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Should there be a human right to immigration?

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Abstract

This thesis critically reviews the debate around immigration, emigration, and open- and closed-borders. In the first section of the thesis the author establishes that there is no current human right to immigration, and outlines possible mechanisms to add one to the list of existing human rights. Subsequently, both sides of the arguments regarding this question are reviewed, and a conclusion is drawn that the arguments are insufficient to add the human right to immigration to the list of existing ones. The author then outlines the asymmetry between the right to emigrate and the not-yet-existing right to immigrate, and concludes that this asymmetry is unjust and problematic. Finally, the author develops an argument using existing theories of justice to defend why closed borders are unethical, and the international community has a responsibility to compensate for morally arbitrary injustices. It is hoped that this thesis has further synthesized the debate regarding immigration, and has made steps to create a better understanding of how to approach and deal with this ethical issue.

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Introduction

In our increasingly globalised world, international migration is a worldwide phenomenon. The sheer amount of information available to the average person in the 21st century allows people to capitalise on opportunities far outside their own social spheres. Modern transportation has made it easier, cheaper and faster for people to pursue new jobs, education or a better quality of life. Unfortunately, at the same time, conflict, poverty, inequality and a lack of sustainable livelihoods compel people to leave their homes to seek a better future for themselves and their families abroad¹.

There are roughly 260 million international migrants worldwide, over 3% of the world population². The motivations to leave one's home country are diverse, but ultimately come down to a desire to increase the quality of life. Whether for political, economic, or safety reasons, many migrants express the desire for the liberty to do what they deem best.

In many countries migration has become a main theme on the political agenda. Topics include: "a nation has the right to refuse entry to foreigners; immigrants erode a nation's culture; immigrants lower wages and take jobs away from nationals; immigrants want to live on welfare programs; immigrants commit a disproportionate number of crimes; security and health requirements mandate immigration restrictions."³

We can often see that these debates are fuelled by emotion rather than reason. However, it is easy for us Westerners to take things for granted simply by virtue of being used to it. Citizenship of our home-country is one of those things. We were born in a western country, have enjoyed all the liberties and rights associated with this, and have capitalized on the opportunities it grants us. However, not all are born in a country that grants these opportunities. Unfortunately, it is purely based on chance where you are born, and what chances you subsequently get in life from this lottery.

In this thesis, I would like to provide an answer to the normative question: Should individuals have a human right to immigration? I will use the arguments of various prominent writers and test their arguments based on soundness and validity. Moreover, I will use the existing literature to build up a coherent argument in favour of a human right to immigration.

¹United Nations, Department of Economic and Social Affairs, Population Division (2017). International Migration Report 2017: Highlights (ST/ESA/SER.A/404)

² United Nations, Department of Economic and Social Affairs, Population Division (2017). International Migration Report 2017: Highlights (ST/ESA/SER.A/404)

³ Jose Azel, "Immigration Is A Human Right, But Borders Matter", Panampost, 2017

Defining a right to immigration

The right to immigration is to be understood as the universal right to cross and remain within state borders, and enjoy equal rights to all the other residents in the state. There are arguments that it is not immediately to be expected that immigrants receive full citizen status and rights, but for now I will assume the following definition by Kieran Oberman⁴:

1. It is a moral rather than a legal human right. Moral human rights set out what people are morally entitled to, legal human rights are those recognized in law.
2. The human right and interest is significant enough to generate duties on the part of others.
3. The right is non-absolute, like other human rights.
4. Outside interference is permitted if states fail to uphold the human right.
5. The human right to immigrate is a right for individuals to enter and reside in a state for as long as they like.

⁴ Kieran Oberman, "Immigration as a Human Right", Published in *Migration in Political Theory: The Ethics of Movement and Membership*, eds. Sarah Fine and Lea Ypi, (Oxford: Oxford University Press, 2016), 32-56 p. 4-6

Existing Human Rights Declarations

It is hardly a new phenomenon that governments mistreat and do unjust things to their own and foreign citizens. Neither is the fact that people rebel against these abuses. What is relatively new is that people can call upon internationally recognized human rights that have the status of international law to criticize the actions of oppressive governments⁵. Before 1948, when the United Nations formulated the Universal Declaration of Human Rights (UDHR), oppressive actions would be called unjust, immoral or barbaric. Today, when violating human rights, it is instantly categorized and internationally recognized as unjust, wrong and illegal.

Human rights can be considered as minimal standards. They are designed to protect people from great injustice, and grant them a moral minimum. As human rights are universal, they have to be “supported by very strong reasons of universal appeal, to have high-priority, and to resist claims of national and cultural autonomy”⁶. Despite this, it is very hard to determine what should and what should not be a human right.

There are a variety of human rights declarations that deal with freedom of movement, migration and the other basic human rights. However, it is important to note that none of them explicitly describe a human right to immigration.

