

ETHICAL TERRITORIALITY AND THE RIGHTS OF IMMIGRANTS

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I want to talk today about normative idea which I have called “ethical territoriality.” I use the term “ethical territoriality” to mean the conviction that a person’s physical presence within the territory of a state – whether a national or supranational state--should be the basis for extending them important rights and recognition.

What I would like to do is examine commitment to ethical territoriality that is often found in liberal legal and political thought (both academic and popular) and raise some questions about it. I will ask why the simple fact of a person’s presence in a national state’s territory should serve to ground rights and recognition there, and what the implications are of thinking about things in this way. And throughout my remarks, I will be especially concerned to link the “ethical territoriality” argument to debates about rights of irregular immigrants—people who are within the territory of a state without formal permission.

To begin, though, I need to set the stage by setting out what the ethical territoriality argument is, where it comes from, and why it matters.

So let us start with following query. Who is it that we understand to be entitled to rights and recognition in a liberal democratic state? Who are the proper subjects of regard and protection? Who are the individuals we treat as basic legal subjects?

One conventional answer to this question is that state’s citizens are. In fact, this has been the dominant answer in contemporary political theory: citizens of the state are the fundamental subjects of liberal democratic membership—of regard and recognition and claims-making: In the U.S., American citizens; in Europe, European citizens.

And this is hardly a controversial position, right? It seems to make intuitive sense that citizens of a state, by virtue of that citizenship, should be the principal subjects of regard and recognition there. In this account, citizenship is the fundamental subject position in a political democracy. On this account, we say citizenship is essential because it is “the right to have rights.”

And yet, this citizenship answer begs some questions of its own. For one thing, from a global perspective, assignment of citizenship status is morally quite arbitrary. How does one obtain citizenship? More often than not, by way of circumstances of birth (having to do with where you are born, or to whom). And access to citizenship status post-natally (via naturalisation) is in most states highly restricted. As a result, there are important questions of moral theory about why it should be legitimate to grant privileged

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recognition to those who happen to have ended up citizens of a particular state? Given the arbitrariness of citizenship's assignment, we might ask why so many other rights be made contingent upon its possession?

But let us assume we agree that citizens of a state, by virtue of their formal citizenship status (however acquired), should be entitled to rights and recognition there. The question remains: Is it citizenship alone that should provide the basis for rights and recognition? After all, not everyone living in liberal democratic states in fact possesses citizenship status in that state. Rates of cross national migration are high and most liberal democratic states receive a great many immigrants every year. At same time, no modern state grants automatic and immediate citizenship to these new immigrants, which means that many people reside in states in a status short of citizenship—as aliens. In the U.S., noncitizens represent somewhere between 8 and 9% of the resident population and I believe the numbers are not terribly different in Europe.

So questions then become: what about all these folks--the status noncitizens in the liberal state? To what extent are they to be included as subjects of rights and recognition? To what extent do we consider them part of the "we" of social and political recognition and solidarity?

Well, these questions about the rights of noncitizens are big question, both in the policy arena and in world of scholarship. To be very simple and reductive about things, I shall say that there are two main kinds of positions people tend to take in response. The first embraces a conception of rights and recognition based on status while the second endorses a territorial conception of rights and recognition based on location.

Under the first, status-based conception, person's rights and standing in political community are function of the specific legal category she occupies within state's immigration system. Status of alienage entails lesser rights than citizenship, but there are an array of alienage statuses one can occupy, which lie along kind of membership spectrum. And idea is that rights and recognition properly increase the closer to citizenship status you progress. So citizenship is normative benchmark—and the status of fullest inclusion-- BUT various locations short of citizenship are accorded incremental inclusion. You are more entitled to rights and recognition as a lawful permanent resident alien than a visiting student or certainly than an irregular immigrant or a person detained at the border.

In contrast, the territorial conception of rights treats person's geographical presence in state as a sufficient basis for core aspects of membership. Instead of focusing on assigned legal categories, it stresses normative significance of presence: of the physical and social fact of presence in the national space. Not only is this independent of citizenship status, but notice that this is usually independent of whether the community has formally consented to that presence through its system of status assignment. So irregular immigrants are HERE and hereness alone places them within the domain of rights-bearing subjects for many purposes. Being here is the right to have rights.¹

So territorial conception repudiates the notion of graduated or differential levels of inclusion because it views it as antithetical to liberal and democratic principles. It says: once someone is in geographical territory of the state, that person must, for most basic purposes, be treated as fully in.

