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## IMMIGRATION, POLITICAL INDEXICALITY AND A POLITICS OF INDEXICALITY

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Hans Lindahl

IMMIGRATION, POLITICAL INDEXICALITY  
AND A POLITICS OF INDEXICALITY\*

I

The aim of the paper is to explore how contemporary studies in indexicality can be appropriated in a way that sheds conceptual and normative light on the relation between immigration and distributive justice. Conceptually, I aim to link the possibility of the *jus includendi et excludendi* polities claim for themselves to a feature of Ulpian's formula, *suum cuique tribuere*, that has gone largely unnoticed in discussions of distributive justice: the quasi-indexicality of *suum cuique*. Pointing to the empty formality of "to each their own," those discussions move directly to the question concerning the criterion or criteria on the basis of which goods are to be meted out to each. As a result, they pass over in silence that the word "own," in "to each their own," is a quasi-indexical used in conjunction with indexicals such as "here," "now," and "we." I will argue that the quasi-indexicality of the principle of justice is by no means fortuitous: not only does distributive justice necessarily involve a first-person plural perspective—the invocation of a "we" on whose behalf goods are distributed—, but this "we" is necessarily a collective that emplaces itself, positing itself as an inside over against an outside, and that "temporalizes" itself, by articulating a past, present and future as the temporal modes of what it claims to be its own history. Accordingly, the first part of my paper, going from section II to V, suggests how a theory of political indexicality can provide the conceptual framework for an analysis of the relation between immigration and distributive justice. Subsequently, sections VI and VII deal with the normative question concerning the conditions under which polities may lay

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claim, if at all, to a right to inclusion and exclusion. This normative question, I will argue, is at the heart of what might be called a politics of indexicality.

## II

Theories of distributive justice that defend the right to inclusion and exclusion modern states claim for themselves have come under attack in the light of the humiliation and suffering associated with cross-country migration in our times. Taking issue with Michael Walzer's view that bounded political communities are the proper locus of distributive justice, Joseph Carens has mounted an impassioned defense of a right to immigration. "Borders," in his view, "should generally be open and people should normally be free to leave their country of origin and settle in another, subject only to the sorts of constraints that bind current citizens in their new country."<sup>1</sup>

Carens mounts three distinct but related challenges to the *jus includendi et excludendi* states claim for themselves. The first draws on Nozick's theory of property rights. To the extent that the right to inclusion and exclusion is justified by the claim that "It's *our* country," this justification seems to appeal to collective or national property rights. But, Carens notes, Nozick's theory is built around the protection of *individual* property rights. Carens draws the implications of this insight for immigration: insofar as "the land of a nation is not the collective property of its citizens," "it follows that the control that the state can legitimately exercise over that land is limited to the enforcement of the rights of individual owners."<sup>2</sup> The enforcement of these rights does not entail the right to exclude aliens from entering the state's territory. The second challenge pits Rawls against Rawls. Although Rawls' theory of justice presupposes that polities are closed social systems,<sup>3</sup> Carens argues that Rawls' conception of justice is incompatible with its limitation to a bounded community. If justice rests on the intuition that all human beings should be treated as free and equal persons, then citizenship is conceptually and normatively subordinate to moral personhood. Since it depends on contingent features such as birthplace and parenthood, citizenship is "arbitrary from a moral

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<sup>1</sup> Joseph H. Carens, "Aliens and Citizens: The Case for Open Borders," in *The Review of Politics* 49 (1987), 251-273, at 251.

<sup>2</sup> *Ibid*, at 254.

<sup>3</sup> See John Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press, 1971), at 8, and John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), at 40.

point of view.”<sup>4</sup> Accordingly, citizens can in principle claim no privileged position *vis-à-vis* aliens, even though this doesn’t necessarily exclude the possibility of restricting immigration. The third challenge is utilitarian. Even though there are deep disagreements among utilitarians as to how utility should be defined, they all link utility maximization to moral equality, such that “everyone is to count for one and no one for more than one when utility is calculated.”<sup>5</sup> As with Rawls, the upshot of this utilitarian line of thinking is that, although immigration can be restricted under certain conditions, citizens can lay claim to no special privilege with respect to aliens.

These three arguments in favor of a right to migration are united, as Carens correctly notes, in the priority they assign to the individual with respect to the community. Moral personhood, rather than the citizen/alien distinction, is, he argues, fundamental to a theory of distributive justice. “Our commitment to civic equality is derived from our convictions about moral equality, not vice versa.”<sup>6</sup> Closer scrutiny shows, however, that each of the three challenges he mounts against a right to inclusion and exclusion actually presupposes bounded community and the citizen/alien distinction as the basis for distributive justice.

Consider, first, his reconstruction of Nozick’s theory of property rights. Although the claim “It’s *our* country” entails a collective or national property right, this right cannot be self-consistently justified, Carens holds, because its exercise would undermine the individual rights from which it is derived in the first place. The most direct way of questioning this approach is to note that, conceptually speaking, individual property rights presuppose a bounded political community, not vice versa. Nozick’s move to postulate individual property rights in the state of nature, which are subsequently brought under the protection of the state, merely retrojects into an imaginary past what is the outcome of distribution within the state itself. This insight gives the nay to Nozick’s methodological individualism, according to which the first person plural perspective is merely an aggregation of—and thus reducible to—the first person singular perspective. To the contrary, laying claim to property rights from a first person singular perspective presupposes a first person plural perspective—a “We” that lays claim, *as a whole*, to a territory, such that property rights in part or all of that bounded region can be created and allotted

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<sup>4</sup> Carens, “Aliens and Citizens,” note 1 above, at 257.

