

STRANGER IN A STRANGE LAND

THE ALIEN AND THE STATE

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The relationship of the stranger and the political community has traditionally been at the very core of various theoretical, historical and mythical accounts; in defining membership, in answering who is to be included, accepted and (thus) protected, in safeguarding a group's position and its coherence. The essay argues that many of these accounts still prove to be of great value in a legal and a political perspective: None of the questions raised today when it comes to the phenomenon of migration and inclusion are particularly new; rather they have been addressed frequently over the last centuries. We would be well-advised to rely on a broader perspective, on the teachings of history, and the insights of political philosophy when facing the intellectual and political challenges of our time.

Keywords: Alien, Foreigner, Hospitality, Human Rights, Language, Nation, Shibboleth, Stranger.

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INTRODUCTION: THE STRANGER

In his seminal work on sociology Georg Simmel described “the stranger” as a wanderer, “not[, however, as he stresses] in the sense often touched upon in the past, as the wanderer who comes today and goes tomorrow, but rather as the person who comes today and stays tomorrow. [The stranger] is,” so Simmel concludes, “the potential wanderer.”¹ Simmel’s observation allows us to gain quite remarkable insights into the difference between individuals and groups as constituted by the experience of strangeness as a social phenomenon.

If we decide to build on it, we can perceive strangeness as a multidimensional social concept: the stranger is someone who has arrived. Because of that, she is not considered to be established. She is not just any “other”. Strangeness is more than mere “alterity”; more than the presence of the other which necessarily denotes the relationship between individuals. Strangeness—“alienity”—is qualified difference. As such, it is necessarily transcendent. According to Simmel, it introduces “qualities into [a given group], which do not and cannot stem from the group itself.”² Based on this observation, strangeness entails the inversion of the typical perception of distance, of nearness and remoteness, in social context; while it would typically imply that someone close to us is far, “strangeness means that [someone], who [...] is far, is actually near.”³

It is this dialectic of near and far that designates strangeness. Being part of the group without being its original member, the stranger provides an external point of reference that allows for collective self-ascertainment. From this perspective, the stranger provides the contrast for a group’s identity which may only be construed by this very contrast. The qualified difference of strangeness leads to a differentiating qualification.

1 GEORG SIMMEL, *SOZIOLOGIE: UNTERSUCHUNGEN ÜBER DIE FORMEN DER VERGESELLSCHAFTUNG* (1908). Translation according to KAREN H. WOLFE, *THE SOCIOLOGY OF GEORG SIMMEL* 402 (Glencoe, Illinois, The Free Press, 1950).

2 SIMMEL, *supra* note 1.

3 *Id.*

I. THE STAMMERER

This differentiating qualification is quintessentially displayed by the function served by language when it comes to determining social affiliation:⁴ “Man”, as Wilhelm von Humboldt emphasized, “draws [...] the circles of his spiritual kinship by separating those speaking like he does, from those speaking differently. This separation, dividing mankind into two classes—locals and strangers—is”, so Humboldt concludes, “the foundation of society”.⁵ Language, while the essential medium of human communication, at the same time holds a moment of social distinction,⁶ and tends to progress towards becoming the “shibboleth”⁷ of the group in question.⁸

The idea that *communication*, in seeking to establish a *community*, allows for an exemplary separation of what is strange and what is familiar, has been extensively explored in social science.⁹ Yet, it may rely on a historical dimension as well; a dimension which resonates etymologically until today: To the Greeks a stranger was a “barbarian” (*βάρβαρος*) because—literally—he was a stammerer; somebody who lacked command of the language. Against this background the

