

Moral Presence Before the Law: the Case of the Group at the Fence*

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Before the Law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment.
Franz Kafka, "Before the Law"

0.

It is one thing to know that there are people in dire need who should be helped by someone; another to know who those people are. But it is an entirely different thing to be in their presence and to recognize their valid moral claims as claims addressed to oneself. The latter predicament has become more common (or simply more noticeable) with the current, much discussed, global refugee crisis. Citizens of affluent countries dwell in moral landscapes that are framed by their political affiliations. The law of the state is supposed to broadly align with the demands of morality. However, these political affiliations and the brute force they wield seem morally feeble when citizens are confronted with specific, valid, moral claims addressed directly to them by non-citizens. The following is a study of such a moral crisis.



Photograph by Nir Elias/Reuters

* The claim that Israel's actions in the case discussed here present a deep and significant inconsistency draws on an unpublished manuscript by Omer Shatz, "The Not So Good Samaritan." Omer was also the litigator on behalf of We Are Refugees, an Israeli legal aid organization, in the petition to the Israeli Supreme Court that I go on to describe. My thinking about the moral claims of refugees were formed by conversations with Itamar Mann and benefitted enormously from his book, *Humanity at Sea: Maritime Migration and the Foundation of International Law* (New York: Cambridge University Press, 2016). I wish to thank them both.

1.

Looking from the inside out, a steel grid fills the frame and obscures the contours of the men, women, and child, huddled together at the picture's center. The tall fence is made of concrete columns, rings of barbed wire, and numerous horizontal and vertical steel bars that create an impenetrable but transparent surface. The only sharply defined figure in the picture appears on the right-hand side, in the foreground: an armed-soldier, carrying a radio on his back, standing still, slightly bowing his head, slouching, his gaze directed at the unidentified, illegal, undocumented, irregular individuals, lying and sitting on the ground, a few meters away from him, outside the border.

But this is not a border – that is, not exactly. The high steel fence was erected by Israel along its southern border with Egypt approximately 10 meters *inside* Israel's territory. For eight days, in late August and early September of 2012, Israel refused to allow entry to this group of 21 Eritrean refugees, trapped between Egyptian land and the Israeli fence. Despite high temperatures and lack of shade, the soldiers had been instructed to provide only limited quantities of water. The group, which included two women and a fourteen-year-old boy, refused to return to Egypt. Technically, they were on Israeli territory but the fence, erected only a few months before their arrival, prevented them from advancing. According to Israeli media reports, one of the women was visibly pregnant, but the migrants told the soldiers watching the group she had miscarried during their wait. The area was declared "closed military zone." Medical aid organizations and human rights activists were denied access but a few journalists made it through and managed to take pictures. "The group at the fence," as they were called by the Israeli media, had not been offered food since their arrival at the spot in the northern stretch of the Israel-Egypt border. Temperatures in the desert area peaked at about 92F.

In a statement, the Israeli Defense Forces said: "The area under question has a long expanse of fence that was recently built in order to prevent unauthorized infiltration into Israeli territory. On the western side of the fence, on Egypt's side, is a group of foreigners whose entrance into Israel has been prevented thanks to this fence. For humanitarian reasons, [Israeli] forces have been providing the foreigners with water."

The Association for Civil Rights in Israel condemned the refusal to allow the refugees entry. "Israel has the right to build a fence, but a fence does not relieve Israel from its obligations," said Oded Feller. "When people are standing at the fence and begging for their lives, we must make sure they are not in danger, and if they are, they must be let in."

Israel's Minister of Interior Affairs, Eli Yishai, said in a radio interview: "Every day there are people stuck there. If there were no fence, and if we weren't steadfast, there would be a million people here." He conceded that it was hard to see the pictures, but added: "I am the one who has to make the difficult decision, and if I have to choose between the good of the state, its civilians and its security, [and the good of the people wishing to enter] I will choose that there be a fence, that they won't enter and instead return to their country."

Some of the soldiers in charge of observing the group and ensuring that they do not enter, protested that the migrants are dying of thirst and hunger, under the scorching sun. Just a month before, another group of refugees were trapped in similar circumstances for several days before

they were admitted to Israel “for humanitarian reasons” and taken to a detention center. Israel had begun building the fence along its 150-mile southern border in the summer of 2011. The fence was completed before the end of 2012. According to the Population and Immigration Authority, the number of migrants entering Israel from Egypt fell to 200 in August 2012, compared with 2,000 a year earlier. In December 2013, Israel opened the “Holot Detention Facility,” in which 3,500 asylum-seekers from Sudan and Eritrea are currently being held. Since it opened, the facility has held over 10,500 undocumented immigrants, described as infiltrators by the Israeli government and as asylum seekers by the lawyers who represent them pro bono. During this time, 12,000 such immigrants have left Israel, choosing a highly uncertain fate over certain imprisonment.

