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Does a State's Right to Control Borders Justify Harming Refugees?

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Abstract: Certain states in the Global North have responded to refugees seeking safety on their territories through harmful practices of border violence, detention, encampment and containment that serve to prevent and deter refugee arrivals. These practices are ostensibly justified through an appeal to a right to control borders. This paper therefore assesses whether these harmful practices can indeed be morally justified by a state's right to control borders. It analyses whether Christopher Heath Wellman's account of a state's right to freedom of association, which represents the most restrictive account of a state's right to control borders available in the literature, can extend to justify current harmful practices against refugees. If not, then no available justification will be able to do so, and thus contemporary harmful practices used against refugees cannot be justified by a state's right to control borders.

Keywords: refugees, borders, freedom of association, immigration, permissible harm

1 Introduction

There are over 27 million refugees worldwide who have been displaced due to war, violence, persecution and extensive human rights violations in their states of origin to seek adequate safety elsewhere (UNHCR 2023). The dominant philosophical approach to understanding the obligations of states in the Global North towards such refugees is what we can term the duty of rescue approach. According to this approach, states in the Global North (hereafter Northern states) are innocent bystanders overlooking the humanitarian crisis of refugee displacement unfold, and these states have positive duties to rescue refugees (either through asylum, aid or resettlement), at least if these states are able to do so at little cost to themselves.¹

¹ See for example 'Like the bystander we have an unambiguous duty of rescue towards [refugees]' (Betts and Collier 2017). 'There is a parallel here with the duty of rescue born by individuals in

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However, this approach has been recently challenged (Hillier-Smith 2020; Parekh 2016, 2020) since it fails to consider how Northern states may not be mere innocent bystanders vis-à-vis the harms refugees face whilst displaced but have instead responded to refugees seeking safety by adopting policies and practices including border violence, detention, encampment and containment that serve to prevent and deter refugee arrivals. These practices result in significant physical and mental suffering and extensive human rights violations for refugees, and (as I have demonstrated elsewhere) constitute instances of doing harm to refugees (Hillier-Smith 2020). Moreover, Parekh's (2016, 2020) analysis has similarly demonstrated how Northern states are not mere innocent 'potential rescuers' but adopt numerous policies and practices that result in significant harms to refugees including the harms of encampment, containment and denial of refuge. States that adopt such practices are therefore (contra the duty of rescue approach) not necessarily mere innocent bystanders but are instead harming refugees.

However, it might be objected that demonstrating that certain practices harm refugees is not itself sufficient to demonstrate those practices are necessarily unjustified: it is not always impermissible to harm others. Indeed, one natural potential justification would be that it is widely accepted (at least in public political discourse) that all legitimate and sovereign states have a right to control their borders, which includes a right to exclude others. This right, it may be argued, justifies using practices of preventing and deterring refugee arrivals even if such practices harm those refugees. Notably, policymakers invoke such a right and rhetoric of defending borders and sovereignty to justify practices to prevent refugee arrivals: the UK Home Secretary writes that 'every sovereign country has a right to defend its borders and to choose who enters' (Braverman 2022), while her predecessor appealed to 'controlled immigration and the right to secure borders' (see UK Government 2022); and the Australian policy programme of interception of refugees at sea and return to Indonesia, Sri Lanka or off-shore detention facilities is itself entitled Operation Sovereign Borders.² Moreover, having highlighted the harms to refugees that result from Northern state practices, Parekh suggests such practices may nonetheless be justified based on 'a widely accepted moral norm: that states have a sovereign right to control admission to their state' (2016, 121); and by an appeal to

emergencies' (Miller 2016, 78). The 'principle of mutual aid' holds that if two strangers meet and one is in need of help, the other person ought to help if the need is urgent and the risks and costs of helping are 'relatively low' (Walzer 1983, 33). 'States have an obligation to assist refugees when the costs of doing so are low' (Gibney 2004, 231). We have obligations to refugees simply because 'they have an urgent need for a safe place to live and we are in a position to provide it' (Carens 2013, 195). We have obligations to help refugees based on the 'Samaritan' principle' that 'one has a natural duty to assist others when they are sufficiently imperilled and one can help them at no unreasonable cost to oneself' (Wellman 2008a, 124).

2 See Operation Sovereign Borders (n.d.) <https://osb.homeaffairs.gov.au/>.

‘principles that are morally neutral or even positive: national sovereignty, border protection, or the rule of law’ (2020, 179). This putative justification is a crucial reason why Parekh concludes that the harms refugees endure as a result of Northern state practices ought to be understood as a structural injustice: a morally unjust outcome that cumulatively results from morally neutral or morally positive acts or norms of numerous agents (Parekh 2016, 110; Parekh 2020, 159, 179).

A sustained normative analysis is therefore required to assess whether a state’s right to control borders can indeed morally justify current harmful practices against refugees. For this paper, I will accept that states do indeed have a right to control borders,³ but will assess whether the normative justifications for this right can justify current harmful practices. Numerous normative justifications for a right to control borders and immigration have been advanced, for instance based on a state’s and its citizens’ (right to determine their) economic, associative, social, cultural, demographic, institutional and political interests (Blake 2013; Miller 2005, 2016; Pevnick 2011; Walzer 1983; Wellman 2008). Nonetheless, almost all such justifications make an exception for refugees who, in seeking safety, have particularly urgent moral claims to admission. For instance, both David Miller’s and Michael Walzer’s accounts of a right to control borders—based, in part, on morally important interests of preserving distinctive national cultures—nonetheless acknowledge the overriding strength of refugees’ claims to admission, and thus that a right to control borders does not include a right to exclude refugees (at least when the costs of inclusion are reasonable) (Miller 2016, 15, 26–27 and 163; Walzer 1983, 33–50).⁴ Since on these accounts, a right to control borders does not include a right to exclude refugees, it *a fortiori* does not include a right to harm refugees to prevent them arriving. These normative justifications will therefore fail to justify current harmful practices.

However, there is one notable exception: Christopher Heath Wellman’s defence of a state’s right to control borders is unique in this debate since, on this account, states are permitted to exclude any and all refugees desperately seeking asylum (Wellman 2008, 2014; Wellman and Cole 2011). And, on Wellman’s account, a state’s right to control borders, as a deontological right, is not contingent on its being exercised to promote important underlying state interests, but is rather a recognition that the state has primary moral authority to determine its own affairs, and as such is less vulnerable to being overridden by countervailing interests (Wellman 2008, 114). This paper will therefore assess whether Wellman’s account, the most restrictive available in the literature, can justify current harmful practices. If it cannot then no (available) justification of a state’s right to control borders will be able to do so. Thus, if (the justifications for) a state’s right to control borders cannot justify current

3 This is of course a matter of extensive philosophical debate. For well-known critiques see Carens (1987; 2013), Oberman (2016) and Fine (2013).

4 Others also note this exception for refugees, see Blake (2013), Pevnick (2011).

harmful practices against refugees, then we ought to firmly reject policy-makers' putative justifications as unfounded; and it will be the case that responsible states will certainly not be mere innocent bystanders with only positive duties to rescue refugees (as on the duty of rescue approach), nor merely acting permissibly in contributing to a structural injustice, with only remedial responsibilities to help address the injustice (as on Parekh's account), but will instead be unjustifiably harming refugees. Such states will thus have urgent and stringent negative duties to desist from and/or abolish current harmful practices used against refugees, duties that have been overlooked in contemporary philosophical debates and in public policy.

To further clarify my aims and scope, this paper does not seek to analyse theoretical possibilities under which it might be permissible to harm refugees (though I address this briefly in Section 6), but (as an exercise in practical ethics and nonideal theory) to provide a close normative analysis of whether current harmful practices (outlined in detail below) are morally justified. Further, I do not suggest that Wellman, nor any other philosopher who defends a right to control borders, would themselves (seek to) endorse current practices. Instead, I am assessing whether an(y) appeal to the justifications of a state's right to control borders could justify them. With these points in mind, this paper can perhaps most usefully be read as a case for abolition insofar as, to pre-empt the conclusions, the analysis demonstrates that current practices cannot be justified by (the justifications of) a state's right to control borders. Consequently, responsible states will have urgent duties to desist from and/or abolish current harmful practices used against the world's displaced.