<sup>5</sup> *Ibid*, at 263.

<sup>6</sup> *Ibid*, at 256-257.

to individuals. Moreover, this collective claim is not primarily a legal claim, in the sense of a collective or national property right, for it is a claim that conditions the possibility of creating property rights, whether individual or collective, in the land. Any attempt, then, to justify a right to immigration by recourse to the alleged priority of individual property rights ends up by quietly reintroducing borders—hence the citizen/alien distinction—as constitutive elements of a theory of distributive justice.

Carens' critical reconstruction of Rawls's theory of justice fares no better. Freedom, according to Rawls, may be limited by "the common interest in public order and security."<sup>7</sup> Although Rawls discusses this limitation with respect to liberty of conscience, Carens acknowledges that it also applies to immigration in the event that unrestricted immigration leads to the collapse of order. If all individuals—both citizens and aliens—would be worse off as a result of unbridled immigration, those in the original condition would agree to curb it, even if, retrospectively, one were an alien whose right to immigration had been restricted. This reasoning, however well intentioned, does not hold water. When applied to immigration, the concept of *public* order both presupposes and aims to secure the distinction between citizen and alien. It presupposes this distinction, because the government seeks to protect the interest shared by the members of the community; it aims to secure this distinction because public order becomes an issue when immigration threatens to bring about the collapse of the order in which citizens, as members of the community, have a preferential stake. Rawls can claim that the invocation of the public order limitation is consistent with the original position precisely because he has assumed that the closure of a community is instrumental to a *common* interest. In the absence of a closure, the very notion of a threat to commonality, hence to *public* order, loses all meaning. Despite its apparently radical character, Carens' argument for "(relatively) open borders" actually gets us no further than the *status quo* concerning immigration.<sup>8</sup> For his qualification of borders as *relatively* open betrays a fundamental asymmetry between the positions inside and outside the borders of a polity: authorities within determine whether and when the borders are opened to immigrants without. By accepting that public order and security may curb immigration, Carens effectively

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<sup>7</sup> Rawls, *Theory of Justice*, note 3 above, at 213.

<sup>8</sup> Carens, "Citizens and Aliens," note 1 above, at 252.

recognizes that the right to inclusion and exclusion and the citizen/alien distinction enjoy priority in a theory of distributive justice.

I can be very brief with Carens' utilitarian challenge. If, he argues, from a moral point of view everyone counts as one and no more than one, then the borders of a political community, and the concomitant distinction between citizens and aliens, can be factored out from the calculus of utility on the basis of which goods are distributed among individuals. The blind spot of this argument resides in the *tribuere* of *suum cuique tribuere*. Indeed, Ulpian's formulation catches a feature that remains more or less invisible in conventional formulations of the principle of justice, such as "treat like cases equally." Rights have to be *attributed* to individuals by an authority, which acts in the name of a collective. Such, precisely, is the gist of Hobbes' insight about the internal connection between law and distributive justice: "take away the civil law, and no man knows what is his own, and what another man's."<sup>9</sup> This does not exclude the possibility of allowing an individual to immigrate and become a member of the community; but it does entail, first, that justice is actualized through acts that attribute to each their own, and, second, that such acts take place from the first person plural perspective of a bounded political community. The equality of a utilitarian calculus with a view to distributing to each their own presupposes political inequality between citizens and aliens. In other words, the utilitarian calculus can only begin when the most important distributive act—the distribution of membership—has already taken place.

In short, each of Carens' three challenges to the *jus includendi et excludendi* that states claim for themselves fails, and each fails for the same reason: by taking methodological individualism as its point of departure, they presuppose a symmetrical relation between individuals, thereby losing sight of the asymmetry between inside and outside. To suspend this asymmetry is to suspend borders and, consequently, the condition in the absence of which *immigration* (and emigration) and a case for *open* borders are meaningless.

Accordingly, the influential theoretical account that is the target of his critique survives unscathed. Walzer can adduce excellent reasons to continue asserting that "[t]he idea of distributive justice presupposes a bounded world within which distributions take place: a group of people committed to dividing, exchanging

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<sup>9</sup> Thomas Hobbes, *Leviathan*, Molesworth edition (Aalen: Scientia Verlag, 1962) Vol. III, at 233-234.



and sharing social goods, first of all among themselves.”<sup>10</sup> The stark conclusion that Walzer derives from this premise remains equally unperturbed: “no one on the outside has a right to be inside.”<sup>11</sup> A critique of the right to inclusion and exclusion that bypasses the problem of the nature and genesis of borders, summoning authorities to endorse the unmediated moralization of immigration policy, forfeits *ab initio* all critical leverage in politics and law. So, instead of simply trading in a right to inclusion and exclusion for a right to immigration, it behooves us to first look more closely at borders, that is, at their structure and their genesis. As I will argue in the forthcoming sections, a theory of political indexicality not only sheds new light on borders but also offers new critical perspectives for an understanding of the relation between immigration and distributive justice.

