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Equality Between Refugees

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James Souter, *Asylum as Reparation: Refuge and Responsibility for the Harms of Displacement*. London: Palgrave Macmillan

States are often complicit in the causes of displacement beyond their own borders. Whether this is through invasion, contribution to climate disaster, or the continuing dynamics of colonialism, many countries contribute to the existence of forced migration. The idea that refugees always arise out of wholly ‘internal’ dynamics within the borders of their states is simply mistaken (Chimni, 1998). A question arises from this fact: how should we think about a state’s obligations to the displaced when they themselves have contributed their displacement?

Asylum as Reparation: Refuge and Responsibility for the Harms of Displacement by James Souter offers a novel, important, and powerful contribution to the political theory of refuge.¹ Souter argues that asylum can function as a form of reparation for the harms of displacement, subject to a set of conditions. In some circumstances, the act of offering protection in the form of admission or resettlement can (partially) repair the damage done by states who are implicated in forced migration. Souter carefully outlines under what conditions asylum might function this way, while also considering the implications of this for the global asylum regime. In Chapter 2, this reparative approach to asylum is set out as an alternative to the dominant ‘humanitarian’ view of asylum which paints obligations to the forcibly displaced as duties of *rescue* (Betts and Collier, 2017; Gerver, 2019; Gibney, 2004; Shacknove, 1985) This broadly dominant position in the literature does not ask questions about whether specific states are involved in the causes of displacement. Instead, what matters is that refugees are in danger and that the international community has a strong obligation to save them. An alternative to this rescue-based account is the more recent ‘legitimacy’ approach to asylum, whereby states – as members of the international

¹ Souter’s view was also articulated in an earlier paper (Souter, 2014).

order – have collective obligations to assist refugees (Bertram, 2018; Brock, 2020; Buxton and Draper, 2022; Owen 2016, 2020).² Again, legitimacy views need not adopt any position on how exactly refugees have been created or who is responsible for their plight.

Souter’s reparative account does not seek to offer an all-encompassing view of obligations to the displaced. Instead, it aims to ask, given that so much of contemporary displacement is caused by states acting in certain ways, what does this entail about the meaning and content of asylum? This view therefore takes seriously the real-world complexity of contemporary migration, much of which is caused by dynamics that push across borders. Unlike other discussions of state’s duties to refugees, Souter wants to confront the fact that much forced movement is caused by states behaving badly.

And so, Souter claims, when states are responsible for a particular case of forced movement, their admission of those refugees that they created might help to repair some of the damage that has been done. Chapter 3 of the book explicitly outlines the ways in which asylum – entry to a new state and the protection of an individual’s human rights – might have this reparative function. Here Souter argues that while asylum may not be able to place refugees in a position of *status quo ante*, it can nevertheless have certain compensatory aspects. The second half of the book is dedicated to the conditions under which this reparative function might be triggered. Roughly, asylum can function as reparation when a state bears *outcome responsibility* for refugees who have suffered *unjustified harm*, and when asylum is the *most fitting* form of reparation available. The following three chapters of the book then defend each of these different features: outcome responsibility (Chapter 4), unjustified harm (Chapter 5), and fittingness (Chapter 6).

The final two chapters (Chapters 8 and 9) of Souter’s book address the limitations of state’s reparative obligations to refugees. It is here that we see whether the reparative function can carry important moral and political weight (and importantly, how much of it). This is also where I’d like to level some criticism against Souter’s view. I am going to focus on two concerns about the implications of Souter’s argument: (1) equality between refugees and (2) the question of prioritisation when considering entry. I do not think these are serious problems for the argument, but I do think they draw our attention to Souter’s tentative conclusion at the end of the book: that an overly strong focus on reparations can

2 For discussion of these views, see Sharp (2020) and Buxton and Draper (2022).

also carry dangers for the institution and practice of asylum itself.

Differential Treatment

In Chapter 8, Souter begins to consider the implications of his argument. Throughout the book, he draws a distinction between humanitarian conceptions of asylum – based generally on broad obligations of rescue – and his own reparative view. These final chapters therefore spell out the truly distinctive nature of his reparative account by asking whether and how reparative asylum can impact (1) how asylum is owed and (2) who asylum is given to.

First, the distinctive nature of asylum as reparation may come about through offering a ‘delux’ form of protection to refugees that the state in question has harmed. That is, ‘reparative’ refugees may be owed a higher standard of protection than others. Indeed, in other areas of the book, Souter flirts with the idea that some refugees may be owed citizenship as the most fitting form of reparation:

‘The most reparatively fitting form of protection for an Iraqi asylum seeker who fled the aftermath of the 2003 invasion in Iraq, and who has strong social ties as a result of his or her residence in the United Kingdom for several years, may well be British Citizenship, given these ties and the UK’s partial responsibility for the generation of Iraqi refugees since the invasion of Iraq in 2003’ (146).

