

# Immigration and Rights: On Wellman's "Stark" Conclusion

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Christopher Heath Wellman defends what he calls a "stark" conclusion: "every legitimate state has the right to close its doors to all potential immigrants" (Wellman, 2008, p. 109). My aim in this note is not to dispute his conclusion, but only to argue that it is not so stark, at least not insofar as it is supported by his arguments.<sup>1</sup>

To understand Wellman's conclusion, we need to be clear on what is entailed by saying that a person, or collective agent such as a state, has a moral right to do something. Two conceptions of rights may be distinguished by asking whether a person's having a right to act in some way guarantees the moral permissibility of her acting in this way. Rights in what I shall call the "strong" sense do guarantee this, whereas rights in the "weak" sense do not. A person may have a "right to do wrong" in the weak sense, but not the in strong sense.<sup>2</sup> Rights in either sense confer immunity against morally justified *interference*. It is wrong for others to prevent you from doing what you have a right to do. But weak rights do not also confer immunity against morally justified *criticism*. We may criticise a person for acting in a way we believe to be wrong, while at the same time maintaining that it would also be wrong to stop her acting in this way. Strong rights, on the other hand, confer immunity against both interference and criticism.<sup>3</sup>

To see that the weak conception of rights is coherent, it is important to distinguish two questions. One question is: who gets to decide? That is, whose decision should determine what happens? Another question is: what is the correct, or morally right, decision? I can accept that some matter is yours to decide, while also thinking that you are making the wrong decision. I can *respect* your decision, by not standing in your way, even when I do not *agree* with it.

Consider first a non-moral example. While watching a football match, you see the referee award a penalty for a blatant "dive". TV replays confirm that the player was merely pretending to have been fouled, though the referee's view of the incident was obscured. You believe that the referee did not make the *correct* decision. Nonetheless, you may feel that his decision ought to be respected. You may hold to the maxim that "what the referee says goes", and therefore disapprove of players remonstrating with the referee in an attempt to overturn his ruling. Players (and fans etc.) ought to respect the referee's decision, even when they disagree with it.

Similar views may be held in moral cases. Consider, for example, a person who is a vegetarian for moral reasons. When she sees others eating meat, she believes that they are acting in a way that is morally wrong. Nonetheless, she may also believe that these people have a moral right to decide their own diet. She may disapprove, for example, of a band of militant vegetarians who go around invading restaurants and confiscating steaks from diners' plates. Again, she may respect another person's decision to consume meat, even though she disagrees with it. For another example, consider a libertarian who believes that wealthy people ought to voluntarily help those in need, while also strongly opposing coercive taxation which, in her

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<sup>1</sup>Wellman's article has prompted a number of critical responses (Fine, 2010; Wellman and Cole, 2011; Blake, 2012; Wilcox, 2012; van der Vossen, 2015). However, none that I have found raises doubts about the starkness of its conclusion.

<sup>2</sup>On this issue, see e.g. (Waldron, 1981).

<sup>3</sup>There may be some debate about which of these senses is properly denoted by the word "right". But this need not detain us here. The important issue is only what Wellman means by this term.

view, unacceptably forces these people to help others. In these cases, it would be natural to say that meat-eaters have a right to eat meat, or that the wealthy have a right to ignore the needs of the poor, even if it is morally wrong for them to do these things.

Wellman's conclusion therefore admits both a "strong" and a "weak" interpretation, depending on whether the right he asserts — the state's right to control its borders — is taken to be strong or weak. The weak interpretation seems to be what he intends. Clarifying his position, he says he favours "allowing political communities to set their own immigration policy" (Wellman, 2008, 117). This seems to involve only an immunity from interference. To *allow* someone to decide some matter is to refrain from *interfering* with her decision. One may be in favour of allowing a state to close its borders — that is, one may be against forcing a state to open its borders — while also thinking that the state ought not to close its borders. This would be like the vegetarian's being in favour of allowing people to eat meat, or the libertarian's being in favour of allowing people to ignore the needs of others, even though the vegetarian or the libertarian believes that eating meat or ignoring others is wrong.