2 Harmful Practices Against Refugees

To clarify the analysis, it useful to consider the details of practices used against refugees seeking safety.⁵

2.1 Border Violence

The United Kingdom has funded barbed wire fences, concrete walls and the *Compagnies Républicaines de Sécurité* (CRS) riot police in the port of Calais in France to deter and prevent refugee arrivals, with numerous reported instances of violence and human rights abuses by the CRS against refugees (Human Rights Watch 2017, 2018a). The CRS have used extreme violence in forced evictions of camps involving

⁵ The details of these practices align with my analysis in my 2020 paper.

beatings with batons, water cannon, tear gas and rubber bullets, including against children (see The Independent 2016). The CRS also roam the area and reportedly use pepper spray and tear gas in unprovoked attacks often whilst refugees are sleeping in makeshift shelters as well as confiscate and destroy personal property such as phones, documentation and medication (see also The Independent 2018).

In another example, Hungary has erected barbed wire and electrified fences at the border with Serbia. There have been violent pushbacks of refugees, with police reported to beat refugees for hours, causing life-changing injuries, and some then take 'selfies' with the injured persons. They are reported to confiscate warm clothing and douse refugees in water during freezing temperatures, increasing risk of hypothermia (see The Independent 2017; Human Rights Watch 2018a).

These cases are representative of a larger trend of 'crackdowns' on refugees with similar instances of violence and human rights abuses against refugees at Polish, Belarusian, Croatian, Slovenian, Greek and Italian borders, with children at particular risk of abuse (Amnesty International 2019; Save the Children International 2018).

2.2 Detention and Containment

In an agreement between EU member states and Libya, refugees crossing the Mediterranean Sea are intercepted and returned to indefinite and arbitrary detention in centres in Libya (Human Rights Watch 2019; 2018c). This has two primary effects. The first effect is detention. Refugees are detained in centres on the Libyan coast funded by EU states and the United Kingdom (Taylor 2018). Overcrowding and lack of sanitation in these centres has led to starvation, disease (in particular, tuberculosis) and death. Refugees including children face grievous human rights violations in and around the centres: being raped, beaten, tortured, abused, starved and traded as slaves (BBC News 2018; Human Rights Watch 2019), with documented footage depicting the torture of refugees being electrocuted (Channel 4 News 2019).

The second effect is containment. This arrangement blocks refugees from travelling from Libya to the EU, where they could otherwise have claimed asylum and found adequate safety. It thereby closes off the main migratory route from North Africa to Europe and resultantly contains refugees in harmful conditions in regions in North Africa where their basic subsistence and security needs are not met, and where they are subjected to extensive human rights violations (see UNHCR 2019).

2.3 Encampment and Containment

A 2016 EU-Turkey deal to stem refugee flows from Turkey to Greece also has two primary effects. The first is encampment: the forced enclosure of refugees into

camps. Refugees who have made the dangerous sea-crossing to the Greek islands are encamped there without adequate supplies of food, shelter and medicine, and face extensive human rights violations, which has caused ‘immense suffering for asylum seekers’ (Human Rights Watch 2016). In certain camps ‘the sewage system is so overwhelmed, that raw sewage has been known to reach the mattresses where children sleep’ (International Rescue Committee 2018). There is also a significant threat of physical violence, with women and even children being subjected to sexual violence (Human Rights Watch 2018b). The mental toll caused by encampment is sufficiently significant that ‘many people have attempted to end their lives due to the extreme distress and emotional pain they experience’ (Human Rights Watch 2018b).

The second effect is containment as refugees are blocked from travelling to Greece from Turkey, and thus this main migratory route to safety in Europe is closed down. As a result, refugees are contained in regions nearer their countries of origin, in Turkey as well as in Jordan and Lebanon, where their security and subsistence needs are not met. In Turkey, refugees live in squalid camps and face destitution in urban areas without adequate human rights protection. They are denied the rights they are entitled to under the 1951 Refugee Convention and 80% live in severe poverty (Human Rights Watch 2016; UNHCR 2017, 55). In Jordan, there is a ‘rapid deterioration in living conditions’ with a significant number of refugees living in abject poverty (UNHCR 2017). And the UN Report on Conditions of Syrian Refugees in Lebanon revealed over 70% live under the Lebanese extreme poverty line, with a significant rise in food insecurity where ‘each day represents a monumental struggle to meet the most basic needs of food, water and healthcare’ (see UN News 2015).

These practices of border violence, detention, encampment and containment result in significant mental and physical suffering and extensive human rights violations, and constitute instances of doing harm to refugees (Hillier-Smith 2020).⁶ Let us now assess whether current harmful practices such as these can be justified by Wellman’s account of a state’s right to control borders.

3 A State’s Right to Freedom of Association

On Wellman’s account (Wellman 2008; Wellman and Cole 2011), legitimate states are entitled to self-determination. An essential component of self-determination is a

⁶ I thank an anonymous reviewer for highlighting how these practices relate to harms to refugees in different ways and are not obviously comparable instances of doing harm. In this paper, I will assume that my (2020) analysis of these practices as doing harm (in causing and making refugees to be worse off in aspects of their wellbeing than they would otherwise have been) is sound. Rather than reanalyse the metaphysics of the harm of these practices themselves, I will seek to assess whether, if the analysis is correct, such harmful practices can be justified.

right to freedom of association. A state and its citizens have a right to determine whom if anyone it would like to associate with and a right to exclude those whom they do not wish to associate with. This right is analogous to that of an individual. We recognise the moral importance of the individual's right to (not) associate with whomever they wish and to exclude others. Wellman's paradigm case is marital or romantic freedom of association: the individual has primary moral authority over whom (not) to enter into romantic or marital associations with, and this right permits them to refuse any romantic or marital association they wish to, and precludes them from being forced into any unwanted associations (2008, 110). And for Wellman,

Just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into its political community. And just as an individual's freedom of association entitles him or her to remain single, a state's freedom of association entitles it to exclude all foreigners from its political community. (2008, 111)

Thus, 'every legitimate state has the right to close its doors to all potential immigrants, even refugees desperately seeking asylum' (2008, 109).

To defend the analogy, Wellman notes the wide acceptance that groups, not just individuals, have a presumptive right to freedom of association. Religious groups, women's support groups and, as one of Wellman's core examples, even golf clubs have a right to choose whom to associate with, and to exclude others whom they do not wish to join their association (2008, 111). Moreover, it is already widely accepted that states themselves have a right to freedom of association (at least in other contexts). States have a right to join or not join various international political or economic arrangements (such as the EU or the NAFTA). It would be impermissible to force a state into such arrangements against their will (2008, 112). Similarly, Wellman, in another core example, notes it would be impermissible for the United States to unilaterally annex Canada even if it did so without violence or otherwise violating the human rights of Canadian citizens. The violation of the right to freedom of association explains the wrongfulness of such a peaceful annexation (2008, 112–13).

Further, though Wellman concedes that 'freedom of association is much more important for individuals in the marital context than for groups of citizens in the political realm' (2008, 113), the right to freedom of association, as a deontological right, does not depend on its being exercised to protect or realise morally important interests in order to be justified. Rather, the right is a recognition that the right-holder has primary moral authority over their own affairs and should not be interfered with:

Just as one need not explain how playing golf is inextricably related to the development of one's moral personality, say, in order to justify one's right to play golf, neither must one show that one's membership in a golf club is crucial to one's basic interests to establish the club members' right to freedom of association. (2008, 114)

Wellman, therefore, maintains that a state has a right to freedom of association, analogous to that of an individual, which permits excluding all outsiders, even refugees.

