Author's personal copy

Law and Philosophy (2010) 29:717–745
DOI 10.1007/s10982-010-9083-9
© Springer 2010

MATTHEW LISTER*

IMMIGRATION, ASSOCIATION, AND THE FAMILY

(Accepted 8 July 2010)

ABSTRACT. In this paper I provide a philosophical analysis of family-based immigration. This type of immigration is of great importance, yet has received relatively little attention from philosophers and others doing normative work on immigration. As family-based immigration poses significant challenges for those seeking a comprehensive normative account of the limits of discretion that states should have in setting their own immigration policies, it is a topic that must be dealt with if we are to have a comprehensive account. In what follows I use the idea of freedom of association to show what is distinctive about family-based immigration and why it ought to have a privileged place in our discussion of the topic. I further show why this style of argument neither allows states to limit nearly all immigration nor requires them to have almost no limits on immigration. I conclude by showing that all states must allow some degree of family-based immigration, and that this is a duty owed not to 'outsiders' seeking to enter, but rather to current citizens.

Any discussion of immigration that hopes to be comprehensive must include a discussion of the family. This is so for both practical and theoretical reasons. From the practical point of view the family must be discussed since family-based immigration[1] is the largest form of

* An early version of this paper was presented at the Northeastern Political Science Association annual meeting in 2007. My thanks to Tom Donahue for organizing that session and to David Alvarez Garcia for his helpful comments at that time. Sarah Song kindly assigned a draft of the paper to her students at Berkeley. My thanks to her and her students, especially Genevieve Painter, for their comments. Stephen Perry, Samuel Freeman, Jon Mandle, Alan Brinton, Kok-Chor Tan, Howard Chang, Ekaterina Dyachuk, and two anonymous reviews for Law and Philosophy also provided very helpful comments.

[1] By family-based immigration I shall primarily mean cases where one member of a family (or would-be family, in some cases) is already an 'insider' in the country of immigration – usually a citizen but sometimes a legal permanent resident, and the would-be immigrant is a family member who is allowed to immigrate, or at least seeks to immigrate, because of the family tie in question. Exactly which family ties should qualify for immigration benefits is part of what I hope to establish in this paper. There are many possible complications to the basic case given above. I shall discuss some of them as necessary, but shall mostly be concerned with this sort of core case in this paper.

Author's personal copy

legal immigration in the world. In a great number of countries family based immigration is, effectively, the only way in which a would-be immigrant may gain access to permanent resident status.[2] Given the massive role that family-based immigration plays, it is necessary that any account of immigration be able to make sense of this feature.

Furthermore, even if many of the factors that now drive large amounts of international migration, such as war, poverty, great inequality in opportunity, political persecution, and lack of freedom were eliminated – if, say, Rawls's law of peoples[3] were in effect – family-based immigration would still need to be taken account of since we could expect it to continue on a large scale. So long as people are free to travel across borders for personal travel, work, studying, or just to explore, people will fall in love across borders and hope to form (or re-form[4]) family units. Since this sort of freedom of movement is the sort we should take for granted to exist in a free world (large-scale restrictions on travel and emigration being one of the hallmarks of dictatorships) we should expect family-based immigration to permanently be part of our world.[5] Given this, even an immigration policy addressed to ideal theory must address the question of family-based immigration.

Family-based immigration also presents several related theoretical questions. Firstly, family-based immigration is, in two ways, likely to be inefficient. To the extent that we think that immigration policies ought to be crafted to promote well-being, both of 'insiders' and 'outsiders', we might therefore have doubts about the advisability of promoting family-based immigration. The first potential inefficiency is that family-based immigration is usually believed to be less likely to benefit the country of immigration than would an immigration system aimed more directly at improving the economic well-being of the target country,

[2] For discussion of this in relation to the major 'countries of immigration' in the world, as well as in relation to France and Germany, see James P. Lynch and Rita J. Simon, *Immigration the World Over: Statutes, Policies, and Practices* (Rowman & Littlefield, 2003). *See also*, Castles, Stephen and Miller, Mark J., *The Age of Migration*, 4th ed. (Palgrave-Macmillan, 2009), p. 110.

[3] Rawls, John, *The Law of Peoples: With 'The Idea of Public Reason Revisted'* (Harvard University Press, 2001).

[4] Cases where families might benefit from family-based immigration can result from the 'formation' of a family, when a citizen of one country marries a non-citizen, or 're-formation' or 'reunification', where one family member migrates to a new country, acquires citizenship, and then brings in his or her family members after acquiring the right to do so. Both types are currently common. I intend my account to cover both formation/unification and re-formation/reunification, though from now on I shall only use the former term.

[5] It is hard to know with any certainty how extensive family-based immigration would be in a world that satisfied Rawls's law of peoples, as there are factors which push in both directions. I shall discuss the matter further below.

Author's personal copy

since many people will immigrate who otherwise would not qualify under a system that aimed to maximize the economic well-being of the target country.[6] This aspect is often noted by those who want the US immigration system, which places great emphasis on family unification, to become more like the Canadian system that gives more emphasis to certain skills that are thought likely to be beneficial to Canada.[7] If we do not assume a general right to migrate to another country, and therefore hold that states may, within limits, regulate 'discretionary' immigration, so as to achieve any acceptable ends, we might here ask whether a state could seriously restrict or eliminate family-based immigration so as to promote national economic well-being.[8]

[6] I think it is easy to over-state this case and to ignore the ways that immigration based around the family, rather than around individuals, can also have positive economic effects for the target country, even when compared with individuals chosen for features that we except would make them significant economic contributors. I will discuss some of these issues later, but here merely want to point out that this particular effect is, I believe, often over-stated. Furthermore, we may doubt that economic well-being is the correct measure of welfare, and think that family-based immigration is less likely to be 'inefficient' if we take another measure. I am sympathetic to this claim, but as economic well-being is a common, perhaps the dominant, measure in most government policy-making (it is the standard used in most cost-benefit analysis, for example) it seems worth here focusing on this method, at least to show it is not decisive.

[7] See, among many examples, Macedo, Stephen, 'The Moral Dilemma of U.S. Immigration Policy', in Swain (ed.), *Debating Immigration* (Cambridge University Press, 2007), p. 67 and p. 77, Borjas, George, *Friends or Strangers: The Impact of Immigrants on the U.S. Economy* (Basic Books, 1990), pp. 218–225. Borjas thinks the Canadian system is better than the U.S. system but does not think it goes far enough. Though he does not explicitly say so, he strongly hints that he favors stringent country of origin limitations on immigration in addition to efforts to more actively recruit 'skilled' workers. Canada does provide for significant family-based immigration of immediate family members, and likely meets the minimal requirements of justice I set out later in this paper, despite having fewer categories for family-based immigration than does the U.S.

[8] Obviously, many philosophers and others working on immigration will reject this assumption as a matter of principle. I will not here provide a defense of the claim that states have some right to set limits on immigration, even well below breaking-point considerations accepted by open or near-open borders theorists such as Joseph Carens, Phillip Cole, Michael Dummett, and Bruce Ackerman. (For these arguments, see Carens, 'Migration and Morality: A Liberal Egalitarian Perspective', in Barry and Goodin (eds.), *Free Movement* (Penn State University Press, 1992), pp. 28–31, Ackerman, *Social Justice in the Liberal State* (Yale University Press, 1981), pp. 89–95, Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh University Press, 2001) and Dummett, *On Immigration and Refugees* (Routledge, 2001), pp. 14–21.) My personal sympathies lie close to the position argued for by Joseph Heath, in his articles, 'Immigration, Multiculturalism and the Social Contract', *Canadian Journal of Law and Jurisprudence* 10: (1997) 2 and 'Rawls on Global Distributive Justice: A Defence', *Canadian Journal of Philosophy Supplementary Volume* (2007), and Stephen Perry, in his article, 'Immigration, Justice, and Culture', in Schwartz (ed.), *Justice in Immigration* (Cambridge University Press, 1995), pp. 94–135. If one accepts that some limits on immigration are compatible with liberal principles of justice, then the considerations in this paper are immediately and directly relevant. However, I contend that the sorts of cases that I here consider are important even for those who claim to favor open borders, for at least two reasons. Firstly, if we are not to have chaos, some sort of priority principles will need to be in place, so that flows may be met in an orderly way that does not, for example, swamp local services. Considerations here considered may help provide such principles. Secondly, those who favor open borders as an ideal may accept my arguments as transitional and second-best. Given that we are unlikely to have a world with open borders in the near future (even if we think such a world is desirable), it is useful to develop principles for the world we are likely to face. As I do not think that open or nearly open borders are a requirement of justice, I do not accept this 'principles for the second-best' reading of my account, though I contend it is a plausible one for those who do support open borders, as in a world with immigration restrictions, the problem of family-based immigration must be faced.