The Universal Declaration of Human Rights of 1948 asserts, in Article 13, that:

- (1) Everyone has the right to freedom of movement and residence within the borders of each State.
- (2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 13 does not mention any right to enter. This is partially mitigated by article 14, which states that:

- (3) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

Note that none of these declarations explicitly state a right to immigration, rather they assert that people should be able to leave their own country, and should be able to enjoy freedom of movement within state borders as a citizen. Article 14 expands on the right to leave a country, and outlines the right to asylum in another country when the individual is subjected to persecution in his home country.

The International Covenant on Civil and Political Rights of 1966 expands on article 13, and outlines possible reasons to restrict (1) and (2). Legitimate reasons to restrict are: “national security, public order, public health or morals or the rights and freedoms of others”⁷.

The human right to immigrate cannot be explicitly found in the existing human rights documents. In order to make an argument that there is (or should be) a human right to immigrate, a different approach has to be taken.

⁵ James W. Nickel, “Making Sense of Human Rights” (2004), p3

⁶ James W. Nickel, “Making Sense of Human Rights” (2004), p5

⁷ The International Covenant on Civil and Political Rights of 1966 (United Nations)

Adding a human right

There are three strategies to add a new human right to the list of existing ones⁸:

1. **Direct strategy:** One can argue that the right to immigrate would serve basic human needs, just like the other human rights. The right can be justified in the same manner, and be added to the same list, as the right to freedom of speech, bodily integrity and subsistence.
2. **Instrumental strategy:** One can justify the human right to immigrate by deriving it from already existing human rights. Unless this new right, the right to immigrate, is added to the list, the already existing rights cannot be properly realized or are insecure. A human right to democracy would not show that democracy is a fundamental and basic human interest, but it is necessary to allow for freedom of speech and subsistence⁹.
3. **Cantilever strategy:** One can justify the human right to immigrate by showing it is an extension of the already existing and recognized human rights. It would be irrational to recognize human right A but not human right B that directly follows from A. An example could be to state that there is a human right to move inside state borders, and that it should rationally follow that therefore one should also be allowed to move across state borders.

David Miller asserts that the direct strategy is the strongest, as the second strategy might run into the problem of defining human interests and showing it empirically without it being contested. The cantilever strategy might be defeated by stating that B does not necessarily follow from A as B has different (harmful) consequences¹⁰.

In the following chapter I will discuss Kieran Oberman's arguments in favour of adding the human right to immigrate, and subsequently David Miller's rebuttal.

⁸ David Miller, "Is there a human right to immigrate" (2015), p. 8-9

⁹ For a good example of such an argument, see T. Christiano, 'An Instrumental Argument for a Human Right to Democracy', *Philosophy and Public Affairs*, 39 (2010-11), 142-76.

¹⁰ David Miller, "Is there a human right to immigrate" (2015), p. 9

Kieran Oberman and David Miller

Kieran Oberman is a prominent advocate of a human right to immigration. He acknowledges that the current human rights documents do not explicitly state a human right to immigration, and makes a case for why it should be added. He utilizes all three above mentioned strategies in the development of his argument¹¹.

1. Direct strategy: Oberman writes that people have essential interests in having a human right to immigrate. He argues that the same interests that support other human rights also ground a human right to immigration.
2. Instrumental strategy: Oberman argues that unless a human right to immigration is added to the list of human rights, other human rights are not sufficiently protected.
3. Cantilever strategy: Oberman argues that the right to domestic freedom of movement should naturally extend to cross-border movement as well.

Oberman argues that people should have a right to immigrate to other states. He bases this argument on the notion that people have essential interests in being able to make important personal decisions, and engage in politics without state restrictions on the personal and political options available to them (direct strategy). He argues that it is this, these fundamental human interests, that other human rights protect. Examples are freedom of speech, right to internal freedom of movement, freedom of association and the freedom of occupational choice. Moreover, he states that when you exclude immigration, these human rights are not sufficiently protected (instrumental strategy).

His argument is not a case for open borders, rather it is a demand that basic liberties are awarded the same level of protection when people seek to exercise them across borders as within borders. Immigration restrictions deserve no special exemption from the purview of human freedom rights.

There are two main interests underlying the right to internal freedom of movement; one personal and the other political. The personal interest Oberman bases on the notion that people have the interest in having free access to the full range of life options; “friends, family, civic associations, expressive opportunities, religions, jobs, and marriage partners”. These interests are already protected inside the borders of the state, the problem however arises when one wants to exercise these rights across borders. As Joseph Carens notes: Every reason why one might want to move within a state may also be a reason for moving between states. One might want a job; one might fall in love with someone from another country; one might belong to a religion that has few adherents in one’s native state and many in another; one might wish to pursue cultural opportunities that are only available in another land¹².

The second interest he brings forward is a political one. He notes that people have an essential interest in enjoying “a free and effective political process”. Free movement is essential in a democratic process, as you need it for attending demonstrations, for meeting people to discuss or exchange political ideas or for acquiring information first-hand. Moreover, without the freedom to move one cannot exercise the right

¹¹ Kieran Oberman, “Immigration as a Human Right”, Published in *Migration in Political Theory: The Ethics of Movement and Membership*, eds. Sarah Fine and Lea Ypi, (Oxford: Oxford University Press, 2016), 32-56

¹² J. Carens, ‘Migration and Morality: a liberal egalitarian perspective’ in B. Barry and R. Goodin (eds.), *Free Movement: ethical issues in the transnational migration of people and of money* (Hemel Hempstead: Harvester Wheatsheaf, 1992), pp. 27-8

to freedom of association. Therefore, based on these two interests, these human rights should be extended beyond the borders of a state.