### III

So, let us begin afresh by scrutinizing Walzer’s main claim: “[t]he primary good that we distribute to one another is membership in some human community. And what we do with regard to membership structures all our other distributive choices . . .”<sup>12</sup> This claim builds on and radicalizes a well-known passage in the *Leviathan* concerning the relation between law and justice. Evoking Ulpian’s famous formulation of the principle of justice, Hobbes notes the following: “And this they well knew of old, who called that *Νόμος*, that is to say, distribution, which we call law; and defined justice, by distributing to every man his own. In this distribution, the first law, is for division of the land itself . . .”<sup>13</sup> Walzer effectively argues against Hobbes that prior to the division of the land comes the distribution of membership. Implicit in Walzer’s account of membership is the idea that borders play a role in distributive justice because they are, most fundamentally, a *distributive* scheme. If we define a place as a bounded region, then borders allow of emplacing things and persons. Only on the basis of this function of borders can justice be articulated as a principle of spatial distribution: *suum cuique locum*. But this remains a thoroughly abstract characterization of the relation between borders

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<sup>10</sup> Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), at 31.

<sup>11</sup> *Ibid.*, at 41.

<sup>12</sup> *Ibid.*, at 31.

<sup>13</sup> Hobbes, *Leviathan*, note 9 above, at 234 (emphases omitted).

and justice; how, concretely, must space be structured, such that justice can become a principle of spatial distribution?

An initial hint can be found in the principle of justice, "to each their own." In effect, the word "own" functions as a quasi-indexical in this phrase, as it does in the claim "It's our (own) country." As such, the word "own" denotes something that is speaker-relative. This feature links it to indexicals in general. "To know the referent of 'I,' 'now,' 'here,' and 'you,' we must know who utters the word and when, where, and to whom he utters it."<sup>14</sup> Although the referent of "own" in "to each their own" is an individual, the legal speech acts that distribute to each their own are also indexical in that they are posited from the first person plural perspective. Whereas Carens' methodological individualism collapses We-talk to I-talk, Walzer (and Hobbes) correctly resists this reductive strategy: distributive justice is only possible when "We come together to share, divide, and exchange," that is, when "We" denotes a unity in (distributive) action.<sup>15</sup> On this reading, *suum cuique tribuere* presupposes the first person plural perspective of a collective agent that distributes goods, preferentially to its members, and which has a common interest in those distributive acts.<sup>16</sup>

Accordingly, I propose to read Walzer's defense of a notion of bounded justice as an invitation to approach acts of distributive justice in general, and immigration policy in particular, as manifestations of politics in an indexical mode, or if you wish a *politics of indexicality*, organized around the triad "We-here-now." Walzer does not, however, articulate a *theory* of political indexicality, understanding by such an elucidation of the general conditions governing the usage of indexicals in distributive speech acts. Yet precisely such a theory is required, both to make sense of the right to inclusion and exclusion claimed by political communities, and to gain a critical perspective concerning this right. While political indexicality has received significant attention in the literature, by way of a discussion of the use of the indexical "we," the analysis of boundary crossings by immigrants not only suggests that the scope of such a theory must be widened to include spatial and

<sup>14</sup> Richard M. Gale, "Indexical Signs, Egocentric Particulars, and Token-Reflexive Words," in Paul Edwards (ed.), *The Encyclopaedia of Philosophy* (New York: MacMillan, 1967), Vol. 4, 151-155, at 151.

<sup>15</sup> Walzer, *Spheres of Justice*, note 10 above, at 3. Walzer does not stand alone in his critique of reductive accounts of collective action. See, amongst others, Philip Pettit, *A Theory of Freedom* (Oxford: Polity Press, 2001), 104-124, and John Searle, *The Construction of Social Reality* (New York: The Free Press, 1995), 23-26.

<sup>16</sup> For a powerful analysis of the first-person plural pronoun, and its different functions in legislative speech acts, see Bert van Roermund, "First-Person Plural Legislature: Political Reflexivity and Representation," in *Philosophical Explorations* 6 (2003) 3, 235-252.

temporal indexicals, but also that integrating space and time into a theory of political indexicality requires rethinking the uses of the indexical “we.”

Returning to the question about the structure of space, I will kick off a theory of political indexicality with the suggestion that by invoking a “We” in whose name goods are distributed, legal speech acts also invoke an indexical organization of space: at a minimum, they presuppose borders which distribute things and persons according to the here/there distinction. This point may seem trivial, but it has an implication of great consequence to our inquiry. In effect, an indexical ordering of space, that is, an organization of space from the first person plural perspective, is irreducible to a boundless, three-dimensional extension “in” which any and all legal orders are located. This scientific conception of space, which is operative in all sorts of ways in modern legal theories, is motivated precisely by the desire to purify space of any relation to subjectivity, whether individual or collective. How, then, is space structured when relative to a collective subject? Here are its main features:

1) To begin with, a right, even a spurious right, to inclusion and exclusion would be unintelligible unless borders are what distinguish—in the twofold sense of separating and uniting—inside and outside. To put it another way, border crossings, hence passages between “here” and “there,” do not simply involve movements from one point to another on a grid; they involve a passage whereby someone or something *enters* a region or *leaves* it to go elsewhere.