Author's personal copy

The next 'inefficiency' is related to the fact that basing immigration rights around family unification is probably less likely to improve the well-being of the global poor than would a program that directly aimed at such a goal. Since family-based immigration, almost by definition involves, international travel by one or more party, and since international travel is not within the normal reach of the worst-off globally, it is safe to assume that most of those who benefit from family-based immigration rights are not in the globally worst off group. So, if we think that immigration policy ought, either absolutely or to some degree, give priority to the worst-off globally, we might believe that we should limit family based immigration, so as to better devote resources to help this group, perhaps by directly sponsoring immigration to more wealthy countries for the worst off.[9]

The second theoretically important aspect of family-based immigration arises because family-based immigration differs from many other types of migration in that it necessarily involves not just an outsider seeking to enter[10] but also someone who is already an 'insider', seeking to bring in the outsider. Given this, we must take into account the rights not only of the would-be immigrant, but also the rights of the current member.

In what follows I shall argue that the second consideration provides grounds for dealing with the first. That is, I shall argue that the way to think about family-based immigration is to look at it primarily through the perspective of the current citizen, rather than the would-be immigrant.[11]

---

[9] To my knowledge no country does this outside of refugee or temporary protection programs of various sorts. Such programs are usually not based on economic need, but other special grounds, and so do not directly fit the example under consideration. A superficially similar program is the 'diversity visa', the so-called 'green-card lottery', in the U.S., which provides for several thousand immigrant visas to residents of 'underrepresented' countries via a lottery system each year. See INA § 203(c). However, because the visas are made available to countries with low immigration to the U.S., many of the visas are reserved for citizens of well-off countries (though many go to African countries as well). Furthermore, the education and work experience requirements, as well as general 'public charge' requirements, of the type discussed below, keep this program from being effectively directed at the worst-off globally. Finally, there is good reason to think that immigration is probably a poor way to help the worst-off globally. For discussion of this point, see Pogge, Thomas, 'Migration and Poverty', in Goodin and Pettit (eds.), *Contemporary Political Philosophy: An Antholgy*, 2nd ed. (Wiley-Blackwell, 2005), pp. 710–720. I largely agree with Pogge's conclusion in this article, though I will not address this issue at length in this paper.

[10] Here I am ignoring a related but distinct question of whether a state may legitimately offer a non-member a chance to enter but at the same time refuse to allow the would-be immigrant's family to join him or her. This question comes up most starkly in the case of guest-workers, a subject that must be saved for another discussion.

[11] The 'primarily' clause here is important. I shall note in what follows some ways in which the receiving state must give some weight to the interests of the non-citizen would-be immigrants. But, given the working assumption of the paper that there is no general right to free movement and that states have significant discretion in setting their own immigration policies, it seems to me preferable to start from the perspective of the citizens of the receiving state, for reasons that will be developed below.

Author's personal copy

I shall argue that states have a duty to their current citizens to allow them to bring in non-citizen family members, at least of certain sorts (primarily spouses but not limited to this). States may take limited measures to ensure reciprocity among members, I shall argue, but may not, at least in normal cases, eliminate this right on the part of citizens or take steps that would make the exercise of such rights impossible for all or nearly all citizens. The case of family based immigration, then, is one where the discretion of the state in shaping its immigration policy must be severely limited.

I will argue that this right to bring in non-citizen family members is based on the fundamental right to form intimate relationships of one's choosing. This right is an essential one for personal autonomy and in the development and exercise of what Rawls calls the 'moral powers',[12] and as such cannot, at least in any serious way, be traded off for gains in utility or to satisfy the preferences of a majority.[13] This right is, at least in part, a special sub-branch of the freedom of association. That this is so lets us see two potential difficulties that must be overcome if my account is to be successful. First, a long line of thought, reaching at least back to several of the 'founding fathers' of the U.S.,[14] and recently articulated by Michael Walzer and Christopher Wellman,[15] has held that freedom of association actually allows states to close their borders entirely, if that is what a majority wishes.

On the other hand, one might think that my argument proves too much, showing that our working assumption that states have discretion to limit what I term (following Michael Blake[16]) 'discretionary immigration' is mistaken. This would be the case if freedom of association created a general right to associate with non-citizens on whatever terms any particular citizen wished. If this were so,

[12] The 'two moral powers' are, (1) the capacity for a sense of justice and the ability to act from principles of political justice that specify fair terms of social cooperation, and (2) the capacity for a conception of the good and to rationally revise and pursue such a conception. See Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), pp. 18–19. Much helpful discussion of the moral powers is to be found in Freeman, Samuel, *Rawls* (Routledge, 2007). See especially pp. 54–56.

[13] For a particularly interesting account of how the family can affect the development of the moral powers see Green, T. H., 'The Right of the State in Regard to the Family', pp. 230–243 in his *Lectures on the Principles of Political Obligation* (University of Michigan Press, 1967). I do not agree with many of the details of Green's account, but believe that it offers one of the more interesting accounts of the role of the family in the development of what Rawls (though not Green) calls the moral powers.

[14] See, e.g., *Records of the Federal Convention* (Yale University Press, 1966), vol. 2, p. 238.

[15] See Walzer, Michael, *Spheres of Justice* (Basic Books, 1984), especially chapter two, 'Membership', and Wellman, Christopher, 'Immigration and Freedom of Association', *Ethics* 119: (October 2008), 109–141.

[16] Blake, Michael, 'Discretionary Immigration', *Philosophical Topics* (2004), 273–290.

Author's personal copy

states would have some freedom left to limit immigration, but this freedom would be greatly circumscribed since, while a state could keep out those seeking to enter unilaterally, the wishes of any citizen to association with a non-citizen would be enough to over-ride the general rule.[17] If my account is to be successful, then, it must show that family-based immigration is special in that it can outweigh the associative desires of a majority, but can also be distinguished from other associative rights in a way that calls for giving a special place to the family, as opposed to other associations in the immigration context. In what follows I shall first set out my general account of why states have a duty to extend family-based immigration benefits to their members, and then show how and why this avoids the two problems noted above.

I. WHY FAMILY-BASED IMMIGRATION RIGHTS?

The right to form and maintain intimate relationships is among the most fundamental and important held by free people. This right is, as I have noted, a subspecies of the general right to freedom of association. The general right is considered by Rawls as being among the basic liberties necessary for the development of the moral powers.[18] It is also a right protected in the U.S. Constitution and in the constitutions of other liberal states, as well as a right proclaimed in the United Nations Universal Declaration of Rights.[19]

Here freedom of association, especially in regard to intimate association, works in two main ways. First, associations help us develop our sense of justice. By interacting with others we learn to

[17] I am here assuming that states do not have to give nearly as much weight to the associative desires of outsiders as to insiders (though also not no weight). This follows, I believe, from a general 'modest cosmopolitan' position of the sort argued for by Jon Mandle in his book *Global Justice*, Polity 2006, and by Samuel Scheffler in his paper 'Conceptions of Cosmopolitanism', in his *Boundaries and Allegiances* (Oxford University Press, 2003), pp. 111–130. I believe that a modest cosmopolitanism along these lines is the correct view, but I will not argue for this claim here.

[18] Rawls, *Justice as Fairness*, p. 44. See also Freeman, *Rawls*, pp. 47–48, 55–56.

[19] Freedom of association is not *explicitly* mentioned in the US Constitution but is usually inferred from the rights protected by the 1st Amendment (assembly, free speech) 5th and 14th amendments (due process and equal protection) and, more controversially, the 10th amendment (reserving other rights to the people). The UN Universal Declaration of Human Rights proclaims, in art. 20, that, 'Everyone has a right to freedom of peaceful assembly and association'. Rights closely related to freedom of association are set out in articles: 12 (privacy in family life and home), 13 (freedom of movement within the state), 16 (right to marry and form a family), 17 (own property in association with others), 18 and 19 (freedom of conscience and to seek information). See http://www.un.org/Overview/rights.html. The Universal Declaration is, of course, aspirational and not a legally binding document, but the inclusion of freedom of association does give reason to think it is widely recognized as important.

Author's personal copy

temper our wants and desires, to consider the good of others, and to interact in mutually beneficial ways. This applies to associations of all sorts, but is perhaps especially salient in the family. (Of course, there is no guarantee that the family, or any association, will be well-used and lead to virtue as opposed to vice. That this is so is one of the dangers people living in a free society must face, and does not change the fact that these associations are essential for moral development.) As Rawls notes, 'Citizens must have a sense of justice and the political virtues that support political and social institutions', and therefore, 'The family must ensure the nurturing and development of such citizens in appropriate numbers to maintain society'.[20] We see here the importance of the family in developing a sense of justice.

