

Being Here: Ethical Territoriality and the Rights of Immigrants

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In this Article, I examine a normative idea of territoriality which I call ethical territoriality. By ethical territoriality, I mean the conviction that rights and recognition should extend to all persons who are territorially present within the geographical space of a national state simply by virtue of that presence. I start by briefly reprising a claim I have developed elsewhere — that territorialism is preferable, on liberal democratic grounds, to status-based approaches to immigrants' rights. Here, though, I set out to interrogate the logic of ethical territoriality itself. I ask why the mere fact of a person's territorial presence should serve as the basis for rights and recognition. Further, even conceding that it should, I ask how this commitment is to be operationalized. What is the scope of the territory in which presence figures so significantly in normative terms, and who, precisely, gets access to presence in that territory? My purpose in this Article is to get beyond the status vs. territorial presence-as-basis-for-membership dispute in the immigration debates and to begin a (self-) critical discussion of the ethical territorial commitment itself.

I.

This Article is about a normative idea of territoriality which I will call ethical territoriality. By ethical territoriality, I mean the conviction that rights and

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recognition should extend to all persons who are territorially present within the geographical space of a national state by virtue of that presence. What I wish to do is demonstrate the significance of this commitment in liberal legal thought about immigration, and then raise some questions about it. I will ask why the mere fact of a person's territorial presence should serve as the basis for rights and recognition, and then consider some implications of thinking about things in this way.

As a general matter, a person's territorial presence or lack thereof in a particular state has a host of legal consequences for that person's treatment under the state's law. From criminal due process rights to taxation requirements to attribution of citizenship, territoriality matters.¹ My own focus here is territoriality in relation to the status of noncitizen immigrants. Although my observations will be relevant to many liberal democratic states, my discussion is informed especially by legal and theoretical debates in the United States.

To set the stage, I must first make clear why territoriality is a defining question in the debate over immigrants' rights. To be very simple and reductive about things, the rights and recognition enjoyed by immigrants are usually understood to derive from either their formal status under law or their territorial presence. According to the status-based conception, a person's rights are determined by the specific legal category she occupies in the country's immigration and nationality regime. The status of citizenship is understood to represent membership's culmination — the moment the individual is entitled to enjoy full rights and entitlements and duties — whereas alienage status of various kinds entails lesser rights.

Two aspects of the status-based approach are significant for my purposes here. The first is differentiation. Legal status is not distributed uniformly among residents. The operation of a state's immigration admissions and citizenship allocation systems produces an array of statuses among members of the society's population, so that at any given time, some people are citizens and some are aliens, and among aliens, there are various status locations assigned by the state. The result is that different people in the society enjoy different sets of rights and recognition by virtue of their legal status assignment.

The second aspect of the status-based approach that interests me is what I will call graduation. Rights are conceived in a graduated, or scalar, fashion;

¹ For an excellent recent analysis of the legal significance in the United States of geographical presence and lack thereof, see Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501 (2005).

they are understood to increase in extent and significance the closer to the status of citizenship the individual progresses. Whether this graduated scale is conceived in linear terms — with formal citizenship the end-point on a continuous axis — or in concentrically-circular terms — with citizenship the prize at the core of a series of membership circles² — the status account of rights is, normatively, a story of incremental progress from less to more. In this account, progress along the membership continuum both presupposes and requires state consent.

In contrast to the status-based approach, the territorial conception of rights for immigrants treats a person's geographical presence itself as a sufficient basis for core aspects of membership. Instead of focusing on assigned legal categories, the territorial conception stresses the normative significance of the physical fact of presence in the national space.³ This presence is not necessarily tied to, or preceded by, political consent, although it may be. The territorial conception repudiates the notion of differential levels of inclusion, regarding the maintenance of partial membership statuses as illegitimate under liberal and democratic principles. It thus treats the conception of belonging as more of a binary than a continuum. It says: once someone is in the geographical territory of the state, that person must, for most purposes, be treated as fully *in*. The fact of a person's "hereness" itself triggers the extension of extensive rights and recognition.

I have elsewhere described the divergence between status-based and presence-based conceptions of immigrant inclusion as a defining divide in the debates over the treatment of noncitizens in liberal societies.⁴ This is not to suggest that they are always directly opposed in practice; what I have described are merely ideal types. In fact, many exponents of the status-based membership model recognize territorial presence as a consequential event sometimes deserving of acknowledgement in the assignment of status. At the same time, most territorialists presume the existence of formal status

2 On this account, a person's rights increase the closer to the center that the she or he progresses. See T. ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 2 (5th ed. 2003).

3 To say territoriality is a physical fact is not quite accurate, as I will explain below. See *infra* text accompanying notes 31-34.

4 Linda Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994); see also LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* ch. 3 (2006) [hereinafter BOSNIAK, *THE CITIZEN AND THE ALIEN*]. In *The Citizen and the Alien*, my concern is the tensions between these commitments, whereas in this Article, I consider what they share in common.

differences among the territorially present and recognize or concede that these differences may have consequences for their treatment, at least in some domains.

Nevertheless, these two approaches to immigrants' rights find themselves directly at odds in some settings. The distinction between them is clearest when we focus on the situation of unauthorized immigrants — people who are territorially present within a national society but who have, as a formal matter, failed to play by the formal rules of graduated membership. Although geographically here, these are people who are out of line, both literally and figuratively. For status exponents, the illegality of their presence places them outside the community of membership for most purposes, or else in its outermost circle. For territorialists, the fact of their presence often trumps the irregularity of their status for purposes of allocating rights and recognition.