2.

On the seventh day of waiting, an Israeli legal aid organization, We Are Refugees, filed a petition to the Israeli Supreme Court, seeking urgent supply of humanitarian aid to the group, immediate admittance of its members, and permission to file asylum claims. During the hearing at the Supreme Court, Israel’s Attorney General (AG) argued that Israel, as a sovereign state, has the right to decide who is entitled to enter its territory and that Israel is not obliged to act with respect to aliens who are located outside its actual territory, effectively marked by the new fence. Moreover, the Government argued, the purpose of the costly fence was precisely to prevent infiltration into Israel. The fence, the AG clarified, has no gates and therefore admittance of the group is not even physically possible. The AG assured the Court that Israel is providing the group urgent medical care. When the Court inquired as to how medical treatment is administered to members of the group, the AG explained that it is done through the holes in the fence. In response, the litigators representing We Are Refugees, argued that a physical obstacle, no matter how effective, does not entail the power to override the applicable legal norm, namely, the obligation to review claims of asylum seekers who are seeking refuge at the border. Specifically, the petitioner argued, this duty is not limited to those already inside the sovereign territory of the state, which is a signatory of the Refugee Convention, but extends to those who reach its fences along borders (or gates of embassies) and thus come under the effective control of the signatory.

But even putting aside the question of Israel’s legal responsibility, the predicament at the fence presents a conundrum. Even if we grant the AG’s claim that the fence was the physical manifestation of Israel’s legal border and that Israel faced no legal obligation to admit the group, we may still wish to understand the significance of this border. Should the existence of a border impact how these individuals ought to be treated? Does this legal and physical barrier influence the moral claims of the individuals whose advancement it prevents?

Let us, then, grant that these 21 individuals had no legal status, not even as asylum seekers who should be let in under international conventions to which Israel is committed. Furthermore, assume, if you will, that nothing was known about the motivations of these individuals, about the reasons for their desperate insistence to be admitted. We may go as far as following the Israeli government in calling them “infiltrators.” Even with these concessions, it is evident that in some significant sense, and contrary to the official stance of the Israeli government, the 21 individuals were recognized as sources of moral claims. They were given water by the order of the military commander, the soldiers expressed concern for their well-being, and the women and child were eventually let in (I will return to this last point shortly.) The pleas of the group did not lack all

force and their presence did not go unnoticed. The State of Israel did not remain wholly oblivious to their existence, as it had been until the moment they presented themselves at its gate, or fence.

Indeed, even the imposing fence itself, the guns, and the uniform – all erected for the professed purpose of blocking the entry of “infiltrators” from Sudan and Eritrea – evince Israel’s recognition of these individuals as sources of claims. To be sure, Israeli authorities clearly did not wish to *comply* with the claims of the group at the fence, but they did *respond* to their claims. Moral claims can compel response and reluctant recognition even as they are refused. Only a few months before this incident, there was no fence worthy of the name and no armed soldiers watching over this stretch of Israel’s border. These individuals and others like them, whom, we are assuming for the sake of argument, lacked all status and ability to make claims on the State of Israel, nevertheless summoned the state. The appearance of the state in the guise of decisive force – the fence, the guns, and the uniform – was a reaction to the presence of individuals who reached the outer frontiers of vulnerability. The state *saw* them as potential citizens, and as such as potential bearers of legal rights, and responded by trying to prevent them from attaining the legal standing to make claims. Israel thereby saw them as having the moral capacity to be bearers of legal rights. In other words, in the eyes of the State of Israel, the refugees’ *moral capacity* to make claims was to be blocked before it transformed into a *legal capacity*.

Or perhaps Israel saw them as having valid moral claims for assistance from *someone* and wished to prevent these general claims from turning into valid *directed-claims* for assistance from *Israel*. Compare this to crossing the street to avoid a homeless person lying on the sidewalk. You may recognize the validity of this person’s moral claims to be helped by someone but wish to avoid being the addressee of these claims. Whether or not the homeless person literally asks you for help, being in his presence would implicate you as the recipient of his claims. Nevertheless, crossing the street is futile as an attempt to avoid being on the other end of the homeless person’s moral claims. For in trying to avoid those claims you show yourself to be (or see yourself as) their addressee. Directed moral claims are unlike arrows that we can duck or evade; they reach us the moment we realize they are on their way to us. Israel’s avoidance of the refugees reveals that it has already recognized itself as the addressee of their valid, directed-claims.