3.1 Wellman's Conditions for Excluding Refugees

Wellman seeks to further justify the exclusion of refugees by arguing that duties towards them can instead be discharged through 'exporting justice': 'one can intervene, militarily if necessary, in an unjust political environment to ensure that those currently vulnerable to the state are made safe in their homelands' (2008, 129), or create a 'safe haven' through establishing 'no-fly zones' to protect citizens from persecutory regimes (2014, 121). Thus, for Wellman:

Affluent societies have a duty to help [refugees] but it is a disjunctive duty ... the presence of those desperately seeking political asylum renders those of us in just political communities duty bound either to grant asylum or to ensure that these refugees no longer need fear their domestic regimes. (2008, 129)

On this view, states are permitted to exclude refugees if and only if they are exporting justice. Can this account, with its conception of duties to refugees and conditions for exclusion, justify current harmful practices?

First, Wellman's means of exporting justice fail to respond appropriately to the nonideal circumstances and needs of contemporary refugees and appear to conflate refugees with internally displaced persons (IDPs). Refugees, by definition, have fled their states of origin, so Wellman's means of exporting justice through military intervention in those states will do little to meet the acute needs of those displaced outside, residing in squalid camps or facing destitution in urban areas in the Global South, or risking their lives on perilous journeys to seek safety in the Global North.⁷ Such refugees qua refugees have distinctive needs in the form of, at a minimum, human rights protection, protection for Refugee Convention rights and adequate subsistence outside their state of origin.⁸ Wellman's means of exporting justice are thus more suited to IDPs. Even still, such military intervention is highly controversial, carries substantial risk and is uncertain (at best) to help such persons or restore the stability necessary for refugees to return. And, as Parekh (2016) warns, Wellman's proposals 'would either be impossible or mean committing ourselves to permanent and global warfare' (63).

⁷ Camps, urban areas or perilous journey are the *de facto* options facing refugees once displaced (Parekh 2020, 104–8).

⁸ Of course, refugees have other important needs beyond this basic minimum.

Wellman's proposals for exporting justice are thus inadequate. An obvious objection could then be pressed: on Wellman's account, states must help refugees either by exporting justice or by accepting them into their political communities. Wellman's means of exporting justice are inadequate and do not help refugees. Therefore, states must accept refugees into their political communities.⁹ Since states must accept refugees, *a fortiori* states may not harm those refugees to prevent them arriving.

To avoid this objection, Wellman's account must be strengthened to include adequate means of 'exporting justice' that meet the acute needs of refugees. Some theorists have suggested that 'open' and democratically run camps, which provide security and subsistence, a dignified existence, and autonomy through free movement and a right to work, are a viable means of addressing (or at least mitigating) harms of displacement (Parekh 2016, 2). Other proposals include supported local integration programmes or economic and development projects in host states near refugees' states of origin which again protect human rights, autonomy, means of subsistence and Refugee Convention rights (Betts and Collier 2017; Centre for Global Development 2019). And Wellman (in a separate article) himself suggests that states might incentivise and financially support another state to accept and adequately protect refugees (2014, 122). Though it is debatable that such measures fully address the harms of displacement, let us grant these as viable means of exporting justice.

Even accordingly amended, this account will fail to justify current practices. States can only refuse entrance on this account if they instead fulfil their then compulsory obligations to provide sustained funding for open camps, local integration programmes, economic projects and means for other states to protect refugees. Each of which, to meet the acute needs of refugees, must (at least) provide security and subsistence, an autonomous and dignified existence, and adequately protect their human rights and Refugee Convention rights. Already then, what is being envisioned would represent a radical departure from the status quo and a fundamental reform of current practices in favour of alternatives that would greatly improve the lives, wellbeing and human rights protection of thousands (potentially millions) of refugees. Furthermore, it is only once states are 'exporting justice' in the above way that such states are then permitted to refuse entrance. Therefore, when applied, it is unclear whether this account can justify even refusing entrance to refugees (much less harming them) since very few states (if any) are fulfilling their obligations to export justice in this way (In addition, and as I demonstrate in Section 6, Wellman's account cannot endorse proposals for exporting justice that unilaterally

⁹ Wilcox (2014) makes a similar argument that since United States' duties towards certain migrants cannot be met through transferring aid, they can only be adequately fulfilled through admission.

contain or relocate refugees against their will since such proposals violate refugees' rights to freedom of association).

Consequently, Wellman's account as it stands, with its disjunctive duty to admit or export justice, cannot justify current harmful practices. However, let us bracket this consideration and suppose that states have a right to freedom of association, which is not contingent on performing duties to export justice, and may exclude refugees. Let us analyse then if (Wellman's account of) a right to freedom of association can itself justify current harmful practices.

4 Does a Right to Freedom of Association Justify Harming Refugees?

As a *prima facie* judgement, a right to freedom of association does in fact appear to permit one to harm others in order to preserve one's freedom of association. For example, consider:

Harassment: There is a persistent harasser who strongly wishes to associate with you and will not leave you alone. They constantly stalk you everywhere, pester you, wait for you outside your home and make unwanted advances such that you cannot continue your life uninhibited by this unwanted association.

In this case, intuitively, it would be permissible to take measures (for instance acquiring a restraining order) to protect your freedom from this unwanted association and even harm the harasser with physical force (perhaps a firm kick) if necessary. Or, to extend Wellman's annexation case:

Annexation: The United States intends to unilaterally (albeit peacefully) annex Canada against the will of Canadian citizens. The only way to repel the annexation is for Canada to use military force and cause harm against the US aggressor.

Intuitively, Canada would be permitted to use force and cause harm in this case. Therefore, these cases demonstrate that a right to freedom of association may in fact include a right to harm others in order to preserve one's freedom of association. Indeed if, as Wellman suggests, a right to freedom of association is essential to self-determination (both for individuals and states), then harm would plausibly be permitted to defend one's association and thereby one's self-determination. Within the ethics of defensive harm in war, a paradigmatic just cause in *jus ad bellum* is a state's self-defence, including (many theorists suggest) defence of sovereignty and political self-determination itself in the face of nonviolent intervention or

annexation from external actors (Frowe 2014; McMahan 1994; Rodin 2002).¹⁰ Perhaps then states are indeed permitted to harm refugees through current practices in order to preserve their freedom of association as an essential component of self-determination.

In response, though harm is permissible in *Harassment* and *Annexation*, there are morally significant differences between these cases and current practices against refugees. Factors that generate permission to harm in *Harassment* and *Annexation* do not obtain in the case of refugees. I will now advance what I argue to be plausible constraints on the permissibility of harm to protect freedom of association: the necessity constraint, the proportionality constraint, and the moral responsibility constraint. These constraints are each necessary and explain why harm is permissible in *Harassment* and *Annexation* but not in the case of current practices against refugees.

4.1 Necessity

According to the necessity constraint, it is permissible to harm in order to preserve freedom of association if and only if causing that harm is a necessary means to preserve freedom of association.

One violates this constraint if one causes harm when there are alternatives available that would also achieve one's aims that would not cause harm (or would cause less harm).¹¹ For example, if Canada could prevent the US annexation either through a short diplomatic negotiation, or through a missile strike on a US military target that would foreseeably kill some innocent civilians, it would clearly be impermissible to cause these unnecessary deaths.

The necessity constraint explains, in part, the permissibility of harm in *Harassment* and *Annexation*. The victim of *Harassment*, we can suppose, had no available alternatives to protect her free association (suppose the harasser ignored legal restraining orders) and so inflicting the harm was necessary for the harasser to desist. So too in *Annexation*, we can suppose the US president was impervious to reason and the only means to repel the annexation would be to use military force and cause harm as a last resort.

In contrast, harming refugees through current practices is not necessary. As canvassed in Section 3.1, there are available means to support refugees in regions near their states of origin. One proposal is to invest in and fund infrastructure development and local integration programmes in host states' communities and

¹⁰ For a dissenting view see Rodin (2002).