I do not want to overstate the contrast. I do not mean to say that advocates of territorialist position are absolute about their commitment. They do not say that there cannot be any differences in treatment between citizens and territorially-present noncitizens. Most do accept some differences, mainly regarding vote and some social benefits. But generally, view is that it is illegitimate for democratic society to have classes of residents who have consistently lesser status than full members (a 2nd class status). As the American political theorist Michael Walzer puts it, doing so is like having a family with live-in servants: a kind of nondemocratic “tyranny.”

So territorialist idea is that everybody here, by virtue of being here, has to be afforded legal recognition—(which takes form of due process and fundamental privacy rights and family rights and property rights and expressive & associational rights and contract rights and employment protections and educational protections so forth)—because to think otherwise would entail a caste-based status system, which cuts against basic liberal democratic commitments.

At the same time, territorialists make a claim on behalf of legalisation. They say: the fact of the immigrants’ hereness should trump irregular status, or cure it, and provide the ground for recognised status.

Thus, rights should attach to territorial presence, irrespective of status, but at the same time, the fact of territorial presence should be enough to resolve irregularity of status.

Now: In earlier work, I have argued on behalf of territorialist position as against the graduated-status position. I believe that ethical territoriality correctly treats membership as matter of social fact rather than as legal formality and it honors egalitarian and anti-caste commitments that liberal democracy purports to stand for—does stand for at its best.

(And I should say that territorialist commitment is a constitutive part of law of many liberal democratic states. In US, all persons who are territorially present (including unauthorised immigrants) are entitled to constitutional and common law rights and various statutory rights.) It truly is the case that presence alone, not citizenship, triggers protection.

Similarly, State Constitution of Canada has written that word “everyone” in the Charter of Rights and Freedoms [quote] “includes every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law.”) In the Constitutional Law of the Netherlands, I have discovered, there is at least one provision which specifically protects individuals who are territorially present: That is Article 1 of the Constitution, which reads “All persons in the Netherlands shall be treated equally in equal circumstances.”

So: I am attracted in many ways to the inclusionary ethos of the territorialist position-- and in current debates over policy, esp. about undocumented or irregular immigration, I defend it. My book, *The Citizen and*

the Alien, is in part a defence of this project. And I think it is the best available argument we have got in practical terms. We say: You cannot have people living among us in a democratic community as legal and political outsiders: that is a contradiction in terms. It is both unjust and destructive for all of us in instrumental terms. We say: it is not the formal status of citizenship that should be the right to have rights: it is the being here and the life in common that this entails, which should ground rights and recognition.

But in this current project, I am interested in turning tables and raising questions of ethical territorialism itself—I want to interrogate this notion that being here should itself count for so much. And so, the first thing that needs to be underscored is that territorialism is—after all-- not all about inclusion. It is internally inclusive but obviously it has constitutive exclusionary element. Territorialism stands for ideal of universality within territory, but it is almost always coupled with vision of bounded territorial community within which inclusion is to take place. Thus, the person standing on the other side of the territorial line is not among the privileged. And notice that this line does not just serve to divide insiders and outsiders at the level of ethical preference (it does not just mean that I feel more responsibility to the ones that are already in); the line functions also as a policed barrier to the outside, meant to keep outsiders from coming in. Most proponents of ethical territorialism either presume or affirmatively embrace enforcement of territorial borders against outsiders.

Walzer's work exemplifies this combination of commitments: He insists on inclusionary, anti-caste values within the community, but at the same time he defends the political community's rights to limit the ingress of outsiders into the community.

So: with ethical territoriality you have got commitments to both universality and boundedness going simultaneously. But notice that for Walzer and many others, these values are not in conflict; they are seen as entirely complementary. The idea is that norms are divided jurisdictionally, with each applying to different domain: universalism within territory, and boundedness at edges. This is what I have called a "hard outside/soft inside" conception of membership---- and it makes a certain intuitive sense. This is the liberal nationalist framework that is second nature to many of us. But it is also problematic (and that is what I want to explore).

For one thing, empirical premise that underlies the hard-on-the-outside, soft-on-the-inside idea are untenable. The key premise is the possibility of severability: in the liberal nationalist view, the national community has an inside and it has edges, and they are distinct in space and function, they constitute different legal domains. But when you think about it, you will see that it is actually not possible to split, or separate, community's interior and its edges. Because "the border" is not just a geographic place at territory's geographic edges; it is a regulatory regime which operates on territorial inside as well. Border is at work at the airports and in detention centres and in the workplaces – all in the territorial interior – and it is enforced above all in the power the government claims to deport or expel. So as practical matter, there is no way of dividing the hard outside and the soft inside in any event. The

border is not just the frame; it is part of the picture. Which means that the characterisation of the community's inside in this model as fully "soft" or inclusive is a fallacy:

But there are several additional difficulties with ethical territoriality position that I want to put on table: I will call these problems of access, problems of scope, and problems of justification.