The brute force exerted by the state mirrored the force of the moral claims it was meant to thwart. The steel was a reaction to starvation and persecution; the guns were a response to abuses that were suffered along the way; the barbed wire protected Israel against the decisiveness of these individuals’ moral presence. Thus, Israel’s preventive measures inadvertently affirmed the moral status of these 21 individuals. Had their aspirations not been recognized at all, there would have been no attempt to prevent their fulfilment; these 18 men, 2 women, and one 14-year-old boy, would have been able to wander into Israel without notice. Alternatively, if the state saw the group as a threat to its sovereignty, as an *enemy*, it would have attacked it without hesitation rather than succumb to this spectacle of physical and moral endurance. No, the vehement denial by the State of Israel of the claims of these 21 individuals was itself an unwitting acknowledgment of those very claims.

The irony was most evident in the brutal conclusion of this confrontation between brute force and utter vulnerability. On the eighth day, Israeli security forces crossed the fence, took in the two women and child, held the men with force and pushed them onto a tarp which was dragged over to the Egyptian side. Later, in their affidavits, the two women and child said that “some of the men had fainted, that everyone was starving and that they tried helplessly to resist while pleading and yelling to be killed rather than be sent back to Egypt.” According to the affidavits, the IDF used tear gas against them.

It might seem, at first, that the use of force shows that in the eyes of the State of Israel these men lacked any moral rights and therefore any status to make claims against it. But the opposite is the case: force was used to *strip* them of their rights. The claims of the 18 men were not ignored, but refused, their status as claim-makers attacked. Later, the spokesperson of the Israeli Prime Minister announced in a special press release: “the infiltrators that were inside the border's fence between Israel and Egypt *turned back*, and two women and a child entered Israel” [my emphasis]. The “infiltrators ... turned back,” said the government, as if by their own accord. But if these men were infiltrators – a term drawn from the vocabulary of war to describe enemy combatants – and genuinely lacked valid claims to entry, there would be no reason to conceal the truth. For there would be nothing wrong with their forceful removal, or with leaving them there to die, or shooting them. No, the State of Israel recognized the validity of these men’s claims and therefore portrayed their departure as voluntary and uncoerced. While realizing that the use of force against these men cannot be justified, Israel was determined to make them go away, disappear. For this reason, it found itself in the position of having to lie. The state was therefore reluctant to admit that the men begged to be killed rather than sent back, and were sent back all the same.

It would be a mistake to dismiss the fears cited by the Israeli government to justify its refusal to admit the group at the fence. As the Minister of Interior Affairs told the Army Radio, and as many Israelis proclaim, these “difficult pictures” of refugees being turned away are believed to be necessary in order to prevent the arrival of “millions”. The implicit concern is that a flood of new arrivals would transform Israel in ways that will pose a threat to its existence or change it beyond recognition. At the very least, such massive arrival of helpless migrants is thought to pose a serious threat to the good of Israeli citizens. This is a familiar fear, echoed in recent years by politicians across Europe and the US. And yet, the Israeli government takes care to avoid the word “refugees” and instead describes the group at the fence as “infiltrators,” implying, perhaps, that had they been *genuine* refugees, they would have been let in and granted asylum.

Why should the government insist on this terminology given that accepting millions of *refugees* would present the same threat or “demographic problem” as accepting millions of *infiltrators*? Insofar as there is a difference between these terms, it is that the demographic problem might justify the refusal to admit immigrants who have viable alternative destinations but cannot justify a refusal to admit refugees who have nowhere else to go. Israel, founded as a place of refuge, purports to provide shelter to victims of persecution even at great cost. And yet Israel is unwilling to abide by this commitment due to fears for its character, safety, and the good of its current citizens. The conflict between the moral law it purports to uphold and its anxiety of self-

preservation is at the heart of Israel's insistence that the people whose entry it refuses are *not* refugees.¹

3.

Simone Weil, in her famous essay, *The Iliad, or the Poem of Force*, suggests that the bare presence of a person commands respect.

Anybody who is in our vicinity exercises a certain power over us by his very presence, and a power that belongs to him alone, that is, that power of halting, repressing, modifying each movement that our body sketches out. If we step aside for a passerby on the road, it is not the same thing as stepping aside to avoid a billboard; alone in our rooms, we get up, walk about, sit down again quite differently from the way we do when we have a visitor.²

Put another way, a person's distinctive presence is revealed in the ways she compels others without force. However, Weil says, when force rebels against a person's presence it can obliterate it. Force does this not merely by bringing about death, which is the most literal transformation of a living thing into a mere thing, but by the sheer capacity to extinguish life. In particular, the power that marks our distinctive existence as individual human beings is annulled when our very life depends entirely on the will of another.

