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Customary Morality: First-Best Principles for Immigration Policies

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LEONARDO QUATTRUCCI, JUL 20 2013

In 2012, the European Court of Human Rights condemned the Italian “push-back” immigration policy as a violation of the European Convention on Human Rights:[1] “No one shall be subjected to torture or to inhuman or degrading treatment or punishment” (Art. 3).[2] Unconditionally rejecting immigrants presents a series of ethical consequences: it sends individuals back to inhuman scenarios, where rights are constantly infringed upon; it breaches immigrants’ rights as human beings (e.g. integrity); it provides no justification to the injured parties regarding why they have been refused. Nevertheless, Christopher H. Wellman maintains that, given freedom of association, legitimate states are fully entitled to control access to their borders on behalf of their citizens. This paper opposes Wellman’s theory on the grounds of what I name “customary morality:” moral practices to which states have repeatedly conformed over time because they believe in their cogency. The aim is to demonstrate that non-compliance with customary morality undermines the legitimacy of the state itself. Following Joseph H. Carens, this paper considers family reunification and asylum seeking as cases in point for the purposes of this paper. Furthermore, it will elaborate on Michael Blake’s theory of the hierarchy of basic freedoms, claiming that freedom of association is subordinate to more basic rights, such as equality. Finally, I agree with David Miller in affirming that states should at least justify their policies in terms of “the general goals of the society in question,”[3] for, as Arash Abizadeh denounces, borders coerce both nationals and foreigners.[4]

Building upon the concept of freedom of association, Wellman argues that legitimate states can exercise absolute control over immigration.[5] But, how does freedom of association justify the right of states to regulate borders? To validate his theory, Wellman highlights the prominence of freedom of association. Today, freedom of association is almost universally recognised as a non-negotiable right.[6] Virtually no one would deny another’s right to choose the desired partner.[7] Individually, “each of us enjoys a morally privileged position of dominion over our self-regarding affairs.”[8] Such “dominion” is expressed in two complementary ways. First, individuals intuitively determine their belongings and identity by associating with affine groups.[9] Second and comparably, identities can be built by disassociation. To exemplify, people can choose their preferred partners, but they cannot associate with them unless they are reciprocated.[10] Having assessed the relevance of freedom of association, Wellman projects it on the state level, in order to answer the question on state legitimacy over border control. Simply, “just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community.”[11]

Wellman effectively proves the importance of freedom of association as a function of individual self-determination. Yet, it is unclear how this individual right pertains to the realm of states. Merely extending the right to the state dimension is insufficient to establish an analogy between individual and state responsibilities. Wellman responds to the critique, by asserting that state legitimacy derives from a collective right of self-determination. He assumes that, generally, countries of immigration are morally respectful of human rights (not coincidentally, they attract disadvantaged foreigners).[12] Therefore, similar regimes must grant their citizens “minimally decent” life conditions.[13] Insofar as a state fulfils these minimal requirements, it is legitimate.[14] It follows that, under legitimate institutions, citizens no longer need to secure their individualities. Consequently, they aggregate their rights of self-determination into a collectively representative agent.[15] Plainly, in legitimate systems, individuals delegate their rights of self-government and self-determination to institutions.[16] As legitimate representatives of the

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community, governments are authorised to pursue individuals' aggregate interests autonomously. To illustrate the validity of his theory, Wellman asks the following question: what if a single vote expressing an individual's right of self-determination were enough to impede the reunification of Germany? Aggregating individual rights into states is necessary to more efficiently enforce decisions on behalf of the national community.[17] For the same pragmatic reasons, states are entitled to the right of association, which, in terms of immigration, translates into border control.

Adopting Wellman's reasoning, one would think that legitimate states have absolute freedom to open or close borders. In practice, however, states do show moral concerns whenever admitting or rejecting immigrants.[18] Looking carefully at the behaviour of states, a moral *usus* can be codified in immigration policies. Carens detects "the norms and principles embedded in the immigration practices of liberal democratic states" according to which individual rights carve out state freedom of association.[19] Over time, states have consistently applied ethical constraints to their policies of inclusion. This paper refers to the aforesaid set of moral practices as customary morality. Logically, if states did not perceive moral criteria as obligations, they would not regularly enact them in decision-making. Moreover, conformity to moral customs has proven to be congruent with legitimacy.[20] To demonstrate the cogency of customary morality and its impact on legitimacy, consider the example of family reunification.[21]