2) The notion of a *jus includendi et excludendi* presupposes that border crossings are normative no less than physical events: a passage is qualified as legal or illegal. This is only possible because borders themselves have a structure that is both physical and normative. Their normative aspect concerns a claim about the common interest of a polity. The second aspect of borders is physical, insofar as the legal order’s claim to institutionalizing the common interest of a polity partitions space by indicating where behavior ought or ought not to take place, in the twofold sense of this expression. A space of action is a *legal* space of action to the extent that it reveals places as *ought*-places. *Suum cuique locum* is by no means limited to immigration: the couplet legal/illegal immigration is only a species of the binary organization of legal space, in which persons and things appear as in-place or misplaced. Only by abstraction can the normative and physical aspects of borders be distinguished, which is why borders are variable even when their physical

positioning does not shift an inch, as when the legal definition of family is tightened or relaxed in view of determining the conditions of family reunion.

3) The distinction between inside and outside arises in the same process by which a polity identifies certain interests as worthy of legal protection—as its *own* interests—and discards others as legally irrelevant; in fact, an “inside” and an “own” place are the two sides of the same coin. Hence, by closing itself off as an inside with respect to an outside, a community posits a territory as its own, and vice versa. An inside and an own territory are two sides of the same coin, namely the specific kind of *unity* a polity claims for its territory.

4) A certain ambiguity in the notion of an “own” space highlights the fact that there are two different forms of inside and outside. On the one hand, the distinction between the inside and the outside of a political community is correlative to the contrast between a community’s own territory and *foreign* territories. On the other, the divide between an inside and an outside is correlative to the contrast between an own place and a *strange* place. These two manifestations of the inside/outside divide are mutually irreducible: the place from which a foreigner comes, when entering a polity, need not be strange; conversely, a strange place need not be foreign: it can irrupt from within what a political community calls its own place.

5) The correlation between an inside and an own place explains why, Nozick’s assumption notwithstanding, a territory is never merely a “geographical area.”<sup>17</sup> Beyond the empirical fact that not all territories are geographically contiguous, the essential point is that the closure of a polity involves a qualitative differentiation of space: the inside is *preferred* to the outside. The claim to a common place entails “a preference in the difference.”<sup>18</sup> So, trivially but again decisively, the very idea of a *jus includendi et excludendi* presupposes that inside and outside are not simply interchangeable locations, and that it is not indifferent whether one enters or leaves a political community.

6) Finally, a space of collective action entails a reflexive relation: a polity relates to itself in relating to a territory. This reflexive relation explains the notion of ownership involved in the paradigmatic claim of political indexicality, “It’s our country.” It is essential to bear in mind that this claim is not juridical, that is to

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<sup>17</sup> Robert Nozick, *Anarchy, State, and Utopia* (Oxford, Basil Blackwell, 1974), at 16.

<sup>18</sup> Bernhard Waldenfels, *Vielstimmigkeit der Rede: Studien zur Phänomenologie des Fremden 4* (Frankfurt: Suhrkamp, 1999), at 197.

say, it does not imply legal concepts such as *dominium* or *imperium*. While a lot of energy has been spent on showing the difficulties in viewing the relation of a collective to a territory as a property relation, such energy misses the point: at stake is a manifestation of political reflexivity, not of legal ownership.<sup>19</sup> On the one hand, the collective relates to itself as the *agent* that, claiming to act as a whole, posits the boundaries of a territory, both those that close it off from other territories and those that demarcate places within it, both public and private. On the other, a collective relates to itself as the community of individuals that has a preferential *stake* in a territory, that is, the set of persons who are interested parties therein. Together, these two collective self-relations define what is meant by the collective "ownership" of a territory, that is to say, its subject-relatedness.

These rough and ready remarks about spatial indexicality may suffice to present Walzer's defense of a right to inclusion and exclusion in its best light. If, as argued heretofore, a legal territory is the concrete union of normative and physical dimensions, then the normative commitment of legal authorities—and this is ultimately a commitment to the common interest of a collective—is *eo ipse* an internal commitment—that is, a commitment to a common place—and vice versa. This insight marks the conceptual limit of any plea for a *right* to immigration: the legal speech acts that distribute to each their own are, to borrow John Perry's phrase, "essentially indexical."<sup>20</sup> Border crossings are regulated from within what a collective calls its own territory—or so legal authorities must claim.

In short, the possibility of a right to inclusion and exclusion depends on the fact that *suum cuique tribuere* implies a subject-relative form of space. This holds for the Greek *polis* no less than for a modern nation state; it applies no less to the post-national polity we call the European Union. This is not to deny, of course, that neither the Greek *polis* nor feudal communities had anything like the regular immigration controls that emerged in the modern Western world.<sup>21</sup> But the claim to a *jus includendi et excludendi*, whatever its contingent historical configuration, is only intelligible from the perspective of a subject-relative form of space.

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<sup>19</sup> For a critical analysis of Kelsen's discussion and rejection of the view that the relation of a collective to a territory is either a *jus in personam* or a *jus in rem*, see my paper, "Inside and Outside the EU's 'Area of Freedom, Security and Justice': Reflexive Identity and the Unity of Legal Space," in *Archiv für Rechts- und Sozialphilosophie*, 90 (2004) 4, pp. 478-497, esp.

<sup>20</sup> See John Perry, "The Problem of the Essential Indexical," in his *The Problem of the Essential Indexical and Other Essays* (Stanford: CSLI Publications, 2000), 27-44.

<sup>21</sup> See John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge: Cambridge University Press, 2000).

