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Morality in migration: a review essay

Ferracioli, L.L.

Published in:
Global Justice

[Link to publication](#)

Citation for published version (APA):

Ferracioli, L. (2012). Morality in migration: a review essay. *Global Justice*, 5, 120-129.

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LUARA | **Morality in Migration:** FERRACIOLI | **A Review Essay***

Christopher H. Wellman and Phillip Cole's discussion in *Debating the Ethics of Immigration* (Oxford: Oxford University Press, 2011) Ryan Pevnick's *Immigration and the Constraints of Justice* (Cambridge: Cambridge University Press, 2011)

For as long as our world remains one in which states employ coercive force to guard their borders, and where prospective immigrants often risk their lives to cross them, immigration will remain a contested practical and moral topic. In recent decades philosophers have defended various answers to the question of whether states are morally justified, or act legitimately, when they stop foreigners from entering or acquiring membership of the state. Some have advocated a world of open borders, while others have defended the full sovereignty of states in matters of immigration. Christopher H. Wellman and Phillip Cole's discussion in *Debating the Ethics of Immigration* and Ryan Pevnick's *Immigration and the Constraints of Justice* are both valuable contributions to this body of literature.

Debating the Ethics of Immigration presents two opposing views: Wellman defends the right of legitimate states to exclude prospective immigrants, while Cole defends open borders. Both authors seek to answer the fundamental question of whether states act legitimately when they exclude non-members, while also exploring such practical topics as the ethics of guest worker programs, the selection criteria for authorized entrance, and the global governance of immigration. Pevnick's *Immigration and the Constraints of Justice* defends a position that falls in between that of Cole and Wellman's. On Pevnick's view, the state's prima facie right to exclude is trumped by the claims of refugees and desperately poor people. While each of these works offer important insights to the debate, a plausible justification for the right to exclude is still needed, as well as a more nuanced understanding of how morality imposes limits on this right.

On the right to exclude

In his contribution to *Debating the Ethics of Immigration*, Wellman restates and develops the case he has made in his previous work for the right of legitimate

* I would like to thank Christian Barry, Ryan Cox and Robert O. Keohane for helpful comments and criticisms.

states to exclude prospective immigrants.¹ His account rests on three basic premises: (1) legitimate states have a right to political self-determination, (2) freedom of association is an essential component of political self-determination, and (3) freedom of association allows one *not* to associate with others. From these three premises, he concludes that “legitimate states may choose not to associate with foreigners, including potential immigrants, as they see fit” (p. 13).

In support of the first premise, Wellman offers a couple of intuitive examples. The first example involves the aftermath of the Second World War, when the Allied Powers sought to prosecute and punish Nazi leaders by establishing the Nuremberg Trials. He recounts the controversy at the time, when, among other things, critics questioned the Nuremberg court’s jurisdiction over crimes that were committed by Germans against their fellow citizens. While Wellman agrees that crimes against compatriots are paradigmatically a case for a state’s internal legal system, he ultimately rejects this view on the grounds that it fails to take into account the distinction between legitimate and illegitimate states.² Because Germany was not a legitimate state, Wellman argues, it was not entitled to exercise dominion over its internal affairs.

Wellman introduces a second case, one in which the state in question is clearly legitimate. He imagines a scenario in which contemporary Norway becomes lax in prosecuting and punishing drivers who exceed the speed limit, leading to an increase in fatal car accidents. Wellman then asks if it would be right for Sweden to take it upon itself to prosecute and punish Norwegian offenders. The answer, he concludes, must surely be negative, given that such unilateral action on the part of Sweden would violate Norway’s right to govern its domestic affairs, which it enjoys by virtue of being a legitimate state.

Having argued for the view that legitimate states have a robust right to self-determination, Wellman turns to defend his second and third premises. In order to elicit our intuitions about the importance of freedom of association, he constructs a scenario in which a hypothetical government agency decides on behalf of its citizenry who should marry whom and how many children each couple should have. As he notes, such an arrangement by the state would be deeply problematic because self-determination entails “being the author of one’s life, and these individuals’ lives clearly have vital parts of their scripts written by the government rather than autobiographically, as it were” (p. 31). Wellman goes on to argue that we must always start our moral judgments with a “presumption in favor of freedom of association” (p. 34), and this is true with respect to determining membership

¹ Christopher Wellman, ‘Immigration and Freedom of Association’, *Ethics* 119 (2008), pp. 109-141.