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4. See Lesley Milroy, *Language and Group Identity*, 3 J. OF MULTILINGUAL & MULTICULTURAL DEV. 207 (1982), Jette G. Hansen & Jun Liu, *Social Identity and Language*, 31 TESOL Q. 567 (1997) or JOHN EDWARDS, *LANGUAGE AND IDENTITY: AN IDENTITY* 15-27(2009).
5. Wilhelm von Humboldt, *Über den Dualis*, in, WILHELM VON HUMBOLDTS WERKE VI/1 25 (Leitzmann, ed., 1868).
6. See Jacques Derrida, *Foreigner Question*, in, OF HOSPITALITY 89 (Mieke Bat & Rent de Vries eds, 2000).
7. Judges 12:5-6 (KJV): And the Gileadites took the passages of Jordan before the Ephraimites: and it was so, that when those Ephraimites which were escaped said, Let me go over; that the men of Gilead said unto him, Art thou an Ephraimite? If he said, Nay; then said they unto him, say now Shibboleth: and he said Sibboleth: for he could not frame to pronounce it right. Then they took him, and slew him at the passages of Jordan: and there fell at that time of the Ephraimites forty and two thousand.
8. See JACQUES DERRIDA, SHIBBOLETH (1986).
9. See Katherine D. Kinzler, Emmanuel Dupoux, & Elizabeth S. Spelke, *The Native Language of Social Cognition*, 30 PROC. OF THE NAT'L ACADEMY OF SCI. OF THE UNITED STATES OF AM. 12577 (2007).

(political) claim regularly made in the recent past that a stranger's integration into a given group would have to start by acquiring the language, may hardly be dismissed.

II. STRANGE OBJECTIVITY

The way a social group looks upon the stranger is the perspective which typically is considered to be of fundamental importance in political theory. This, however, is not to say that, conversely, the way the stranger views the social group is negligible for the topic at hand. Rather, it is this view in which the synthesis of near and far allows for a remarkable quality that made the stranger not only the focal point of a multitude of concepts in political theory, but also put her at the center of various founding myths: the "objectivity of the stranger". This objectivity results, as Simmel emphasizes, from the fact that the stranger "is not radically committed to the unique ingredients and peculiar tendencies of the group". It is an objectivity which "is a particular structure composed of distance and nearness, indifference and involvement".¹⁰

The stranger as the uninvolved participant, thus, according to one of the essential claims underlying Rousseau's social contract may serve as the "superior intelligence that could see all [of] men's passions without having any of them". This intelligence is—as Rousseau emphasizes—"wholly unrelated to our nature, while knowing it through and through; [and even if] its happiness does not depend on us, it readily concerns itself with our happiness."¹¹

The stranger's uninterested attentiveness allows for an unadulterated perception of her object without making it necessary to cloak it with a Rawlsian veil of ignorance.¹² The stranger's objectivity is ensured without depending upon such auxiliary means which seek to effect a similar result.

10. SIMMEL *supra* note 1, at 404.

11. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 25 (G.D.H. Cole trans., reprinted ed., 2007) (1762).

12. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

III. STRANGE LEGISLATION

Against this backdrop, it does not necessarily “take gods to give men laws”.¹³ A legislator as envisioned by Rousseau who acts without conceit, prejudice or self-interest may also be found in the stranger. At the same time (and again differing from the Rawlsian conception), the options to make good use of the stranger’s objectivity are not exhausted by employing it as a mere thought experiment:¹⁴ To use the stranger’s objectivity by transferring the task of legislating onto him is an *actual* option. Indeed, Rousseau himself provides us with several historical examples that underline this: “It was the custom of most Greek towns to entrust the establishment of their laws to foreigners”, he emphasizes. And “[t]he Republics of modern Italy in many cases followed this example; Geneva did the same [Rousseau alludes to the reformer Calvin] and profited by it.”¹⁵

These examples are impressive. And yet another founding myth outshines them: The Israelites’ exodus from Egypt led by Moses and the founding of Israel that was about to follow. Of course: At first glance this seems to be the classic example of a state’s founding by a group’s emancipation from foreign dominion. Still, as Bonnie Honig convincingly argued in a recent monograph,¹⁶ this myth proves to be exemplary for the phenomenon of a state founded by a stranger; at least if we embrace the interpretation essentially shaped by Sigmund Freud:¹⁷ that Moses—departing from the biblical record—was not an Israelite but rather an Egyptian. Freud sought to substantiate this in particular by pointing to the section of “Exodus” according to which