He argues that the interests grounding the human right to internal freedom also ground a human right to immigrate, and makes the case that one can derive a human right to immigrate from rights to freedom of expression, association, religion, occupational choice, and the right to marry. Immigration restrictions would interfere with the freedom of individuals to communicate, associate, worship, work, study or marry with as they please.

Miller disagrees with Oberman's arguments that claim that the interests grounding the human right to internal freedom also ground a human right to immigrate. He accepts that that the arguments put forward are subjectively strong interests, but disagrees with the notion that they are essential. They might be of importance to individual persons, but not to a human being as such. He draws an analogy with food, and argues that while people have a human right to food, they do not have a human right to the best available quality of food, the adequate range argument. Would a country violate a human right by invoking quotas on the best quality fish? Miller states that people have the right to adequate food, not the absolute best, as the right is based on generic interests to food but not on specific ones to a particular type of food. He notes that while states are not allowed to deliberately impose obstacles, they do not have to take positive action in order to make it happen either. It does not mean that the freedom of association means that the state has to provide transport to the other person in question, when the individual does not have the means to arrange the transport himself.

I agree with Miller's rebuttal of Oberman's argument. The interests outlined by Oberman are valid interests, but I do not deem them important enough to invoke duties on the part of others and ground a human right. To quote: *"...the conclusion that I wish to draw is that the direct human rights argument cannot justify a right to migrate. So long as the state in which I reside provides a range of opportunities that is adequate to meet my generic human interests, the fact that I may also have specific interests that cannot be satisfied unless I reside in another country gives me only a reason, not a full-blown right, to move there"*.¹³ Especially his adequate range argument is sound, as it clearly separates normal interests from generic human interests, and by doing this creates boundaries and restrictions for the adding of human rights.

Oberman tries to defend his claims against the "adequate range- argument" made by Miller. He states that people who accept Miller's argument, would deny the validity of already existing human rights such as the freedom to internal movement. He finds that people living in a state with larger/better than adequate range of life options would therefore be able to divide their territory up in parts that all individually provide an adequate range, and that citizens can then be excluded from moving between the parts without violating this human right.

I find this rebuttal problematic, as it would no longer be a proper state in my view. It would grant areas or provinces with state-like border-enforcing capabilities, and split an existing nation-state up into smaller states. Artificially creating states defeats the characteristic of most nation-states in that they consist of a large body of citizens who collectively support, and decide to be, a nation state. Moreover, it already is the case that parts of a nation-state are un-accessible to the public as there are many laws (property rights

¹³ David Miller, *"Is there a human right to immigrate"* (2015), p. 16

or traffic regulation) that restrict this right¹⁴. In a healthy democracy such a thought experiment, as outlined by Oberman, would quickly be voted against and defeated based on simple rational arguments.

David Miller appears to agree with this view of mine. Miller further dives into the notion of what should happen when the circumstances are not adequate, and human rights and a minimum standard of quality of life are not met, and the only way to secure these interests is via migration. He calls this an instrumental argument in favour of migration, not necessarily immigration. He notices that this argument already rules out people migrating between societies that meet the minimum standard of quality, and does not grant the migrants the right to choose where they go. Rather, the argument grants migrants to move to *some* society that has the range of adequate life opportunities.

Additionally, Miller does not accept Oberman's cantilever argument. He shows that the domestic right to freedom of movement is based on grounds that do not necessarily apply to international free movement. States should not be able to restrict free movement domestically, as they could oppress minority groups or dissident individuals. But such an argument does not hold on the international level. He writes: "Do political rights include the right to associate and communicate with anyone? Oberman asserts that they do: 'political life is not fully free if people are prevented from meeting, organizing and protesting as they wish', which he takes to include engaging in these activities anywhere in the world as may be felt necessary". He states that these arguments might apply to a situation where we live under a world government. But since we don't, he notices the crucial difference between interacting with other state citizens, who share the responsibility for the state apparatus, and outsiders who merely share an interest or goal. While it might be desirable to communicate with whoever one likes; it is not important enough to be considered a human right.

Conclusion

Oberman brings forward compelling reasons for why immigration should be added to the list of human rights. He primarily focuses on the duty claim, that states have duties to uphold the freedom to Immigration as a Human Right to immigrate rather than the interference claim, that outside interference can be justified against states that violate these duties. He utilizes all three strategies outlined earlier in his argumentation, but all are rebutted by Miller who has a stronger argument than Oberman in my opinion. In order to add a human right to immigration to the existing list of human rights a more compelling argument has to be found.

¹⁴ Nickel, Making Sense of Human Rights, p. 134.