In the incessant tug-of-war between status-based and territorially-based conceptions of membership, I am generally sympathetic to the territorial approach. It seems to me that ethical territoriality appropriately insists on treating membership as a matter of social fact rather than as a legal formality. And by opposing the imposition of less-than-complete-membership on classes of residents, ethical territoriality honors the egalitarian and anti-caste commitments to which liberal constitutionalism purports to aspire.⁵

Despite its virtues, however, the territorial model begs its own questions, and it is these that I am interested in exploring here. Why, first of all, should the fact of territorial presence matter so significantly in the allocation of rights and recognition? And even conceding that it should, how is this commitment to be operationalized? What is the scope of the territory in which presence figures so significantly in normative terms, and who, precisely, gets access to presence in that territory? My purpose in this Article is to get beyond the status vs. territorial presence-as-basis-for-membership dispute in the immigration debates and to begin a (self-) critical discussion of the ethical territorial commitment itself.

II.

The ethical territorial view was explicitly articulated by political theorist Michael Walzer in his book *Spheres of Justice*. In the chapter on "Membership," Walzer defends a principle of "political inclusiveness" for

⁵ I elaborate these arguments at length in BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 4.

immigrants residing within the territory of a democratic political community. To the extent that individuals who inhabit a national community are not recognized as members, he writes, they are subject to nothing short of political and social "tyranny."⁶ As a paradigmatic example of such tyranny, Walzer cites the case of the metics of ancient Athens who lived and worked in the city but enjoyed neither political rights nor "welfare rights," nor any prospect of acquiring citizenship in the future. They were, Walzer says, "the subjects of a band of citizen tyrants, governed without consent."⁷ What makes the status of metics wrong, from a democratic point of view, is the fact that they share territory with the citizens but nevertheless subsist as a class of political and social outsiders. Democratic justice requires that membership's rights and rule "be open, and equally open, to all those men and women who live within [a political community's] territory . . . and are subject to local law."⁸ For "the state owes something to its inhabitants simply, without reference to their collective or national identity," but merely by virtue of that inhabitation.⁹

The territorial conception of rights and recognition that Walzer endorses is embraced, in some form, by many political liberals and progressives. These commentators argue that people who are here, by virtue of *being here*, are entitled to rights and recognition within the national society. This embrace is apparent in much of the liberal scholarly literature on the rights of noncitizens, but the commitment is not merely academic. A commitment to the territorial conception of rights is, in fact, expressed in the fundamental law of many liberal democratic systems. In many countries, every person who is territorially present — citizen or not, legally present or not — is entitled to fundamental forms of due process, to contract and property rights, to access to the courts, and to core rights in the educational and employment spheres.¹⁰ The territorial imperative was powerfully articulated by the United States Supreme Court in late nineteenth century (this, notably, in a case involving noncitizens of Chinese descent at the height of the Chinese exclusion period):

[Fundamental rights] are not confined to the protection of citizens. . . .

6 MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 59 (1983).

7 *Id.*

8 *Id.* at 60-61. The European guestworker programs of the 1970s were similarly defective: ostensibly democratic communities imported foreigners to function as "live-in servants" to do the society's "dirty work," but these workers had no prospect of ever moving beyond that status.

9 *Id.* at 43.

10 BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 4, ch. 3.

These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.¹¹

The territorialist claim is not, however, an unequivocal claim that citizenship status is irrelevant in the treatment of the nation's inhabitants. American courts have never held that all of the rights liberal societies hold as fundamental must be extended to all territorially present persons.¹² Nor are those liberal scholars who advocate the territorial conception entirely strict about it; they do not maintain that there cannot be *any* differences in treatment between citizens and territorially-present noncitizens. Most territorialists, for example, accept that the franchise does not necessarily extend to all persons who are territorially present. Even Walzer bends in his discussion of contemporary immigrant policy; he allows that noncitizens need not be afforded the vote. They must have swift and easy access to citizenship status through naturalization, he insists, which will itself put them in a position to vote. But accession to citizenship first is essential. Yet this exception does not swallow the rule for Walzer, for voting is the only exception to the principle of territorial inclusion that he (directly) accepts.¹³ He claims that, otherwise, it is illegitimate for a democratic society to maintain a caste of residents who subsist in a lesser status than that of full members.¹⁴

I identify a great deal, as I have said, with the universalist, anti-caste commitment that animates the territorialist position. In the territorialist view, rights and recognition are owed not merely to formal status citizens but to

11 *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). This is a powerful strand of constitutional doctrine that has fundamentally structured the treatment of noncitizens in the United States. It is the strand that has competed with the so-called "plenary power doctrine" in immigration law, according to which the national state is largely unconstrained in exercising its sovereign right to regulate borders. In fact, noncitizens are subject to both regimes, which are often in conflict. See BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 4, ch. 3.

12 For discussion of the difference that alienage makes in U.S. law, see BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 4, chs. 3, 4.

13 I say "directly" because Walzer does not appear to oppose all indirect forms of constraint on the rights of noncitizens. Given Walzer's commitment to a national community's right to maintain an admissions policy, he presumably would endorse the community's authority to deport noncitizens in some circumstances. However, the deployment of the deportation threat as a means of social control is subject to explicit critique by Walzer. See *infra* note 26.

14 Again, in Walzer's formulation, "to the extent that immigrants who live and work within a national community are not recognized as members, they are subject to nothing short of 'tyranny.'" WALZER, *supra* note 6, at 59.

all persons present in the national society. On this commitment, it is both anti-democratic and morally wrong in liberal terms to allow for treatment of a class of persons who are living among us as social and political outsiders. Territorialism embodies an ethic of inclusiveness and equality: it is the ground (both literally and figuratively) of national community belonging.

