⁹

On this account, rights carve out a sphere within which the right-holder's decisions and actions are morally protected from external interference – rights might be said to confer decision-making authority in the sense that it is morally impermissible for others to interfere with the right-holder's decisions within the protected sphere. A similar account, which also seems to be in line with the protected options thesis, is given by Altman and Wellman of what they call a 'moral right to self-determination': 'If an agent has a basic moral right to self-determination and makes a certain choice in the exercise of that right, then other agents have a deontological reason to respect that choice.' They go on to explain that by 'deontological reason' they mean something like a duty.²⁰ Again, the idea seems to be that a moral right protects a certain range of decision-making, in that other agents have a duty to respect the right-holder's decision, presumably by not interfering with its execution.

There is further evidence that Altman and Wellman favour the protected options thesis – or at least, some of their discussion of other moral rights only makes sense in the light of this view. They claim, for example, that the right to freedom of association entitles individuals to make decisions about who to marry based on racist reasons, even though they hold racism to be 'abhorrent' and hence

¹⁹ Michael Walzer, 'The Moral Standing of States: A Response to Four Critics', *Philosophy and Public Affairs* 9 (1980): 224.

²⁰ LTII, p. 6.

presumably morally unjustified. Indeed, in elaborating this entitlement they note that ‘racist individuals cannot permissibly be forced to marry someone ... of another race’.²¹ The example of the right of individuals to a free choice of marital partners illustrates well the structure of moral rights according to the protected options thesis: rights, on this view, specify a range of options that are morally protected from interference in that it is morally impermissible for others to interfere with the right-holder when she acts on her choice within the protected range. Moreover, the impermissibility of external interference does not arise merely due to the lack of wrongdoing on the part of the right-holder; on the protected options view, it can be impermissible to interfere *even if the right-holder’s actions are morally unjustified*.

The protected options thesis therefore helps to make sense of the racist’s right to freedom of marital choice. In contrast, the justified options thesis cannot generate this right. Recall that on this view, a right simply defines the set of all and only those morally justified options within a certain domain. But on this view, the racist, since her marital choice is morally unjustified, makes a choice that falls outside the scope of the right to freedom of marital choice. Since Altman and Wellman clearly endorse the claim that an individual’s moral right to freedom of marital choice extends to racist choices, it seems that they implicitly reject the justified options thesis and rely on the protected options thesis.

Aside from the fact that Altman and Wellman, as well as Walzer, likely hold the protected options thesis and hence the protected options conception of the state’s right to control immigration, the protected options thesis independently seems to be the more plausible view and therefore the conception of the right that they should defend. As we have seen, the justified options thesis seems *under-inclusive*, since it cannot explain why right-holders sometimes have the right to make choices that are morally unjustified. But the justified options thesis also seems to be *over-inclusive*, in that it is unable to distinguish between protections offered to individual (or group) liberty by what might be called a *general autonomy principle* and those special protections that are associated with the recognition of a right.

To see what this distinction involves, consider John Rawls’s insistence in his later work that ‘[n]o priority is assigned to liberty as such’. Rawls notes that while there is ‘a general presumption against imposing legal and other restrictions on conduct without sufficient reason’, this presumption ‘creates no special priority for any particular liberty’.²² In contrast, Rawls thinks that there is a specific list of basic liberties which are specially protected – in his terms, they have ‘priority’.²³ Moreover, it is only

21 LTIJ, p. 186.

22₁ John Rawls, ‘The Basic Liberties and Their Priority’, in *Political Liberalism* (New York: Columbia University Press, 2005), pp. 291-2 (hereafter PL).

23 PL, p. 294.

in their 'central range of application' that the basic liberties have this strong protection or priority, such that 'they can be limited and compromised only when they conflict with other basic liberties'.²⁴ The contrast that Rawls draws here between the general presumption against imposing restrictions without sufficient reason and the basic liberties tracks the contrast I want to draw between the general autonomy principle and the special protections offered by moral rights. What I call the general autonomy principle permits external interference if and only if the balance of reasons favours interference. Moral rights, on the other hand, permit interference only on a much more stringent test – this more stringent test for permissible interference might be something like Rawls's principle of priority for the basic liberties, or some other test which gives special protection to the options which come under the scope of the right. Indeed, the idea that the scope of a moral right might be constrained – that is to say, interference may be permissible – to prevent violation of certain weighty moral duties (but not to prevent any instance of morally unjustified action), discussed earlier as the specification of the content of the right to control immigration, might be such a test.