The right to emigrate

Many states defend the right to emigrate and leave a country for personal reasons without interference from the state. Without this right people could be treated as property of a state, as was the case in early modern mercantilist states¹⁵. More recent examples include the Soviet bloc, where emigration was restricted to prevent brain-drain¹⁶. However, almost no state extends the right to emigrate to a right to immigrate. As mentioned in the chapter on human rights documents: The Universal Declaration of Human Rights of 1948 asserts, in Article 13, that: Everyone has the right to leave any country, including his own, and to return to his country. Article 15 adds to this: “no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”¹⁷

This is a negative right, as it obliges states not to act pro-actively and facilitate it, but rather not to interfere with the process. This means that states are not obliged to facilitate or arrange that the individual is accepted into another country. Additionally, it is a right that applies to one’s own country, not a foreign country. But does this make sense? Without a foreign country accepting you as a new citizen, it is impossible to change nationality. Likewise, without a foreign country accepting entry into its state borders, it is impossible to emigrate.

Interpreting the right to emigrate

There are three interpretations of the right to emigrate¹⁸.

1. The first interpretation grounds the right to leave on a claim to travel freely abroad¹⁹. It claims that people have an essential interest in not being prevented by the state to cross borders to pursue access to associates, institutions, and experiences that benefit the individual. Travel is often necessary to visit religious sites, go on vacation or simply visit friends and family abroad.
2. The second interpretation grounds the right to leave on a claim to relocate. Contrary to the first interpretation, this can be of more permanent rather than temporary nature. Much like Kieran Oberman notes: people have an interest in having free access to the full range of life options; “friends, family, civic associations, expressive opportunities, religions, jobs, and marriage partners”.
3. The third interpretation grounds the right to leave on a claim that individuals should have the right to renounce their citizenship. This interpretation links the freedom to leave to the notion that individuals should be able to quit the allegiance to the state and fellow-citizens²⁰. Without the ability to unilaterally quit membership, citizens cannot voluntarily consent to membership of

¹⁵ Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* (New Haven, CT: Yale University Press, 1987), pp. 26–31

¹⁶ Dowty, *Closed Borders*, pp. 114–27

¹⁷ <http://www.un.org/en/documents/udhr>

¹⁸ Stillz highlights three interpretations to leave in “Is There an Unqualified Right to Leave?” p.59

¹⁹ Whelan highlights the interest in travel in “Citizenship and the Right to Leave,” p. 638.

²⁰ Cf. Dowty, *Closed Borders*, p. 4, who suggests that emigration is grounded in a right of personal self-determination, which gives one “the right to remain party to one’s social contract or to seek another”; Whelan, “Citizenship and the Right to Leave,” p. 638, argues that a right to leave “seems to go at least part way towards making citizenship and its obligations entirely voluntaristic.”

the state. When expressing the desire to renounce membership, individuals should be able to do so without obstruction or prosecution from the state. This means that individuals can quit the civic and redistributive obligations to the state and its citizens, and relocate to a different state or area.

The right to emigrate cannot simply be defended by a general right to free movement. While it is important a person is not prohibited from entering a house of worship, or visiting a friend, a general right to free movement would also allow us to jay-walk, ghost-ride and enter various military complexes. Whilst it is widely accepted that our negative freedom to freedom of movement is restricted by traffic laws, it is not when one is prevented from entering their house of worship. It is therefore important to carefully develop the grounds on which the freedom of movement can be restricted or defended.

A proper instrumental argument can be developed to defend the right to freedom of (domestic) movement. Kieran Oberman justifies the right to freedom of movement by showing they are instrumental to other interests and basic liberties. Freedom of movement is paramount in order to exercise basic rights that are collectively recognized (see interpretation 2). However, to justify a right to emigration we have to extend these claims as Miller showed us that the Oberman's direct-strategy-argument is controversial.

In order to justify the right to emigrate we have to look at what could be the consequences of not having such a right. Without the right to emigrate we cannot escape when our human rights or other basic liberties are violated by a state. Often, when fundamental freedoms are violated, people or minorities are also prevented from leaving the country, intensifying the political persecution²¹. Allowing individuals to exit a country helps to, and incentivizes the, protection of rights in a state. With a human right to emigration the Soviet Union (ideally) could not have prevented the emigration of thousands of Soviet citizens fed up with the violation of basic rights in their home country. Moreover, it forces governments to make political compromises, much like in a democracy, rather than repress citizens.

We can conclude from this that there is an asymmetric view regarding the right to emigration and freedom of movement, which focusses on the individual's right to exit, and the state's current and self-proclaimed right to restrict immigration. In the next chapters I will explore a possible justification for this asymmetry, and the reasons for a state to want to restrict immigration. However, later in this thesis I will revisit the problem posed at the beginning of the chapter, the fact that all territory on earth is occupied, or claimed, by a state and that the hypothetical unwillingness of all other states but your own to accept you interferes with your right to emigrate.