Freedom of association works in the development of the moral powers in a second way as well. The right to free association, perhaps especially intimate association, is a pre-condition of good lives, and hence is essential if people are to be able to exercise their ability to form a conception of the good. Without this right, the large majority of good lives would be precluded. This is perhaps especially so of the right to form intimate associations such as the family, not only because most people will, and will want to, form such associations, but also because such associations are necessary for the perpetuation of society. Given that this right is a pre-condition to the formation of most all conceptions of a good life, it will be protected as a basic right by Rawlsian deliberators.[21]

[20] Rawls, 'The Idea of Public Reason Revised', in Samuel Freeman (ed.), *Collected Papers* (Harvard University Press, 2001), p. 596.

[21] An obvious worry about my account at this point is that Rawlsian deliberators, notoriously, consider themselves, while behind the full veil of ignorance, to be in a 'closed society'. See Rawls, *Justice as Fairness: A Restatement*, p. 40. Given this, it is not immediately obvious how an argument such as mine extends to the right to bring in outsiders. My view, developed in more detail below, is that the basic right to form intimate associations is protected in the constitutional stage of the four-stage process that Rawls discusses in *A Theory of Justice*. See *Theory, revised edition* (Harvard University Press, 1971, 1999), pp. 171–176. At the later stages, as the veil of ignorance is progressively lifted, the parties, for reasons I discuss below, come to see that the same right that protects domestic association must allow for family-based immigration, if it is to be effective. This is done without the controversial attempts to 'globalize' the original position in the way suggested by Thomas Pogge, Charles Beitz, or Joseph Carens, among others. See *Realizing Rawls* (Cornell University Press, 1989), *Political Theory and International Relations* (Princeton University Press, 1979, 1999), and 'Aliens and Citizens: The Case for Open Borders', in Kymlicka (ed.), *The Rights of Minority Cultures* (Oxford University Press, 1995), pp. 331–349, respectively. Seyla Benhabib, in 'The Law of Peoples, distributive justice, and migration', chapter 3 in her *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004), discusses what she sees to be certain pathologies in Rawls's account of international justice, and draws conclusions from this for immigration policy. I believe that her account is systematically distorted by an incorrect understanding of how the 'closed society' premise in Rawls's argument functions, as well as other significant misreadings of Rawls, but I cannot pursue this issue in more depth here. See Benhabib, *The Rights of Others*, pp. 71–128, and especially pp. 85–93.

Author's personal copy

The same conclusion can also be reached by focusing on the idea of 'deliberative freedoms', as developed by Sophia Moreau in recent work. These are 'freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features…'. This entails, Moreau argues, that 'In a liberal society, each person is entitled to decide for herself what she values and how she is going to live in light of these values'.[22] If our deliberative freedoms relating to forming associations, especially intimate associations, are to be effective, they must be protected as a matter of right. But, as I shall demonstrate below, in the case of intimate associations such as the family, if this deliberative freedom is to be effective, it must allow for family-based immigration. However, as I shall also demonstrate, other forms of association do not entail a right to immigrate.

Importantly, what is protected by the right in question here is the right to form certain sorts of relationships or associations, not the right to be successful in any such attempt. The state cannot, of course, guarantee that anyone will benefit from any particular association, or that an attempt to form an intimate association will be successful, nor is compensation for such unhappy attempts necessary. It is not the happiness of individuals that is guaranteed here, but their basic freedoms and liberties. A person who is unlucky in love may have the same subjective feeling of despair as a person who was prevented from forming a relationship she wanted to because of legal rules, but only the second one has been wronged.

But, while freedom of association in general is important and protected by all liberal states, not all types of associations are given the same sort or degree of protection. As a general rule, the more intimate and closely-knit an association is, the fewer restrictions the state may put on the association.[23] Examples from employment and housing law can help make this point clear. First consider employment law.

[22] Moreau, Sophia, 'What is Discrimination?', *Philosophy and Public Affairs* 38(issue 2): (2010), 147. Moreau uses this idea to discuss discrimination, not specifically association, but it seems to me easily applicable to both ideas.

[23] This is not to imply that other forms of association, such as political association or labor organization, are not extremely important. They are, which explains why such rights must be protected in any state, if it is to be just. But note how the same sort of anti-discrimination limits that I discuss below have been imposed in the case of political and labor organization, showing how, even though these are important forms of association, they may still be regulated for broader purposes in a way we do not think intimate associations may. See, for example, *Smith v. Allwright*, 321 U.S. 649 (1944), finding the Texas 'white primary' unconstitutional. Labor organization may stretch over borders as well, though it is not clear that such activities must involve *immigration*, as opposed to more temporary forms of movement. I discuss related issues below.

Author's personal copy

A business is a sort of association and those who control such associations have a large degree of discretion in setting the terms of association. They may, for example, require standards of dress and grooming, and can set minimum requirements for positions. But, in most cases, businesses may not discriminate on the basis of race or sex.[24] Here we see one liberty traded off against another, where freedom of association is limited to protect people from arbitrary discrimination.[25] But, there is an exception to this rule: businesses that employ less than fifteen employees are exempt from anti-discrimination rules. We find a similar pattern in fair housing laws. In general, those seeking to sell or rent housing may not discriminate on the basis of race or family status.[26] But again there is an exception. If an owner is renting rooms in a home which she occupies, she is exempt from these rules.

In both of these cases we see a pattern. The more intimate an association, the less subject to limitations by non-members it is allowed to be. Of course, this rule is not absolute – it too must be balanced against other basic liberties. If a certain form of association made the development of the moral powers impossible, for example, we would have good reason to regulate it no matter how intimate it might be. This can explain why we do not give parents full discretion in raising their children, for example, even though this limits familial (and other) association. It can also help explain why we do not allow child or, more controversially, polygamous marriages.[27]

[24] Title VII of the Civil Rights Act of 1964 ('Title VII').

[25] George Kateb has argued that such trade-offs are in almost all cases illegitimate and that freedom of association may be limited only to protect the 'vital claims reaching to the life, liberty, or property of others' from serious harm. See Kateb, 'The Value of Association' in Amy Gutmann (ed.), *Freedom of Association* (Princeton University Press, 1998), p. 40. Kateb claims that his position is both the morally right one and also the one that follows from the best interpretation of the US Constitution, despite the fact that the Supreme Court has consistently rejected his account. His more basic claim is that any approach that does not grant near unlimited rights of freedom of association cannot take it to be a basic right but must see it as merely instrumental to the exercise of some other basic right such as freedom of speech. This is, I believe, a mistake, since we might well think that basic rights may be traded off against each other so as to have the largest or most adequate scheme of rights without thinking that any one must be reducible to or merely instrumental for the exercise of another. Given this, I shall not further argue against the claim that almost any limitation on freedom of association is illegitimate.

[26] Fair Housing Act of 1968, as amended in 1974 and 1988, 42 USC § 3601-19, 3631. Some cities have even stronger fair housing regulations.

[27] It seems unlikely that polygamous marriages are always or necessarily harmful. To the extent that they are not, they ought not be prohibited. But, in many actual cases it does seem that polygamy is part of a pattern of domination of women by men. To the extent that the practice of polygamy keeps women from being able to be autonomous it is reasonable to regulate it. For a particularly interesting discussion of how polygamy might restrict the development of the moral powers (though not put quite in these terms) see Green, *Lectures on the Principles of Political Obligation*, pp. 235–236. A somewhat similar argument is made by Thom Brooks in his paper, 'The Problem with Polygamy', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331492.

Author's personal copy

However, importantly for my argument, very few regulations on marriage and the family are acceptable. This is so since the family is the most intimate of all associations. The right to marry and form a family according to one's wishes is one that the U.S. Supreme Court has found, on a number of occasions, to be a 'fundamental right', one that can be restricted only for the strongest of reasons.[28] Although the Supreme Court does not use this terminology, I would argue that this right can be limited only to protect other basic liberties for all. It cannot, if a state is to be just, be limited for the sake of less basic liberties, or for gains in economic efficiency. And, if other forms of association are less fundamental than marriage, the right to marry may not be limited because of them.

States may legitimately[29] wish to limit immigration for reasons such as to better promote internal justice, to control population growth, and, within limits, to help shape the sort of communities that they wish to be. Some of these considerations are considerations of promoting efficiency. Others are designed to promote important duties of justice and basic liberties, among them freedom of association. This is the right invoked by Walzer when he argues for the rights of countries to limit immigration so as to form 'communities of character'.[30] Similar arguments have been put forth in recent times by Joseph Raz and Avishai Margalit and by David Miller.[31] The argument, however, is an old one. Gouverneur Morris made such an argument during the constitutional convention in Philadelphia, when he argued that, 'every society from a great nation down to a club had the right of declaring the condition on which new members should be admitted'.[32]

In all of these cases the argument is, or can be, cast in terms of freedom of association, where this is seen as necessary for the

[28] See *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1932).