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13. ROUSSEAU, *supra* note 11, at 25.
14. For an experiment on the thought experiment see Norman Frohlich, Joe A. Oppenheimer, & Cheryl L. Eavey, *Laboratory Results on Rawls’s Distributive Justice*, 17 BRIT. J. OF POL. SCI. 1 (1987). On this experiment see Michael Jackson & Peter Hill, *A Fair Share*, 7 J. THEORETICAL POL. 169 (1995).
15. ROUSSEAU, *supra* note 11, at 26.
16. BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 25 (2003).
17. SIGMUND FREUD, *DER MANN MOSES UND DIE MONOTHEISTISCHE RELIGION* (1939).

Moses was “slow of speech, and of a slow tongue”.¹⁸ He concluded that “[t]he report may, in a slightly distorted way, recall the fact that Moses spoke another language and was not able to communicate with his Semitic Neo-Egyptians without the help of an interpreter at least not at the beginning of their intercourse.”¹⁹

Recalling the differentiating qualification based on language discussed above, Freud’s allusion is quite remarkable. The historical question whether Moses was indeed an Egyptian, however, is not subject to proof based on this hypothesis or other arguments.²⁰ Still, in the given context, the symbolism and its implications are of far greater importance: the fact that the people of Israel’s laws were handed down on Mount Sinai by a stranger.²¹ It is this moment in which the qualified difference denoting the stranger is being transformed from a social into a normative dimension; the *founding* is set in difference to the *foundation*; the *constituent* power is set in difference to the *constituted* power.

To uphold this difference, the alienity of the legal framework that is withdrawn from the disposition of those subjected to it necessitates to dispose of the stranger upon completion of the act of legislating. In order to modify Georg Simmel’s dictum referred to before: the legislator is a stranger “who comes today and stays tomorrow”,²² but only to legislate and then to move on; out into this world or into the next, regardless of whether he himself sets out to jump or whether he is being pushed: Moses passes away (even if not immediately) after having received the laws on Mount Sinai; before the people of Israel reach the promised land. Lycurgus, son of a Spartan king—alienated by his exile – returns to his native land to give it a constitution and decides (if we believe Plutarch’s account) to starve himself to death outside the city thereafter, only to furnish the legal framework he created with even greater authority.

18. Ex 4:10 (KJV).

19. SIGMUND FREUD, *MOSES AND MONOTHEISM* 54 (Katherine Jones trans., 1939).

20. For this far-reaching discussion, see *i.e.* JONATHAN KIRSCH, *MOSES: A LIFE* 24 (1998).

21. HONIG, *supra* note 16. at 30.

22. SIMMEL, *supra* note 1, at 402.

IV. SUBJECTIVITY AND SUBJECTION

The strange legislator cannot become a member of the community she has organized according to her objectivity. Institutionally, this demands strict separation of the function of the legislator from the actual exercise of power; as Rousseau emphasizes: “for if anyone who commands men ought not to have command over the laws, then anyone who has command over the laws ought not to have it over men; for if [s]he did, [the] laws would be the servants of [the legislator’s] passions and would often merely perpetuate [her] injustices; [her] private aims would inevitably mar the sanctity of his work.”²³ Put differently: the stranger who remains within the community will lose her objectivity. This does not allow for perceiving her any longer to be outside the legal order: the stranger’s subjectivity entails her subjection.

The stranger as the one “who comes today and stays tomorrow”, however short that stay may be, must become “subject among subjects”.²⁴ And yet, this is not to say that the stranger thus becomes an “equal among equals”. Much rather the *superordination* of the legislator, presupposed to the legal order entrusted to her disposition yields to the *subordination* of the subject for whom a legal order is predetermined which defies her disposition. The stranger is, as stated in the Book of Exodus, a “sojourner in a strange land”²⁵; the stranger is—a normative explication of the differentiating qualification of strangeness—only tolerated in the community. This does not necessarily mean that the stranger has no legal status in the community (as even toleration rests on a quasi-legal foundation); rather, that normatively she is subject to the community’s disposition.