¹¹ This is a simplified adaptation of McMahan's (2013) definition. See also Lazar (2020).

economies to provide for refugees' security and subsistence needs as well as opportunities for an autonomous and dignified existence.¹² Another is supporting adequately funded, open and democratically run camps that provide security and subsistence, as well as autonomy through free movement and a right to work (see Parekh 2016, 2). Another is the establishment of specialised economic zones that provide jobs, wages, skills development and autonomy for refugees (Betts and Collier 2017, 179–80). Though these measures arguably may not fully mitigate the harms of displacement, such measures can provide security and subsistence in regions close to refugees' states of origin, and demonstrably disincentivise onward journeys to states in the Global North (see Betts and Collier 2017, 154–55, 206). Current harmful practices against refugees are therefore not necessary to preserve freedom of association, but are a policy choice among numerous (nonharmful) alternatives.

It may be objected that nonharmful alternatives would be (more) economically costly and avoidance of such costs justifies the use of cheaper but harmful current practices to preserve free association. In response, the costs of regional programmes are not obviously substantially greater than the costs of current practices. The building, funding and maintenance of the border infrastructure of barbed wire, walls and armed personnel, as well as of the network of detention centres and encampments, are costly. As are the financial incentives provided to states to contain refugees. The EU-Turkey deal itself saw the transfer of nine billion euros (Betts and Collier 2017, 92). By contrast, as an example, fulfilling the entire annual budget of the UNHCR (consistently unmet by donor states) to help provide regional programmes would cost 8.6 billion dollars (see UNHCR, n.d.). This is not a comprehensive empirical analysis; however, the cost disparity would plausibly not be significant. If states can fund practices that harm refugees, states can instead fund practices that help refugees, which would also preserve free association.

Furthermore, even if nonharmful alternatives are more costly, the avoidance of economic costs alone is not a sufficiently compelling moral consideration to justify current harms (or demonstrate them as necessary). Even granting that states have agent-relative permissions to prioritise their own interests and the interests of their own citizens over the equal (or even greater) interests of noncitizens, this priority cannot plausibly be absolute. To hold that avoiding economic costs justified current harmful practices would entail that the economic interests of a state and its citizens are sufficiently more morally important to be able to override the urgent interests of refugees to avoid the abuse, violence, torture, rape, disease, starvation and death (that result from current practices used against them). Such a priority-weighting of interests would discount refugees' most fundamental interests and human rights to

¹² See, for example, the recommendations in 'Toward Medium-Term Solutions for Rohingya Refugees and Hosts in Bangladesh' (Centre for Global Development 2019).

an implausible extreme, which would be inconsistent with recognising refugees as human beings with equal moral worth. Agent-relative permissions cannot plausibly extend to failing to respect the equal moral worth of persons in this way.¹³ For example, it is uncontroversial that a state may not permissibly aggress against other states or harm or violate the rights of foreign populations even if doing so was economically advantageous or necessary to avoid significant economic costs. This would be impermissible precisely because such an aggression, in subordinating those outsiders' fundamental interests and human rights to economic considerations, would fail to respect the moral worth of those outsiders and would be a perverse distortion of agent-relative permissions. Thus, avoiding economic costs lacks the moral significance to justify harming or violating the rights of innocent others. Therefore, even if nonharmful alternatives cost more, avoiding this cost cannot justify harming and violating the rights of refugees.

Current harmful practices thus violate the necessity constraint, and this is no trivial point: the suffering and human rights violations that refugees endure as a result is needless and avoidable.

4.2 Proportionality

According to the proportionality constraint, it is permissible to harm in order to preserve freedom of association if and only if that harm is proportionate relative to the severity of the prospective imposition (and relative to the liability of the agents harmed).

Proportionality concerns comparing the severity of the harm caused to protect one's freedom of association to the severity of the imposition on one's freedom of association if one refrained from that harm.¹⁴ Thus, even if harm is necessary, it ought to be proportionate to the severity of the imposition, rather than excessive. To take an example, if the only means to prevent someone from pinching you is by killing them, then killing them would be clearly impermissible, precisely because that harm is grossly disproportionate (McMahan 2013, 6–7). Proportionality is also sensitive to the liability of the agents harmed (yet I will discuss this liability dimension within Section 4.3.).

This proportionality constraint explains, in part, the permissibility of harm in *Harassment* and *Annexation*. In *Harassment*, if the victim did not cause harm, then

¹³ Miller (2016) endorses a similar conclusion that states' justified partiality cannot give zero weight to the interests of outsiders. We 'may not act towards [noncitizens] in ways that violate their human rights' (31). This is because respecting (all persons') human rights 'appears to be a straightforward way of acknowledging the equal moral worth of all human beings' (153).

¹⁴ Adapted from McMahan (2013, 3–5).

the potential incursion on her freedom of association would be substantial indeed: invading her personal space, constantly and intimately associating with her such that she is unable to continue her life uninhibited by this unwanted association. Therefore, kicking the harasser would be proportionate. So too in *Annexation*, where Canadian citizens, if annexed, would be completely subjected to the dominating, arbitrary will of a foreign state with no political self-determination whatsoever. This would be a total abolition of their freedom of association, where millions of citizens would have their rights to determine their political future comprehensively and indefinitely violated.¹⁵ A targeted military strike therefore (if necessary) could constitute a proportionate response.

By contrast, consider a variation on Wellman's golf club case:

Harmful Golf Club: There is a persistent applicant to the golf club who will not take 'no' for an answer. The existing club members do not wish him to join. Perhaps if the group broke his arms he would be dissuaded.

This harm is intuitively impermissible. This judgement is explained by the fact that an additional member does not count as a sufficiently significant imposition, and the grievous harm caused to the applicant would be disproportionate relative to that imposition. In fact, it seems that if there is no other way to exclude him without breaking his arms, the group must begrudgingly accept him into their club.

In terms of imposition, accepting refugees into political communities in the Global North is closer to *Harmful Golf Club* than it is to *Harassment* or *Annexation*. In contrast to *Harassment*, individual citizens' most intimate and personal associations would not be constantly infringed, and citizens could continue to live and self-determine their lives and freely choose with whom to associate, socialise, join groups or form relationships. An individual right to freedom of association plausibly does not include a right to determine who is allowed to live down the street from oneself, or who works in one's office, or who one shares public transport with or who one passes in the street (if it did, then my right would (absurdly) be violated each time I board the tube, and an incalculable number of times every day). More plausibly, one's right to freedom of association includes a right to choose with whom (not) to socialise, join groups or form relationships. It is not clear that the presence of refugees within a community would infringe one's right or undermine one's ability to do such things any more than the presence of any other group of persons in one's community would do so. Thus, the inclusion of refugees would not represent a significant imposition on individual freedom of association. Moreover, in contrast to *Annexation*, nor would the inclusion of refugees entail that the state and its citizens

¹⁵ In Hurka's (2005) words a violation of 'an immense number of people's rights for an immense period of time'.

were deprived of political free association or self-determination at the collective and state level. The citizens and state would not be subjected to the dominating arbitrary will of an external state with no self-determination over the direction of their political community. Rather, the state and its citizens would retain full abilities to freely (participatively) determine the policy and the future direction of the *demos*.

It may be objected that the inclusion of refugees would undermine political self-determination since new refugee arrivals could, through political participation, then have a say on the policy priorities of the state (see Wellman and Cole 2011, 39–40). In response, a certain number of additional votes from enfranchised refugees does not appear to be any substantial imposition on the free association or self-determination of the state and its electorate in precisely the same way that the enfranchisement of an equal number of a new generation coming of voting age is not taken to be any substantial imposition. Moreover, any putative impact can itself be mitigated as it is contingent on domestic policies regarding refugees' political participation rights (in most states for instance, refugees are presently denied voting rights).¹⁶ Thus, the inclusion of refugees represents a nonsubstantial imposition on free association at the individual level (in contrast to *Harassment*) and a nonsubstantial (and contingent) imposition at the collective state level (in contrast to *Annexation*).