²¹ Stillz "Is There an Unqualified Right to Leave?" p.63

Justifying the right to exclude

The human right to freedom of domestic movement, and the right to emigration are widely accepted and recognized around the world. Despite this individual liberty, many states across the world impose heavy restrictions on immigration. In this chapter I will explore why states could have valid and legitimate reasons to do so, and why this asymmetry in international law might be morally justified.

Christopher H. Wellman is a prominent advocate that defends this asymmetry. He believes that the strongest argument for a legitimate state's right to exclude outsiders can be built on three foundational premises²²:

- (1) legitimate states are entitled to self-determination.
- (2) freedom of association is an integral component of self-determination.
- (3) freedom of association entitles one to not to associate with others.

Let me discuss each premise in order, and assess the validity of the arguments supporting them before accepting or denying the Wellman's conclusion that a legitimate state has the right to exclude outsiders.

The first premise is the most controversial one as the right to self-determination has been contested in the past. During the aftermath of the second World War many Germans were put on trial in the Nuremberg Trials. Whilst it was evident that many Germans committed horrible crimes against humanity, it was controversial in regards to *outside nations* (the Allied Powers) putting these German citizens on trial for crimes against other Germans. It was hardly a surprise, or controversial for that matter, that the Allied Powers prosecuted the Nazi-military-regime for its unjust war and crimes against outside nations. The controversial aspect was the outside interference and violation of a sovereign Germany's right to exclusive jurisdiction over its system of criminal justice²³.

Why should a legitimate state have the right to self-determination? Wellman outlines a thought experiment to illustrate the necessity of this entitlement. Imagine the Netherlands, a legitimate state adhering to human rights, having a rather lax attitude towards enforcing speed limits on its highways. Because of this lax enforcement, the death-rate due to speed related accidents is higher than it would have been under strict enforcement. Let's say that Belgium sees what is happening and its citizens urge the Belgium government to start prosecuting all Dutch people not adhering to the speed limit in the Netherlands. Should it be permissible for the Belgian government to start prosecuting Dutch citizens breaking Dutch laws in the Netherlands? Wellman asserts that they shouldn't, and I am inclined to agree, as it would violate the Netherlands' sovereign rights. Without this sovereignty any country with a subjectively sub-optimal system of criminal justice would be subject to being taken over by an outside entity simply by virtue of there being room for improvement. A state should be entitled to self-determine self-regarding affairs as long as the state is legitimate, i.e. not violating human rights (like the Nazis did). A more forceful example Wellman provides is the hypothetical situation in which the European Union would like for Norway to become a full member. If the European Union, despite the Norwegians

²² Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (New York: Oxford University Press, 2011) pp. 13

²³ Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (New York: Oxford University Press, 2011) pp. 14

preference of not joining, could unilaterally force Norway to join without violating human rights or waging war, would it be permissible? Without accepting the principle of legitimate states' right to political-self-determination, Wellman asserts that it is impossible to explain why it is wrong for the EU to unilaterally annex Norway.

I find Wellman's arguments satisfactory and will therefore accept his first premise, that legitimate states should have the right to self-determination. I would like to emphasize the word legitimate in this premise, which entails the proper governing without the violation of human rights. When human rights are violated, outside states have the right to interfere as discussed in the chapter about Kieran Oberman and David Miller.

The second premise, that freedom of association is an integral component of self-determination, rests upon accepting premise (1), and is closely related to premise (3), that this freedom of association entitles one to not to associate with others. Without accepting a state's right to self-determination, it is irrelevant whether the freedom of association is an integral component of it. Likewise, without accepting a state's right to freedom of association it is irrelevant whether this extends to the right of not associating with others.

Wellman continues the thought experiment of the EU trying to have Norway become a member state. In this case the European Union sends an official invitation to Norway asking them to become a member state. As Norway is a legitimate state, they have the right to self-determination. This right would allow them to decline the EU's invitation to join them. Upon accepting Norway's legitimacy to decline such an invitation, Wellman argues that you in avertedly also accept Norway's right to decide with whom they associate or not associate.

Based on this reasoning I am inclined to accept both premise (2) and premise (3). However, Wellman extends his reasoning for (2) and (3) in a way I do not agree with.

Wellman continues by stating that if a political entity is allowed to refrain from associating with another political entity (say Norway and the EU), and an individual is allowed to refrain from associating with another individual (say my girlfriend refuses my proposal to marriage), then why should a group of people not be allowed to determine who joins their community?

The first problem with his reasoning is the level on which freedom of association or self-determination occurs. Whilst it makes sense for one individual to refuse another, and like wise for one state to refuse another, it doesn't automatically follow that these two grants the ability of a state to refuse an individual.

