

## Denied Entry: a Rawlsian Defence of the Moral Right of the State to Close its Borders

By Liam Fields

### Abstract

I justify the moral right of states to close their borders to economic migrants on Rawlsian grounds: the common interest in security that would be chosen in the original position allows the state to prioritise that over an individual migrant's right to liberty. I do not make a normative claim that they *should*, but rather that morally they *can* opt to exclude migrants.

### I. Introduction.

In this paper, I will argue that states have a right to exclude economic migrants, and that this right can be justified on Rawlsian grounds. A right to exclude would give the state the right to close its borders and deny entry to economic migrants if it so wishes.

Many of the arguments will also apply to migration by those in dire need, for example refugees, and as argued by Wellman (2008) it may well be the case that states have a right to exclude even those. While there will inevitably be some overlap, my aim is solely to show that states have the right to exclude economic migrants.

I will begin by setting out the right to exclude itself, as argued for by Wellman (2008). I will then look at the competing claims of migrants, examining the theories of Fine (2013) and Carens (1987) which argue in favour of open borders. Finally, I will show that although these theories are persuasive, the right to exclude can be defended against them when practical realities are brought to bear.

### II. The right to exclude entry.

For Wellman (2008) nation states have a right to freedom of association analogous to that held by individuals, and this further entails a right to exclude entry to immigrants. He argues that freedom of association is a key aspect of “...*dominion over our self-regarding affairs*” (p.110), which entitles individuals to choose who to

associate with, particularly in important areas like marriage and religion. An intrinsic part of this freedom is a right to refuse association - one does not have to marry a particular person, or become a buddhist, unless one chooses to do so.

He contends that the state's right to exclude entry is no different to the individual's right to remain single in any relevant way. Drawing this analogy is straightforward - as a person might choose a husband, a collective might choose whom, if anyone, it would like to join its community. It seems intuitively apparent that it would be wrong for Iran to be forced to join NATO, or for the UK to annex France, and the wrongness of these cannot, Wellman posits, be explained without reference to the right to autonomy these states possess.

Pevnick (2011, 30) disputes Wellman's analogy, arguing that membership by birth does not equate to free association, but this argument is not entirely convincing. We are incapable of agency at birth, and we readily accept that our parents make life decisions for us until we are able to do so ourselves. Membership of a society is arguably equivalent; our parents simply make the decision to enter into association on our behalf. In liberal societies at least, parents have a choice of where their children become citizens of, albeit one limited by the availability of alternatives. With this being so, I will continue by assuming the validity of Wellman's analogy, foregoing a defence of Pevnick's (2011) institutional ownership argument in favour of a right to exclude entry.

Wellman's analogy therefore establishes that states do have a right to exclude economic migrants. He argues that as it is rooted in an entitlement that it is a deontological right, but emphasises that it is not absolute - it can be defeated by competing considerations (p.117). Fine (2013) builds on this point, asking why the state's right to exclude outweighs the competing claims of the immigrants to be admitted.

She argues that the difficulties and costs of immigrating, including learning languages, abandoning social support networks, and building a life in an alien culture imply that people who do it must have good reasons (p.263). She highlights that the right of a state to exclude migrants is far more significant in a person's life than the right held by voluntary associations; no one state can necessarily

replace another, nor can one readily found their own state, so exclusion of immigrants has far greater consequences. These are valid concerns, and necessitate a closer look at the competing claims of immigrants, and the moral argument for open borders.

### III. Competing claims: open borders in theory.

Fine (2013, 256) notes that the exclusion of immigrants by nation states is a recent development, only becoming commonplace in the late 20th Century. She argues that the right of states to do so is contrary to a “*..fundamental liberal commitment to the moral equality of all people*”. Per Cole (2000), exclusion of immigrants cannot be justified on liberal grounds, as it is inherently morally arbitrary.

Perhaps the strongest liberal argument along these lines is made by Carens (1987), who equated citizenship in Western liberal democracies to feudal privilege, an inherited status that enhances your life chances for morally arbitrary reasons. His argument is based on John Rawls’ (1971) theory of justice as fairness, which posits that just principles for governing a society would be a chosen from behind a ‘veil of ignorance’ in the ‘original position’. A person in the original position has no knowledge of their own characteristics, including their gender, age, race, place of birth, or concept of the good, and would therefore choose principles impartially and rationally. While Rawls himself expressly limits his thought experiment to a closed system where the question of immigration could not be addressed, Carens (1987, 256) makes a convincing argument that it is a relevant way of looking at it. By examining immigration from the original position we avoid self interested and partisan considerations, treat all humans as free and equal moral persons, and remove morally arbitrary ‘*..natural and social contingencies*’.

Carens (p.255) follows Rawls’ approach of first setting out an ideal theory, which makes a number of idealising assumptions about the world in order to reach a set of fundamental principles by which we might reform the non-ideal world. Under ideal theory, we assume everyone will adopt the principles we set out, and that there are no countervailing

negative social conditions (Wenar, 2017). Carens thereby sets out a standard by which we would judge an ideal society.