In legal history we find that even proto-states guarded their accomplishments against the unwanted grasp of outsiders. In political theory this has been prominently transformed by Thomas Hobbes into the thought that among the essential purposes of the state was providing protection from foreign invaders.²⁶

23. ROUSSEAU, *supra* note 11, at 26.

24. GEORG JELLINEK, ALLGEMEINE STAATSLHRE 406-408 (3rd ed., 1914).

25. Ex 2:22 (ERV).

26. THOMAS HOBBS, LEVIATHAN xvii (1651).

However, for Hobbes it would appear foreshortened to equalize foreigner and foe. Still, this thought, as emphasized by John Rawls among others,²⁷ points out that the rights of aliens are select privileges granted by the state, not positions withdrawn from the control of the community; or, to put it differently: original rights (disregarding the specific legal order). Thus, not only does the legal order of the state defy the stranger's disposition in this changed perspective;²⁸ much more it makes the stranger herself an object of its disposition. The inclusion of what legally comes to be considered an "alien," therefore, in the end is warranted only upon the suspensive condition of her potential exclusion. Taken to extremes this may manifest itself in what the Spartans (among others) are supposed to have practiced as *xenelasia* (expulsion of aliens).

V. INALIENABLE RIGHTS

One may, of course, object that this view is outdated, at least from the end of the 18th century when—and the literal expression proves to be interesting for the case at hand—in*alienable* rights of man were propagated.²⁹ Still, upon closer examination this is not convincing; in particular when taking into account that these normative concepts were not being stressed in the dawn of the nation-state by mere coincidence. In this context they serve as a constitutive precondition as well as a legitimacy vanishing point of a people merging into a nation;³⁰ a nation, as phrased in Article 3 of the Declaration of the Rights of Man and of the Citizen in which the "principle of any sovereignty resides" and which therefore embodied the rights of members.

The rights as recapitulated in the declaration (according to Mirabeau

27. JOHN RAWLS, *THE LAW OF THE PEOPLES* 38-39 (1999).

28. See Obrad Savić, *Figures of the Stranger Citizen as a Foreigner*, 11 *PARALLAX* 74 (2005).

29. United States Declaration of Independence, July 4, 1776; Déclaration des Droits de l'Homme et du Citoyen, August 8, 1789.

30. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 291 (1973).

first and foremost a declaration of war against tyranny),³¹ thus, are to be perceived in their respective conditionality towards the sovereign nation for which they served as starting and as terminal point at the same time; not, however, as legal entitlements to be relied on directly by an individual; or in particular: by *any* individual.³² Already in this respect these “rights” proved to be those “abstractions” that drew the powerful criticism of Edmund Burke.³³

VI. THE BINARY STATUS

Perceived as constitutive factor of the emergence of the nation, these rights, as emphasized in particular by Lucien Febvre, are potentially inclusive as well as exclusive: they transfer a typically fragmented people into a homogeneous union of citizens.³⁴ To remove these inner barriers by establishing a unifying formal status entails outward demarcation: citizens stand opposed to aliens excluded from membership in the nation; a nation guarding the set of rights preceding itself.

The postulates inherent to the concept of the nation-state, according to Habermas homogeneity and leitmotif,³⁵ help to catalyze this effect: inclusion takes place contingently according to the established criteria of “blood and soil” is regulated by formal integration by acquiring citizenship according to criteria determined by the community. Still, it is unnecessary to pursue this any further. By integrating the alien, the object of our examination goes astray, as through integrating the stranger – literally – is being *estranged* and merges into the community embodied by the nation.

31. See Savić, *supra* note 28, at 73.

32. SAMUEL MOYN, *THE LAST UTOPIA* 25-29 (2010).

33. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1790): In the famous law of the 3rd of Charles I, called the Petition of Right, the parliament says to the king, “Your subjects have inherited this freedom”, claiming their franchises not on abstract principles “as the rights of men”, but as the rights of Englishmen, and as a patrimony derived from their forefathers.