And yet: a shift in gaze and a little reflection make clear that the territorialist view is hardly all about inclusion. When we step back from a purely intranational focus and survey the landscape more broadly, we can see that ethical territorialism also has a constitutive exclusionary element. Almost every version of inclusion-within-the-territory is coupled with a vision of a bounded territorial community *within which* inclusion is to take place. Ethical territorialists, that is to say, invariably presuppose the existence of borders around the territory in question. In some cases, they affirmatively embrace those borders.

Walzer himself expressly embraces borders and the exclusionary work they do. His views on the legitimacy of a country's immigration control policy are well-known. Political communities must have the right to distribute membership according to their own values and commitments — to fashion their own "admissions policies," in his memorable formulation.¹⁵ According to Walzer, a country is a membership community, a "world of common meanings" and "shared ways of life," which its members are entitled to preserve. Since the unimpeded entry of strangers would render such preservation impossible, members of a national community must have the right to "control and sometimes restrain the flow of immigrants."¹⁶ Walzer insists, in short, not only on the imperatives of inclusion within the territory but also on the legitimacy of exclusion at territory's edges.

One might, perhaps, wonder how it is possible for Walzer to maintain his robust national inclusionism while simultaneously defending the imperatives of national closure. Walzer, however, does not regard these dual commitments as standing in conflict at all. For him, in fact, they are entirely and necessarily complementary.¹⁷ This is because, in his view, border and interior are distinct regulatory and social domains whose governing logics are entirely separate. His approach relies on a conception of border and interior as divided jurisdictions, with different normative practices applying to each.

¹⁵ *Id.* at 39.

¹⁶ *Id.* The last two sentences in the text appear in almost identical form in my discussion of Walzer in BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 4, at 40.

¹⁷ As Walzer says, "the theory of distributive justice must vindicate at one and the same time the . . . right of closure and the political inclusiveness of existing communities." WALZER, *supra* note 6, at 63.

Boundedness governs at the community's edges, while inclusiveness prevails within.¹⁸ This conception of membership based on jurisdictional splitting between border and interior — whereby anti-caste values apply *within* the community, while the community possesses the right to limit the ingress of outsiders *into* the community¹⁹ — is widespread among liberals and progressives in and out of the immigration debate. The inclusive universalism of territorialism is commonly understood to be framed, and enabled, by a hard or hard-ish shell around the territorial perimeter. Membership is, in this normative conception, "hard-on-the-outside and soft-on-the-inside."

A recent lead essay in the *Boston Review* on immigrants' rights was structured precisely around this spatially divided conception of membership. The author, constitutional scholar Owen Fiss, takes as given the current restrictions on immigrant admissions.²⁰ "My point," he writes, "is not to subvert the admission process or otherwise open the borders," but rather, to focus on the treatment of those immigrants who are already here. In his essay, Fiss "insist[s] that laws regarding admission cannot be enforced or implemented in ways that would transform immigrants into pariahs."²¹ Whatever restrictions are enforced at the border, Fiss argues, we must maintain egalitarian values within, in relation to those who are territorially present.

I understand the appeal of this "hard-outside/soft-inside" model of membership. Liberal democratic thought is notoriously plagued by tensions between universalist and particularist conceptions of responsibility and belonging,²² and a division of normative labor between inside and edges

18 I have called this construct a "hard-on-the-outside and soft-on-the-inside" conception of citizenship. BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 4, chs. 1, 5, 6.

19 Sphere separation is a central concern of Walzer's throughout *Spheres of Justice*. See the discussion in BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 4, ch. 3. In his work, separation is not merely a descriptive reality but also a normative imperative.

20 "I am not surreptitiously questioning the validity of laws regulating the admission of immigrants to this country. For present purposes, I am prepared to assert that these laws are just." Owen Fiss, *The Immigrant as Pariah*, *BOSTON REV.*, Oct.-Nov. 1998, at 4, *reprinted in* A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS 3, 16 (Joshua Cohen & Joel Rogers eds., 1999) [hereinafter Fiss, *The Immigrant as Pariah*]. See response by Mark Tushnet, *Open Borders*, *in* A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS, *supra*, at 69, 69 ("Owen Fiss's proposal doesn't go far enough. He assumes that an immigration policy founded on creating legal barriers to people's entry into this country is just.").

21 Fiss, *The Immigrant as Pariah*, *supra* note 20, at 16.

22 See especially SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* (2002).

would seem to hold out the promise that we can have it all: we can have our universalist cake on the inside, and eat our particularist cake, too, at the border. Jurisdictional division seems to resolve the dilemma, for at least some purposes.

Attractive as this splitting strategy might seem, however,²³ it is actually not terribly functional in practical terms. The problem is that it is based on empirical premises about the possibility of maintaining separation between the community's inside and its edges that simply do not hold. Fiss's account itself makes this clear. He writes:

Admission laws can be enforced by fences at the borders, deportation proceedings, or criminal sanctions, not, I maintain, by imposing social disabilities.²⁴

The operation of border norms via exclusionary "fences" at the threshold is not, as Fiss himself recognizes, the only mode of administering admissions laws. Exclusion functions also inside the territory — most significantly through the power and practice of deportation. The nation-state's power of exclusion, in other words, does not disappear the moment an individual physically enters the state's territory. Through a complex regime of immigration regulation — one that includes government authorization to detain and deport noncitizens under some circumstances — the "border" — conceived as regulatory sphere — follows the immigrant into the national geographic space and shapes her experience there.

The result is that squarely *within* the space of the national society liberal egalitarian norms work alongside exclusionary border norms. Both occupy the same, geographically internal, terrain. And given their joint applicability, what happens, in practical terms, is that they often compete for primacy.²⁵ Whether an issue pertaining to the treatment of the undocumented — say, their access to driver's licenses or workers' compensation insurance

23 There are certainly debates to be had about its normative attractiveness in the first instance. The commitment to exclusion at the borders has been criticized by a number of analysts. See discussion *infra* text accompanying note 27.

