



Breaking Promises To Keep Them: Immigration and the Boundaries of Distributive Justice

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collective identity: 'the link between people and land is a crucial feature of national identity'.⁵

While Walzer presents a political argument in defense of the boundedness of distributive justice, his approach also requires treating immigration as a moral problem. Indeed, once it is taken for granted that communities enjoy a right to closure, the question inevitably arises whether there are *limitations* to this right. Walzer readily grants such limitations, most notably the 'principle of mutual aid'.⁶ But it is also clear from his account that this principle is *moral* in character, rather than political. It speaks to a form of cross-boundary reciprocity between individuals as moral beings that suspends the constraints of intramural political reciprocity between citizens.

While there are certainly good reasons for giving serious attention to the principle of mutual aid, the prior question is whether Walzer's political argument in favor of the boundedness of distributive justice is sufficiently political. Indeed, does he go far enough when insisting that first admission is the initial—and essential—distributive act? Consider the following passage: 'We assume an established group and a fixed pop

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Jürgen Habermas is certainly not the only liberal thinker to challenge Walzer's thesis that distributive justice is bounded. But his position is particularly apposite to our analysis because he acknowledges and attempts to overcome a political difficulty emerging from the fundamental premise shared by a wide range of defenses of a right to migration. In an important article on this topic, Joseph Carens articulates the common premise underpinning Nozick, Rawls and utilitarianism. He argues that these three strands of moral thinking endorse a right to migration because all three share the conviction that moral personhood, rather



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comment that ‘territorial boundaries are the source of embarrassment for liberals of all stripes . . .’¹⁷ Indeed, Habermas deals with political boundaries by excising them from a theory of distributive justice. On the face of it, justice can only be *world* justice. The inversion is complete: to Walzer’s bounded justice Habermas opposes a justice that is boundless.

So, on closer consideration, neither Walzer nor Habermas get around to addressing the following question: why does immigration pose a fundamental *political problem* for a theory of distributive justice? To the extent that Walzer takes for granted the closure that gives rise to political community, only the moral limitations to an alleged right to closure, not the claimed right itself, are at issue in a theory of distributive justice. Habermas, for his part, can only rescue distributive justice by rendering political reciprocity coextensive with moral reciprocity, thereby ridding political community of closure—and immigration. Both approaches trivialize immigration, concealing why it is a political problem that goes to the heart of distributive justice.

In the face of this impasse, it seems natural to adopt an ‘intermediate’ position, which attempts to reconcile the boundedness of political community with the universality of moral obligations to strangers. In one way



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members of a collective view themselves as the individuals that have a privileged interest in the boundaries, as posited.²⁰

So, the first term of the contrast between 'own' and 'strange' places is indispensable if we are at all to understand why legal space is a unity of ought-places. But need this imply that a legal space can only be structured as a unity by dint of a closure that contrasts the community's own space to *strange* places? Would not a world state preclude that possibility, to the extent that it inaugurates an all-inclusive political 'we'?

The snag is that a world state would have to determine, at its foundation, what interests unite its members in political reciprocity, by including some interests and (implicitly) excluding



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strange places—places that have no place within the unity of places that constitute its territory. Strange places appear abruptly, in the form of displaced behavior, behavior that *dis-locates* boundaries by contesting the manner in which a legal order organizes the distinction between emplacement and misplacement. A good61n84249y6.19945 Tm(

interlocking web of the intentions of the individuals.’²⁴ Bratman is concerned to clarify the kind of unity implied in the idea of an ‘interlocking web of intentions.’ His central claim is that ‘shared intentional activity’ turns on mutual responsiveness: reciprocity of intentions, to the extent that my intention to act is co-determined by your intention to act and vice versa, and that we know this of each other; reciprocity in the meshing of our individual plans and action, in v

these two modes of identity, and tends to collapse collective selfhood into sameness, he correctly asserts that ‘the idea of distributive justice presupposes . . . a group of people committed to dividing, exchanging, and sharing social goods, first among *themselves*’ (emphasis added). For whoever cries out ‘this is just!’ or ‘that is unjust!’ already evokes the reflexive stance of a ‘we’ in distributive action.