This insight sheds new light on the ancient notion of *nomos*, which Hobbes translates as distribution or law. According to Cornford, this meaning covers up an earlier use of the term *nomos*, namely “a range or province, within which defined powers may be legitimately exercised.”<sup>22</sup> And Arendt, drawing on Cornford, notes that we have become so accustomed to “understanding legislation (*Gesetz*) and the law, in line with the Ten Commandments, as orders and prohibitions, the only meaning of which is to demand obedience, that we easily allow the originally spatial character of legislation to become forgotten.”<sup>23</sup> I am not equipped to establish whether this etymology is spurious or well founded; fortunately, nothing of importance for this paper turns on this philological issue. What is of overriding practical and theoretical importance, however, is coining a label for the fact that a bounded region is not merely a condition for but an element of the law. In the forthcoming, I will call this strong reading of law a *nomos*.

#### IV

A theory of political indexicality suggests that if legal speech acts necessarily invoke a “We” in whose name goods are distributed, they also necessarily invoke it as an *emplaced* collective, a collective that delimits itself as an inside over against an outside: a “We-here.” In this, I concur with Walzer. But the implication of the subject-relatedness of *nomos* is that borders are themselves the outcome of a distributive act. In other words, inside and outside emerge through a collective *self*-closure. How, then, is this act to be interpreted in the framework of a theory of distributive justice?

In a fateful move, Walzer relegates the self-closure of political community to a “historical” issue beyond the pale of a theory of distributive justice:

We assume an established group and a fixed population, and so we miss the first and most important question: How is that group constituted? I don’t mean, How *was* it constituted? I am concerned here not with the historical origins of the different groups, but with the decisions they make in the present about their present and future populations.<sup>24</sup>

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<sup>22</sup> F.M. Cornford, *From Religion to Philosophy: A Study in the Origins of Western Speculation* (New York: Harper Torchbooks, 1957), at 30.

<sup>23</sup> Hannah Arendt, *Was ist Politik? Fragmente aus dem Nachlaß*, edited by Ursula Ludz (München: Piper, 2003 [1993]), at 122. I engage with Arendt’s conception of *nomos* in “Give and Take: Arendt and the *Nomos* of Political Community,” in *Philosophy and Social Criticism* 32 (2006) 7, 881-901.

<sup>24</sup> Walzer, *Spheres of Justice*, note 10 above, at 31.

Carl Schmitt exposes what disappears from view if one takes on board Walzer's assumption that borders are a condition but not part of a theory of distributive justice. In his late work, Schmitt explores the relation between law and space or, more precisely, between law and place. Schmitt is primarily concerned to show that a legal order (*Ordnung*) arises through an emplacement (*Ortung*), an emplacement in the active sense of an emplacing.<sup>25</sup> Schmitt terms this active sense of emplacement *nomos*, which he relates to the German verb "*nehmen*"—taking. Not the correctness of the etymological derivation but the conceptual issue is of importance here: Schmitt argues that Hobbes' identification of *nomos* with distribution and the "nourishment" of a commonwealth neutralizes the political content of the term. Indeed, the sequence of acts that compose *nomos* begins earlier than the distribution of the land between the members of a community: "in the same way that distribution precedes exploitation, a taking precedes distribution. Not the distribution, not the *divisio primaeva*, but a taking is what comes first." For, he adds, "no human being can give, distribute and apportion without taking."<sup>26</sup> This primordial act is a land appropriation, a "taking of land" (*Landnahme*), which founds the law both internally and externally: internally, by making room for the allocation of ownership and property relations, whether public or private; externally, by demarcating a political community over against other political communities.

This insight is no mere speculative ploy of a notorious thinker bent on legitimating the European conquest of Africa; Schmitt's discussion of *nomos* goes to the heart of the inaugural gesture that gave rise to the European Community. Indeed, the Preamble to the Treaty of Rome states that the parties to the Treaty are "determined to lay the foundations of an ever closer union among the peoples of Europe." Crucially, while the six founding Member States claimed to represent European unity, they had received no legal mandate to this effect from all possibly affected parties, whether states or individuals. The founding states are the self-proclaimed representatives of European unity. By taking the initiative of founding the European Community, the signatories seize Europe, disclosing it as a common market. The objective of "establish[ing] progressively an area of freedom, security

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<sup>25</sup> Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. by G. L. Ulmen (New York: Telos Press, 2003), at 42 (trans. altered).

<sup>26</sup> Carl Schmitt, "Nomos-Nahme-Name," in his *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969* (Berlin: Dunker & Humblot, 1995), 573-591, at 581.

and justice" in Europe (Article 61, EC-Treaty) is only intelligible as the continuation and realization of an act that *takes* the land. Whence the threefold sequence of meanings of *nomos* alluded to by Schmitt: "freedom," "security," and "justice," in the sense of rights to be enjoyed by citizens and legally resident third country nationals (exploitation), presupposes an act of allotting rights and obligations (distribution), which, in turn, presupposes a land appropriation (taking). A discrete but potent circularity governs European immigration policy: exclusion from (and inclusion in) the European Union is held to be justified because this bounded region is the own place of European citizens; yet, to begin with, exclusion (and its attendant inclusion) gives rise to European citizens and their own place.