This distinction between the protections for liberty offered by the general autonomy principle and by moral rights helps explain why certain unjustified choices receive protection against interference if they fall within the scope of a right. It also implies that we must distinguish between those areas of conduct which are regulated by the general autonomy principle and those areas protected by moral rights. Take for example the right to freedom of speech. Many would argue that while political speech receives stringent protections under this right, other forms of speech, such as commercial speech used in advertising products for sale, or indeed libellous and defamatory speech, do not and are regulated only by the general autonomy principle.²⁵ But it is not clear that the justified options thesis can accommodate this distinction between general autonomy and the special protections offered by a right. For example, on the justified options thesis, commercial speech which on the balance of reasons ought not to be regulated would be justified and considered to fall within the scope of the right to freedom of speech in the same way that justified instances of political speech would. But this seems not to capture what I think is the important distinction that I have drawn attention to above.

It seems, therefore, that we should reject the justified options thesis in favour of the protected options thesis. However, notice that once we have done so we are committed to the view that in fact moral rights have little to do with the moral justification of the choices of the right-holder. On the justified options thesis

24₁ John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press of Harvard University Press, revised ed., 1999), p. 54. In PL, he refers to the similar idea of the 'significance of a particular liberty' (p. 335).

25 Rawls seems to have held something like this view of freedom of speech. See PL, pp. 335-6.

(7) *P* has a right to ϕ .

entails

(8) *P* is justified in ϕ -ing.

But on the protected options thesis, (7) does not entail (8) but only

(9) Others have a duty to refrain from interfering with *P*'s ϕ -ing.

Indeed, once we accept that moral rights serve to protect decision-making, it becomes difficult to see why moral rights provide any reasons for action for the right-holder. Moreover, if to justify a course of action is at least to provide a reason in favour of it, then the fact that moral rights are not sources of reasons for right-holders but only for other agents – at least if we accept the protected options thesis – means that to establish that some agent has a right is not to establish any thesis about justification at all.

This has been noted by Jeremy Waldron:

Although it does not provide *me* with any reason or justification for acting, my right provides [others] with a reason for not interfering.²⁶

[That rights protect decision-making] is why the fact that an individual has the right to perform some particular action does not in itself provide a *reason* for his performing that action. For the claim that he has the right to perform it refers us to the wider area of decision, in which the action is located and in which alternatives are available, and asserts only that his decision making in this area is to be protected. To protect decision making is not to provide a reason for the making of any particular decision.²⁷

²⁶ Jeremy Waldron, 'A Right to Do Wrong', *Ethics* 92 (1981): 21-39, p 29.

²⁷ Waldron, 'A Right to Do Wrong', p. 35.

If we apply these claims about moral rights to the right of a state to control immigration, however, we seem to encounter troubling implications. Recall that the main concern of Altman and Wellman, as well as of Walzer, is to give an account of what we should think, from a moral point of view, about the restrictions on immigration that states may impose. The centrepiece of their accounts is the claim that legitimate states have a right to control immigration. But if moral rights do not justify the decisions of right-holders, but only protect a range of decisions from external interference, then it is unclear to what extent their account provides anything like a full, or even adequate, theory of the morality or justice of state restrictions on immigration. Even if they successfully established the case that legitimate states do in fact have a right to control immigration, they would not have shed light on what immigration policies, what patterns of restriction and exclusion, are justified or unjustified, right or wrong.

If we accept – as it seems Altman and Wellman and Walzer do – the protected options thesis about moral rights, we accept too a distinction between what we might call, together with Waldron, ‘the morality of rights’ and ‘the morality of rightness and wrongness’. Both, of course, have an important place in moral theory, for they play distinct functions. As Waldron suggests, ‘the former has the function of protecting choices and the latter the function of guiding them.’²⁸ The accounts of Altman and Wellman and of Walzer, however, seem to neglect the morality of rightness and wrongness. Indeed, if Waldron is correct in suggesting that this part of morality serves to guide deliberation and decision about which actions to take and which policies to adopt, we might wonder if the individual members of the self-determining states envisioned by these theorists can take any guidance, in thinking about which immigration policy to choose, as protected by their collective right, from the Altman-Wellman or Walzer accounts of justice in immigration. I believe that they cannot. That, I think, suggests a serious defect in these accounts.

²⁸ Waldron, ‘A Right to Do Wrong’, p. 37.