Consider, now, Ulpian’s famous formulation of the principle of justice—*suum cuique tribuere*, to each his own. As it stands, the principle is silent about space and legal boundaries. But the spatiality of distributive justice comes into view if one re-inscribes justice in what the legal doctrine calls the ‘spheres of validity’ of legal norms.²⁹ The basic doctrinal intuition is that as the legal ‘ought’ refers to human behavior, legal norms order behavior in its subjective, objective, temporal, and spatial dimensions. These spheres of validity are the most general features defining the law as a normative order. Indeed, no legal order is conceivable that does not offer responses to four different questions: *Who* ought to behave in a certain way? *What* behavior ought to come about? *When* ought behavior to come about? *Where* ought behavior to come about? Returning to the principle of justice, *suum cuique tribuere* evokes the material and personal scopes of legal validity, indicating who is entitled to what. Although space and time are passed over in silence, this does not mean, however, that they are only ‘preconditions’ of

presupposes the first-person plural perspective of a 'we' that constitutes itself as a legal space by closing off an inside over against an outside. The distributive question—where ought behavior to take place?—ultimately concerns how the boundary between inside and outside should be drawn. And this amounts to a query concerning the commonality of the territory a polity calls its own. The where-question can only be raised and answered against the horizon of a unity of ought-places, and as a renewed question about what constitutes a manifold of places *as* a spatial unity.

Accordingly, the four questions noted above are questions confronting a collective: they arise and are addressed from the first-person plural perspective of a 'we.'



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has a right to be inside' is plausible. Indeed, there can be no law nor politics, and *a fortiori* no distributive justice, without a prior closure. Yet, while it grants a certain

This circularity, which is constitutive for every imaginable polity, disrupts the simple oppositions between inside and outside, and right and fact, which underpin Walzer's defense of a right to closure. Turning, first, to the opposition between inside and outside, consider, once again, the Preamble to the Treaty of Rome: ' . . . determined to lay the foundations of an ever closer union among the peoples of Europe.' Notice that the Treaty does not only distribute space by separating and opposing an inside (Europe) and an outside (the rest of the world). In the same movement by which the Treaty closes off the European polity from the rest of the world, it includes the EC and what is excluded therefrom in an encompassing spatial unity: a world market, the denizens of which are viewed as economic actors subject to the rules of market exchange. The logic of boundaries is at work here: boundaries separate by joining. Importantly, the second leg of the logic of boundaries is also at work: the Treaty distributes space by separating Europe from *itself*: it splits Europe, including it as a common market and excluding other possible interpretations of what constitutes it as a common space, such that contestation of the common market can erupt in the name of 'another Europe.'

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The disruption of the pat opposition between inside and outside is paired to a disruption of the simple opposition between right and fact. The circularity of the founding closure reveals an ineluctable *de facto* core in the alleged *jus includendi et excludendi* politics claim for themselves. This is particularly clear with respect to the *de facto* immigrant, that is, tTjs0sTEm(cor)Tj11.52 0 0 11.5277.92029 Tm(n of)Tj11.5/90e.52 209.79515 6 0

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place for itself: in the same movement by which a founding closure separates inside from outside, preferring the fo



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claims to enforce and maintain boundaries that had been drawn earlier, acts that enforce and maintain boundaries always found anew the spatial unity of a polity and of the world in which a polity takes up its place—even when confirming extant boundaries. If the paradox of representation

This insight, although crucial, must be amended. For the linear temporality suggested by the notion of a promise that is first made and then kept is belied by the paradoxical temporality of political judgment. For the task of political judgment is to anticipate the meaning of the past in the future: *immigration policy has to decide what promises had been made in the light of boundary crossings that determine what promises can be kept*. As such, political judgment dislocates the simple progression of a temporal arc that begins in the past and that, passing through the present, leads into the future. To be sure, the fact that political judgment anticipates the past in the future does not mean that the past is simply at its disposition. For the past would cease to be such if it were under the control of acts that redefine its meaning as they see fit. By the same token, promises would cease to be promises unless they could be kept or broken. I submit that the political judgment deployed in immigration policy has the structure of a *wager*: it involves a reasoned initiative concerning the commonality of boundaries in the face of a past and a future that elude the collective's control.