24 Fiss, *The Immigrant as Pariah*, *supra* note 20, at 16.

25 In fact, a lot of the fights over the rights of immigrants in the U.S. are disputes over the question of how far the border legitimately extends within the national society. So, for example, in the debates over whether undocumented immigrants should be entitled to driver's licenses, we are arguing about whether this is legitimately a border control question or whether it is a question about the rights of territorially present persons. For further discussion, see LINDA BOSNIAK, *THE UNDOCUMENTED IMMIGRANT: CONTENDING POLICY APPROACHES IN DEBATING IMMIGRATION* (Carol Swain ed., forthcoming 2007).

or disaster relief — is properly viewed as an "immigration question" or an "equality question" perennially plagues legal actors and policy-makers in the field. Indeed, the competition between immigration control prerogatives and equality norms constitutes the structural substratum of all of our legal and policy debates about the status of immigrants in liberal democratic states. One significant practical consequence of this competition, notably, is that the rights that many noncitizens do enjoy by virtue of their territorial presence are often drastically curtailed by the internal operation of the border. As is well-known, unauthorized immigrants are often reluctant to avail themselves of the rights that are formally extended to them out of fear of attracting the attention of the immigration authorities. As a result, they are subject to various abuses of public and private power even where formal law would seem to otherwise protect them.²⁶

The point, in short, is that the normative divide between the community's inside and its edges that the territorialists presume possible — that, indeed, is foundational to them — is chimerical. For even when noncitizens are geographically here, and are therefore theoretically embraced within the territorialist ethic of inclusion, they remain subject to the jurisdiction of the internally-implemented border as well. And as such, the rights and recognition they are meant to enjoy by virtue of being here are often (though not always) undercut, both directly and indirectly.

III.

Ethical territorialism's first problem, therefore, is that it is self-undermining in practical terms. The territorial boundaries that are understood to be universalism's enabling frame are not, in fact, confined to the territory's physical threshold but penetrate the territorial interior as well, and there function to thwart ethical territorialism's own internal universalist project. Yet even if it were possible to confine the border to the territory's physical edges — even if, once inside, a person would truly be insulated from the action of the border — ethical territorialism would raise other concerns, both analytical and normative. In this part of the discussion, I want to briefly raise two of these.

²⁶ This is an effect Walzer recognizes, though not specifically in relation to the undocumented: a democratic community is undermined when some of its residents are subject to what he calls the "everpresent threat of deportation." WALZER, *supra* note 6, at 58.

There is, first of all, the question of access to territory. The question is: "territoriality for whom?" In a normative regime in which territoriality is so unsurpassingly important, we will need to establish who it is who gets to be territorially present in the first place. How, exactly, is physical territoriality going to be distributed?

As I have said, the ethical territorialist view usually presumes that access to territory will continue to be restricted. It insists on rights and recognition for everyone who is here, but *being here* continues to be a limited commodity. States are usually understood to have a right to restrict territorial access (here is the hard-on-the-outside conception again) through regulation of both immigration and citizenship acquisition and transmission. Consequently, not everyone who would wish to be here can or will achieve it. This is not to say that the norm of border control is necessarily entailed by the territoriality position. One could certainly take a stance on behalf of rights and recognition for the territorially-present while also espousing an open borders policy, as some have done. But most advocates of territorial inclusion tend either to affirmatively embrace an ethic of border restriction or at least to concede it.

However, limitations on access to territory via restrictive immigration and citizenship rules raise their own problems of justification. To state the case briefly, why should the fortuities of birthplace and parentage — which today establish the background rules for distribution of territoriality through domicile or residence — be permitted to dictate people's life chances so unalterably? Why should national states be able to stand in the way of those individuals lacking in privileged pre-given birthplace or parentage ties who wish to improve their life chances through cross-border movement to other territories?²⁷ In much the same way that limitations on opportunities for formal immigration raise profound questions of normative justice for liberal thought, limitations on access to physical territoriality do as well.

There is, moreover, the practical point that even the most stringent border restrictions will not halt the territorial ingress of national outsiders. Many do, and will continue to, arrive notwithstanding. What happens then? A strict territorialist position would seem to say: the exercise of border control

²⁷ These points have been powerfully made by a handful of theorists in legal and political theory, including Joseph Carens and, more recently, Ayelet Shachar. See Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality Through Citizenship Laws*, in NOMOS XLIV: CHILD, FAMILY AND THE STATE 13 (Stephen Macedo & Iris Marion Young eds., 2002). But these arguments tend to be regarded as utopian in nature and fail to have much influence on the mainstream debates, not merely in the policy arena but in the academy as well.

must be confined to the nation's geographic perimeter. Once a person has touched national soil, he or she is to be considered part of the universal "we." In means *in*.

In practice, of course, this would result in something like a rolling legalization program whereby everyone who manages to set foot in the national space is automatically recognized as a national member. Defending such a position is not unthinkable. Indeed, some countries, including the United States, have had approximations of it embodied in policy at various times.²⁸ Yet I am certain that many advocates of ethical territorialism today would find themselves wishing to disavow such a scenario, not merely because it would be politically unpopular (though unquestionably it would) but also because it presents inherent difficulties for them. On the one hand, a "touch the territory and you're in" policy could surely threaten the very commitment to territorial boundedness that most ethical territorialists presuppose, since the existence of such a rule would arguably serve as a powerful incentive to irregular entry.²⁹ This might not be a bad thing if you want to critique the existence of borders to entry in the first place, but assuming you want to stick with them, this would be self-defeating. On the other hand, any effort to avoid this difficulty by allowing for, or insisting upon, a drawing of distinctions among categories of the territorially present (by, for instance, privileging legal or long-term immigrants over irregular entrants or just-over-the-line entrants or opportunistic entrants, however this latter would be defined)³⁰

28 According to Mae Ngai,

Before 1891 there were no provisions in our immigration laws to deport an immigrant who entered without permission. (Indeed, hardly any requirements for admission existed.) Thereafter, Congress enacted statutes of limitations of one to five years for deportable offenses. This policy recognized an important reality about illegal immigrants: They settle, raise families and acquire property — in other words, they become part of the nation's economic and social fabric. In the first decades of the 20th century, it was considered unconscionable to expel such people. Judge Learned Hand of New York said that deportation, especially when it tore people from their homes and families, was "barbarous and cruel."