To begin with, family reunification is a claim by the insiders of the host country to exercise their freedom of association.[22] Thus, rather than a cosmopolitan argument for open borders, family reunification is a duty of the state towards its citizens.[23] A legitimate state should favour similar calls for reconciliation, since it is responsible for protecting the rights of its nationals. However, imagine that a state prevents a resident's spouse and children from immigrating and reunifying the family. Appealing to Wellman, the government could justify its action as the legitimate exercise of freedom of association on behalf of the community. Problematically, the pronouncement violates the right of the citizen to freely associate with his family. Simultaneously, the verdict of the government is self-defeating, since the citizen is member of the community whose rights have to be protected by a legitimate state. In conclusion, the case of family reunification validates the rationale behind the necessity to comply with customary morality: if indiscriminately exercised, state control over borders breaches the constituents' rights.

Undeniably, the unrestricted freedom to associate of states can violate citizens' rights. So, are we sure that state freedom of association is an absolute and unconditionally granted right? Insisting that the state right to associate is yielded by legitimacy (i.e. protection of individuals' rights), this paper contends that Wellman's argument is internally incoherent. Wellman initially agrees that states must minimally protect fundamental rights (i.e. equality, freedom of expression...), in order to acquire legitimacy.[24] Paradoxically, he then allows legitimate states to override crucial liberties on grounds of absolute freedom of association. As Blake notices, Wellman seems to forget that freedom of association depends on the enforcement of basic, individual rights.[25] In the case of family reunification, this article observed how the peremptory use of freedom of association by states is *internally* illegitimate. Now it will attest the *external* illegitimacy of Wellman's principle, by looking at the rejection of refugees.

Admittedly, Wellman affirms that states only hold "morally relevant" obligations in regards of constituents.[26] Nevertheless, this paper rejects this view on the grounds of the conception of legitimacy that Wellman himself shares. If legitimacy derives from the protection of *human* rights by states, it means that *human*, rather than parochial, liberties are the precondition to any legitimate state activity. Every human being, including immigrants, is, therefore, entitled to safely exercise the aforesaid rights to develop personal abilities and aims.[27] For instance, refugees escape from illegitimate systems that annihilate their autonomy and freedom, which is why they seek legitimate states to recreate life prospects. As human beings, asylum seekers are entitled to the same rights that legitimate states protect domestically. Consequently, why should we think that a state is legitimate if it merely defends human rights domestically? Since human rights extend beyond national boundaries, states that want to preserve full legitimacy need to safeguard both insiders' and foreigners' rights, when these are violated. Therefore, Wellman's wrong is giving freedom of association priority over more essential political and human rights.[28]

So far, the unconditional freedom of association of states has produced two collateral effects. First, it provokes "internal delegitimation," when presumed national interests encroach on the citizens' right to associate (i.e. reunify the family). Second, it "externally delegitimises" the state because the unconditional rejection of asylum

Customary Morality: First-Best Principles for Immigration Policies

Written by Leonardo Quattrucci

seekers invalidates the principle of legitimacy as defence of human rights. Given these premises, legitimate states should, *at least*, consider immigrants' calls for rebuilding their autonomy. Nonetheless, if governments are legitimate and, so, empowered to exercise full capacities in representation of their nationals, why should they be responsible for justifying their decisions before non-members of the polity?

Abizadeh reasonably explains that borders are coercive institutions that limit individual autonomy both domestically and internationally.[29] Subjection to border coercion "sometimes simply destroys (or hinders the development of) the requisite mental capacities [...] it inherently eliminates options otherwise available to the person [...] and] it subjects one agent to the will of another, violating its independence." [30] For these reasons, it would be ethical and sound if states regulated borders in light of an adjusted "harm principle": states are free to disassociate insofar as they do not considerably harm immigrants' liberties. However, as states decide not to associate with refugees, they deprive them of both their freedom of association and of their autonomy.

Wellman's argument for state control over immigration suffers from an internal problem: collective freedom of association often conflicts with the foundations of legitimacy. A trumping exercise of freedom of association is to be condemned because it impedes the exercise of individual self-determination and autonomy.[31] Some maintain that welcoming immigrants could generate disequilibrium within the national community. For example, Miller thoroughly holds that, without denying the obligations of states towards foreigners in need, immigration is neither the most effective nor the only way to fulfil a state duty of assistance.[32] Aid and intervention are efficient alternatives to secure human rights without altering the internal equilibrium of potentially host countries.[33] Certainly, these are valid and effective solutions. Yet, Miller himself admits that these temporary remedies are inadequate in the long term, since they do not guarantee permanent opportunities to recreate a decent human life.[34] Accordingly, this article advocates open border policies as legitimate, first-best solutions in harmony with customary morality.