However, if Wellman's conclusion is merely that states should be allowed to determine their own immigration policy, then it seems not very "stark" at all, but fairly uncontroversial. I expect it would be accepted by many who believe closed borders are morally indefensible. One prominent advocate of open borders, whose work Wellman discusses, is Joseph Carens. It is true that Carens uses the language of rights when characterising what he sees as the received view on immigration which he wants to challenge:

The power to admit or exclude aliens is inherent in sovereignty and essential for any political community. Every state has the legal and moral right to exercise that power in pursuit of its own national interest, even if that means denying entry to peaceful, needy foreigners. States may choose to be generous in admitting immigrants, but they are under no obligation to do so. (Carens, 1987, 251)

But Carens clearly intends rights in the strong sense. If a state has a right to choose its own immigration policy, says Carens, then it is under no obligation to choose in any particular way. On the weak conception of rights, however, this does not follow. It may be wrong to force agents to fulfil their obligations. Consider an analogy. Many who believe that a state has a moral obligation to provide adequate healthcare for all its citizens may nonetheless oppose foreign intervention aimed at enforcing this obligation. These people may believe that states have a right, in the sense of being immune from interference, to decide their own healthcare policy. To hold views about what sort of policy a state ought to adopt — in immigration, healthcare, or any other area — is not thereby to oppose allowing states to set their own policy. To be clear, I am not claiming that Carens *does*, or *would*, accept Wellman's conclusion (on the weak interpretation). I claim only that Carens does not even discuss this conclusion, which suggests to me that it is much less significant than Wellman presents it as being.

But perhaps I have misinterpreted Wellman, and he in fact intends the strong interpretation. His view, on this interpretation, is not merely that states should be allowed to set their own immigration policy, but that whatever policy a state chooses to adopt is morally okay. Morality is indifferent between open borders, closed borders, or any other policy in between. The question of what sort of immigration policy a state should adopt is, in this respect, like that of what sort of hairstyle an individual should choose. The decision, in either case, is beyond moral criticism. If *this* is Wellman's conclusion, then it is indeed controversial. One reason why we think that hairstyle choice is, at least in general, a matter of moral indifference is that it has so little impact of the well-being of others. "So what if I want to dye my hair purple, who am I hurting?" But immigration policy seems rather different. It has the potential to profoundly affect the well-being of very many people. It would therefore be surprising if morality were simply silent on this issue.

But then the trouble for Wellman is that this stark conclusion is not well supported by his arguments. He argues by appeal to freedom of association. As he notes, this freedom is widely

valued. One of his central examples is marriage. An individual's freedom of association entails that she has the right to choose whom she will marry. By analogy, he argues, a state's freedom of association entails that it has the right to choose to whom it will grant residency. However, the rights conferred by freedom of association are plausibly only weak rights. Many would accept, I believe, that people should, for the most part, be allowed to choose for themselves with whom they will associate. You should not be forced to associate with people you don't like, nor prevented from associating with those you do like. But this is not to say that your "associative" choices are beyond moral criticism. Consider, for example, a selfish businesswoman who cannot be bothered to visit her ill mother in a nursing home. We might be against forcing her to visit her mother. But this surely does not stop us from judging that, from a moral point of view, her behaviour is quite appalling. We may think she has a moral obligation to visit her mother, even if we do not think she should be forced to fulfil this obligation.

As noted above, a state's decision to close its borders may have the effect of allowing very significant harm to befall certain people. One does not have to be a utilitarian to think that a state's choice to allow such harm makes it liable to moral criticism. It is perhaps plausible to argue, on grounds of freedom of association, that states should not be forced to accept refugees. But it seems wholly implausible to argue, on the same grounds, that morality is indifferent to the plight of refugees; that a policy of turning away those in desperate need is morally on a par with one of accepting them. Thus the stronger interpretation of Wellman's conclusion — that states can do no wrong in their selection of an immigration policy — is not supported by his argument from freedom of association.

In summary, on neither interpretation does Wellman's argument contribute much to the important question of what immigration policy states should adopt. If he intends rights in the weak sense, as mere immunity from interference, then his thesis is essentially that foreign intervention in a state's immigration policy is morally unjustified. But this simply does not answer the question, or rather answers only a different question. It is one thing to ask, for example, whether states should open their borders, quite another to ask whether they may be forced to do so. On the other hand, if he intends rights in the strong sense, as immunity also from criticism, then his thesis is that all immigration policies are morally equal. This does answer the question. But on this interpretation, his argument is very weak. Freedom of association does not generally entail that a person's choices about whom she will associate with are beyond moral criticism. And no reason is given to think that it entails this in the case of a state's choice of an immigration policy.

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