Notice, moreover, that land appropriation works externally as much as it does internally: the EU and its Member States not only expect that individuals inside the Union but also those *outside* it recognize their right to inclusion and exclusion. This claim is only possible if, in a sense, those who are excluded are also included. The European polity closes itself off as a polity by including itself and what it excludes in an encompassing spatial unity. Putting this point in terms of a theory of political indexicality, the act that creates "here" and "there" accommodates both within a single region. See here a specific instance of the double function of borders, which cannot separate the Union from the rest of the world without also uniting these two regions into a whole: the world is disclosed as a *market*, and its denizens as economic actors who submit to the rules of market exchange. So, the founding members of the European polity do not only claim to represent European unity; they also claim to represent world unity. But, no less than is the case for Europe, the founding Member States had received no prior legal mandate to this effect from all possibly affected parties in the world, whether states or individuals. The founding states of the European polity act as the self-proclaimed representatives of a world market. The land appropriation that gives rise to the European Union is coevally an appropriation of the world, a European *nomos* coevally a *nomos* of the earth.

Here, then, is the pressing question that arises with respect to a *jus includendi et excludendi*: if a land-appropriation inaugurates the distinction between inside and outside, how can such an appropriation countenance a *right* to inclusion and exclusion? Walzer excises this question from a theory of distributive justice; Schmitt, having stared it in the eye, belatedly attempts to whitewash it by



asserting that “[t]he land appropriation is the ultimate legal title for all further divisions and distributions, and therewith for all further production. It is the *radical title*, according to John Locke’s expression . . .”<sup>27</sup> Is there any alternative to the immediate moralization of immigration policy or its collapse into an exercise in cynicism?

## V

An alternative, if there is one, must begin by considering an aspect of distributive acts that has remained beyond the purview of our discussion: time. Walzer implicitly broaches this issue in the passage scrutinized in the foregoing section: “How is [a] group constituted? I don’t mean, How was it constituted? I am concerned here not with the historical origins of the different groups but with the decisions they make in the *present* about their present and future populations.”<sup>28</sup> Although this passage omits a reference to the past, Walzer later incorporates it into his account of the temporality of *suum cuique tribuere*: “we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and of what sort of a community we want to have.”<sup>29</sup>

Accordingly, distributive speech acts imply an indexical organization of time, in which the discursive “now” of the apposite legal speech act is linked to the past and future of a polity. This insight loses its apparent triviality if we bear in mind the distinction Émile Benveniste draws between calendar and lived time. In the same way that a subject-relative form of space is irreducible to a boundless three-dimensional extension, so also a subject-relative form of time is irreducible to the uniform and continuous sequence of measurable units of time made available by calendars. “As a day is identical to another day, nothing says about this or that calendar day, taken in itself, whether it is past, present or future. It cannot be placed under one of these three categories other than by who *lives* time.”<sup>30</sup> The unity of calendar time manifests itself as the inexorable sequence of a before and

<sup>27</sup> Carl Schmitt, “Nehmen / Teilen / Weiden,” in his *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 489-504, at 493.

<sup>28</sup> Walzer, note 10 above, at 31 (emphases modified).

<sup>29</sup> *Ibid.*, at 32.

<sup>30</sup> Émile Benveniste, “Le langage et l’expérience humaine,” in Émile Benveniste *et. al.* (eds.), *Problèmes du langage* (Paris: Gallimard, 1966), 3-13, at 8. Perry also points to this feature of temporal indexicals in “The Problem of the Essential Indexical,” note 20 above.

an after; by contrast, past, present, and future can only appear as a unity to the extent that they are the temporal modes *of* an "I" or a "We," that is, insofar as they are relative to a subject. The discursive "now" of distributive speech acts cannot be substituted for a date without forfeiting an explanation of those acts. Indeed, legal acts that distribute places, either authorizing or denying entry to immigrants, are only intelligible as acts in which a collective posits itself as a *historical unity*, that is, as the unity of a past, a present, and a future. In this sense also, *suum cuique tribuere* is "essentially indexical": "to each their own place" goes hand in hand with "to each their own time."

How, then, is this subject-relative form of temporality at work in the distribution of persons and places? Consider once again the cited passage of the Preamble to the Treaty of Rome: the parties to the Treaty are "determined to lay the foundations of an ever closer union among the peoples of Europe." Although it refers to a plurality of peoples, the passage also claims that there *already* was a union at the time of laying its legal foundation in the Treaty of Rome, a community of peoples that, by virtue of their shared interests, could go further together, engaging in a process of legal and economic integration. The wording of the passage implies that the Treaty of Rome builds on a prior closure, providing this community with an institutional setting and specific goals. Its *jus includendi et excludendi*, or so the European Union holds, emanates from an original title, an aboriginal cut lost at the dawn of history. Significantly, by evoking a primal cut that created two places—Europe and the rest of the world—the Preamble not only assures the EU of a place of its own, but also of a place within a single distribution of places. The fundamental distinction between those who are in-legal-place in the European Union, and those who trespass its borders, is already prepared in the Treaty of Rome, which only gives legal form, so it claims, to a cut that established at the dawn of history who belongs where: *suum cuique locum*.