Compare this nonsubstantial potential imposition to the harms that many thousands of refugees currently endure as a result of border violence, detention, encampment and containment, which include immense physical and mental suffering, violations of their human rights (against torture, rape, sexual violence, exploitation and enslavement) and death. No further argument is necessary to demonstrate that these practices cause a substantially greater amount of harm compared to refugees' potential imposition. These practices thus cause (grossly) disproportionate harm to refugees.

4.3 Moral Responsibility

According to the final and crucial constraint, the moral responsibility constraint, harm is permissible to preserve freedom of association if and only if that harm is proportionate relative to the moral responsibility of the agent(s) harmed for the imposition.

This constraint draws upon the plausible view that liability to harm is grounded in moral responsibility for posing an unjust threat (Frowe 2014, 73; McMahan 2009, 158). Agents who are morally responsible for posing an unjust threat are thereby

¹⁶ I personally endorse voting rights for refugees. Here I am merely demonstrating the contingency of refugees' purported imposition on collective self-determination.

liable to harm (or in other words have forfeited their rights not to be harmed). Agents who are not morally responsible for posing an unjust threat are morally innocent, have not forfeited their rights and are thus not liable to harm. The permissibility of defensive harm is sensitive to liability: harming persons who are morally responsible for posing an unjust threat (who are thereby liable to harm) may be permissible where harming nonresponsible or innocent persons (who are thereby nonliable) may not be. More precisely, the amount of harm it is permissible to inflict on liable persons is much greater than the amount of harm it is permissible to inflict on nonliable innocent persons. (I consider this more precise formulation later.)

Frowe's (2014) framework is useful in explaining moral responsibility further (72–76). On this framework, an agent (A) is morally responsible for posing a threat to a victim (V) if A intentionally failed to avail herself of a reasonable opportunity to avoid posing this threat to V. A intentionally failed to avail herself of such a reasonable opportunity if

- (i) V has a right not to suffer the harm,
- (ii) A believes that a given course of action will endanger V,
- (iii) A believes that she has alternative courses of action available to her that are not unreasonably costly to her or other innocent people and that will not endanger V (or will not endanger V to the same degree), and
- (iv) A chooses not to take any of those alternative courses of action (Frowe 2014, 73).

In short, A is morally responsible for the threat if she intentionally failed to take an alternative course of action to avoid posing that threat, and that action was not unreasonably costly to her. To determine whether an alternative to posing the threat is unreasonably costly for A or not, we compare the cost to A of taking the alternative and the severity of the prospective harm to V if she fails to take the alternative and consider whether we can reasonably expect A to bear those costs to avoid posing that threat to V. For our purposes then, an agent will be morally responsible for an imposition on freedom of association if that agent had reasonable alternatives to avoid posing the imposition that were not unreasonably costly to that agent, and the agent intentionally failed to take those alternatives. Only those agents who are morally responsible for imposing on freedom of association in the above way are liable to be harmed.

So understood, the moral responsibility constraint explains, in part, the permissibility of harm in *Harassment* and *Annexation*. In *Harassment*, the harasser had reasonable and costless alternatives to avoid posing the threat but chose to neglect them and threaten the victim instead. The harasser is, therefore, morally responsible for posing an unjust threat to the victim and, in so doing, is liable to harm, which renders the defensive harm proportionate and permissible. So too in *Annexation*, the US aggressor had reasonable and costless alternatives to simply

avoid posing this threat yet opted to pose the threat instead. The US aggressor is, therefore, morally responsible for posing this unjust threat, and, in so doing, is liable to be harmed, which renders the defensive harm proportionate and permissible.

However, it strikes us as far less permissible to harm an agent who would impose on one's free association but is not morally responsible for that imposition. Compare:

Solitude is bliss (enemy): You wish to live a life of solitude in a cave and don't wish to associate with anyone. However, your enemy knows how much it would distress you to associate with others and so, of their own free choice, seeks to enter your cave to disrupt your solitude.

Solitude is bliss (innocent): You wish to live a life of solitude in a cave and don't wish to associate with anyone. However, someone is forced to seek refuge in your cave to escape a threat to her life and disrupts your solitude.

Though it arguably may be permissible to harm the enemy to protect your freedom of association (say, by throwing stones at them to cause some physical injury), it is clearly impermissible to harm the innocent person. This is explained by the difference in moral responsibility and liability. The enemy had reasonable alternatives to not impose but culpably chose to disrupt your solitude and is therefore morally responsible for an unjust imposition and is thus liable to harm. By contrast, the innocent person faced life-threatening circumstances and, through no fault of her own, had no reasonable alternative but to seek refuge and is thus not morally responsible for the imposition and is not liable to harm.

So too with refugees, who (unlike the harasser or US aggressor) are not morally responsible for any supposed imposition. Contemporary nonideal circumstances of refugee movements are such that, once displaced from extensive human rights violations in their own state, most refugees in the Global South effectively face either a life of further extensive human rights violations in squalid refugee camps or face destitution, exploitation and further human rights violations in urban areas. Neither of these possibilities provide adequate security or subsistence (Parekh 2016, 2020; UNHCR 2017, 2022) Given the relative lack of safe and legal routes for refugees to access asylum and the lack of active resettlement by Northern states¹⁷ together with the diminished possibility of repatriation owing to long term instability in states of origin (see UNHCR 2017, 2022), the only *de facto* available means through which refugees might escape extensive human rights violations and unmet subsistence needs is to seek adequate safety in Northern states. Consequently, though refugees arguably may impose, the alternative for those refugees to avoid this imposition is unreasonably costly—having their human rights extensively violated and enduring a lack of subsistence—which is a cost beyond what one could reasonably expect a

17 For example, only 0.3% of refugees worldwide were resettled in 2019, see UNHCR 2020a,b.

person to bear. Therefore, refugees do not intentionally fail to avail themselves of a reasonable opportunity to avoid infringing the state's free association quite simply because there is no reasonable opportunity. Refugees are therefore not morally responsible for the imposition. Refugees, as innocent persons, are not liable to be harmed and thus harming such refugees to preserve free association is impermissible.

It may be objected that it is not always impermissible to harm nonmorally responsible or nonliable persons. While *narrow proportionality* concerns the harm that is proportionate to inflict on liable agents, *wide proportionality* concerns the harm that is proportionate to inflict on nonliable agents (see McMahan 2020). Though the amount of defensive harm it is permissible to inflict on liable persons within narrow proportionality is much greater than the amount of defensive harm it is permissible to inflict on nonliable persons within wide proportionality, it may nonetheless be widely proportionate and permissible to harm a nonliable person if necessary to prevent a substantially greater harm to other nonliable persons. Therefore, it may be argued, even though refugees are not liable, harming them through current practices might be permissible within wide proportionality.

It is demonstrably clear, however, that current harmful practices will fail to be widely proportionate, since such practices do not prevent any substantially greater harm to other nonliable persons. Indeed, Section 4.2 demonstrated that current harms to refugees were disproportionate relative to their potential nonsubstantial imposition even on the implicit assumption that refugees *were* morally responsible for that imposition and were thus liable to some defensive harm. Current harms to refugees are disproportionate in the narrow sense (against liable persons) let alone in the wide sense (against innocent persons). Therefore, this consideration of wide proportionality, far from justifying current practices, reveals that (since refugees are innocent and not liable to harm) current practices inflict an even greater amount of disproportionate harm and are thus an even more egregious violation of the proportionality constraint than suggested in Section 4.2.