Accordingly, the spatiality of distributive justice is rooted in *time*, in the paradoxical temporality of representation. On the one hand, there could be no distributive justice unless the exercise of political judgment in immigration policy were able to *breach* the promise that had been made, by founding anew the distinction between inside and outside in response to boundary crossings that challenge the place a collective claims for itself in a larger world. This breach is *a-topic*, by dint of being neither inside nor outside the collective, and *a-chronic* because it interrupts the temporal arc spanning the past, present, and future of a collective. Not a 'dialectic of self and the other than self,'

the instrument selected to enable the provisions for the repatriation of aliens who have entered Italy illegally to be carried out more effectively . . . they are also one of the key means of ensuring the effective functioning of expulsion procedures which . . . is a pre-condition for the correct implementation of an immigration policy based on annual quotas.³⁹

Not Amnesty International's reports of allegations of 'physical assault by law enforcement officers' and other personnel of the centers, not the 'excessive and abusive administration of sedative and tranquilizing drugs,' not the 'unhygienic living conditions,' not the 'unsatisfactory medical care,' and the like are most fundamentally at stake in Lampedusa, however horrific all of this may be. What is essential from the perspective of political reflexivity is the status of the immigrants who 'stay' at the Center, such that expulsion can be a pre-condition for immigration policy. In this respect, Amnesty International has expressed serious reservations about the *detention* of immigrants in CPTA's, arguing that such detention is disproportionate in the face of international standards. The Italian government has countered this critique by saying that immigrants are 'held' (*trattenuti*), rather than detained, at the Lampedusa CPTA. The distinction is crucial, albeit in a way different to that intended by the Italian government. To qualify an immigrant as a detainee is to recognize that s/he is misplaced, thus that, although illegally, s/he has entered a legal space. Entry to the European legal space is precisely what the holding center at Lampedusa is designed to avoid. Indeed, Lampedusa confronts the EC with the following paradox: the founding self-closure calls forth the possibility, held in suspense until the circumstances so require, of enforcing the borders of the polity by *dis*-owning part of Europe. This 'dis-owning' amounts to a suspension of political reflexivity as a condition for sustaining the first-person plural perspective of a 'we' as a bounded political community. This twofold movement is what makes of a land dis-owning a form of 'post-reflexive politics.'⁴⁰

That distributive justice is spatially bounded means that it poses two thresholds for immigration policy. The first marks the point prior to which an immigrant is deemed to have a stake in the political 'we,' hence a person who has, in one way or another, a *de jure* interest in the distribution of rights and goods by the community. This is the threshold at which the distinction between the just and the unjust begins to take hold—proto-political reflexivity. The second threshold marks the point beyond which claims by immigrants cease to register as claims

³⁹ Cited in the Amnesty International Report, 'Italy. Temporary Stay – Permanent Rights: The treatment of foreign nationals detained in 'temporary stay and assistance centres' (CPTAs)' at <http://web.amnesty.org/library/prin>

that call for distributive acts by legal officials because they are uttered in a place that, stripped of its normative dimension, has reverted to the status of a non-place that is neither inside nor outside a polity. At this point, the distinction between the just and the unjust has been obliterated—post-reflexive politics. These non-places, in which the immigrant finally becomes a thoroughly *de facto* immigrant, are also the non-places in which a community ceases to claim a *right* to closure, such that its founding closure becomes nothing more than a *de facto* act—an act of violence.