This indefinable influence that the presence of another human being has on us is not exercised by men whom a moment of impatience can deprive of life, who can die before even thought has a chance to pass sentence on them. In their presence, people move about as if they were not there; they, on their side, running the risk of being reduced to nothing in a single instant, imitate nothingness in their own persons. Pushed, they fall. Fallen, they lie where they are, unless chance gives somebody the idea of raising them up again. But supposing that at long last they have been picked up, honored with cordial remarks, they still do not venture to take this resurrection seriously; they dare not express a wish lest an

¹ In a recent book, *Humanity at Sea*, Itamar Mann recounts the legal battle that followed the deportation of *Exodus*, a ship of Jewish refugees who, in 1947, sought to land on the shores of Mandatory Palestine, under British rule. In this instance, as in the 2012 case of the group at the fence, there was controversy regarding jurisdiction. The lawyers who represented six members of the group on *Exodus*, argued that the ship was illegally intercepted on the high seas, but the British court ruled that it was in Palestine's territorial waters. A second point of similarity with the case of the group at the fence is the refrain on the part of the court from using the word "refugees" as well as any mention of the migrants' reasons for seeking refuge, that is, the atrocities they suffered in Germany, the very land to which they were now forced to return. Third, Mann highlights the words of Justice Jenkins in his decision: "These six persons ... set sail ... with the intention either of getting into Palestine by stealth, or, if intercepted, of embarrassing the authorities who would then have on their hands a further 4,500 people to be dealt with somehow." The embarrassment, the attribution of devious and manipulative intentions to the asylum seekers, and the denial of responsibility for their fate, characterize the Israeli response to the group at the fence as much as the British response to *Exodus*, a ship that became a symbol of Israel's mission and core values. See Itamar Mann, *Humanity at Sea* (New York: Cambridge University Press, 2016), ch. 1.

² Simone Weil, "The Iliad, or the Poem of Force," originally published in the November 1947 issue of *Politics*. Republished in *War and the Iliad* (The New York Review of Books, 2005). The passage appears in p. 7 of this edition. Subsequent citations refer to this edition.

irritated voice return them forever to silence.³

To be in the world as a person is to have the capacity to command respect without force, but this very capacity is denied of a person who lacks all force. This dependency on force is an important source of human cruelty. The utterly helpless remind us of our own inherent frailty and our inevitable succumbing to the forces of nature. Struck by this horror, we attack its source: the vulnerable person before us. By making the helpless person disappear, or better yet, by using our force to show this person to be a mere thing, entirely unlike us, lacking any presence that demands respect – by doing this we try to assert our own immunity to force. Our assertion of force against the vulnerable is therefore a futile rebellion against our own vulnerability. The very reason we respond with violence, trying to drown our horror in the thunder of our might, is that we see ourselves in the object of our aggression. Immediately and without deliberate thought, we recognize that this thing standing before us, this pathetic creature, is our spitting image. It is because we cannot stand this realization – that we are like him in being thoroughly dependent on others – that we are overcome by the call of violence. We wish to extinguish him, it, our own vulnerability.

Force is as pitiless to the man who possesses it, or thinks he does, as it is to its victims; the second it crushes, the first it intoxicates. The truth is, nobody really possesses it. The human race is not divided up, in the *Iliad*, into conquered persons, slaves, suppliants, on the one hand, and conquerors and chiefs on the other. In this poem there is not a single man who does not at one time or another have to bow his neck to force.⁴

4.

In our daily lives as citizens we face the possibility of violence everywhere, and yet we do not see it. We are used to the presence of countless strangers in streets and parks, in elevators and staircases, on highways, in public transport, and at our places of work. Any one of those strangers can hurt us, maybe even kill us, if only he or she chooses to do so. Yet for the most part, we do not feel threatened and we certainly do not “imitate nothingness in our persons.” Somehow, we are confident that these strangers, whom we never met before and about whom we waste no thought, would not attack us. For some reason, we are confident that the brute force around us will reliably bow before ours and others’ moral presence.

A possible explanation of our confidence in the immunity of the moral order is our common faith in the force of law. As citizens, our moral presence is embedded in a system of law that protects it by force. We know that law exists and feel law’s presence because we see its manifestation in the violence unleashed by its violations. As long as we are *within* the law, we feel, we are protected by its force. Our individual moral presence is reflected in the moral law, or moral order, which, in turn, is protected by the law of the state, expressed and upheld by the state’s force. Our sense of safety might be explained by the fact that we see these three realms as intrinsically connected: the moral order, the law of the state, and the force of the state.