Another possible way to justify harm to nonresponsible persons could be drawn from Frowe's (2014) analysis of how innocent lethal threats have an enforceable duty to bear certain costs in virtue of the fact that they threaten harm (67–70). For Frowe, the permissibility of defensively killing innocent threats is based on the fact that killing the threat inflicts less morally weighted harm, calculated as the harm of death minus the costs the threat has an enforceable duty to bear, than the victim of the threat would incur if she did not kill the innocent lethal threat (the nondiscounted harm of death).

Applying Frowe's analysis to our context would nonetheless still entail that current practices are impermissible. This is because, assuming Frowe is correct, though refugees may have an enforceable duty not to impose, harming in self-

defense through current practices inflicts a far greater amount of morally weighted harm (which far outstrips the costs refugees have an enforceable duty to bear), than would obtain as a result of the imposition.

Thus, the moral responsibility constraint prohibits harming refugees through current practices since refugees, as innocent persons seeking safety, are not morally responsible for an(y) unjust threat and as such are not liable to harm. And this conclusion is not undermined by considerations of wide proportionality, nor enforceable duties to bear harm.

4.4 Violating the Constraints on Permissible Harm

A right to freedom of association does not extend to an unconditional permission to harm in order to preserve one's association. Rather, the necessity, proportionality and moral responsibility constraints entail that it is permissible to harm in order to preserve freedom of association if and only if (1) the harm is necessary; (2) the harm is proportionate relative to the severity of the imposition; and (3) the harm is proportionate relative to the moral responsibility of the agent(s) harmed. Current harmful practices against refugees are not necessary to preserve freedom of association; the harms caused are disproportionate; and refugees are not morally responsible for the imposition. Therefore, current practices used against refugees today cause unnecessary and disproportionate harm to innocent persons. For this reason, they cannot be justified by a state's right to freedom of association.

5 Does Wellman's Account in Fact Oppose Harming Refugees?

We have seen that Wellman's account cannot justify current practices. I now wish to consider how Wellman's account may in fact oppose such practices.

5.1 A Right to Freedom of Association

To demonstrate the value of a right to freedom of association as an essential component of self-determination, Wellman envisages a nightmarish dystopia where a state agency arbitrarily decides for us whom and for how long we will form (romantic and sexual) associations with. Such forced associations would entail our lives would not be self-determined, as substantial parts of our life scripts would be

instead ‘written’ for us by the agency. Wellman rightly suggests that we would be ‘aghast at this imaginary society’ (Wellman and Cole 2011, 29–31).

As Wellman acknowledges, all persons possess this important right to freedom of association. It follows obviously that refugees have a right to freedom of association, essential to their self-determination. Now, recall that, as part of current practices, refugees are forced into detention centres where they face being beaten, raped, tortured and traded as slaves by others and enclosed in camps where refugees—including women and children—face sexual violence and harassment. Parekh’s (2016) analysis has shown how encampment engenders a sense of captivity and pervasive sexual violence: ‘domestic violence, sexual exploitation, and various kinds of sexual torture occur at extremely high rates’ (34). The pervasiveness of sexual violence is due in part to the structure of the camps themselves: as enclosed spaces that deny free movement, it becomes very difficult for women and children to find safety from sexual violence (36). The practice of containment, illustratively labelled ‘caging’ by some theorists, similarly functions to actively confine refugees in certain regions and conditions (in camps and urban areas) in the Global South where their human rights are systematically violated by others, and to prevent their escape from such conditions to access safety in the Global North (FitzGerald 2019, 6–7, 263–64).

In addition to the immense suffering caused to refugees, we must also note the violation of their right to freedom of association. If I force you into a place where you do not wish to be and to associate with others whom you do not wish to, this is a paradigmatic violation of your freedom of association. Detention, encampment and containment force refugees against their will to associate in places where they would not have wished to be (in detention centres, encampments and areas of containment) and to associate with persons they did not wish to. Moreover, this violation of freedom of association resultantly devastates self-determination. Rather than determining for themselves, refugees are denied any say as states arbitrarily determine for them where and with whom they will associate, what their associations and future prospects will be, and thus unilaterally ‘write’ substantial parts of refugees’ life scripts against their will. It is not necessary to use our imagination to envisage Wellman’s nightmarish dystopia, it is a reality for many refugees today.

Moreover, the most egregious and repugnant violation of freedom of association is being forced into an unwanted sexual association. This is the most pernicious imposition on one’s most personal and intimate association. Therefore, for the refugees forced into sexual slavery, violence and exploitation owing to their being detained, encamped and contained, this is an egregious violation of their right to freedom of association. States, in forcing refugees into enclosed conditions where their free movement to escape from threats is denied, thereby force them into close proximity and interaction with persons whom they do not wish to associate with and force them into risk of sexual attack. Forcing someone into an unwanted association

with a person who poses a threat of sexual assault is a violation of their right to freedom of association, and perhaps the most abhorrent conceivable.

Thus, current harmful practices constitute a serious violation of refugees' rights to freedom of association (and resultant self-determination). Therefore, any appeal to a right to freedom of association (as an essential component of self-determination), far from justifying current practices against refugees, will more plausibly prohibit them.

5.2 Relational Egalitarianism

Wellman's account also endorses relational egalitarianism—the view that egalitarian justice requires removing oppressive unequal relations between persons—and Wellman acknowledges that 'achieving relational equality is [arguably] important enough to trump other values like freedom of association' (2008, 122). Since refugees exist within social relations with states through current practices, questions of relational egalitarianism are applicable (Sharp 2022).¹⁸ To see how, consider that the specific aims of relational equality, as advanced by Anderson (1999) and endorsed by Wellman, are 'negatively ... to abolish oppression—that is, forms of social relationship by which some people dominate, exploit, marginalize, demean, and inflict violence upon others' (313). In light of these aims, consider the features of current practices.

Domination: Refugees, in having (relatively) no political power whilst displaced or effective recourse to any authority, cannot but be subjected to the arbitrary will of states that detain, encamp or contain them. Their will—for example, their wish to seek safety, or have their human rights protected, or to rebuild their lives, or simply to not be detained, encamped or contained—is ignored and overruled. Instead, refugees are subjected to the will of others who arbitrarily control them, their movements and ultimately their life prospects.

Exploitation: Parekh (2016) has analysed how Northern states benefit from harmful practices that contain refugees away from their territories since those states then avoid costs of accommodating such refugees (115). If Parekh's analysis is correct, then current practices may constitute exploitation insofar as states benefit from harming refugees. Moreover, these practices force refugees into conditions in which they can easily be exploited by others: traffickers, criminal groups, police or border officials.

¹⁸ Daniel Sharp (2022) has argued (in a similar vein) that border controls more broadly instantiate relational inequality since they represent objectionable asymmetrical power relations between states and prospective migrants, and this counts against a state's right to control borders. My aim is narrower in focusing only on certain practices that harm refugees, which I believe more paradigmatically instantiate relational inequality insofar as they dominate, exploit, marginalise, degrade and visit violence on refugees.

Marginalization: As Parekh's (2016) analysis has also highlighted (90–99), such practices marginalize and exclude refugees from participation in society, a community and what Hannah Arendt termed 'mankind as a whole'. Refugees are cast as unwanted and undesirable elements, enclosed or pushed away from society to the margins of an adequate human existence.

Degradation: Current practices reduce refugees to live below acceptable standards for a dignified human existence. Consider the disease-ridden detention centres or encampment amongst raw sewage. Furthermore, refugees being detained, encamped and contained in these ways—treated as undesirable or as mere pests to be kept away—is not consistent with their being treated with respect as human beings with (equal) moral worth. Aside from the degrading conditions refugees are made to endure, this treatment of them is itself degrading.

Violence: Such practices involve the direct infliction of violence either at borders or through forced apprehension, incarceration, coercion as part of detention, encampment and containment. And violence and human rights violations are endemic within detention centres, camps and areas of containment.

From this brief analysis then, current practices are plausibly paradigm examples of unequal relations which instantiate domination, exploitation, marginalization, degradation and violence. These are the precise criteria for an unjustified inequality on the relational view. Wellman's account, therefore, with its commitment to the importance of relational equality and its potential to outweigh the moral importance of freedom of association, far for justifying these practices, more plausibly rules them out.