[29] My claim here is only that these are legitimate goals that states may have, and that limiting immigration might, in some cases, be part of a strategy of achieving these goals. If open borders are required by justice, then these other legitimate goals will have to be addressed in different ways. If, however, as I am here assuming, states have some degree of discretion in setting their immigration policies, then these legitimate aims might function as reasons for adopting particular immigration policies, assuming that this can be done in a way that does not conflict with other considerations of justice.

[30] Walzer, *Sphere of Justice*, p. 62.

[31] Raz, Joseph and Margalit, Avishai, 'National Self Determination', in Kymlicka (ed.), *The Rights of Minority Cultures*, pp. 79–93. See also Raz, *The Morality of Freedom* (Oxford, 1988), Miller, David, *On Nationality* (Oxford, 1995), p. 129, among other places.

[32] *Records of the Federal Convention*, vol. 2, p. 238. Quoted from Kesler, Charles, 'The Promise of American Citizenship', in Pickus (ed.), *Immigration and Citizenship in the 21st Century* (Rowman & Littlefield, 1998), p. 15. Kesler largely endorses Morris's view.

Author's personal copy

development of the moral powers of both individuals and the people as a whole. Making reference to standard liberal principles, we may assume that states may not invoke such claims if they are invoked selectively against only certain outsiders on the basis of race or ethnicity (and perhaps religion).[33] Here we might see a parallel with the employment case – a country is less intimate than even the largest firm and as such the desire to not be near certain races cannot stand against the duty of equal respect. But, if a country is willing to limit all immigration regardless of race or ethnicity, then these arguments do not come into effect. The question is then whether, if applied equally without regard to race or ethnicity, a state could, on the basis of freedom of association and other important interests, eliminate or very greatly restrict family-based immigration. I shall argue that, consistent with justice, it could not.

Before going into this argument I want to first strengthen the case by recalling that even in an otherwise fully just world, this issue would remain a pressing one. In this way we might think that family-based immigration places a deeper or at least less contingent restriction on a state's discretion on its immigration policy. Recall that, in the world as we find it today, a significant amount of international migration is due to reasons that would not exist, or at least would be greatly limited in a just world-war, economic deprivation and lack of economic opportunity, lack of political and religious freedom, and so on. Now, suppose that these problems were eliminated. If this were the case, a significant portion of presently-existing family-based immigration would cease, since much of this starts from one person moving between countries, seeking to avoid one or more of the bad situations noted above, and then bringing family members at a later time, perhaps after the first immigrant has gained full membership.[34] In a just world such cases would largely disappear. This might lead us to think that in a just world family-based immigration would be of minimal importance.[35]

---

[33] On this point, see Perry, Stephen, 'Immigration, Justice, and Culture', pp. 114–115, and Blake, Michael, 'Immigration', in Frey and Wellman (eds.), *A Companion to Applied Ethics* (Blackwell, 2005), p. 228.

[34] For discussion of this sort of case see Borjas, *Friends or Strangers*, pp. 177–178.

[35] It is possible that Rawls thought something like this, since, in his few short words on immigration in *The Law of Peoples* he claims that immigration would not be a serious issue in a world that met the demands of the law of peoples. Rawls, *The Law of Peoples*, pp. 8–9. As Rawls says so little about immigration, I hesitate to attribute any specific views to him, but insofar as he did believe this he was mistaken, I shall show.

Author's personal copy

However, there is reason to think this is not the case. Even in a just world people will travel for fun, adventure, and for business. In a just and more equal world we might expect such cases to increase. A free county would place at most very few limits on travel and movement by its own citizens, and will have little reason to fear foreigners. We might expect, then, the amount of 'friendly' movement between states to increase in a just world. But, as this sort of movement (which is not, strictly speaking, immigration) increases, we can expect the number of cross-border relationships to increase as well. The case of the EU seems to bear this out, since as barriers to movement between the member-states have fallen, the number of cross-border marriages has greatly increased.[36] Given this, it should be clear that even in a fully just world, family-based immigration will be a major source of immigration, possibly even more than at present.[37] Since we are far from a just world, such discussion may seem merely academic, but it is worth-while to show, I believe, that even in a world where every state was well-ordered, the case of family-based immigration would remain. This fact helps highlight how any account of immigration must be able to deal with this problem.

My argument now proceeds as follows: freedom of association is a fundamental right or basic liberty, and as such can only be traded off against other fundamental rights or liberties. Various types of associations are protected by these rights, but in general, the more intimate a relationship, the less discretion a state has in limiting it. While nearly all types of associations are useful to some degree or other in the development of the moral powers and in allowing us to fulfill our ideas of a good life,[38] it is plausible to think that the family, as the most intimate, is deserving of the most latitude from the state. Any attempt to say who can or cannot form a close intimate relationship, where the fundamental rights of others are not at stake, is a

[36] Bermann, Goebel, Davey, and Fox, *European Union Law*, 2nd ed. (West Group, 2002), pp. 575–576.

[37] These are just the sort of facts that become known to the deliberating parties in Rawls's account, as they move through the four-stage process. This explains how the general right to freedom of association, and the right to form intimate associations in particular, come to guarantee the right to form relationships across borders without having to 'globalize' the original position.

[38] Of course some associations are harmful, both to others and to the members of the group itself. White supremacist groups are an obvious example. To the extent that such groups do actual harm to others, there is no problem in restricting their activities. Even in the case of such groups, however, the value of association may still be present in some forms. See the discussion of such groups in Rosenblum, Nancy, *Membership and Morals*, pp. 274–277.

Author's personal copy

grave infringement on one's liberty, as has been noted by the U.S. Supreme Court on numerous occasions.[39] But, no society could prevent the formation of intimate bonds between its citizens and outsiders without committing other grievous abridgments of liberty. So, citizens of a particular country will sometimes want to form a family with non-citizens. It is part of the nature of family life that it can almost always only be lived in a satisfactory way if its members, or at least the core members (spouses and minor children), are able to live in close proximity. This, however, is possible only if states allow their citizens to bring in their non-citizen partners and family members and make available permanent residence (and hence eventually full citizenship[40]) to the entering family member. Therefore, states have a duty to allow their citizens to bring in their foreign born partners and family members.[41] Importantly, this limitation on the freedom that a state has in setting its immigration policy flows entirely from duties owed to citizens. That is, the right in question here is the right of a current citizen to bring in an outsider, and not the right of an outsider to enter. As such, it does not depend on any supposed right to freely enter and remain in other states despite the wishes of current insiders, and therefore is not subject to arguments against a general right to free movement.[42]

II. CAN FREEDOM OF ASSOCIATION PLAY THE ROLE I HAVE ASSIGNED IT?

As briefly noted above, several philosophers as well as others have argued that freedom of association grounds a right for states, or more correctly, a majority with governmental power within a state, to strictly limit or even eliminate immigration. The view is perhaps most succinctly (if not satisfactorily) captured by the remark of Morris, quoted above, that 'every society from a great nation down

[39] See the cases cited in note 27, among others.

[40] For a concise and, to my mind, convincing argument that all legal permanent residents ought to eventually have access to citizenship without significant restrictions, see Carens, Joseph, 'Why Naturalization Should be Easy: A Response to Noah Pickus', in Pickus (ed.), *Immigration and Citizenship in the 21st Century*, pp. 141–148.

[41] I argue that family-based immigration benefits should be available to same-sex couples in my paper, 'A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same-Sex Couples', *University of Memphis Law Review*, 37 (Summer 2007): 745–780.

[42] In this way my argument is somewhat similar to that made by Justice Marshall in this dissent in the case *Kleindienst v. Mandel*. *See Kleindienst v. Mandel*, 408 U.S. 753, 777–784 (1972) (Marshall, J., dissenting). Marshall argued that the exclusion of Marxist philosopher Ernest Mandel was a violation of the first amendment rights of *the U.S. citizens* who wished to hear him speak. I here take no position as to whether *Kleindienst v. Mandel* was properly decided, but the parallel is important to note.

Author's personal copy

to a club had the right of declaring the condition on which new members should be admitted'.[43] I will here focus on the accounts of Michael Walzer and Christopher Wellman. While I have some sympathy with certain aspects of these accounts, especially Wellman's, they cannot, I shall show, establish that states may prevent family-based immigration, since, to the extent these arguments are persuasive, they actually support the position I have sketched above.

Both Walzer and Wellman start their arguments by comparing states (or nations) to other associations.[44] Now, one of the defining features of any association is that it may set the rules of admission to it. Neither Walzer nor Wellman think that a state should have unlimited discretion, in that it should be allowed to set any admission rules that it wishes, though both would allow a significant amount of freedom. Walzer would allow nearly any admission rule to be used, even one allowing for racial or ethnic discrimination, so long as enough land and resources were left for others. For example, what was unjust with the 'White Australia' policy, on his account, was not that it discriminated against Asians, but rather that it was greedy, taking more land than was needed.[45] But, if a state takes no more land that it 'needs', it may craft its immigration policies in any way it wishes. Walzer does note a duty to take in refugees, or at least those to whom we owe a special duty.[46] But, beyond this, states are free to set their policies as they wish, so as to form 'communities of character'.