² For Wellman, legitimate states are those that adequately protect the human rights of their members and the rights of others (p. 16).

in all sorts of associations, such as clubs, religious groups, and states. Given that freedom of association also entails the right not to associate with others, Wellman concludes that legitimate states have a *presumptive* right not to associate with prospective immigrants.

While Wellman's arguments have merit on their own terms, the application of freedom of association as the pertinent moral value at the state level remains controversial. Ultimately, the value of *political autonomy*, and not that of freedom of association, provides a rationale for a robust right to exclude. Liberal societies take freedom of association seriously because of how much they care about personal autonomy, which entails, among other things, the ability to decide unilaterally whether to associate, disassociate, or not to associate with others. But the reason we care about self-determination at the state level is that we care about the political autonomy of the citizenry, which entails, among other things, the ability to decide collectively on matters of political membership.

In arguments about a right to exclude, political autonomy and not freedom of association is the relevant value, because political autonomy can ground a right to self-determination. To make better sense of how political autonomy grounds self-determination, imagine a situation in which, due to environmental reasons, Canada refuses visas to U.S. workers even though Canada would benefit economically from accepting them. Imagine further that the United States objects to this policy and decides to help smuggle these workers into Canada. After designing a plan that ensures no one is harmed in the process, the United States carries out this plot, thereby making both U.S. immigrants and Canadians better off economically. Is there anything wrong about this? My intuition is that there is something wrong: by unilaterally assigning such a role to itself, the United States undermines the political autonomy of Canadian citizens. Given that Canadians are not only autonomous individuals but also autonomous political agents, they have a right to decide for themselves what sort of migration arrangement best suits their collective aspirations.

Rights of freedom of association at the state level are also limited in important ways. For instance, we do not typically think that citizens have the right to disassociate from the state, thereby returning to the state of nature. And as Sarah Fine has pointed out, "states are neither intimate nor expressive associations,"³ which makes them qualitatively different from the collectives where freedom of association seem to matter the most (marriage being a paradigm example). In a sense, political communities are simply different sorts of collectives, and the reason we must respect the right of citizens to exercise control over immigration

³ Sarah Fine, 'Freedom of Association is Not the Answer,' *Ethics* 120 (2010), p. 353.

is that we must respect their political autonomy. Indeed, there is nothing that sets immigration apart from other domestic issues that primarily affect citizens and residents, but also have spillover effects on outsiders. As with questions regarding the usage of natural resources, trade policies, and budget allocations, we must strike the right balance between the political autonomy of the citizenry and the moral claims of foreigners. The upshot here is that a plausible account of the ethics of migration must carve out enough space for the right of citizens to determine their own political future, while simultaneously ensuring that morality bears on matters of migration.

Another reason to think that freedom of association can only play a limited role (if any) in determining rights in immigration is that it seems to trivialize the *necessity* of political membership. As Phillip Cole reminds us in his contribution to *Debating the Ethics of Immigration*, “When one leaves a club, or a marriage, or even a job, one does not need to have another similar association to enter into in order to exercise that right.... But to exercise the right to leave a state, one needs another state to exit into” (p. 209). Following Cole, we should understand states as “meta-associations,” where all other sorts of association can flourish, and where autonomous human lives are made possible. By focusing on freedom of association, Wellman’s arguments for a right to exclude obscure the role of political autonomy in grounding self-determination, while undermining what is really at stake for those fleeing political persecution, dire economic circumstances and severe human rights violation: the inability to lead minimally decent lives in their countries of citizenship rather than their interest in associating with a different set of people.

Given that the right to political self-determination is only presumptive, in what cases can it be overridden? One might think that refugees would be a clear-cut case. Wellman, however, rejects this claim. He argues instead that a “state can entirely fulfill its responsibilities to persecuted refugees without allowing them to immigrate into its political community” (p. 123). For Wellman, refugees can most likely be helped in their own state of citizenship through aid and/or humanitarian intervention; and when that is not the case, the most that they have a right to is some sort of temporary inclusion in the receiving state.