Mae M. Ngai, *We Need a Deportation Deadline: Statute of Limitations on Unlawful Entry Would Humanely Address Illegal Immigration*, WASH. POST, June 14, 2005, at A21.

29 This is the same concern that opponents of various amnesty or legalization programs express.

30 It is the same charge of territorial opportunism that is directed against so-called birth tourists. The iconic image is that of the impoverished Mexican woman who manages to drag herself across the Rio Grande just before giving birth in order to convey U.S. birthright citizenship on her newborn. But there are more affluent versions as well. See Barbara Demick, *Women Take Trips to Give Birth in U.S.: For South Koreans, American Citizenship*

would mean adopting a graduated conception of rights and recognition among the territorially-here and, to that extent, abandoning a strict commitment to the equal membership imperative underlying ethical territoriality in the first place.

A second question to ask about ethical territoriality relates to the precise scope of the territory within which presence counts as so normatively consequential. What is the geographic space that constitutes any state's territory anyway? Conceding for the moment that being within national territory should serve as the basis for rights and recognition, how do we decide what the scope of that territory is? Where does this territory begin and end? Answering these questions is not simply a matter of looking at a map of the world. What counts as "our territory" is itself subject to all kinds of contestation. Territory is gained through conquest and lost through secession. Disputes among states about the proper locations of territorial borders are legion. Indeed, determining what constitutes the legitimate scope of a particular state's territory is what many wars are all about.

Most often, these conflicts concern the legitimacy of a state's exercise of power, or sovereignty, in a particular geographic space. But disputes over the scope-of-territory question are not confined to disputes over government rule. Sometimes they concern the scope of government responsibility as well. As we have seen, liberal democratic states commonly regard themselves as owing fundamental obligations — if not total equality of treatment — to persons who are present within their territory. Sometimes, however, states opportunistically define the contours of their territory in restrictive terms to limit, or disavow, the obligations they would otherwise maintain to those persons. The most vivid recent example of this for any country is the case of Guantanamo, which the United States government sought to describe as "outside" the territory of the U.S. precisely in order to avoid the territorially-based requirement that it extend constitutional protections to prisoners it was holding on its military bases there.³¹ Another example of longer standing in the U.S. context is the case of Puerto Rico, which

is Best Present for Baby, MILWAUKEE J. SENTINEL, June 2, 2002, available at http://www.findarticles.com/p/articles/mi_qn4196/is_20020602/ai_n10796512.

31 The government sought to take advantage of the rule in U.S. law that noncitizens located outside U.S. territory are entirely unprotected by the Constitution. See *Johnson v. Eistentrager*, 339 U.S. 763 (1950). This is, of course, a territoriality rule that is both the inverse, and corollary, of the one I am concerned with in this Article. In this context, *lack* of territorial presence — at least for noncitizens — means lack of rights and recognition.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the U.S. Supreme Court repudiated the government's claim that Guantanamo is outside the U.S., holding that the individuals

the United States claims as its territory for most purposes yet describes as "foreign" when defining the constitutional rights of its inhabitants.³² Notably, in neither Guantanamo nor Puerto Rico has the U.S. relinquished any claim to exercise sovereign control. What it has done, instead, through manipulation of the idea of territoriality, is decouple rule and obligation.

States employ other legal fictions to avoid the obligations of territoriality. Among them is the fiction that certain individuals who are in fact physically within the territorial space are "not here" as a legal matter. Under U.S. immigration law, for example, people detained at the border by the immigration authorities are deemed not to be "within the United States" and therefore not entitled to the rights that come with territorial presence.³³ The distinction drawn between physical and legal presence, among other things, has been read to allow the government to hold individuals in indefinite detention without falling afoul of the Constitution's due process requirements.

The manipulability of territorial scope is seen, finally, in the power states exercise to remove noncitizens from their territorial jurisdiction. Usually, we regard a state's physical removal of foreigners from its territory as an instance of that state's immigration regulatory authority; in this context, deportation is just one of the mechanisms the state employs to maintain control of the composition of its national political community. Sometimes, however, the practice of physical removal of foreigners represents something else: it is a strategy that allows the state to avoid the obligations that a person's continued territorial presence would otherwise impose upon it. Thus, for example, the recent practice of prisoner "rendition" from the U.S. to Egypt, Syria, and other countries would appear to be motivated less by a desire to rid the country of the presence of these individuals than by the wish to

seeking redress have "for more than two years . . . been imprisoned in territory over which the United States exercises exclusive jurisdiction and control." *Id.* at 467.

32 According to the Supreme Court, Puerto Rico is "foreign in a domestic sense." *Downes v. Bidwell*, 182 U.S. 244 (1901). For an important volume addressing the meaning and import of this phrase, see CHRISTINA DUFFY BURNETT & BURKE MARSHALL, *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION* (2001).