When evaluating a principle from the original position, we adopt the perspective of the person it most disadvantages, as once the veil of ignorance is lifted, we may find it is we who are so disadvantaged. If we accept, as per Fine (2013) above, that an immigrant has compelling reasons to migrate, then they are most disadvantaged by exclusion and it is their perspective we must adopt. Carens (1987, 258) assumes that the benefits of decentralisation might persuade us to maintain nation states in an ideal world, so assumes we would keep them. In such a perfect world, he argues, even where states refrain on Rawlsian grounds from restricting religious freedom or sustaining inequalities between states, there are still many valid reasons for individuals to become economic migrants. Individual economic opportunities will vary between states, one might fall in love with a person living on the other side of the world, or one might want to live among people who share one's religious beliefs. Migration might, therefore, be essential to the migrant's plan of life. This provides us with a particularly strong competing claim against the right to exclude.

How might we adjudicate between these claims? Under Rawls' 'justice as fairness', liberty may only be restricted to ensure the preservation of public order and security, as these are ultimately necessary for all other liberties (Rawls, 1971:p.187). If we were to follow this, as Carens (1987) does, it would need to be shown that open borders would lead to a reasonable expectation of chaos and the breakdown of order in order to decide in favour of the right to exclude. If we accept all the assumptions of an ideal world, such an expectation seems far from reasonable.

The pursuit of an ideal then, to create a world in which morally arbitrary contingencies like birthplace and parentage have no justificatory strength, gives us a compelling reason for states to open their borders. Is the pursuit of an ideal sufficient justification to force states to open their borders in the real world, where we have to face historical obstacles in the absence of idealising assumptions?

#### **IV. Competing claims: open borders in practice**

In practice, there are vast social and economic inequalities between nations, and these conditions make it far more likely that migration controls are needed to impose or ensure order. A common argument concerns the size of demand (Carens, 1987); that the number of people in poor countries who would migrate to wealthy countries with open borders far exceeds the number that could practically be taken. For Carens, if the goal is to prevent wealthy countries being overrun, present restrictions on migration are too restrictive.

We would struggle to use the size of demand to justify the right to exclude on Rawlsian grounds however. Under the original position we have to prioritise the worse off, which means that we would have to show that the economic well-being of current citizens would be lowered below that of the migrants in their home country. Further than that, liberty is prioritised over economic condition, so the financial concerns of current citizens are largely irrelevant.

To justify the right to exclude on Rawlsian grounds then, you would need to show that there was a reasonable expectation that opening borders to migrants would cause chaos and the breakdown of order, leading to a net loss of liberty. This is more plausible in the absence of idealising assumptions. Carens (1987) warns that to think of migrants in this way is the territory of bigotry and ignorance, but even if we accept this, evidence suggests it *is* a reasonable expectation.

For example, Boyes (2017) connects an increase in Muslim migration to Sweden and Germany with increases in anti-semitism, including the firebombing of a synagogue in Gothenburg and the vandalism of a cemetery in Malmö. While the immigrants Boyes refers to are refugees, the principle is the same for our purposes. A recent study by the Zurich University of Applied Sciences, funded by Germany's Ministry of Family Affairs, showed that Lower Saxony experienced an increase in violent crime of 10.4% in 2015-2016, 90% of which was attributed to migrants (see, e.g., Deutsche Welle, 2018). The same study found that migrants from war torn places, like Syria and Afghanistan, were significantly less likely to commit violent crime; we might infer from this that economic migrants are *more* likely to commit violent crimes than refugees. Without

a right to exclude then, a state becomes vulnerable to chaos and disorder, as evidenced by violence and citizens being unable to express their religious beliefs in public.

Note that the justification sought here is dependent on a breakdown of social order, not merely on a challenge to the distinctive national cultures of, say, Sweden and Germany. Fine (2013, 261) quotes Miller (1995), who argues that distinctive national culture is necessary to “*provide citizens with a sense of their collective identity and belonging, and a background against which more individual choices about how to live can be made*”. Fine notes that such considerations don’t count under the original position however, as nobody behind the veil of ignorance would risk the possibility of foregoing an important right of freedom for a cultural ideal that might be irrelevant to them.

Boyes’ example, however, demonstrates chaos and the breakdown of order on a local scale, and is indicative of how it might occur on a national scale. With open borders, it is plausible that a large number of immigrants with values antithetical to the indigenous citizens would move to the state. If a small number of refugees are minded to incite violence, and prevent the state from protecting the religious freedoms of its citizens in localised places, we can infer that a larger (and unlimited) number of immigrants could be so minded across a larger area. This is sufficient, I think, to give us a reasonable expectation of chaos and the breakdown of social order; we need not defend exclusion merely on the grounds of a threat to the host culture. The right to exclude can therefore be justified on Rawlsian grounds.

## **V. Conclusion**

It seems clear that a person’s birthplace is morally arbitrary, and the argument that you should be free to migrate to the place where you have the best opportunities in life is a powerful one. In a perfect world, it would be indefensible to close state borders to migrants, and it is extremely difficult to advocate for such a position from behind Rawls’ veil of ignorance. Nonetheless, all liberties are ultimately dependent on security, as without it the state cannot uphold them, and the permissibility of prioritising security from the original

position means that states have a moral right to exclude economic migrants.

## VI. Bibliography

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