To be sure, assistance can take many shapes, including the shape of financial assistance and humanitarian intervention. If such actions can, in fact, assist refugees and similarly vulnerable individuals to lead minimally decent lives, then states should be able to discharge their duty of assistance in whatever way they deem fit. However, in case that assistance cannot take place at the sender state, the temporary protection of refugees by receiving states is not enough to discharge the duty. Temporary protection is not enough because it becomes merely a stop-gap

solution that fails to take the basic interests of refugees adequately into account. Refugees are not only seeking a safe haven but the opportunity to start a new life. And when they lack the knowledge of how long it will take for the situation in their state of citizenship to improve, and cannot permanently settle in their state of temporary residence, they are unable to plan and pursue important life goals. A morally defensible account of the ethics of immigration must therefore entail a duty to permanently include, at least in some cases, refugees and similarly vulnerable individuals if they cannot be assisted in their own state of citizenship.

The case for open borders

Against Wellman, Phillip Cole defends a presumptive obligation on the part of states to include prospective immigrants. He makes both a case for open borders and a case against closed borders, putting forth important challenges to those who subscribe to liberal values and wish to defend the right of states to control membership.

Cole's case for open borders relies on the value of the immigrant's autonomy, and on the idea that immigration is "an essential component of human agency, such that it is a crucial part of the ability of people to be free and equal choosers, doers and participators in their local, national and global communities" (p. 297). The case against closed borders, on the other hand, rests on the alleged tension between liberal values and exclusion. Given that the idea that persons are free and equal is central to liberalism, Cole argues that liberal theorists who defend the right of states to exclude "are left with two unpalatable choices: either a liberal universalism that contradicts itself into incoherence, or a liberal realism that is coherent and consistent, but only at the cost of abandoning the quest for morality altogether" (p. 311).

Cole maintains that autonomy is what grounds a right to freedom of movement at the international level, and that a state unduly infringes upon a person's autonomy when it refuses to include her as a member. Cole's first point can hardly be denied for it seems true that when we prevent a person from joining our state, we take an option away from her, thereby reducing the range of options from which she can autonomously choose. But we cannot conclude from this that states must open their borders, since this depends on whether a prospective immigrant actually has a moral claim that her autonomy be so expanded. Do all prospective migrants have such a claim?

To begin with, it is important to note that this putative right for inclusion would not be simply the exercise of a liberty-right on the part of the immigrant (that is, to move freely within the recipient state), but the exercise of a claim-right on her part—one that would create a duty for inclusion in all sorts of goods and

services that are provided within the recipient state: service provisions, welfare benefits, non-excludable goods, political participation, and so on. Given the costs involved, the question is whether her situation creates a compelling moral case for the citizenry to bear the costs associated with her inclusion.⁴ Whether or not she has such a case depends in my view very much on the circumstances of the political community in which she currently resides. If a prospective immigrant can already exercise a sufficient degree of autonomy in her country of citizenship, the simple expansion of her autonomy that is entailed by membership in a second state does not seem to create a moral duty on the citizens of that state. The same considerations apply to interpersonal cases. If an assailant has kidnapped you, and I (a stranger) happen to be in a position such that I can, at moderate cost to myself, assist you to escape, then it seems obvious that I should bear such costs and help you. If, however, you have not been kidnapped but would instead like my financial assistance so that you can buy a second house by the sea (thereby expanding the choices available to you), then it does not seem that I have a duty to expand your autonomy, even if I am rich and can assist you at very little cost to myself.

In sum, Cole's positive case for open borders does not take adequately into account the distinction between the claims of those who lack the resources to lead minimally decent lives and those who have enough to lead decent lives but lack resources that would expand the opportunities available to them. Insofar as inclusion gives rise to costs on the recipient state and its citizens, they would seem to have a right to refuse to take on such costs unless doing so is necessary to protect others from severe deprivation of autonomy.