34. LUCIEN FEBVRE, *A NEW KIND OF HISTORY* 208 (1973).

35. JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER* 108-120 (1998).

So we see: the nation-state and the rights claimed *in* and *by* it do not normatively overcome the qualified difference to the stranger; rather they amplify it by transforming the differentiating qualification into a formal demarcation between inside and outside: to include and to exclude individuals according to the criterion of citizenship allows for the emergence of what the U.S. Supreme Court in the 1950s referred to as “the traditional power of the Nation over the alien.”³⁶

By interlinking the nation and its citizens as bearers of *inalienable* rights—even if it appears linguistically paradoxical at first glance—the alienity of the outsider is emphasized. Notwithstanding the international developments over the last decades to narrow this gap, the political situation as it presents itself today most strikingly affirms the central importance of the differentiating qualification of individuals by citizenship.

Against this backdrop, the alien still is to be considered, as Hannah Arendt put it, “outside the pale of the law”; left to their “abstract nakedness of being human,” without any “right to have rights”;³⁷ without any self-reliant legitimate claim to address the community to seek and to find admission. To overcome the difference between the human and the citizen and to adhere to such a claim to be included on a theoretical level entails to disentangle rights and citizenship; to normatively emancipate the individual from the nation.

VII. (TOWARDS) PERPETUAL PEACE?

The classical account of such a claim awarded to the alien is to be found in the third definitive article of Immanuel Kant’s essay on “Perpetual Peace”³⁸ in which Kant postulates a right to “world citizenship” is limited to universal hospitality. A *right*, as Kant emphasizes, not a mere question of philanthropy: “Hospitality [means the right] of a stranger entering foreign territory to be treated without hostility. One may refuse to receive him, if it can be done without endangering his exis-

36. *Harisiades v. Shaughnessy* 342 U.S. 580 (1952) 587-588.

37. ARENDT, *supra* note 30, at 296.

38. 8 IMMANUEL KANT, *ZUM EWIGEN FRIEDEN* 357 (1975).

tence; however, so long as he conducts himself peaceably, he must not be treated as an enemy. It is not the right to be a permanent visitor, the stranger may demand. A special beneficent agreement on his behalf would be needed to make him a fellow inhabitant for a certain period. It is only a right of temporary sojourn [!], a right to offer oneself as associate, which all men have.”³⁹

When examining this concept of a global right to migration, Kant’s choice of words seems remarkable; “hospitality” attests etymologically to the potential reflexivity inherent to the concept: in Latin “hospes” denotes the guest as well as the host. Hospitality points out, that anyone may be a potential guest as well as a potential host, as everyone is to be considered a stranger, nearly everywhere, when moving beyond the boundaries that define her community. But the etymological roots of the concept of hospitality developed by Kant run deeper still, as in Latin, the guest and the host (*hospes*)—which in the English loanword is easily recognized for the latter originate from the same source as the enemy (*hostis*): According to Jacques Derrida, thus, “hospitality” harbors its “self-contradiction in its own body a word which allows itself to be parasitized by its opposite, ‘hostility,’ the undesirable guest.”⁴⁰

It is unclear whether and to which extent this remark is imbued with a critical undertone. However, if so, it does not seem justified. Kant’s choice of words is rather a deliberate one; as in its very etymological openness the concept of “hospitality” reflects the ambivalence inherent to the encounter with the stranger in a political theory perspective: think back to what Hobbes had to say about the purpose of the state.⁴¹ Relying on this ambivalence, hospitality in the wider sense appears to be a necessary precondition of a diligent contact with the unknown for which the distinction between friend and foe is yet to be made. All hospitality wants to ensure against this backdrop according to Kant is a “privilege of strangers arriving on foreign soil that does not amount to more than what is implied in the condition of the possibility to make an

39. Translation partly based on IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* 137-138 (Campbell Smith, ed., London, 1903) (1795).