This insight modifies Schmitt's analysis of an original *Landnahme* in a decisive way: although the Treaties postulate Europe as the spatio-temporal origin of the European Union, the Union has no direct access to its origin. Yet more forcefully, Europe can function as the origin of the Union *only* if it is not in empirical space and time. More precisely, legal authorities have no direct access to the original scission that gives rise to Europe, on the one hand, and the rest of the world, on the other. Instead, Europe only appears *indirectly*, by way of its

representations: the internal market and the Area of Freedom, Security and Freedom. Paradoxically, and radicalizing Schmitt's account of *nomos*, a community appropriates the land, separating inside from outside, by reappropriating it, by representing an original separation of inside and outside to which it has no access. Europe, which the European Union claims to represent, is, strictly speaking, nowhere and "nowhen." Accordingly, the speech acts that exercise the European Union's *jus includendi et excludendi* designate a "here" and a "now" by way of a detour through a first place and time that never could have been—and never can become—a "here" and a "now." The use of political indexicals is only possible by invoking a "we," a "here" and a "now" that cannot be uttered.

Notice how the paradox of representation impinges on the political use of spatial and temporal indexicals. On the one hand, the Treaty of Rome claims that the distinction between "here" and "there," inside and outside, is prior to it, hence that the respective acts already take place within Europe. Yet what makes of this treaty the inaugural land appropriation of the European Community is that it *creates* the distinction between "here" and "there," inside and outside. To the extent that it creates these distinctions, the respective act is neither inside nor outside, neither "here" nor "there"; it is, strictly speaking, *a-topic*. Only retrospectively, to the extent that it catches on, does the distinction between the European Community and the rest of the world appear to be no more than the institutionalization of a prior distribution of places. On the other hand, while claiming to be a present that flows from the past into the future, the Treaty also interrupts the temporal span of historical time, instituting in a new way the three-way distinction between past, present, and future. In this sense, the Treaty is, strictly speaking, *a-chronic*. Accordingly, Perry's analysis of indexicality must be radicalized: not only are legal speech acts that assign to each their own place and time context-dependent but also, and at the same stroke, context-productive.

## VI

These considerations explain why the distributive issues raised by border crossings by aliens call forth a *politics* of indexicality. For, as opposed to a boundless three-dimensional extension and calendar time, it is the burden and the gift of the subject-relative forms of unity evoked in the indexicals "here" and "now"

to be problematic. As no polity has direct access to the original cut whence it derives its claim to a *jus includendi et excludendi*, each border crossing inevitably confronts a polity with the question concerning its unity in space and time, hence its unity as a collective. There is, accordingly, no clear-cut distinction between an initial act that separates “here” from “there,” and subsequent acts that enforce this distinction. If the act that constitutes the borders of a polity already moves to enforce what are held to be the community’s prior borders, all acts of enforcement constitute these borders anew, refounding the polity as a spatial unity—a *nomos*—even when they confirm this unity. Border crossings call forth a politics of indexicality because each legal act that qualifies such crossings not only secures prior borders but is also, and unavoidably, a decision about what *counts* as “here” and “there,” and what *counts* as the historical unity in which the authorization or denial “now” of a border crossing draws its meaning. Precisely because acts of distributive justice are “essentially indexical,” they are also “essentially questionable.”<sup>31</sup>

The questionableness of indexical claims is radical because the self-closure that gives rise to a polity does not operate a simple disjunction between inside and outside. In fact, the self-closure of a polity is an *inclusive exclusion* and an *exclusive inclusion*. I noted earlier that the European Union not only seizes Europe, disclosing it as an internal market, but also the world, which it discloses as a world market, and its denizens as economic actors that submit to the rules of a market economy. In other words, the Treaty of Rome includes what it excludes in a more comprehensive spatial unity, the world market. But the Treaty also excludes what it includes: by disclosing Europe as a common market, it excludes non-market forms of organizing the European Union. The self-inclusion that gives rise to the European Community is also an act of self-exclusion. The annual meetings of the European Social Forum, with its calls for another Europe in another world, attest to the exclusiveness of the European Union’s inclusiveness.

Accordingly, Walzer’s account of the distribution of membership, which appeals to the triad “We-here-now,” is reductive. The questionableness of indexicals is radical because the self-closure of a polity that spawns the distinction

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<sup>31</sup> I develop the notions of questionability and responsiveness, as features of an ontology of collective selfhood, in “Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,” forthcoming in Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007).

between “here” and “there” also spawns an *elsewhere*, a place that is neither here nor there, yet which announces itself in the process of crossing from there to here. Indexical claims are questionable because the closure of a polity into an inside spawns an outside in the strong sense of strange places that announce themselves in acts that transgress spatial boundaries, whether these are the “external” borders of a polity or boundaries within it. In the same way, if every distributive speech act claims to be the present of a collective history, the border crossings it must qualify as legal or illegal confront a polity with the possibility of an *elsewhen*, a “now” that does not fit into the unity of past, present, and future posited in that speech act. Yet more forcefully, to the extent that the European Union can be contested by its members in the name of another Europe, “We, here and now” are also, and from the very beginning, “They, elsewhere and elsewhen.”

## VII

In terms of European immigration policy, the questionable character of indexical claims manifests itself most starkly in the pervasive distinction between *de jure* and *de facto* immigrants. A prominent scholar on asylum law voices what has become the commonplace of European immigration policy when he notes that “[a]lthough the EU Member States have unanimously denied that they are countries of immigration, by and large all have eventually become *de facto* immigration countries. The flow of asylum applications has become a major source of *de facto* immigration.”<sup>32</sup> A case in point is the European Commission’s proposal for a Council Directive on minimum standards concerning refugees or persons who otherwise need international protection.<sup>33</sup> Having chided the Member States for not recognizing that the position of beneficiaries of subsidiary protection is comparable to that of refugees under the Geneva Convention, Hailbronner adds that, nonetheless, “there is clearly a need to limit residence rights according to actual protection needs. For that reason Member States have a legitimate right to prevent *de facto* immigration when only provisional protection is needed.”<sup>34</sup> But what *title* vouchsafes the “legitimate right” of inclusion and exclusion as exercised by the

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<sup>32</sup> Kay Hailbronner, “Asylum Law in the Context of a European Migration Policy,” in Neil Walker (ed.), *Europe’s Area of Freedom, Security and Justice* (Oxford: Oxford University Press, 2004), at 42.