Imagine you were the Italian Minister in 2009. Hundreds of asylum seekers are landing on Italian coasts, escaping from brutal situations in their countries of origin. Having no safe homeland to return to and no political rights, they have desperately sailed for hundreds of kilometres to seek the possibility of rebuilding a decent life in a legitimate country. How should you behave before their requests of asylum? What are Italy's moral responsibilities as a legitimate state? Based on Wellman's theory, you could reject immigrants on the basis of the right to disassociate of states. But rejection, in such scenarios, means condemning individuals to live in dreadful realities. By repelling immigrants, the state denies them the rights in which it roots its legitimacy. In addition, unilateral rejection infringes upon the previously defined concept of customary morality: the consistent enforcement of morally-driven decisions in relation to specific issues, such as family reunification and refugees, in the belief of their cogency. In short, the possession of territorial rights implies neither that states "ought" to exercise them nor that they can indiscriminately control access to their territory.[35] Indeed, customary morality illustrates "how" states should exercise their rights.[36]

In response to the Italian and similar dilemmas, states should respect the protocol dictated by moral customs. Precisely, states must evaluate immigrants' claims, their background, and their relationship with the rights of the insiders. In applying these criteria, states need to contextualise freedom of association in the wider set of universal civil and political rights, which represent the benchmarks of legitimacy. Regardless of the resultant decision, states must justify their verdicts both before insiders and immigrants, because border control coerces each of the two categories.[37] One should consider the following question: is it ethical to abandon individuals deprived of their rights to a lottery or do states have a responsibility to help them? Again, assuming that recognition and protection of individual rights takes precedence over state legitimacy, the answer is positive.

This paper aims at disclosing the flaws of morally unrestricted closed border policies in terms of legitimacy. Specifically, it argues against Wellman's claim that legitimate states can unilaterally control access to their territory. Contrarily, I maintain that states are morally responsible for minimally protecting individual rights, given customary morality. In light of these moral obligations, I conclude that state freedoms are justified, but conditional. State actions are legitimate insofar as they respect concerns regarding human rights protection, both domestically and internationally. In pragmatic terms, states should design immigration policies as reflections of their constitutional values and in conformity with the principle of legitimacy.

Customary Morality: First-Best Principles for Immigration Policies

Written by Leonardo Quattrucci

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[3] David Miller, *National Responsibility and Global Justice* (Oxford: Oxford, 2012), 222.

[4] Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36, no. 1 (2008): 39-40.

[5] Christopher H. Wellman, "Immigration and Freedom of Association," *Ethics*, 119, no. 1 (2008): 109.

[6] Ibid.

[7] Ibid., 110.

Customary Morality: First-Best Principles for Immigration Policies

Written by Leonardo Quattrucci

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid., 110-11.

[12] Andrew Altman and Christopher H. Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford, 2009), 16.

[13] Ibid., 32.

[14] Ibid.

[15] Ibid., 16.

[16] Ibid., 17.

[17] David Miller, *National Responsibility and Global Justice*, 214.

[18] Joseph H. Carens, "Who Should Get In? The Ethics of Immigration Admission," in *Ethics & International Affairs: A Reader*, eds. by J. H. Rosenthal and C. Barry (Washington DC: Georgetown University Press, 2003), 231.

[19] Ibid.

[20] Ibid., 232.

[21] Ibid.

[22] Ibid., 233.

[23] Ibid.

[24] Andrew Altman and Christopher H. Wellman, 32.

[25] Michael Blake, "Immigration, Association, and Antidiscrimination," *Ethics* 122, no. 4 (2012): 751. doi: 10.1086/666327

[26] Wellman, 124.

[27] Blake, 755.

Customary Morality: First-Best Principles for Immigration Policies

Written by Leonardo Quattrucci

[28] Ibid., 757.

[29] Abizadeh, 39-40.

[30] Ibid., 40.

[31] Blake, 752-54.

[32] David Miller, "Immigration: The Case for Limits," in *Contemporary Debates in Applied Ethics*, eds. Cohen A. I. and Wellman C. H. (Malden, MA: Blackwell, 2005), 198.

[33] Ibid.

[34] David Miller, *National Responsibility and Global Justice*, 225.

[35] Ibid., 222.

[36] Ibid.

[37] Abizadeh, 39-40.

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Written by: Leonardo Quattrucci
Written at: John Cabot University
Written for: Eszter Kollar
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