33 The entry fiction "holds that excludable aliens are to be treated as if detained at the border despite their physical presence in the United States." *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987). See especially *Shaughnessy v. United States ex rel Mezei*, 345 U.S. 206 (1953), which held that a returning lawful permanent resident being held on Ellis Island was not within the United States and therefore not entitled to invoke the Constitution on his behalf to challenge his indefinite detention. This case has never been overruled and is still invoked by the Court as governing law. See *Zadvydas v. Davis*, 121 S. Ct. 2491 (2001).

avoid the legal constraints on the individuals' treatment that their territorial presence would otherwise impose.³⁴

We can see, therefore, that the scope of what constitutes a state's territory is far more contestable and manipulable than ethical territorialism tends to presume. A political community's territory is neither naturally given nor fixed in its contours; boundaries are endlessly drawn and redrawn and fought over. This malleability in itself casts some doubt on the workability, if not the defensibility, of an ethical commitment that makes rights and recognition contingent on being territorially inside.

IV.

Beyond questions about territorial access and territorial scope, the most fundamental question we need to ask about ethical territoriality is the "why" question: Why privilege territorial presence at all? Why should being on *this* side of the territorial line rather than the other side be so normatively significant?³⁵ As Kal Raustiala has asked in another context, what accounts for the "magic" worked by geographical presence?³⁶

Of course, the magic involved here is not of a kind that comes down from the heavens. This magic is a function of political and social practices. People who live inside territorial communities often choose to ascribe certain recognition and rights upon those with whom they occupy the same territory. Some would want to ascribe more. These are rights and recognition generally *not* extended to nonterritorial others. Understanding the magic of territoriality, therefore, requires understanding what it is about the fact of sharing territorial space that gives rise to this sense of heightened

34 "Rendition is the CIA's antiseptic term for its practice of sending captured terrorist suspects to other countries for interrogation." David Ignatius, *Rendition Realities*, WASH. POST, Mar. 9, 2005, at A21. *See generally* Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106.

35 It is interesting to note that this is a question that anti-immigrant advocates pose all the time. They query why the fact that a person has managed, by hook or by crook, to get herself "in" should, by itself, confer advantage. Implicit in such a critique is not merely unhappiness about possible irregular entry but also the conviction that merely being here should not be enough to trigger obligations and recognition; there has to be something more. The "something more" that many anti-immigrant advocates believe must exist is formal legal status, acquired through rule-following and state consent. But even if we reject such formalism, we are still faced with the question of why territoriality alone should be enough.

36 Raustiala, *supra* note 1, at 2546.

obligation.³⁷ Why should the fact of territorial presence have particular ethical significance? How do we make sense of this commitment? It seems to me that there are three different kinds of answers to these questions that exponents of ethical territorialism might submit as an account of their position. When not explicitly articulated, they are at least implicit in the territorialist discourse. Each of these accounts is meritorious in important respects, but each raises difficulties as well.

One kind of answer is the "affiliations" answer.³⁸ On this account, the physical sharing of national territory serves to tie people together through proximity and linkage to place.³⁹ Extending rights and recognition to co-territorial inhabitants acknowledges the common bonds that develop among those who share physical context.⁴⁰ On this account, it is not so much the connection with the land per se that is salient;⁴¹ rather, the impulse seems to be

37 There are, of course, other uses of the term "territoriality." With the rise of the Westphalian State system, territoriality became the rule associated with the scope of sovereign state power: In the classic model, a sovereign state enjoyed plenary power within the territory and was constrained from acting outside it. But territoriality as a rule about scope of power — about jurisdiction — and territoriality as a rule about the basis for rights and recognition of individuals are not the same thing; indeed, they could be in tension. Classically, a sovereign was entitled to treat persons within its territory as it desired, without constraint. The commitment to ethical territoriality, in contrast, specifically acts as a limit on state discretion; it is a requirement of a particular kind of state action toward individuals within that state's territory.

38 In using the language of "affiliations," I am borrowing from HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006). Motomura describes "immigration as affiliation" as a way of viewing the rights and incorporation of immigrants that "depend[s] on the ties that they have formed in this country." *Id.* at 11. My use of affiliation is also meant to reference the "ties formed" by immigrants. But my account differs from Motomura's in this respect: Motomura regards "immigration as affiliation" as an approach to immigrants' rights that "evolved" out of an earlier commitment to "territorial personhood," pursuant to which "simply being present in the United States bestows certain . . . rights." *Id.* at 10. In contrast, I am using the idea of affiliation to explain why ethical territorialism has emotional and political resonance. I view an affiliations conception of membership, in other words, as a way of making sense of territorialism's purchase — although in my analysis I also show how territorialism and affiliationism are in some ways distinct.

39 Yishai Blank, *Spheres of Citizenship*, 8 *THEORETICAL INQUIRIES L.* 411 (2007).

40 Doreen Massey, *Geographies of Responsibility*, 86B *GEOGRAFISKA ANNALER* 5 (2004).

41 Some characterize the relationship that exists between particular people and their territory in quasi-essentialist terms. For instance, David Miller writes,

Through custom and practice as well as by explicit political decision [members

to acknowledge attachments and social ties that often develop among persons who are leading a common life within a single territorial space.

But while the affiliations account is intuitively appealing in many respects, analytically it presents various difficulties. For one thing, to the extent that the affiliations response depends on people's "leading a common life" to trigger the obligation, it would appear to contain a requirement that goes beyond the sheer fact of a person's physical location within the territorial space. It would seem to require that the person to whom we owe our co-territorial obligation actually reside or dwell (lead a life) within the territory. The mere fact of a person's physically *being here* — just passing through, for example, or just visiting for the weekend — would not seem to meet the standard.⁴² On the other hand, what *would* be enough to meet it? How long would we require that a person be here in order to regard her as someone with whom we "lead a common life"? Is it two weeks, or two months, or two years? And can length of stay, alone, be the defining variable in any event? Is the operative principle indeed "the longer the stay, the stronger the claim," in Joseph Carens's phrase?⁴³ What about the terms, or circumstances, of that stay? For instance, what about a person who was arrested abroad months ago and forcibly brought to the United States to stand trial?⁴⁴ How about the immigrant who has been residing here for months or years but is present in an unauthorized status?⁴⁵ And what, finally, about the fact of work? Doesn't

of a political community] create laws, establish individual or collective property rights, engage in public works, shape the physical appearance of the territory. Over time this takes on symbolic significance as they bury their dead in certain places, establish shrines or secular monuments and so forth. All of these activities give them an attachment to the land that cannot be matched by any rival claimants.