<sup>33</sup> Council Directive 2001/66/EC of July 20, 2001.

<sup>34</sup> Hailbronner, “Asylum Law in the Context of a European Migration Policy,” note 32 above, at 68.

Member States, whether individually or collectively in the framework of the Area of Freedom, Security and Justice? Remember that its founding states are the self-proclaimed representatives of European unity and of a world market. The “legitimate right” to combat *de facto* immigration seems to derive from an act of taking the land that is as much *de facto* as it is *de jure*. Indeed, *de facto* immigration is the mirror image of a *de facto* land appropriation: in the same way that the act that posits the borders of a polity can never be entirely brought under the aegis of the law, challenges to those borders resist, to a lesser or greater extent, legal qualification in terms of the *jus includendi et excludendi* a political community claims for itself.

Accordingly, it would be reductive to assert, as Hailbronner does, that *de facto* immigration only poses a problem for the European Union because of the difficulty in *enforcing* the distinction between legal and illegal border crossings. *De facto* immigration poses a radical problem because it calls into question the *right* claimed by the Union and its Member States to determine who and what belongs within and without the Union, which is to say that it presages another *nomos* of the earth. Notice the inverted symmetry: in the same way that there is a *de facto* core to the EU’s *de jure* claim concerning its borders, border crossings by *de facto* immigrants also intimate a *de jure* claim to another Europe in another world, hence another way of apportioning to each their own place: *suum cuique locum*. This, concretely, is the manner in which something like a “right to immigration” announces itself at the borders of the European Union.

The challenge posed by *de facto* immigration resonates in what all commentators take to be the major constitutional tension governing the Area of Freedom, Security and Justice, namely the tension between effectiveness and accountability.<sup>35</sup> On the one hand, authorities must be granted the legal instruments to effectively enforce the borders of the European Union; on the other, these authorities must be rendered accountable for their enforcement activities. While this tension can no doubt be negotiated, there is nonetheless a point at which *de facto* land appropriation catches up with a political community, such that effectiveness comes to mean that what is identified as *de facto* immigration is controlled with *de facto* mechanisms, that is to say, by *de facto* acts of border

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<sup>35</sup> See Neil Walker, “In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey”, in Walker (ed.), *Europe’s Area of Freedom, Security and Justice*, note 32 above, 3-37.

control. This, concretely, is what Schmitt's state of exception means for immigration. Such is the unvarnished meaning of the public order and security limitation that Rawls and Carens confidently bring into the fold of distributive justice. At this extreme political juncture, the *right* to inclusion and exclusion a polity claims for itself is suspended in view of recreating by *de facto* means the conditions of normality under which this right can be exercised.

The question returns: how can a *right* to inclusion and exclusion be justified? While the conditions governing the genesis of political community preclude any definitive disjunction between a *de facto* and a *de jure* closure, the possibility of meaningfully drawing this distinction resides in what makes any definitive disjunction impossible in the first place: the representational paradox governing land appropriation. If, as Schmitt argues, there is a spatial unity that is immediately present at the foundation of a polity, then, indeed, legal authorities could only be held accountable for enforcing the distinction between inside and outside, legally if possible, effectively if necessary. But there is no such original presence of Europe. Because the initial taking cannot but *retake* an original spatial unity that eludes the EU, these distinctions become the primary subject of accountability: what counts as inside and outside, legal and illegal, is that for which legal authorities must be called to account.

But to whom? The whole thrust of Schmitt's and (implicitly) Walzer's analysis is that the Union, as every polity, is only accountable to those who, by virtue of being included in the light of the original land appropriation, have an interest in the European *nomos*. In a sense, their point is indisputable: *suum cuique tribuere* is essentially indexical. But who has an interest in the European *nomos*, by virtue of being included therein? I noted earlier that the self-closure of the European Union includes this polity and what it excludes in a more encompassing spatial unity: the world market. In the act by which the founding states proclaim themselves the representatives of European unity, they also proclaim themselves—and the European Union—as representatives of a world unity. To this extent, the European Union acknowledges, albeit implicitly, that by including itself in a *nomos* of the earth, the rest of the world has an interest in the European *nomos*. The *de facto* immigrant, that is to say, the economic migrant who is subject to the vagaries of global market forces, embodies this interest. I submit that this inclusive exclusiveness, in the absence of which the self-closure of the

European Union as we know it today could not have taken place, is the condition of possibility—and no more than that—of a politics of indexicality that institutionalizes a form of accountability of European authorities to those who stand at the Union's borders. To the extent that a polity cannot posit its borders without *eo ipse* acknowledging that these are the spatial manifestation of intersubjectivity, the subject-relatedness of borders can be more than the expression of subjectivity, in the sense of arbitrariness. The subject-relatedness of borders involves a claim to objectivity, that is, a measure governing distributive acts to which a polity defers and which does not simply stand at its disposal.