Wellman tries to address this in part by quoting Stuart White: 'Freedom of association is widely seen as one of those basic freedoms which is fundamental to a genuinely free society. With the freedom to associate, however, there comes the freedom to refuse association. When a group of people get together to form an association of some kind (e.g., a religious association, a trade union, a sports club), they will frequently wish to exclude some people from joining their association. What makes it their association, serving their purposes, is that they can exercise this "right to exclude."²⁴ He states that members of an

²⁴ Stuart White, "Freedom of Association and the Right to Exclude," *Journal of Political Philosophy* 5 (1997): 373–391

association deeply care about the membership rules governing the association. This makes sense, as the number of members greatly impacts the experience the existing members have (number of members affects costs, wear and tear of club property and the intimacy of the club). What Wellman does here is try to argue that a country has the same properties as a club or association. However, he fails to address a very important flaw in his argumentation. Where marriage and the joining of an association or club is voluntary, and not mandatory, being part of a state is.

Cole spots the same issue as I describe above, and nicely captures it:

“However, when one exits a marriage, one does not need to have another marriage to enter, and this is the same with many associations—the right of exit does not require that one has another association to enter into. There is, if you like, a “space” one can enter without difficulty, and where one can remain indefinitely. One never needs to enter into marriage, or a golf club, or any of the other kinds of association that are often appealed to in the immigration debate. This is why it is plausible to suppose that here the right to exit does not entail a right of entry, because the right of exit does not depend on entry elsewhere. This is dramatically and importantly not the case when it comes to nation states. Exit from this kind of association does depend on being able to enter another one, both territorially and civically. There is a “space” of statelessness, but it is not one anybody would wish to enter—it is deeply problematic and dangerous, and nobody can develop their life prospects in that space to any degree. While it is plausible to suppose that the right of exit does not entail a right of entry into the other kinds of associations, like marriages and golf clubs, because there is no need to enter another association in order to enact the right to leave, in the case of the nation state there is a need to enter another association in order to enact the right to leave, and so in this case it is plausible to suppose that the right of exit does imply the right of entry.”²⁵

Conclusion

Whilst I am willing so accept Wellman’s premises, and acknowledge the necessity for a country to enjoy the right to self-determination, I disagree with the extend to which a country has this right. I would rather call it a presumptive, and non-absolute, right. Such a right can be outweighed by other, more pressing, concerns. In the following chapter I will explore the reasons a state can have to restrict immigration.

²⁵ Wellman and Cole, *Debating the Ethics of Immigration*, pp. 203–4.

Restricting immigration

It is important to note that both Oberman and Miller agree that human rights are not absolute, as Miller points out: "...nearly all accounts of rights are conditional in this sense, since they concede that catastrophic circumstances may arise in which even basic human rights can justifiably set aside"²⁶. They however differ when it comes to what arguments can be justifiably used to deny immigration. Wellman takes it a step further by claiming that the right to self-determination trumps all other concerns.

David Miller brings forward three reasons for limiting immigration²⁷:

1. Overall numbers. Miller argues that unless the immigration is countered by emigration the population size will grow within a state's jurisdiction. When states have put forward policies and objectives that are directly influenced by, and to scale to, the population size, it is important for states to be able to control the population size. When a state cannot control their population size, they cannot complete their own policy targets.
2. Cultural shifts. Miller argues that states have an interest in preventing radical cultural shifts. Migration within a modern state is much more homogeneous than immigration from a foreign culture. The influx of these foreign cultures can erode the national language, amplify already existing cultural divisions, and damage their inherited culture. He notices that cultures always tend to converge to one another, and that thus language, political values, and norms of socially accepted behaviour can shift.
3. The composition of the citizen body. Miller brings forward this argument under the assumption that immigrants will be able to become full citizens after residing in the country for a certain period of time. He notes that if that is the case, the immigration will not only change the population size and culture, but also the citizen body. Democratic systems are balanced between many rivalling ideological, ethnic and religious groups. Allowing for immigrants to become full citizens would alter the balance of this complex political system. Examples include the Russians in Ukraine or the Kurdish in Turkey.

Having outlined and established that there are reasons to restrict immigration, I will now analyse if these reasons are morally justifiable.

²⁶ David Miller, "Is there a human right to immigrate" (2015), p. 5

²⁷ David Miller, "Is there a human right to immigrate" (2015), p. 23-24

Justifying open borders

Philip Cole, a prominent advocate of open borders, takes a normative and ethical approach to defend his claim for open borders and a right to immigration. Rather than focussing on the libertarian argument that assumes superiority of individual liberty over group interests, or on Oberman's human rights approach, Cole focusses on what global justice requires. Doing this, Cole combines the theories of human rights, global justice and the ethics of migration to form a positive normative argument in favour of open borders²⁸.

Before diving into the development of the argument of why border restrictions are morally unjust, I will outline a few schools of thought and definitions.

Moral universalism

At the core of our Western ethical considerations lies the idea that people are equal. We use this principle of equality to argue why slavery is horrible and unjustified, why racism is not to be tolerated, and why aristocratic regimes are unjust. Intuitively, this makes sense, as even children feel treated unfairly when one of their friends gets a bigger piece of the birthday pie at a party. When people are treated differently than others, we expect there to be a morally relevant reason for doing so, and we expect this to be consistent across time.

Not everyone agrees with this notion of moral universalism.