First, access: If territoriality is going to be so important—if being here is going to count for so much—then obviously question of who GETS to be here becomes crucial. How will the benefit of territorial presence be distributed? As I said a moment ago, the ethical territorialist view usually takes as given that access to territory will be restricted. It insists on rights and recognition for everyone who is here (so again, in this regard it differs from the citizenship-based model to the extent it allows for rights of the territorially present, not just citizenship or permanent resident status holders). BUT: being here continues to be a limited commodity, because of national border laws which preclude entry.

(That is not to say that norm of border control is necessarily entailed by ethical territoriality position two. You could take a position of open borders as well as a rights-for-all-who-are-present position. But most advocates tend to either embrace border control or concede it. They do not contest states' rights to control their borders, it is just that once someone is here, their view is that these individual are entitled to rights and recognition (entitled either rights while noncitizens and/or opportunities to progress toward citizenship via some mode of regularisation of status). That posture of noncontestation by most immigrant advocates is hugely significant; it takes immigration control (at least *ex ante* control) off the agenda for policy debate. But of course, it is only by virtue of that *ex ante* control that people end up being in these states as irregular immigrants anyway and, only by virtue of this, that we need to attend to the question of their rights.)

In any event and as practical matter, even stringent border restrictions do not eliminate entry of immigrants. Many continue to arrive. So then what happens? Strict territorialist position (whatever its position on the border) would seem to say: once you have managed to touch national soil, you are part of universal "we"; here means here. But taken to its extreme and as practical matter, this would produce something like rolling legalisation program, whereby everyone who manages to set foot in national space is automatically recognised as national member. (given rights by virtue of presence and perhaps, put on path to citizenship via regularisation). It is hard to avoid the conclusion that this is irrational: to have a regime which places border controls but then says, if they are breached, then the individual is home free. Why not just get rid of the *ex ante* controls?

But in practical terms, I am certain that most ethical territorialists would not go for this-- it does not make for a good politics. And in a deeper way-- in a way that bears on the coherence of the territorialist position itself-- it would seem to cut precisely against one of the territorialist's constitutive commitments, which is national boundedness, because it would create

incentives for foreigners to bypass border controls in order to avail themselves of the privilege of presence.

A second question about ethical territoriality has to do with defining the scope of the territory at issue. What constitutes a state's national territory anyway? Assuming that being within national territory should make a difference in rights and recognition, there is still the question of how we decide what scope of state's territory is. Where does a state's "territory" begin and end?

The reality is that what counts as territory is subject to all kinds of uncertainty and manipulation. There are endless disputes about who controls which territory. And crucially, not only do states lay claim to control territories, but they sometimes opportunistically disavow territorial jurisdiction in order to avoid obligations that attach to territoriality. Best example of this in recent memory I know of for any country is Guantanamo, which the US government has tried to describe as outside territory of US in order to avoid constitutional obligations to prisoners that would otherwise attach.

And states engage in fictions all the time in which they designate portions of their interior territory as "outside" the state and thereby maintain that the territorially-based rights rules do not apply to persons in those spaces (from airports to detention centres).

So the point for present purposes is: any position that holds that rights and recognition depend on someone's territorial location is less straightforward than it might initially appear. There are contested territorial zones and law defining the borders of territory—defining what is in and out—is subject to manipulation.

Now, the questions about ethical territoriality I have just discussed—those concerning access and scope - are generally about operation or execution of the principle. They raise questions about the commitment's workability. The final question I think we need to ask about ethical territoriality, however—and this is probably ultimate question here—is question of why: Why should a person's territorial presence serve as the basis of such significant privilege in the first place? What justifies extending rights and recognition to people who are here simply by virtue of that presence? What is it about their here-ness that should give rise to greater regard and obligation and recognition than someone receives who is not physically here? How do we explain the moral intuition that grounds the ethical territorialist position, and is it defensible?

I think there are three different kinds of answers that ethical territorialists might give to the "why" question.

One kind of answer I shall call "affiliations" answer. The idea is that physical sharing of territory—national or supranational-- serves to tie people together through proximity and linkage to place. Ethical territoriality acknowledges common bonds that develop among those who share a physical context. Here, it is not so much connection with the land that is

salient (this is not the impulse of autochthony, in other words). Instead, impulse seems to be that we should acknowledge social ties that often develop among persons who lead a common life within a single territorial space.—that accompany shared cohabitation in a place.

This account is intuitively appealing in many ways, but it presents some difficulties. For one thing, to extent that the “affiliations” response depends on people's "leading a common life" to trigger the obligation, it appears to contain requirement that goes beyond sheer physical location.