Wellman offers a similar account, but one based more explicitly on political association. Majorities with governmental power, he claims, have a right based on freedom of association to restrict admission for permanent residence as they see fit.[47] Wellman would

[43] *Records of the Federal Convention*, vol. 2, p. 238.

[44] Walzer, *Spheres of Justice*, pp. 35–40, Wellman, 'Immigration and Freedom of Association', p. 112.

[45] Walzer, *Spheres of Justice*, pp. 46–48. I find this account to be deeply implausible, if for no other reason than that the reason why Asians wished to immigrate to Australia was not that they were overcrowded as such – most Asian countries have less populated regions, after all – but because their home countries lacked economic prosperity and freedom. Merely making Australia smaller would not have given these things to would-be immigrants. This is only one way in which Walzer's account is, I think, deeply implausible.

[46] Walzer, *Spheres of Justice*, pp. 48–51. This is, I believe, an insufficiently strong position with regard to refugees, as it will predictably lead many who can only be protected by giving them access to a new state without protection. I cannot, however, elaborate on this point here, though I hope to do so in future work.

[47] Wellman, 'Immigration and Freedom of Association', p. 139. Wellman distinguishes here, rightfully, between admission for permanent residence and admission for lesser periods. This important distinction is often over-looked by people writing on immigration, and is important to my own account, but cannot, I believe, do enough to salvage Wellman's account.

Author's personal copy

not allow as much discretion as would Walzer on the basis of race or ethnicity, perhaps because of less emphasis on Wellman's part on communitarian concerns. However, this is not because of concerns about mutual respect and fair cooperation with other states and peoples, of the sort that might ground principles of international justice, but rather for concern towards those already in a society. That is, a state which already has members of a particular ethnic or racial group may not refuse to allow in more members of that group, as this would be an insult to (and therefore an injustice for) the current insiders from the particular group.[48]

Both Walzer and Wellman allow that this right of states to freedom of association may limit even the claims for admission of refugees. Neither author directly addresses the claim of those individuals who show up on the borders of a country seeking asylum in a country that limits immigration. (Wellman might just not see the need to directly address such cases.) Walzer holds that unless a state has a particular responsibility for or a connection to the refugees,[49] a state has no duty to accept them if it does not wish to. Wellman also holds that states need not admit refugees so long as they otherwise help the global poor.[50] These points help illustrate the strength that Walzer and Wellman attribute to freedom of association at the national level.

Neither Walzer nor Wellman explicitly discuss the family in relation to immigration, but given the general character and strength of their claims there is no reason to think they would make an exception for it. We are then left with a conflict. I have argued that freedom of association requires states to allow their citizens to bring in their family members, while Walzer and Wellman have argued that freedom of association allows majorities with governmental

[48] It is not clear from Wellman's account exactly how this would work. Australia, during the 'White Australia' period, for example, did have some Asian members. But, if it did not have any members from, say, Mongolia, would that have allowed Australia to keep out Mongolians, even though they are Asians? Wellman notes that no country today is ethnically or racially 'pure', but not all ethnic or racial groups are represented in all countries. Whether those not represented in a particular country may be kept out is left unclear on his account.

[49] His examples of the first case is American responsibility for the plight of so-called 'boat people' from South Vietnam and of the second is the ethnic connection between Germans in Germany and ethnic Germans forced out of other central and eastern European countries after the second world war. Walzer, *Spheres of Justice*, p. 48 and p. 42, respectively.

[50] As with Walzer's discussion of refugees cited in note 34 above, I believe this is a significantly mistaken position, in that it will predictably leave many people without the protection that they need, protection that can only be granted by giving those in need access to a new state. An argument for this position will have to wait for a future paper.

Author's personal copy

control to set almost any limits on immigration that they wish. Obviously, not both claims can be true.

III. WHY FREEDOM OF ASSOCIATION CANNOT SERVE TO RESTRICT FAMILY-BASED IMMIGRATION

I shall argue that, while the arguments of Walzer and, especially, Wellman have some force, they cannot justify restricting family-based immigration, at least of immediate family members. The first argument for this position comes from the general discussion of freedom of association above, namely that more intimate associations deserve more deference in determining their members than do less intimate ones. Secondly, I shall argue that the nature of the state as an association gives us special reasons to be wary of giving it power to limit the makeup of other more intimate associations, especially the family. I start with the first argument.

As noted above, the law generally gives more deference to intimate associations than to larger, more anonymous associations. So, to recall, fair housing law limits the freedom of landlords to decide whom to rent to, but exceptions are made for rooms rented in an owner-occupied home. And, anti-discrimination laws that prohibit employers from refusing to hire people on the basis of race or sex are waived for very small businesses. Similarly, private clubs are generally allowed to discriminate in whom they will deal with in ways that organizations of a more public sort are not.[51] The justification for this seems to be that, the more intimate an organization, the more important it is that the members be able to determine the content of the group if these organizations are to be able to serve as the 'schools of virtue' (to use Rosenblum's term)[52] and so to allow for the development of the moral powers.

But, there are no associations more intimate than the (immediate) family, and modern states, even in the case of small and fairly homogenous states, are large and anonymous enough that they only count as associations in a very broad sense. Given this, we have some reason to hold that the right of individuals to form families across states lines (given that people will want to do so) is more important than the

[51] For discussion of this point, and its limits in U.S. law, see *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Boy-Scouts of America v. Dale*, 530 U.S. 640 (2000).

[52] Rosenblum, Nancy L., *Membership and Morals*, pp. 26, 59–60.

Author's personal copy

right of a majority in a state to make the state into a particular sort of association, one that does not include any 'outsiders'. This argument does not mean that a state can place no limits of any sort on family-based immigration. I will discuss several possible limits below. But, as a general rule, given what we take to be important about freedom of association, in a conflict between the largely anonymous association of the state and the highly intimate association of the family, the more intimate association deserves the greater deference here.[53]

There is another reason why we ought to hesitate before thinking that a majority in a state ought to have, because of freedom of association, the right to set membership rules so as to exclude foreigners, even when this conflicts with the associative desires of individual citizens who wish to form familial groups with foreigners. This second argument starts from the way that the state as an association differs from other associations, even beyond being large and largely anonymous. In light of these differences, discussed below, we are justified in limiting the freedom of association of a majority in a state holding political power when this conflicts with other more intimate associations.

The modern state is unlike most associations in two main ways. First, membership in the state is not voluntary in the way that membership in most other associations are. The large majority of people do not 'join' a state in anything like the same way that they join other associations.[54] Similarly, while one may attempt to leave a

[53] I here must disclaim two unintended implications of this line of thought. As noted above, this argument does not imply that the family is the most important form of association in all senses. Rather, the important point is that the *type* of association the family is makes it such that it cannot serve its functions unless its makeup is largely left to the parties. This is less clearly so with larger and less intimate associations, even if they are, in some ways and for some purposes, more important. Secondly, I do not imply that families are always or only 'schools for virtue'. Obviously, they may also be schools of despotism and vice, as Mill noted many years ago in his *The Subjection of Women*. As the title of this paper is a play on Okin's famous book on the family, I hope my acceptance of this point is clear. See Okin, *Justice, Gender, and the Family* (Basic Books, 1989). But, this same fact is true of all associations. That an association may have an evil impact on the members does not mean, however, that they cannot be 'schools of virtue', nor that we should not see that as a powerful reason to protect associations of various sorts, including the family.

[54] Many authors hold that the U.S. has a 'consensual' model of citizenship, one that treats membership in the state much like membership in a club. See, for example, Schuck, Peter and Smith, Rogers, *Citizenship Without Consent: Illegal Aliens in the American Polity* (Yale University Press, 1985), and Schuck, 'Consensual Citizenship', chapter 9 in his *Citizens, Strangers, and In-Between* (Westview Press, 1999), pp. 207–216. This is obviously a flawed account descriptively, and cannot, in any strict literal sense, serve as a normative account of citizenship for reasons adequately developed by Hume more than two hundred years ago. See Hume, 'Of the Original Contract', pp. 465–487 in his *Essays, Moral, Political, and Literary* (Liberty Classics Edition). This criticism applies only to actual consent theories like that developed by Smith and Schuck (and, of course, Locke before them) and not to hypothetical consent theories like Rawls's, since such theories serve a rather different purpose. I discuss this point at more length in my paper 'Citizenship, in the Immigration Context', *Maryland Law Review*, 70, 1 (2010, forthcoming).