DAVID MILLER, *Secession and the Principle of Nationality*, in *CITIZENSHIP AND NATIONAL IDENTITY* 110, 116 (2000). An "attachment to the land" concept does not seem to support the ethical territorial position, because it presupposes an already-existing membership community that maintains an ongoing relationship with the land in question. The ethical territorial view is far more open, holding that the fact of presence within the state's borders, even if of recent vintage, is itself the basis for community membership.

⁴² The word "inhabit" interestingly highlights this ambiguity regarding the ethical significance of territorial presence versus residence. The American Heritage Dictionary contains two definitions for the term: "1. To live or reside in. 2. To be present in; fill." *AMERICAN HERITAGE DICTIONARY* 901 (4th ed. 2000).

⁴³ Joseph Carens, *On Belonging: What We Owe People Who Stay*, *BOSTON REV.*, Summer 2005, at 16.

⁴⁴ See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁴⁵ See Carens, *supra* note 43, at 19 ("The general principle with which I began — the longer the stay, the stronger the claim — applies even in the case of those who have settled without authorization, and for the same reasons. When people settle in a

the social contribution of the working immigrant, ipso facto, qualify her as someone with whom we share a common life irrespective of her length of stay?⁴⁶ Inevitably, the line drawing here is going to be controversial.

Notice, however, that to the extent we draw any line that requires more than sheer physical presence in the territory, we are implicitly smuggling additional requirements into the equation. The ethical principle now depends not on territoriality alone but on territoriality-plus (with the precise content of the "plus" itself uncertain). But if this is true, then arguably a person who is geographically here but just passing through is not differently situated than a person who is located on the other side of the border. Territorial presence per se has lost its purchase.

My point so far is that ethical territorialists who are animated by an affiliations justification actually wish to privilege territorial co-residents rather than co-occupants — although again we must acknowledge the real difficulties involved in drawing the line between these two categories. There is, however, a further problem with the affiliations account of the ethical territorialist commitment. This is the fact that co-residence within a territory is a highly imperfect proxy for the existence of attachments and affiliations in any event. No doubt, certain kinds of connections do often develop among people who share a physical context. But it is also true that many people reside within a common territory who are distinctly unattached to their co-inhabitants. And correspondingly, plenty of territorial residents maintain very close affiliations and attachments with people located outside the territory — attachments both physical (through travel) and virtual (through distance-shrinking technologies) — which may be far more engaged and central to them than those they maintain with their co-territorial residents.⁴⁷ Add to this that a nation-state territory is far larger than the kind of shared physical space (say, a town or even a city) in which the possibilities for face-to-face or other physically proximate contact are possible or likely in any event.⁴⁸ To the extent that the logic of the ethical territoriality rule rests on a

country they form connections and attachments that over time make them members of the society. After a while, the conditions of admission become irrelevant.").

46 Walzer emphasizes the normative significance of the social contribution through labor made by immigrant workers in his examination of alien status. WALZER, *supra* note 6, at 52-61.

47 See Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 470-88 (2000).

48 If the world is too big for the development of community affiliations, so, too, is a nation. See Bruce Robbins, *Introduction: Part I*, in *COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION* 6 (Pheng Chea & Bruce Robbins eds., 1998).

desire to acknowledge the importance and salience of physically proximate human attachments, it therefore seems both too broad and too narrow.

A second answer to the "why territoriality" question — and one which quite expressly animates many ethical territorialists — is what I will call the "anti-caste" answer. To maintain its democratic character, the argument goes, a national community cannot abide the existence of caste. Yet to the extent we allow for a class of persons to subsist among us in a less-than-fully-incorporated status, we will have entrenched and institutionalized caste-based distinctions. This is a consequentialist argument, pitched in the negative: if we do not extend rights and recognition to co-inhabitants, if we allow for the maintenance of what Walzer calls "a class of live-in servants" who are perpetually disadvantaged under law, we will, to that extent, poison the democratic community at its heart.

I identify with the anti-caste commitment in ethical terms, and I agree as a descriptive matter that democracy suffers when differential caste-like status is permitted. But rendering this commitment as a rule about territoriality is problematic for several reasons. First, as I argued above, so long as the territory in question is bordered by policed boundaries and so long as those boundaries operate not merely at the geographic edges but inside the territorial interior by way of the deportation power, differences in status among those within can never be eliminated completely. Even those noncitizens who are formally extended substantial rights and recognition are, by virtue of being noncitizens, subject to the exercise of the immigration regulatory regime and inevitably find themselves, to that extent, less than full social members.

Second, and more fundamentally, it is not clear why the commitment to egalitarianism that underlies the anti-caste vision should be confined to the world within the national territory. I recognize that this is the conventional understanding: equal justice is a national project. People are by nature particularistically motivated, and the idea that we could be compelled to extend solidarities of justice to the world at large is politically utopian and sociologically naive. There is, however, an important case to be made — and it is one that some scholars and activists have been making — first, that responsibilities of justice extend beyond the bounds of the territorial nation-state and, second, that as a matter of fact, people are increasingly experiencing themselves as ethically and politically connected to others across national borders.⁴⁹ Paying attention to the global — to global justice and to the movement for increased democracy at the global level — makes it

⁴⁹ For further discussion, see Bosniak, *supra* note 47, at 489-509.

harder to take as a given that a person's being territorially "in here" rather than "out there" should be the dispositive factor in allocating rights and recognition.