Moral particularism

Moral particularism does not start with the notion that every human is morally equal to every other human. Rather they begin with the principle that: "agents are already encumbered with a variety of ties and commitments to particular other agents, or to groups or collectivities, and they begin their ethical reasoning from these commitments"²⁹. Rather than morals being applicable universally, they believe that it is case dependent.

Cosmopolitanism

Cosmopolitans believe that every human being belongs to a single universal human community, and base this on there being a shared human morality. They argue that all citizens of the world should enjoy equal moral standing.

Communitarianism

Communitarians believe that, rather than starting from the individual, the connection the individual has to the community is most important. They claim that a community has moral value, which differs from the cosmopolitan view, and therefore use a different scope for moral principles. Rather than apply moral universalism to all members of humanity, like the cosmopolitans, they apply it to their community. This causes the community to be of moral value.

Having outlined the different definitions of the above mentioned schools of thought, I will now analyse Cole's claim that moral universalism is problematic when it comes to arguments in favour of closing

²⁸ Cole, *Debating the Ethics of Immigration*, pp. 160.

²⁹ David Miller, *On Nationality* (Oxford: Clarendon Press, 1995), p. 50

borders: “The problems arise because what emerges from ethical universalism is a principle of the moral equality of persons, a principle that all persons have equal moral value, so that moral principles apply to all equally in the absence of any morally relevant differences”³⁰. According to Will Kymlicka this basic notion of equality is often used to analyse and criticize political theories and is found at the core of contemporary theories like Nozick’s libertarianism or Marx’s communism³¹. However, Kymlicka specifically mentions that: “A theory is egalitarian in this sense if it accepts that the interests of each member of the community matter, and matter equally. Put another way, egalitarian theories require that the government treat its citizens with equal consideration; each citizen is entitled to equal concern and respect”.³² This definition is problematic for the immigration research question, as it specifically talks about citizens and their respective political communities rather than humans in general. It appears to take a more communitarian notion of moral universalism, and this is exactly what cosmopolitans object to. As Onora O’Neill says: “It seems to me that an adequate account of justice has to take seriously the often harsh realities of exclusion, whether from citizenship of all states or from citizenship in the more powerful and more prosperous states. Why should the boundaries of states be viewed as presuppositions of justice rather than as institutions whose justice must be assessed?”.³³

This is an important question, because it questions a state’s right to exclude. Moreover, it possibly contradicts Wellman’s earlier arguments in favour of this claim by virtue of the principle that all humans are equal. In order to include and exclude people from a state, a proper moral justification is required to avoid a lack of consistency with the principle of moral universalism. Going back to my birthday cake analogy, what moral justifications can be used to exclude people from the distribution of membership? Cole claims that this question is fundamental for the coherence of “the entire liberal project of justice”³⁴. He proposes a very valid and sound argument to substantiate this claim. Namely, that unless the groups are formed in a fair and non-morally arbitrary manner, the fair distribution of goods within that group counts for nothing. Similarly, unless states are formed fairly, the fair distribution and application of justice within that state counts for nothing.

This begs the question if states are formed fairly, and what fairness would constitute in this situation. John Rawls, a prominent moral and political philosopher, has laid the normative groundworks in his “A Theory of Justice”³⁵. In his works he proposes to conduct a thought experiment, called the original position. He proposes that a group of people would come together to talk and think about how to structure the state both politically and economically. These people ought to do so from behind a “veil of ignorance” meant to take all arbitrary factors out of the discussion. Behind this veil, you do not know where or in which

³⁰ Cole, *Debating the Ethics of Immigration*, pp. 177. For statements of this understanding of liberal political theory, see Amy Gutmann, *Liberal Equality* (Cambridge: Cambridge University Press, 1980), p. 18; Bruce Ackerman, *Social Justice in the Liberal State* (New Haven, CT, and London: Yale University Press, 1980), p. 67; and Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Clarendon Press, 1990), pp. 34–37. For a summary see Phillip Cole, *The Free, the Unfree and the Excluded: A Treatise on the Conditions of Liberty* (Aldershot, UK: Ashgate, 1998), pp. 15–17.

³¹ Kymlicka, *Contemporary Political Philosophy*, p. 34.

³² Kymlicka, *Contemporary Political Philosophy*, p. 4.

³³ O’Neill, *Bounds of Justice*, p. 4.

³⁴ Cole, *Debating the Ethics of Immigration*, pp. 179

³⁵ Rawls, (1971). *A theory of justice*. Cambridge, Mass. :Belknap Press of Harvard University Press.

family you will be born, neither do you know your gender, colour of skin or intelligence. From this position of ignorance, Rawls proposes two principles of justice³⁶:

1. "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all".
2. "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."

Moreover, Rawls states: "What the theory of justice must regulate is the inequalities of life-prospects between citizens that arise from social starting positions, natural advantages and historical contingencies".³⁷ When looking at this quote of Rawls, it becomes immediately apparent that arbitrary state boundaries clash with what a proper theory of justice would constitute. The country in one is born most definitely dictates relative social starting positions, natural advantages and historical contingencies. As it is arbitrary in which country one is born, and that thus the relative benefits one receives from being born in particular countries is arbitrary, we must conclude that exclusion from states is unjust according to these definitions of what is fair.