Author's personal copy

state, there is little reason to assume beforehand that another state will take one in. And, it has only recently been the case that states have come to recognize the right to leave, in the sense of abandoning citizenship.[55]

One implication of this aspect of membership in the modern state is that states have some obligations to their members that cannot reasonably be left to majority rule. If membership in a state were fully voluntary, and there were many other options open to those who were not satisfied with their present state, then perhaps it would make sense to treat states more like clubs, allowing majorities to set the rules (including membership rules) as they wished. But, since states are not like clubs in this way, there is good reason to restrict the power of the majority.[56] I hold that one freedom that ought not be up for strict limitation by a majority in a state is freedom of association, especially of intimate association, for the reasons discussed above.

States differ from other associations in a second, related, way in that those who are dissatisfied with membership in a state are not usually free to find or found a new state to their liking. This again implies that majorities in states have less discretion in some areas in setting rules than would clubs. One reason why we think it is acceptable to allow clubs or associations to form their own rules is that, if some members are dissatisfied, then they may leave and form their own club. This may not always be easy, but it is possible. It is this possibility that justifies (or at least helps justify) majority rule in clubs. So, for example, people who were dissatisfied with the boy-scouts' discrimination against homosexuals and atheists can and have set up alternative organizations that do not discriminate on these grounds.[57] But, of course, states are not like clubs in this way. If I do not like the rules of my state, I am generally not free to enter

[55] For discussion, see Cohen, Elizabeth, 'Carved from the Inside Out: Immigration and America's Public Philosophy of Citizenship', in Swain (ed.), *Debating Immigration*, pp. 40–45.

[56] This argument parallels Rawls's treatment of states as closed systems in the original position. For discussion of this point, one of the most misunderstood points in Rawls's work, see Freeman, Samuel, *Rawls*, p. 416 and Freeman, 'Consequentialism, Publicity, Stability, and Property-Owning Democracy' in his *Justice and the Social Contract* (Oxford, 2006), pp. 90–91. See also my paper, 'A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same Sex Couples', *University of Memphis Law Review*, 37, 763–764.

[57] See, *Boy-Scouts of America v. Dale*, 530 U.S. 640 (2000). Groups that have many features similar to the Boy Scouts but that seek to avoid the aspects they disapprove of include the SpiralScouts http://www.spiralscouts.org/metadot/index.pl and the Navigators USA http://www.dysongraphics.com/navigators/ among others.

Author's personal copy

another just for this reason, and I am, of course, not free to set up a new state, one that better suits my desires.

But, since states are in this way different from clubs, it makes sense that they ought not have the same freedom in determining their rules as do clubs. I again claim, for the reasons noted above, that one area where states ought to have less freedom than clubs in setting rules is in relationship to membership based on freedom of association, where again the more intimate associations ought to trump the more anonymous. Given this, and given known facts about the world, it would be unreasonable to allow majorities in a state to forbid the citizens of a state to form families across state boundaries and then bring their partners and (at least) other immediate family members to their home states. This is to say, freedom of association at the state level cannot justify limiting freedom of association at the family level, even though this means allowing some significant level of immigration.

IV. DOES FREEDOM OF ASSOCIATION ALLOW ANY IMMIGRATION RESTRICTIONS?

I have argued that freedom of association requires allowing citizens to bring their foreign partners and (at least) immediate family members to live with them. This argument was based in part on the way that intimate associations trump larger and anonymous ones and partly on the ways that states are not like other associations. Now I will address the worry that my argument proves too much, and that it conflicts with our working assumption that states ought to have significant discretion to limit immigration. This worry arises from the fact that families are not, of course, the only form of small and fairly intimate associations. We may here ask why my argument does not also apply to friends, workers in small firms, domestic help, members of sports teams, and so on. If I run a French restaurant, for example, and would like to have a French staff, does the argument I have just given not suggest that I should be able to have such a staff, even if the majority in my country disapproves? Or, if my best friend is from another country, why should I not be able to have her immigrate, so that we may better pursue our friendship? The worry here, then, is that if my argument requires limiting the power of majorities in a state to place limits on immigration in all of these

Author's personal copy

cases, then the ability of states to limit 'discretionary' immigration, in Blake's sense, will be largely empty.

I respond to this worry by agreeing that freedom of association does put limits on the power of majorities in a state to limit international movement in cases such as these, but note that when we look more closely at the nature of the associations involved here, we can see that these limits on the ability to shape international movement are not, strictly speaking, limits on the ability of states to regulate immigration. Recall, to start, that not all types of international movement is immigration.[58] Following standard usage, in this paper I understand immigration as international movement with the intent to remain indefinitely (usually perpetually) in the country to which the migrant has moved.[59] International movement of shorter periods that does not entail a right to remain in perpetuity, and eventual access to full membership, imposes less risk and burden on a state and its members, and so, we may assume, has different, less strict, rules regulating it.

This fact is relevant to the cases under consideration. All of the associations and relationships I have enumerated above are such that they do not, by their nature, require close and intimate contact in perpetuity. While having a French staff at a French restaurant may require allowing French workers to come for some period of time, it does not require that these workers be granted immigrant status. And, while friendship is usually easier when friends live close together, we do not think it is an essential element of friendship that friends live together. (Epistolary friendships are, after all, one of the classic forms.) It would be unreasonable for a country to not allow its citizens to invite (and bring) international friends for visits, since such visits do not normally impose significant burdens on the other members of a state. But, since friendships can exist, and even thrive, despite distance, in a way that we usually think marriage and the family cannot, it follows that freedom of association in these cases does not impose as strong of limits on the rights of majorities to limit immigration as does the case of the family.

[58] This distinction is ignored by Chandran Kukathas in his paper, 'The Case for Open Immigration', where he treats both temporary and permanent migration under one heading. See his paper, in Cohen and Wellman (eds.), *Contemporary Debates in Applied Ethics*, p. 208. I contend that this leads Kukathas to draw significantly flawed conclusions from his premises. Some argument is given in what follows, though I cannot here provide a complete discussion of this point.

[59] For the U.S. see INA § 101(15).

Author's personal copy

In normal cases, states will have an obligation to take the freedom of association of its members into account, and to allow non-immigrant movement when this is called for by the freedom of association, absent any extra-ordinary circumstances. When this sort of movement is limited, states will owe an individualized explanation to those seeking to have the non-members enter.[60] So, friends will have a defeasible right to have their international friends visit, and employers will have a (more limited) defeasible right to bring in foreign-born employees on a temporary basis when there is legitimate reason for this. But, since neither of these cases, nor the others discussed above in this section, require perpetual admission, freedom of association here does not imply a limit on the state's ability to limit immigration. The situation is different, I have tried to show, in the case of the family. Here, at least in the case of the immediate family (though perhaps not limited to it), that is, in the case of spouses and minor children, we normally think that close physical proximity is an important, even essential, aspect of the association.[61] Given this, mere temporary admission will not do, and so admission for permanent residence, that is, immigration, is required.[62] The

[60] This is just one of many ways that I believe the Supreme Court was wrong in the case of *United States Ex Rel. Knauff v Shaughnessy*, 338 U.S. 537 (1950). In that case the U.S. government refused admission to the non-citizen wife of a US citizen on the basis of secret (and, it later turned out, largely non-existent) evidence. The Court held that the government need not present its reasons for refusing entry to Knauff or, even *in camera*, to a federal judge. While, of course, national security is a serious concern, at least in most cases a state will owe those seeking to have outsiders enter at least some individualized rational if the would-be visitors are kept out. Note here that this is a duty owed to the citizens, one that arises from the need to respect their freedom of association and to explain why it is limited when it is. It is not a duty owed directly to the outsider seeking to enter. While such a duty to outsiders may exist, it will have a different normative base, and is not a topic I can address in this paper.

[61] Of course spouses do sometimes spend long periods apart, as do parents and children, but these are normally thought to be quite unusually and generally undesirable cases, and even in these cases the separation is usually expected to be only temporary, even if not short.

[62] A full analysis at this point would have to explore whether a feasible and just temporary worker program is possible. I sketch such a program in an unpublished paper, 'Guest-Worker Programs: An Analysis and Partial Defense', but cannot hope to answer all worries here. Two quick points are worth noting, however. First, few people who accept any limits on immigration at all think that any admission to a country at all, including, say, tourist visas, must grant a right to remain indefinitely. Nearly everyone, then, accepts that some sorts of time-based limits on immigration are acceptable. The difficulty is in figuring out the time and how to make it work reasonably well. Secondly, there is significant evidence that many migrant workers have no significant intention of remaining permanently, and large number return to their homes when this is possible. On this, see, among other discussions, Massey, Durand, and Malone, *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration* (Russell Sage Foundation, 2003) and Sassen, Saskia, *Guests and Aliens* (The New Press, 1999).