In addition to the affiliations answer and the anti-caste answer to the "why territoriality" question, there is, finally, a third answer — one concerned with state power and its constraints. This "jurisdictional" answer begins from the proposition that a state is a body that possesses legitimate authority to rule over a particular territory. To the extent that a state exercises power in a territorial space, the argument goes, every person present within that space, and "subject to the jurisdiction" of that power, should be armed with individual protections against its exercise. Walzer's account of the rights of immigrants relies, in part, on this conception. He writes, "Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does."⁵⁰

The jurisdictional argument, grounded in a conception of "mutuality of obligation," embodies a crucially important principle on behalf of individual rights.⁵¹ It is this principle that underlies the extension of fundamental constitutional rights to territorially-present noncitizens in most liberal democratic states. In the U.S. context, as explained above, all territorially present persons are entitled to rights against government power and to affirmative protections in a variety of crucial settings, whether or not they possess citizenship status.

Yet important as it is, the mutuality of protection afforded to territorially present noncitizens is incomplete. For one thing, noncitizen immigrants remain subject to various forms of government discrimination, notwithstanding the extension to them of certain core rights. And once again, noncitizens are always vulnerable to ejection from the jurisdiction altogether. Mutuality, in short, only goes so far.

Additionally, we might ask why the mutuality of obligation involved should be territorially circumscribed at all. If the core principle here is availability of protections against power where power is exercised, then it is unclear why those noncitizens located abroad who are subject to the exercise of a sovereign's power are not entitled to protection against that sovereign as well. Many states wield power in ways that affect people

50 WALZER, *supra* note 6, at 61. Gerald Neuman has described such a concept in American constitutional law as the "mutuality of obligation" approach. GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW* (1996) (especially ch. 6). *See also* Raustiala, *supra* note 1.

51 *See* NEUMAN, *supra* note 50, on "mutuality of obligation."

outside the territorial boundaries of their states and yet deny obligations to them.⁵² Arguably, those so affected should enjoy protections from its exercise irrespective of their geographical location and as well as their citizenship status.⁵³

V.

Ethical territoriality has a great deal to recommend it. In the debates over the status of noncitizen immigrants, it is, I believe, far preferable to the formalist, status-centered framework embraced by so many dominant voices. Ethical territoriality is especially valuable in its effort to acknowledge and honor the real attachments people develop in their daily lives, in its commitment against the perpetuation of caste in democratic political communities, and in its insistence on ensuring individual protections against the exercise of state power.

But ethical territoriality has its own hang-ups. First, it promises more than it delivers. The rights and recognition it actually demands for territorially-present noncitizens are limited. The trouble is that ethical territorialists fail to come to terms with the defining condition of alienage itself. So long as persons are present in a territorial community *as* aliens, they remain outsiders to some degree, for alienage entails a conditionality of presence that often trumps whatever formal rights and recognition are extended. Furthermore, when read through the lenses of globalization, we see that territoriality is beginning to fray at the edges. Territoriality as an ethical concept is becoming less authoritative, largely because territory itself no longer organizes social and political life in the determinative way it once did.

This is not to say that territory no longer matters; on the contrary, it continues to structure many of our most significant relationships and associated obligations. Nevertheless, in a world in which affiliations and

52 In U.S. constitutional law, citizens abroad may claim protections against the exercise of American power, but aliens abroad may not. *Compare* Reid v. Covert, 354 U.S. 1 (1957), *with* Johnson v. Eistentrager, 339 U.S. 763 (1950). *See generally* NEUMAN, *supra* note 50, at 99-100 (arguing on behalf of a "modern form of the mutuality [of obligation] approach . . . [which] extends constitutional rights to aliens abroad . . . in those situations in which the United States claims an individual's obedience to its commands on the basis of its legitimate authority").

53 Kal Raustiala's outline of a "despatialized understanding of legal rules and protections" is a good starting point. *See* Raustiala, *supra* note 1.

memberships and political engagements do often press beyond the confines of territory, our ethical commitments must be understood to do so as well. A normative political and legal theory that attends to these transnational connections is still in its infancy, but the issues are increasingly on the agenda in scholarly and political debate. I suspect Iris Young's later work will be regarded as important in placing it there. In 2006, Young wrote that

obligations of justice arise between persons by virtue of the social processes that connect them Claims that obligations of justice extend globally for some issues, then, are grounded in the fact that some structural social processes connect people across the world without regard to political boundaries.⁵⁴

We are sure to see development of this line of theory in the coming years.

In the meanwhile, those of us working on behalf of immigrants find ourselves facing a lag-time between our social reality and our prevailing political concepts. In most policy debates over immigration, the normative significance of territoriality is unquestioned, and issues of global ethics barely register. Our debates are structured, instead, by competing visions of inward-looking, nation-centered ethics, with ethical territoriality but one version. In such a setting, and given the alternatives, ethical territoriality still represents the best argument for immigrants' rights that we have.

⁵⁴ Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y 102, 102 (2006); see also Iris Young, *From Guilt to Solidarity: Sweatshops and Political Responsibility*, DISSENT, Spring 2003, at 39. Many other theorists across the disciplines have certainly paved the way. See, e.g., CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992); Martha Nussbaum, *Patriotism and Cosmopolitanism*, BOSTON REV., Oct.-Nov. 1994, at 19; Robbins, *supra* note 48; Massey, *supra* note 41.