40. Jacques Derrida, *Hospitality*, 5 ANGELAKI: J. OF THE THEORETICAL HUMANITIES 3-18 (2000).

41. HOBBS, *supra* note 26.

attempt at interacting with the original inhabitants.⁴²

This entails, according to Kant, “not be treated as an enemy [...] as long as the stranger conducts himself peaceably”. Put differently: even as the mere “condition of the possibility” to initiate interpersonal contact, a normative claim to hospitality ends where *hostility* begins; where a stranger turns out to be a danger for the community.

CONCLUSION: COSMOPOLITAN HOSPITALITY

It was not too long ago that Kant’s concept of “world citizenship” may have been perceived as a matter of course in the theoretical as well as in a doctrinal view: After historical experiences that couldn’t have been more drastic, it was considered to be understood that the reality of international law had overtaken the Eutopia of political theory. The legal obligation to hospitality—according to the current standards of international human rights protection and international humanitarian law—means not only to safeguard the “condition of the possibility of interaction” for those who seek it. Hospitality, as a legal obligation, (in particular, but, of course, not exclusively, by means of the right to asylum, the prohibition of collective expulsion or refoulement and the protection of interpersonal relationships) means to be responsible: responsible for those who have been placed outside of, or even disowned by, their communities. It means to include those who otherwise would not have the possibility to live their lives in accordance with their identity. It means not to sever family ties without grave reasons. Ultimately, it also means ultimately to harbor even those of which we may be unsure whether as *hospes* they may not prove to be *hostile* after all; at least in those cases in which, in accordance to Kant, “to refuse to receive him” cannot “be done without endangering his existence”.⁴³

42. KANT, *supra* note 39, at 139.

43. See *i.e.*, ECtHR (GC) 15.11.1996, *Chahal v. UK*, 22414/94 Rn 80: “The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting

This, because hospitality as a human right, as a right of the cosmopolitan citizen, in return, means more than to accept the philanthropy, more than the toleration of others, more than to be a “sojourner in a strange land”. A right to hospitality ultimately means to have a right to be a “stranger in a strange land” as it conveys—even if only within a rather narrow spectrum—a fundamental claim to be a “human in a strange land”; which normatively sanctions the qualifying difference of strangeness emphasized before.

In a world dominated by nation-states this does not make the stranger an “equal among equals”. However, it shows that in a certain realm of legally safeguarded “fellowness” the citizen takes a step back behind the individual thus emancipated from the nation. By this emancipation the individual is withdrawn from the disposition of the specific legal order; even if the enforcement of the sketch of the normative framework presented above in the end is interlinked with the structures of the nation-state and even if its effectiveness depends on the extent to which national actors are ready to reproduce it.

Analytically, however, the normative inclusion thus depicted attests that in this segment of rights attributed to the “citizens of the world” the dialectic of near and far is being dissolved, as the concept of the stranger is strange to it, has to be strange to it, as it perceives “the abstract nakedness of being human” not as a mere given but as its point of departure.⁴⁴ Individuals united by their diversity are not strange to one another. The inalienability of their normatively corroborated status converts there alienity to mere alterity; turns the qualified difference into a plain one; makes the stranger a human.

In this way, just as Kant longed for, “distant parts of the world indeed can come into peaceful relations with one another, and peace may finally be established by law, when humanity can gradually be

State to safeguard him or her against such treatment is engaged in the event of expulsion [...]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.” For the Court’s more recent case law see ECtHR (GC) 23.08.2016, J.K. and Others v. Sweden, 59166/12 and ECtHR (GC) 13.12.2016, Paposhvili v. Belgium, 41738/10.

44. See HABERMAS, *supra* note 35, at 199.

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brought closer and closer to establishing cosmopolitan citizenship.”⁴⁵

Of course, we must not get ahead of ourselves: We may have indeed come far in achieving that. And yet, Kant’s vision seems blurred by recent events. So whether indeed we are about to be brought closer and closer to establishing something akin to cosmopolitan citizenship or rather farther and farther from this idea is yet to be decided.

45. KANT, *supra* note 39, at 139.