Author's personal copy

family, then, is a special case since here freedom of association requires limits on discretion in immigration policies.[63]

V. EXTENT OF FAMILY-BASED IMMIGRATION RIGHTS

Now we must address the limits of my argument in the case of the family itself. Though I have argued that the more intimate association of the family trumps the relatively anonymous association of the state, it is not the case that the rights in relation to immigration for the family are unbounded, or that the state, taken as an association, can assert no claim that might justify restrictions on family-based immigration. Additionally, other factors, not directly related to the rights of association held by society as an association, but rather relating to the need to maintain reciprocity within the state among members, will further place limits on family-based immigration. In what follows I will first look at how the need to maintain reciprocity within the state may place some limits on family-based immigration rights. Secondly, I will attempt to establish how broad the right to family-based immigration ought to be.

If, as argued by Rawls and others, reciprocity among citizens is a condition on (domestic) justice, then maintaining reciprocity may be reasonable grounds for limiting immigration. That is, if allowing in immigrants would be expected to make those in the country worse off than they would be without allowing in the immigrants (after relevant considerations of global justice are accounted for – here I again assume some form of modest cosmopolitanism), then this might be grounds for a state to limit immigration. This would be the case if immigrants were expected to use more resources than they produced, for example. Rules to prevent such cases are wide-spread in western countries, all of which exclude would-be immigrants who are likely to become public charges.[64] Such rules are, I shall, for now, assume, largely acceptable, especially when placed within the context of the duty of assistance towards burdened societies and the

[63] In this conclusion I differ from Howard Chang's conclusion in his recent article 'Cultural Communities in a Global Labor Market: Immigration Restrictions as residential Segregation', *University of Chicago Law Forum*, 2007, in that I do not think that justice requires granting *immigrant* status to those seeking to enter and work in the U.S., even if this would provide a net improvement in over-all global welfare.

[64] In the US, see INA §212(a)(4). For the European Union, in addition to various member-state laws, see Council Directive 90/365, art. 1, 1990 O.J. (L 180) 28, Council Directive 90/364, art. 1, 1990 O.J. (L 180) 26, Council Directive 93/96, art. 1 1993 O.J. (L 317) 59.

Author's personal copy

duty to provide protection for refugees.[65] The question that remains is how this requirement for reciprocity affects family-based immigration.

The U.S. addresses this issue by requiring that a citizen (or permanent resident) who wishes to bring in family members must be able to support his or her family at 125% of the poverty level for a family of the given size.[66] This may be done via evidence of employment, proof of assets, or, if the person seeking to bring in her family does not meet this level on her own, by means of a third-party guarantor. Furthermore, the petitioner must promise to maintain this level of support for the would-be immigrant for at least five years.[67] This rule has two practical effects. First, if a citizen is unable to meet this requirement she cannot successfully petition to bring in her foreign-born non-citizen family members.[68] Secondly, once the foreign family members are in the US, this rule makes it difficult for the foreign-born family member to qualify for means-tested government assistance, since the assets of the sponsor are deemed to be available to the immigrant.[69] When joined with restrictions on access to public benefits to new immigrants (when these are needed to ensure reciprocity – this need not always be the case) such measures can help ensure that allowing family-based immigration does not violate reciprocity among citizens. Measures such as these cannot, of course, ensure that family-based immigration will bring the largest possible benefit to the receiving country that any immigration policy could. This will most likely not be the case. But, to demand that

[65] Again, following Pogge, I believe that states may best meet their duties to the global poor through means other than allowing immigration. See Pogge, Thomas, 'Migration and Poverty'. I disagree with Pogge's claim in this paper that direct aid to the poor may also discharge duties states have to refugees, which is why I distinguish them as a separate category here. A full account of the duties owed to refugees, and to whom these duties are owed, must wait for another paper, though I here note that the policy in the U.S. of granting public benefits to refugees seems to me to be a minimal condition of justice.

[66] INA § 213A(1)(A).

[67] After this period in the U.S., the immigrant is eligible for naturalization, and to otherwise receive public benefits.

[68] Officially, becoming a public charge is a ground for removal as well, since any action that would make a would-be immigrant inadmissible also makes her removable. In practice, however, very few if any removal proceedings are brought on this ground. But, failure to meet the public charge provisions is a major ground for denial of a family-based immigration provision. INA § 237(a)(1)(A).

[69] INA §§ 212(a)4 and 213A. Note this is a distinct rule from federal laws allowing (and in some cases compelling) the exclusion of immigrants from means-tested federal benefits. For those rules see 8 U.S.C. §§ 1612(b), 1621, 1622. For helpful discussion on these matters see Chang, Howard, 'Public Benefits and Federal Authorization for Alienage Discrimination by the States', *New York University Annual Survey of American Law* 58(Issue 3): (2002), 357–370.

Author's personal copy

would be to ask too much. While certain measures may be taken to ensure that no citizens are used as a mere means to the support of another's choices, there is no duty of justice to promote the highest amount of aggregate welfare when this would interfere with the basic liberties of others.[70]

Of course the disabilities discussed above may not continue indefinitely if we wish to comply with justice. This is partly because there is reason to expect that only a temporary deprivation is necessary to ensure reciprocity,[71] and also because, after some fairly short period of time, the immigrant family member will be eligible for full membership. After these points are reached any further deprivation would be unreasonable. At this point we may assume that the immigrant is significantly enough integrated into the society so that a refusal to provide public support, if needed, would be unjust, akin to a refusal to provide benefits to a citizens based on ethnicity.[72] Special rules may also be put in place to help prevent abuses and exploitation within families. Rules of this sort exit now, and though the current rules are not sufficient, there is no good reason why they could not be strengthened.[73] I am, of course, not wedded to the particular details of the U.S. system. And, if a majority in a country wished, they could legitimately choose to have fewer restrictions than this, or even none at all. But, if we are to accept that family-based immigration is something owed as a right to citizens, then we must make sure that this right works in a way that everyone could reasonably accept. Regulations such as I have discussed here

[70] Interestingly enough, John Stuart Mill thought that rules much like these ought to apply to all persons, including citizens, seeking to marry, for much the same reason as I have argued for above. He said, 'The laws which, in many countries on the Continent, forbid marriage unless the parties can show that they have the means of supporting a family, do not exceed the legitimate powers of the State: and whether such laws be expedient or not… they are not objectionable as violations of liberty'. Mill, 'On Liberty', in Collini (ed.), *On Liberty and Other Writings* (Cambridge, 1989), p. 108. For an excellent discussion of this point see Ryan, Alan, 'Mill in a Liberal Landscape', in Skorupski (ed.), *The Cambridge Companion to Mill* (Cambridge, 1998), pp. 512–514.

[71] For discussion on this point, see Chang, Howard, 'Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor', *UCLA Journal of International Law and Foreign Affairs* 3(2): 384–395.

[72] Here, as in many areas of modern life, bright-line rules are likely to be preferable to individual assessments, and more compatible with liberalism, since they both allow greater planning, and hence freedom, and also because they allow for less room for arbitrary decision-making and discrimination. On this point see Larmore, Charles, 'In Praise of Bureaucracy' in his *Patterns of Moral Complexity* (Cambridge, 1987), pp. 90–92.

[73] See, for example, the provisions relating to adjustment of status and cancellation of removal in the 'Violence Against Women Act' in the U.S. INA § 204(a)(iii)(II), INA § 240A(b)(2). Immigrants who adjust status under these acts are eligible for public benefits.

Author's personal copy

can, by ensuring reciprocity, help make sure that this requirement is met.[74]

The last question to be discussed is the extent of the right to bring in one's family members. I have, in this chapter, several times referred to the fact that 'we' generally believe that it is part of the nature of the family that families must be free to live together. That is, I have referred to a common understanding of what is important about and to the family. I use this idea to help discuss the limits of family-based immigration rights. I refer to our 'common understanding' here for several reasons. First, because I do not believe that there is a deep or 'real' level of importance that can be assigned to various associations beyond our common understandings of the importance or nature of the various associations.[75] Secondly, even if there were 'real' foundations for claims about the nature and importance of various associations, there would be disagreement as to what these foundations were. Therefore, we are likely to get both more agreement and greater legitimacy if we abstract from foundational claims and try to find an overlapping consensus here as to what is most important about various associations. This is, of course, a common methodology in liberal political philosophy, so it should be no surprise that we apply it here, too. Finally, an appeal to common conceptions is especially helpful here in showing how the extent of the right to family-based immigration may vary over time and space.

Now, we may have a hard time agreeing on just what our shared conception of the family is and why it is important. (Recent debates over gay marriage in the U.S. surely helps underline this potential disagreement, though perhaps in a way that is more apparent than real in the end.[76]) I will not attempt to give a full answer to this question here for even one society. Rather, I will look at what I take to be a minimal core and then look at how this might be extended. The minimal core of the family, the unit to which all states must

[74] Note that this discussion is independent of the question of what other services, such as language and civics classes, help finding jobs, and so on should be provided to immigrants of any sort. I discuss this matter to some degree in my paper 'Citizenship in the Immigration Context', *Maryland Law Review*, 70, 1 (2010, forthcoming), but cannot hope to deal with all such issues in one paper.