Does Cole's case against closed borders successfully rebut the presumptive right to exclude? According to Cole, when liberal theories presuppose the control of borders by the state, they become inconsistent with their moral commitment regarding the treatment of all persons as free and equal. As he explains, "There is no ethically grounded distinction between citizens and migrants that the liberal state can appeal to in order to morally justify this discrimination, but as the exclusion is necessary in order to protect self-interest, no ethically grounded distinction is needed" (p. 310). In light of this alleged inconsistency on the part of liberal states, he claims that only open borders will allow for liberal citizens to realize their moral commitments.

This is an important challenge to both liberal theory and practice, and Cole's quest for a liberal philosophy that takes the idea of equality and freedom to its

⁴ For a discussion on the specific costs associated with cultural change and population growth, see David Miller, 'Immigration: The Case for Limits', *Contemporary Debates in Applied Ethics*, eds. A. I. Cohen and C. H. Wellman (Malden, MA: Blackwell, 2005), pp. 193-206.

radical conclusions deserves recognition. The problem with this argument is that the alleged tension between liberal values and exclusion is substantially reduced once we recognize that no liberal state can in fact treat *all persons* as free and equal. This is because, in reality, states are incapable of providing membership to such a large group of human beings. In other words, if *ought* implies *can*, then no state ought to treat all human beings equally through the provision of membership. As a matter of fact, the best the international community can hope to do is ensure that each state does a sufficiently good job of treating its own citizens as free and equal, and of assisting foreigners whose own states of citizenship have failed in this task. To expect more from each state—liberal or otherwise—is to expect more than what citizens can feasibly provide to their fellow human beings.

It is certainly true that states privilege their own interests and goals. But why should this be problematic? The important normative point here is not that states should never seek to protect their interests, but that they should recognize that such aims must sometimes give way to other considerations. In the area of immigration, for example, states can recognize a duty to take on the cost of protecting refugees and similarly vulnerable individuals. There is no need to also include prospective immigrants who already enjoy decent standards of living elsewhere.

An intermediate position

In *Immigration and the Constraints of Justice*, Ryan Pevnick's strategy is twofold. First, he offers a justification for self-determination that departs from freedom of association. Second, he advocates the right of refugees and poor people to cross international borders. Taken together, these commit him to an intermediate position between Wellman and Cole's.

Pevnick follows Wellman in accepting that there is a *prima facie* right to exclude, derived from the right to self-determination. But he departs from Wellman when he claims that the right to exclude is actually grounded in a group's ownership of public institutions, and that the citizenry of a state has a relationship of ownership to their institutions that is not shared by foreigners. Such a relationship evolves from the efforts of previous members, who "passed on its institutions to current generations as part of a trust to be taken forward to future generations" (p. 39). Because "outsiders did not play a fundamental role in the creation of the relevant institutions" (p. 36), they do not currently have a claim for inclusion.

However, Cole's point that we must remember the history of racism and colonialism when thinking about the status of our current immigration arrangements is pertinent here (p. 160). After all, many states have the institutions that they currently have precisely because of the direct contribution of those who

have colonized them. One thinks of Brazil and Australia, for example, where previous generations of Portuguese and British subjects played an essential role in creating the relevant national institutions.⁵ Or consider contemporary Iraq, where Britain and the United States have played a crucial role in the establishment of the current institutional order in Iraq. If we accept Pevnick's account, it then follows either that American and British citizens have claims to citizenship in Iraq, or that Iraq simply lacks the right to exclude non-members.

Pevnick's associative ownership account could lead to two potential interpretations, both of which seem to lead to counterintuitive results. One interpretation suggests that current citizens of former colonial powers have a right to become members of their former colonies, due to the contributions of previous generations. In contrast, on a broader interpretation, only countries that have not been colonized or whose institutions have not been shaped in some relevant measure by outsiders have the right to exclude prospective immigrants. In either case, we are left with the implication that the citizenry of former colonies now have a somewhat weaker claim to self-determination in the area of immigration than countries that were not colonized.