³ Ibid, pp. 7-8.

⁴ Ibid, p. 11.

However, coordinated as they might be, these three realms are not intrinsically connected. The force of law *is* brute force: it is brute force exercised for the sake of enforcing the law. The same brute force can be used to other ends. When the law of the state bluntly contradicts the moral law, when the state exercises violence against citizens who did not violate the law, or when some citizens are, directly or indirectly, denied access to the protection of the law, our confidence in the moral order is undermined. Such deviations from the rule of law may remind us that the law is helpless without a brute force acting in its name. Moreover, when law lacks the backing of force it falls silent and its existence is cast in doubt. The same buildings, uniforms, weapons, vehicles, and signs that gave law its concrete existence *can* abandon it. The possibility of such divergence between the moral order, the law of the state, and the force of the state, is deeply unsettling for those of us who take our safety for granted. Our sense of security, necessary for daily life as we know it, depends on the transparency of the force that structures our surroundings: we see the moral order *through* the force of the state and the application of its laws.

When entirely vulnerable individuals present themselves at the state's gates, their moral presence compels inclusion under the protection of the law. But the very fact that, as things are, they lack all legal standing – the fact that they are *undocumented* – exposes the arbitrary boundaries of the law, and the brute force that undergirds it. Undocumented migrants are a living proof of the inherent distinction between moral presence and brute force. Their vulnerability *is* the vulnerability of the moral order and of our own moral presence. Their complete dependence on brute force is the same dependence we overlook in our daily life; their lawlessness is our lawlessness. When we see these persons, when we are in their presence, our confidence in the moral order is shaken. Consequently, the authority of the state that speaks in the name of the moral order is undermined. In response, the state resorts to force in order to strip these persons of their moral presence while portraying them as anything but individuals entitled to its protection. Unlawful force is used to protect the appearance of the rule of law and our confidence in the moral order.⁵

The State of Israel claimed that the group at the fence is outside its territory and jurisdiction, and yet, rather than do nothing and allow them to wither away, Israel finally cut a hole in the fence, stepped outside, forced the men across the Egyptian border and took in the two women and child. This was a compromise of sorts between the state's moral authority (the women and child were let in) and the state's brute force (the men were removed.) It was a *perverse* compromise because the state attempted to ground its authority by contradicting it. Finally, “the infiltrators ... turned

⁵ Compare Hannah Arendt's observation:

“...the nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality, which originally was destined to replace the older laws and orders of the feudal society, the nation dissolves into an anarchic mass of over- and underprivileged individuals. Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of nation-states. The clearer the proof of their inability to treat stateless people as legal persons and the greater the extension of arbitrary rule by police decree, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police.” Hannah Arendt, “The Decline of the Nation-State and the End of the Rights of Man,” *The Origins of Totalitarianism*, New edition (New York: Harcourt, Brace, Jovanovich, 1973).

back,” they were no longer present. With the moral challenge removed, the appearance of law and order was restored.

5.

In Kafka’s “Before the Law,” a man prays to be let through the gate of the Law. The doorkeeper refuses, and the man waits at the gate years upon years, till the end of his days. Just as the man is about to draw his last breath, he turns to the doorkeeper one last time:

“Everyone strives to reach the Law,” says the man, “so how does it happen that for all these many years no one but myself has ever begged for admittance?” The doorkeeper recognizes that the man has reached his end, and, to let his failing senses catch the words, roars in his ear: “No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it.”⁶

In Kafka’s parable, the man at the gate is neither migrant, infiltrator, nor asylum seeker; he is every man (and every woman, for that matter.) No one is let into the Law. One by one we are all refused, each by his or her doorkeeper, at his or her gate. The predicament of the group at the fence is unsettling in a similar way. We all face the possibility of utter abandonment. Mortified by this possibility, we strive to attain the protection of the law.

In late August 2012, the State of Israel appeared at the northernmost end of its southern border to refuse the admittance of 21 individuals who – like Kafka’s man from the country, and like us – were striving to reach the law. “The Law,” thinks the man in Kafka’s parable, “should surely be accessible at all times and to everyone.” And yet, astonishingly, the Law asserts itself by the force it exerts against those entitled to its protection.

⁶ Franz Kafka, “Before the Law,” *The Complete Stories*, ed. Nahum N. Glatzer, trs. Willa and Edwin Muir (Schocken Books Inc., 1971/1983), pp. 3-4.