It seems to require that a person actually conduct a life within the territory. Thus, the mere fact of a person's physically being here— say, just passing through or visiting for weekend—would not seem to meet standard. But then, what would be enough to meet it? Is it being here for two weeks, or two months or two years? And what is so special about time, anyway? What about factors other than time: such as contributions made through work, for example? Perhaps someone is “here” for only a brief period but makes a substantial (however measured) contribution to this place through their work—should that not be enough?

I think a good case can be made that either time present or social contribution or both ought to matter along with sheer presence for purposes of extending many rights and recognition. But to the extent they do count, notice that we are implicitly smuggling in additional requirements: The ethical principle now depends not on territoriality alone but on territoriality-plus something else. WE are no longer espousing a pure territoriality position.

Notice, further, that if we were to end up endorsing a territoriality-plus position, we would be recapitulating the very problem the status-centred folks face that ethical territoriality wants to redress: We would end up with internal exclusions-- of those who fall short on time or contribution measures, people who are here but have not been here for the requisite period of time, or have not made the recognised social contribution. We would have an internally tiered system of rights and recognition. Again, avoiding such internal strata and exclusions is, above all, what the ethical territoriality position purports to stand for.

Another problem with the affiliations answer is that co-residence within a territory is a really imperfect proxy for the existence of attachments and affiliations in any event. Some kinds of connections do often develop among people who share physical context. But it is also true that there are lots of people residing within common territory who are quite unattached to one another, while, at same time, there are plenty of territorial residents who maintain very close affiliations and attachments with people located outside state's territory — attachments both physical and virtual — which may be far more engaged and central to them than those they maintain with co-territorial residents.

Finally, keep in mind that a nation-state territory is great deal larger than a kind of shared physical space (say, a small city) where there are possibilities for physically proximate contact. Therefore, if the logic of ethical territoriality

rests on a desire to acknowledge the importance of physically proximate human attachments, it seems both too broad and too narrow.

A second conventional answer to the "why territoriality" question is what I shall call the "anti-caste" answer. The argument is that to maintain its democratic character, a national community cannot abide the existence of entrenched status differentials. This is a consequentialist argument about democracy: if we do not extend rights and recognition to co-inhabitants, we will poison democratic community at its heart.

As I have said, I identify with anti-caste commitment and I agree as a descriptive matter, that democracy suffers when differential caste-like status is permitted. But treating this commitment as a rule about territoriality is problematic for a few reasons. First, so long as there are citizens and aliens, we have got structural status inequality built into situation. Most territorialists do not call for an end to the statuses of citizenship and alienage ---but I think they would have to in order to be fully consistent.

Second, and more fundamentally, we might ask why the commitment to egalitarianism and inclusion that underlies anti-caste vision should be confined to the world within national or supranational territory. Clearly, this is conventional understanding: Equal justice is the project of a territorially-based political state--and to think otherwise is usually dismissed as utopian.

But there is, of course, an important case to be made that responsibilities of justice extend beyond bounds of the nation-state or supranational state. And when we think about justice in global terms, anti-caste rationale for territorialism falls short. From a perspective of liberal moral theory, global caste differentials matter too.

A final answer to the "why territoriality" question is concerned with legitimacy of governance. The idea is that where a state exercises power in a territorial space, every person "subject to the jurisdiction" of that power (in language of the U.S. Constitution's Fourteenth Amendment), should be armed with individual protections against its exercise. Power entails obligation.

This is, of course, a crucially important democratic principle. But it is not immediately clear why it should be read as territorially circumscribed. If the core commitment is to ensure protections against power where power is exercised, then why should any person not subject to a state's power, wherever that power is exercised, be entitled to protection from that state? Why should it matter whether the person who is the object of the state's power is inside or outside the state's formal territory? (And let us remember, again, that states do not infrequently draw boundaries opportunistically to manipulate what is territorially "in" and what is territorially "out" in any event).

To conclude, I want to reiterate that ethical territorialism has a lot to recommend it and it is certainly far superior to the main alternative--which grounds rights and recognition in legal status-- but it raises a range of difficulties, as well, which I believe we need to talk about.

The challenge for legal and political theory in this area, I believe, is that there is today a substantial gap between our available normative frameworks and our social and political reality. Territoriality is still dominant as an idea but in fact it is becoming less justifiable in practice. Our affiliations and political engagements and psychic imaginaries often exceed the confines of territory and it seems to me that our ethical commitments and responsibilities have to as well.

Eventually, we can hope for development of normative concepts that capture the processes of territorial mobilities and manipulations and even irrelevance. But in the meanwhile, I still find myself making arguments on behalf of immigrants who are here, (wherever “here” is at any given moment—whether the U.S. or Europe or elsewhere) simply because, in the world of practical politics, it is the best argument we have got.