Pevnick's intermediate position could become sounder, if he were to ground it in the importance of political autonomy. However, he rejects this possibility due to the fact that states are not voluntary associations (pp. 28–30). But note the analogy he offers when discussing the claims of unauthorized immigrants:

A group of childhood friends each month wire money into a bank account under an agreement that when they reach the needed sum of money, they will together purchase a vacation home which they will then share. John, who is not a friend of the group, seeks access to a vacation home but cannot afford one on his own. Hearing of the above scheme, he begins to wire money into the bank account without the agreement of the group. After the group has raised the requisite amount of money and purchased the home, John steps forward – produces receipts documenting his contributions – and demands an equal place in the group (p. 165).

Pevnick concludes that, like John, unauthorized immigrants have no right to inclusion. But note that his example suggests that what really grounds self-determination is the value of autonomy and not past or present contribution. It is the autonomy of members of the group that was violated by John's contributions, and this is true irrespective of whether he contributed in small or large amounts, or whether "voluntary" childhood friends or "non-voluntary" family members

⁵ For a similar critique, but focusing on the scope of duties of distributive justice, see Lea Ypi, Robert E. Goodin & Christian Barry, 'Associative Duties, Global Justice and the Colonies', *Philosophy and Public Affairs* 37 (2009), pp. 103–135.

were responsible for setting up the bank account. If contribution really did the work, then John would have a claim for inclusion, as would illegal immigrants who contribute, through labor and taxation, to the maintenance of the relevant public institutions.

Notwithstanding problems with Pevnick's justification of the right to self-determination, his acknowledgement that the claims of foreigners can at times be strong enough to trump the right of states to exclude adds an important insight to the literature. That is, by resisting extremes of open and closed borders, Pevnick puts forth a more nuanced account that succeeds in showing respect for both citizens and foreigners in need. He goes even further by defending a desirable and feasible guest worker program that, if implemented, would certainly realize these moral goals.

Pevnick's account focuses only on the claims of those who wish to immigrate, and thus neglects those in the sending countries who are harmed by the departure of their fellow citizens. While he acknowledges that "by focusing on skilled applicants, immigration policy demonstrates disrespect for citizens of developing countries" (p. 74), he does not take the point far enough. The account fails to notice that by including skilled immigrants from countries where their departure will lead to severe deprivation, recipient states foreseeably enable harm to occur in those countries. If morality is to set limits to the right of states to develop their own immigration policies, then surely the foreseeable harm that is enabled by immigration policies must also constrain the amount of freedom recipient states can legitimately exercise. The upshot here is that the right of recipient states to include prospective immigrants can, at times, be trumped by a negative duty not to contribute to harm in resource-deprived countries.

But how about the negative implications of this duty to those skilled workers who would cease to enjoy the benefit of immigration? There are a couple of reasons to think that there are no grounds for complaint here. First, these workers would not be denied something that everybody else already enjoys, but rather, they would be denied what is already not available to other kinds of prospective immigrants, namely the privilege of migration (recall how the fact of political autonomy entails that, in general, migration is a privilege and not a moral right). Second, and most importantly, the possession of skills in resource-deprived settings endows one with a greater capacity to assist, and this gives one a more stringent responsibility to protect the basic interests of those in need. In other words, by denying skilled workers entrance, recipient states would not be treating prospective immigrants unfairly. Rather, doing so simply puts their moral claim on a par with the claim of other kinds of prospective immigrants (un-skilled and low-skilled workers).

The ethics of migration is most certainly a pressing topic in international relations. Tackling the normative question of whether states have the right to exclude is essential for the implementation of desirable migration arrangements at the global level. In this essay I have illustrated that the right to exclude is best grounded in the political autonomy of the citizenry. I have also suggested that states have not only a positive duty to include refugees and similarly vulnerable individuals, but that they also need to set limits on the inclusion of prospective immigrants whose departures would lead to foreseen harm in their countries of origin. Taken together, these duties of migration give due weight to the basic interests of foreigners without simultaneously undermining the political autonomy of citizens.

*Dr Luara Ferracioli
Postdoctoral Research Associate
Woodrow Wilson School of Public and
International Affairs
Princeton University
email: luaraf@princeton.edu*