Against structurally similar arguments (for example, Wilcox 2014), Wellman suggests that duties to offset any relational inequality that results from states exercising their free association can be discharged through distribution of resources or reform of practices rather than in 'the currency of open borders' (Wellman 2014, 120; Wellman and Cole 2011, 66).

Applying Wellman's potential response to our present context, distribution of resources alone to refugees who are detained, encamped or contained would manifestly fail to alleviate the relational inequality in the form of their domination by controlling states, or the exploitative nature of their treatment, or their marginalisation from political societies, or the degrading subjection as undesirable elements, or the violence they are subjected to. Instead, radical reform would be required to remove unequal relations of domination, exploitation, marginalisation, degradation and violence. This concession itself confirms my conclusions that (Wellman's account of) a right to control borders cannot justify current practices, which must be reformed (if not abolished). Moreover, there is reason to doubt, though I cannot demonstrate this fully here, that any practice that similarly functioned to forcibly detain, encamp or contain refugees could adequately be reformed

to remove unjustified relational inequalities (in particular of domination, exploitation, marginalisation and degradation), since such practices may necessarily function to dominate refugees through arbitrarily controlling them and their movements against their will, exploit refugees through benefitting from their exclusion, degradingly treat refugees as undesirable elements, and marginalise refugees from societies and adequate state protection. Any reform required to eliminate the unjustified relational inequality of current practices would thus plausibly take the form of abolition.

5.3 Conclusion of Wellman's Account

Wellman's account of a state's right to control borders is unable to justify current harmful practices against refugees. A right to freedom of association cannot justify causing such unnecessary and disproportionate harm to innocent persons. Moreover, Wellman's account, with its commitments to individuals' rights to freedom of association and to relational egalitarianism, is in fact more likely to prohibit current practices. Therefore, since Wellman's account (the most restrictive available) will fail to justify current practices, no normative justification of a state's right to control borders will be able to do so. Thus, a state's right to control borders cannot justify current harmful practices against refugees.

6 Could Harmful Practices Ever Be Permissible?

Before concluding, it is worth briefly considering certain theoretical possibilities regarding whether a state's right to control borders could ever justify harming refugees in ways comparable to current practices.¹⁹

¹⁹ This paper has the limited aim of assessing whether a right to control borders can justify current practices in contemporary non ideal circumstances. Yet I thank an anonymous reviewer for pressing me to consider in more detail, and consult further literature on, more abstract theoretical possibilities in which it might be permissible to harm refugees. Gerver (2020) for instance, has suggested that it may be permissible for citizens to support immigration policies that exclude outsiders even if those outsiders need access to resources in order to survive, if and only if citizens also require those same resources in order to survive, and those citizens have a pre-existing claim right to those resources. And Hidalgo (2018) suggests that harms of exclusion would be justified if and only if necessary to prevent significantly bad consequences overall in the form of social collapse (57). I am in broad agreement insofar as, of course, it must be conceded that there must be some circumstance in which harming refugees could be permissible, for instance to prevent some moral catastrophe. And my analysis entails that it may be permissible to harm refugees if and only if that harm is necessary, proportionate and importantly widely proportionate insofar as it would prevent a far greater harm

Suppose state S was adequately fulfilling duties to export justice to help refugees in regions close to their states of origin in ways detailed in Section 3.1. Yet further refugees in need of safety sought to enter state S. Would S now be justified in adopting current harmful practices to prevent refugees from entering its territory?

In response, the performance of positive duties to aid does not vitiate negative duties not to harm. Consider,

Generous Golf Club: A remarkably charitable golf club is committed to supporting victims of domestic violence. The club (and its members) donate substantial amounts to support women's refuges, which provide safety for those fleeing domestic violence. One day, a victim of such violence is fleeing her attacker and notices the golf club. Knowing that she would be safe there, she seeks to enter to escape her attacker. The members of the club decide to throw stones at her to knock her unconscious to prevent her from entering the club, and thereby deny her escape from her attacker.

It is clearly impermissible to harm this woman and deny her escape. Note also that the generosity of the club does not give rise to any justification to then cause harm to women fleeing domestic violence. The constraint against causing harm and violating the rights of innocent people stands, no matter how generous one otherwise might be. Note also that it would be just as impermissible to harm this woman whether the group donated to women's refuges or gave nothing. Thus, the fulfilment of duties to help others has no bearing on the stringency of the constraint against harming innocent people. Therefore, even if state S was exporting justice, it would remain impermissible to harm refugees.

Another possibility is this: suppose that the exercise of free association and exclusion itself necessarily resulted in harms to refugees. For instance, suppose the only means refugees could escape serious harms such as extensive human rights violations and a lack of subsistence was to seek safety in state S (or a group of states). Yet state S (or a group of states) sought to preserve freedom of association and so excluded those refugees, not by adopting additionally harmful practices, but simply by, say, closing borders and refusing entrance. Suppose this very act of exclusion entailed that refugees were now unable to escape and so endured severe harms of human rights violations and a lack of subsistence. Would such exclusion be justified?

When exclusion itself is harmful, this may render exclusion impermissible. For instance, Sarah Fine (2010) has argued, in the context of immigration more broadly, that if and when an exercise of free association would potentially harm others, this

to (many) other innocent persons. However, such a circumstance is so far removed from our current (or any foreseeable) circumstances to have any practical relevance. As such, I do not have much further to add to, nor the space to enter into, the broader abstract debate. In this section then, I only consider theoretical possibilities that are closely relevant to my previous analysis of (Wellman's account of) a state's right to control borders.

provides grounds to restrict the exercise of that association (345–49). Where ‘interests [in inclusion] are so substantial and thwarting them is so detrimental to the wellbeing of the excluded, the exclusion itself becomes a cause for concern’ (347). Fine then argues that exclusion of immigrants is harmful insofar as it thwarts their substantial interests in entrance and this counts against exercising free association and exclusion (348).

Some might object that exclusion of immigrants does not necessarily actively harm those immigrants, but rather fails to make them better off through the benefit of inclusion and so instead merely allows harm. However, this objection will not apply to our current context of exclusion of refugees. In this context, *ex hypothesi* since refugees’ only means of escaping severe harms is to enter S, the very act of exclusion blocks refugees’ route to safety and thereby causes and makes it the case that those refugees are harmed when they otherwise would not have been (as they could have escaped). In such a case, the act denies escape from a harmful sequence and the exclusion itself constitutes doing harm (see Hillier-Smith 2020). For example, if you sought to prevent a drowning child from swimming to safety onto your dry land by holding them at arm’s length in the water, this positive act of denial of escape actively interferes with the sequence of events such that the child is harmed when they otherwise would not have been, and therefore constitutes doing (rather than allowing) harm (Hillier-Smith 2020, 316). Thus, Fine’s argument that exclusion is itself harmful and exercising freedom of association in this way is impermissible is most compelling in this context of exclusion denying refugees’ escape from a harmful sequence.²⁰ To finally demonstrate this, consider:

Golf Club (fleeing attacker): The only means for an innocent person to escape a murderous attacker is by entering a golf club where they will be able to mingle with the other members, fabricate an alibi, evade detection or some such action. The members of the group do not want them to enter or join the club, even if it will save them from this threat.

It would be clearly impermissible for the Golf Club to lock the doors thereby ensuring the victim will be unable to escape from and will suffer the threat from her attacker. This is because the act of exclusion itself would constitute doing harm as an instance of denying escape from a harmful sequence thus ensuring the victim is harmed when she otherwise would not have been, (and this harm would be disproportionate relative to the imposition and to the moral innocence of the nonliable victim). Therefore, a right to freedom of association does not extend to a right to even exclude others if that exclusion would (widely disproportionately) harm innocents through

²⁰ Given, of course, that the harm of exclusion to refugees (in denying their escape from severe threats) will be widely disproportionate.

denying their escape from a harmful sequence. Thus, it is not permissible for states to exercise their freedom of association and exclude refugees in this way.