[75] Compare the claim of one of the drafters of the Universal Declaration of Human Rights that the delegates could agree on the rights only so long as they did not have to agree on their foundation. There are also obvious similarities here with the Rawlsian idea of an 'overlapping consensus'.

[76] For discussion on this point see my paper, 'A Rawlsian Argument for Extending Family-Based Immigration Benefits to Same-Sex Couples', *University of Memphis Law Review*, 37 (Summer 2007) as well as Gerstmann, Evan, *Same-Sex Marriage and the Constitution* (Cambridge, 2003).

Author's personal copy

extend immigration rights to their citizens, is, I hold, the spouse or partner and minor children. While different societies conceptualize the family in different ways, this seems to be a common core included in all conceptions, without which the notion of a family hardly makes sense.[77] Therefore, if the family has the importance that we normally associate with it (as discussed above), then all states must allow their citizens to bring in spouses or partners and minor children. To refuse to do so, in the large majority of cases, would be unjust.

Many countries offer family-based immigration benefits much broader than this. In the U.S., for example, parents of citizens who are over twenty-one are also considered 'immediate relatives' and so are eligible for the broadest immigration benefits.[78] Many other relatives of citizens and permanent residents are also eligible for reduced immigration benefits under U.S. Law.[79] The question we must here ask is whether these broader grants of immigration benefits ought to also be considered a matter of right, or whether they can be left to the political process in individual countries to decide. My answer is that each state must look to its common conception of the family to decide which level of benefits are a matter of right. This

[77] This is, of course, not to say that there cannot be other conceptions of family – but, it seems, these other conceptions are parasitic off of the core conception. I shall not, however, argue this point now.

[78] *See*, INA § 101(b)(1), (2). The reason this benefit applies only to citizens over 21 is to prevent, or at least minimize, attempts to gain 'back-door' access to family-based immigration benefits by having a child in the U.S., since all children born in the U.S., even to illegal immigrants, are citizens. If children of any age could petition for their parents, this would create strong perverse incentives for non-citizens to have children in the U.S. Of course, non-citizens, including irregular migrants not eligible for legal status, do have children in the U.S., potentially creating problems. Most states deal with this by having much less generous *jus soli* citizenship rules than those found in the U.S., though this seems to me undesirable. I argue for this position in my paper, 'Citizenship in the Immigration Context', *Maryland Law Review*, 70, 1 (2010, forthcoming). No immigration policy can be perfectly implemented. Immigration policy here is like all policy – there will be opportunity for abuse and no system can avoid such problems. We must seek to minimize injustices in application, but this can never be fully achieved. My approach to this problem would be to apply a standard somewhat like that found in U.S. law, where 'extreme hardship to a U.S. Citizen or permanent resident' (here the child born in the U.S.) can ground a claim for cancelation of removal, though in a more generous way that the law is currently applied. This, I think, would allow us to avoid the clearest cases of injustice. See, INA § 240A(b) for the current U.S. Law.

[79] Potential beneficiaries include siblings and adult children, among others. *See* INA § 203(a). These beneficiaries are, however, subject to numerical and country of origin limits in such a way as to create very long back-logs. It is sometimes argued that these backlogs are themselves unjust. Certainly they are highly frustrating to those subject to them. Since I hold that the justice of these aspects of immigration policy turn on the details of the country in question, and that the only way to determine these details is via the democratic process and serious deliberation, I will not here attempt to determine whether, as a matter of justice (as opposed to a matter of sound or efficient policy) the U.S. should strive to reduce these backlogs or eliminate them altogether.

Author's personal copy

is, of course, not to offer an easy practical answer, but only to suggest what features ought to be considered. In a liberal, highly mobile society like the U.S., we might reasonable agree that only the minimal core ought to be protected as a matter of right, though the U.S. in fact offers much broader benefits. In other more 'traditional' societies, where the extended family is both more common and important, it might be reasonable to include more family members under the right of immigration. But, beyond the minimal core that seems to apply to any conception of the family, this matter will be one to be determined by the democratic deliberation of a free people.

Of course, countries may decide, for any number of reasons, to offer family-based immigration benefits that extend beyond what is required for justice as determined by the conception of the family for that society. The U.S. seems, to my mind, to do this now, at least in the case of benefits given to adult siblings. There may be good reason to do this. Given the sponsor requirements, we can expect such immigration to meet the reciprocity requirements and we might think that those with family members who are already citizens will be better able to integrate[80] and adapt to the country, for example, making this type of immigration more desirable over-all. Or, we might think that, even if this sort of immigration is less efficient from a strict economic perspective than would be immigration targeted at people who posses certain desirable skills, that these benefits are out-weighed by the personal good that would accrue to current members by allowing them to bring in their family members. The important point for my project, however, is that such extensions are open for democratic decision-making and may be regulated without violation of justice.[81]

Given this, we can say, for example, that considerations of justice alone do not allow us to favor either the U.S. or the Canadian

[80] This statement is not to endorse any philosophical account of cultural assimilation and whether this is desirable. Such questions are beyond the range of this paper and would require significantly more space to address than I can here provide. Rather, my point here is the banal one that having contacts one can trust in a country is usually helpful for helping one learn how to get along with daily tasks, find work, not get lost, and so on. Such sorts of economic and practical integration are, I believe, tangential to the deeper philosophical disputes.

[81] This basic rule, of course, will have limits. For example, if a state had long granted immigration benefits to extended family members of citizens, but then later greatly limited them, solely because these benefits were being used by members of an ethnic minority in a way that was changing the ethnic make-up of the country, but was in no way harming the country, then restricting such benefits might well be a violation of the demands of justice. But, this violation of justice would be due to the unequal treatment of various members, and not due to the change in immigration policy as such.

Author's personal copy

system, one which gives less emphasis to family reunification than does the U.S., and more emphasis to skills-based immigration, since both systems give rights to their citizens in regards to the core conceptions of the family in those countries.[82] Additionally, it would not be a violation of justice to extend further, or to restrict to some degree the extent of family-based immigration benefits in the U.S.,[83] but it would be unjust to follow the proposed legislation of former Colorado Representative Thomas Trancedo and stop all immigration, even that of immediate relatives. The U.S. system is imperfect insofar as it does not formally protect the core benefits as a matter of right, as it ought to do. In this it is not alone. This right ought to be made explicit.[84] But, insofar as these rights are granted, no injustice is done.

Finally, we must briefly address one salient issue as to how such rights will be administered, namely, how the state will know who is properly eligible for them. States have an interest in making sure that rights are not 'devalued' by making them available to those who do not deserve them or fit the eligibility requirements, and states may plausibly require some degree of evidence that the marriage in question is a 'bona fide good-faith marriage'. However, a state may not require that the marriage have any particular internal form. As one U.S. court has said, 'Aliens cannot be require to have more conventional or more successful marriages than citizens'.[85] The question of what sort of evidence may be required is not one that a philosophical inquiry can hope to answer beyond noting that the evidence must be relevant to the question at issue and must be of the sort that anyone making a legitimate attempt could meet, and that the burden of proof may not be unreasonable.

---

[82] Given the non-ideal nature of our current world, and the fact that neither the U.S. nor Canada currently meet the requirements of a just foreign policy, even on the modest cosmopolitan account, there may be grounds in non-ideal theory for preferring one system over another. It is generally thought that the U.S. system provides more access to less advantaged immigrants than does the Canadian system. Whether this alone is reason to prefer it in non-ideal conditions is not, however, something I can hope to establish in this paper.

[83] In the case of restriction, of course, measures would have to be taken to protect the legitimate expectations of those already in the system before any changes could legitimately be made. But, this is a general principle of just action by states and not something special to the immigration context.

[84] Whether this means that such a right should be formally written into a constitution or should rather be inferred from other relevant clauses is not a matter that I shall discuss here. What is important is that the right be formally recognized.

[85] *Bark v. INS*, 511 F.2d 1200 (9th Cir.) 1975.

Author's personal copy

VI. CONCLUSION

In this paper I have tried to show how considerations of freedom of association relate to questions about immigration. Such considerations give some reason for both allowing majorities to limit immigration and to individuals to bring in outsiders so as to facilitate associative groups. I have argued that, while these are real concerns and worth giving weight to, considerations of freedom of association are not strong enough either to give majorities unlimited right to regulate immigration, nor to individuals to bring in anyone with whom they wish to associate for any reason for indefinite duration. The exceptional case is that of the family. Here the great importance of family life in our moral and personal development, as well as the nature of the family as an association, provide grounds for a specific right relating to immigration, namely the right of current citizens (and perhaps permanent residents), held against their own states, to bring in at least their immediate family members to live with them.

Sharswood Fellow in Law and Philosophy,
University of Pennsylvania Law School, 3400 Chestnut St.,
Philadelphia, PA 19104, USA
E-mail: mlister@law.upenn.edu