It ultimately comes down to whether the distinction between member and non-member is valid. Cole describes a common logical fallacy; the *petitio principii*. This fallacy outlines the error of already taking for granted the proposition in one of the premises. Cole continues to analyse if prominent closed-border arguments commit this fallacy, and do not defend the moral justification of the distinction between members and non-members.

The first argument Cole analyses is the following: "we can argue that the right to exclude arises from the priority of the rights of citizens over those of noncitizens: citizens have rights to welfare, etc., embodied within their citizenship (citizenship just is—among others things—this bundle of rights), and noncitizens do not; and respecting these rights necessitates discriminating between members and non-members of the political community, which entails the right to exclude". However, this argument does not address the ethical question why the distinction between members and non-members is justified, it only states that there is a distinction.

The second argument Cole analyses is: "members have the right to exclude because they have contributed to the economic prosperity of their nation-state through work and taxation and other forms of contribution, and have the right to benefit from these "cooperative schemes". Non-members have made no such contribution, and so to allow them access to the national "cake" is unfair. Members therefore have the right to exclude non-members from that national cake, and this necessarily takes the form of excluding them from membership as such". Intuitively this argument makes sense, as members have collectively invested in infrastructure and many other things we collectively enjoy. Any new member would capitalize and use what the members have collectively arranged without contributing to it; so called free-riding. Without diving into the rebuttal of such an argument as Cole continues to do, I'd rather focus on the validity of the argument itself. The argument does not explain, but rather takes for granted, that it is contingent on being a citizen to be able to contribute to the national good, likewise the argument ignores that not being a citizen does automatically not allow you to contribute. It commits the same logical

³⁶ Rawls, (1971). A theory of justice. p. 266.

³⁷ Rawls, "The Basic Structure as Subject," in A. Goldman and J. Kim (eds.), Values and Morals (Dordrecht: Reidel, 1978), p. 56

fallacy and does not provide a valid and sound argument to why exclusion is ethically justified, it rather focuses on the distribution of wealth instead of the distribution of membership.

Conclusion:

When accepting the cosmopolitan view of moral universalism, it becomes obvious that border restrictions are based on morally arbitrary values. As morally arbitrary values are unjust, and outside the capability of an individual to dictate or influence, I must conclude that border restrictions are unjust as well. The notion that in liberal democracies the citizens are all equal in their relation to the state, and one another, counts for nothing if the nation state is formed in an unjust and morally arbitrary manner.

Conclusion

In the beginning of this thesis I have shown that there is no current legal human right to immigration present in the existing human rights declarations. I have continued to show that the debate of whether or not one could be added on the basis of current human rights is non-conclusive, as David Miller successfully rebuts the arguments put forward by Kieran Oberman. From this position I have outlined the reasons to restrict immigration, which in my mind outweigh the reasons to allow it. However, when looking at the question if there should be a human right to immigration from an ethical point of view it becomes painstakingly clear that there is an unjust asymmetry between the right to emigrate and the not-yet-existing right to immigrate. When accepting the principle of moral universalism, according to the cosmopolitan view, I must conclude that states, and thus citizens, bear the responsibility to eliminate and compensate morally arbitrary differences between members of humanity. This includes the elimination of the restrictions on immigration, as it is purely based on chance (and unfortunately luck), in which country you are born.

Moreover, there is an incoherency and asymmetry between the human right to emigrate, and the non-existing human right to immigrate. Without using this as the basis to defend a human right to immigration, it is important to note that this asymmetry is problematic. Without the option to enter elsewhere, the right to leave holds no value. It is like stating one has the right to leave a country, but not to cross the international border.

However, my plea for a human right to immigration is not absolute. There are a variety of ways in which a state can bear their responsibility in the elimination of unjust or morally arbitrary factors. When the costs of allowing immigration become too great for a nation, they should have the option to aid the unfortunate in a variety of different ways. Defining what costs are too great, and what kind of alternative contribution a country can make is still open to debate. However, I would like to urge that when a process takes place to make international rules regarding these issues, that they take a democratic form. Hopefully the people involved will show compassion and reason, much like behind a hypothetical veil of ignorance, rather than simply defend their own privileged position or try to maximize personal gain.

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17. <http://www.un.org/en/documents/udhr>
18. Stillz highlights three interpretations to leave in "Is There an Unqualified Right to Leave?" p.59
19. Whelan highlights the interest in travel in "Citizenship and the Right to Leave," p. 638.
20. Cf. Dowty, *Closed Borders*, p. 4, who suggests that emigration is grounded in a right of personal self-determination, which gives one "the right to remain party to one's social contract or to seek another";

Whelan, "Citizenship and the Right to Leave," p. 638, argues that a right to leave "seems to go at least part way towards making citizenship and its obligations entirely voluntaristic."

21. Stillz "Is There an Unqualified Right to Leave?" p.63

22. Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (New York: Oxford University Press, 2011) pp. 13

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