Another possibility to consider is this. Suppose state S wished to preserve freedom of association and exclude refugees, and so sought to relocate refugees who sought safety on its territory by pressuring and funding other states to accept them. Wellman himself suggests that states may pressure other states to take in their unwanted refugees (2014, 122). Similarly, Miller (2013) argues that states (only if they are adequately fulfilling duties to refugees and would also incur significant costs in further admissions) may legitimately ‘pass on’ refugees to other states (12).

Such relocation schemes are morally deeply problematic. In practice, destination states for relocation schemes are often less or unable to adequately protect the wellbeing and human rights of relocated refugees, resulting in human rights abuses,²¹ increased risks of trafficking and exploitation, as well as psychological trauma (see e.g. UN News 2022b). Even without such harms, ‘trading’ refugees (paying states to accommodate unwanted refugees) is demeaning and dehumanising in failing to respect refugees as human beings with equal moral value and instead expressing them as having negative value: undesirable in the exporting state and a burden to be compensated for in the importing state, akin to some toxic waste (Sandel 2012). Moreover, such schemes may fail to respect refugee agency in states unilaterally deciding *for* refugees where they will live (Gerver 2018; Owen 2018). These provide independent moral reasons to reject such schemes. And most crucially for our present analysis is that such relocation schemes are not justifiable (on grounds of freedom of association) since they violate refugees’ rights to freedom of association. Refugees have a multitude of various claims to seek safety in certain states, including but not limited to, the extent of human rights protection in that state, previous connections to that state, the presence of relatives in that state, proximity to their home state, the language(s) they speak, the existence of a diaspora from their homeland in that state, the range of opportunities for security, subsistence, education or employment, its cultural and religious composition, and importantly the extent of opportunities to rebuild, determine and live their lives as they would wish.²² Not only does excluding and relocating such refugees from that state (arguably) constitute an impermissible infringement of their positive liberty-right of freedom of association (to associate with persons and in places one would wish to), but further: arbitrarily determining where and with whom a refugee will associate constitutes a violation of their negative claim-right to freedom of association (not to

21 For one example, the UK’s proposed relocation to Rwanda scheme has been criticised due to Rwanda’s lack of capacity to effectively support refugees (UN News 2022a) and its record of human rights abuses against refugees (Human Rights Watch 2022).

22 These examples are mostly drawn from Owen (2018, 7).

be forced to associate with persons or in places they do not wish to). For a refugee—who sought entrance to *S* perhaps to join family members or members of the diaspora, or to rebuild their lives there due to their language abilities or some such—to not only be excluded but forcibly and involuntarily relocated to join a separate and unwanted association is a paradigmatic violation of an individual's right to freedom of association. Moreover, such a violation devastates an individual's self-determination, as the state arbitrarily determines with whom they will be able to associate or form social ties, where they will live, their community and cultural environment, and ultimately (the parameters of) their life trajectory. Involuntary relocation is then a violation of free association and of self-determination. Therefore, a state's right to control borders, based on a right to freedom of association and self-determination cannot on these grounds justify such relocation schemes.

A final possibility to consider is this. Suppose *S* was exporting justice and had also taken in a great many refugees, while still other refugees in need of safety sought to enter *S*. Yet any further admissions would entail significant political, economic, cultural and associational costs. Miller (2016), for example, suggests that if admitting further refugees would transform political institutions and national cultures then any duty to do so is no longer required, but is up to the discretion of the (citizens of the) state (93). In such circumstances, would it be permissible for *S* to harm refugees in ways comparable to current practices if necessary to prevent them from entering?

In response, consider that we already accept that it would not be permissible for states to harm or violate the human rights of innocent persons in other contexts even in order to avoid immense political, economic, cultural and associational costs. Suppose for example, that Britain's abolishing its involvement in institutional slavery²³ meant the end of its dominance of the global sugar trade, the economic loss of extensive cheap resources and goods globally, the loss of control over populations and cheap and exploitable labour. Consider also the costs to the domestic cotton trade and manufacturing, to sugar merchants and port-town industries. Consider the economic costs of a new dependence on expensive nonslave-produced imports; and the vast costs of (perversely) compensating the slave owners (which itself in fact represented 40% of all government spending in 1833). Consider also the social changes: the drastic impact to domestic manufacturing industries and port cities, and individual citizen's livelihoods and social structures, with millions of British people's jobs having been dependent to varying degrees on the economics of slavery. Consider the change in social orders in abolishing the domestic ownership of slaves, and the accompanying cultural attitude shifts. Consider the associational 'costs' of many thousands of newly freed slaves, and citizens now having to socially associate with newly freed slaves as equals, and in their communities, and as enfranchised political

²³ This slavery example is only loosely historically accurate, with details drawn from Olusoga (2016).

co-participants with an equal say over the future direction of the *demos*. All these immense economic, social, political, cultural and associational ‘costs’ could have been avoided if Britain continued to practice slavery. Yet can anyone plausibly suggest that the avoidance of such ‘costs’ would be a sufficient justification to engage in such an immoral practice?

From this, might we acknowledge the principle that even significant political, economic, cultural and associational costs can be morally required if the alternative is extensive harm and human rights violations against innocent persons? If so, then even the avoidance of significant costs to the state will fail to be sufficient to justify inflicting violence on refugees at borders, forcing refugees into detention centres where they face torture, or into squalid camps where they face sexual violence, or containing them in conditions in which their human rights are extensively violated.

In any case, such a scenario is far removed from current circumstances. Few Northern states, if any, are adequately fulfilling their duties to export justice or have taken in as many of refugees for the scenario to be applicable. Further, the number of refugees in need of resettlement or asylum in Northern states could be feasibly accommodated and would by no means impose such drastic costs (UNHCR 2020b).²⁴ Moreover, refugees will not necessarily impose such vast costs to states that accommodate them, which, in any case, will be largely contingent on domestic policies (regarding economic rights, political participation rights and integration programmes). And, even if such costs would be incurred by states, there are alternative nonharmful practices available to avert them and support refugees in regions close to their states of origin. Therefore, even if one believes that in the extreme circumstances considered above harm to refugees would be permissible, this will do little to support current practices as we find them today.

7 Conclusion

This paper analysed whether current harmful practices against refugees could be justified by a state’s right to control borders. Wellman’s account of a state’s right to control borders, the most restrictive available in the literature, failed to do so and was in fact more likely to prohibit current practices. Since the most restrictive justification for a state’s right to control borders is unable to justify current practices, we can conclude that no available justification will be able to do so. Therefore, an(y)

²⁴ For an indicative example, if the 1.4 million refugees identified by the UNHCR (2020b) as in need of resettlement were distributed among the 29 resettlement states (states that currently participate in resettlement schemes facilitated by the UNHCR, which include most EU states as well as the United States, Canada, New Zealand and Australia), each state would resettle around 48,275 refugees.

appeal to (the justifications of) a state's right to control borders cannot justify the current harmful practices used against refugees, and policymakers' claims to the contrary are unfounded and ought to be rejected. These practices, which cause unnecessary and disproportionate harm to innocents, are unjustified, and, I believe, unjustifiable. Thus (contrary to the dominant duty of rescue approach) certain states are not mere innocent bystanders, and (contrary to Parekh's approach) such states are not merely acting permissibly based on their right to control borders (and thereby permissibly contributing to a structural injustice). Instead, such states are currently unjustifiably harming innocent refugees seeking safety. These states therefore have urgent and compulsory negative duties to desist from such unjustified harmful practices—duties that have been overlooked in theory and in practice. This entails that rather than being an acceptable feature of our world as a justified exercise of a right to control borders, current harmful practices against innocent refugees must be urgently reformed if not fully abolished.

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