Souter returns to this idea when thinking about the ‘distinctive’ nature of reparative asylum, asking whether this higher standard of protection may be what is owed to refugees who the state asylum is responsible for displacing. However, he argues that there are reasons of equality to worry about this approach: ‘The fact that both reparative and humanitarian claimants would live alongside each other within their state of asylum may, from the perspective of distributive justice render this differential treatment deeply unjust’ (173). It would be unfair to the humanitarian refugee – the one displaced through no fault of the receiving state – for the reparative refugee to receive a higher standard of treatment. It is not the humanitarian refugee’s fault that they were displaced either by some other state, or by a freak natural disaster, and the two displaced people are substantively in the same position vis-à-vis their need for international protection. Souter therefore argues that there are all-things-considered reasons of justice to avoid this inequality *between refugees*. Souter then rightly points out that, to avoid this problem, we could either level down the reparative refugee’s position or level up the humanitarian refugee’s position – depending on state capacity. Here Souter offers some convincing arguments in favour of levelling up (where possible).

All this potentially raises questions about the distinctiveness of the reparative argument (which Souter himself notes) – if external considerations mean that we need to maintain equality between refugees in terms of their treatment, then what exactly is the distinctiveness of the reparative view? Of course, Souter’s approach is still at least distinctive in its normative foundations, as well as the implications it might have for the ‘fair share’ debates on the distribution of refugee protection. But we can now turn to a potential second answer: prioritisation for admission itself.

Admission

Later in Chapter 8, Souter considers whether reparative refugees might have a stronger claim to admission than a humanitarian refugee. In order to consider this, he asks us to think about three cases. In all three cases, suppose that the state of asylum is faced with two claimants – one who was displaced by the state in question and the other who was displaced by a freak accident. The state can only accept one of the two.³

Case 1. The two refugees have identical needs. The only thing to distinguish them is the question of who (or what) caused their displacement.

Case 2. The reparative refugee is in greater need than the humanitarian refugee.

Case 3. The humanitarian refugee is in greater need than the reparative refugee.

Souter contends that in cases 1 and 2, we have reasons to accept the reparative refugee over the humanitarian one. In case 2, the answer is straightforward: there is no conflict between the humanitarian and reparative obligations because the refugee to whom the state has these repair-based obligations is also the one in greatest need. We should take the reparative refugee. In case 1, where the need is the same, Souter contends, ‘the only justifiable way to prioritise between the two refugees would be to offer asylum to the refugee for whose flight the state of asylum bears outcome responsible. This is because, if the two refugees have the same level of need, then we can no longer simply appeal to the humanitarian principle’ (164). When the need is the same, we should therefore choose the reparative refugee over the humanitarian one. In Case 3 Souter accepts that humanitarian need can trump reparative obligations, particularly if the stakes

3 These kinds of cases are obviously artificial and there has been some interesting criticism of the idea of discussing issues of prioritisation (Fine, 2020). Here, though, the case is used by Souter to essentially test the strength of reparative claims and to determine whether they should carry any weight at all in decision-making about the admission of certain refugees.

are sufficiently high (165). He writes: 'Here a strong case can be made for departing from the principle of reparation and prioritising the needier refugee, even if her flight was not caused by the receiving state.' Reparative obligations are therefore not strong enough to overcome the weight of humanitarian claims.

However, a possible worry that we could raise here is that this creates concerns about inequality between refugees: the very considerations of fairness that Souter raised earlier in the chapter when discussing differential treatment could potentially apply to the case of admission as well. Why should the humanitarian refugee accept that they do not receive asylum in that state, simply because they were not harmed by the appropriate agent? Why do reasons of (un)fairness not arise in cases of entry as well?

If they in fact do – and it would therefore be unfair to choose the reparative refugee over the humanitarian one – then presumably in Case 1 where the need for protection is equal, we should simply flip a coin. If we accept this, then reparative obligations never in fact trump humanitarian obligations in the cases that Souter presents. Because of external constraints arising from questions of equality, reparative obligations don't carry the kind of weight that we might think they should. Only in Case 2, when the reparative refugee is already also in greater need, would the state have an all things considered reason to choose the reparative refugee. Questions of equality therefore appear to undercut the power of reparative obligations. If we want reparative obligations to hold more power, we may have to choose to weigh them more heavily than humanitarian obligations or concerns of equality.

One way for Souter to reply to this might be to claim that the context is different in the admission case. When considering differential treatment, it was the fact that refugees would have to live side by side while enjoying a higher or lower form of protection. This inequality between co-residents may be more morally troublesome than inequality between refugees in cases of admission, because in the latter instance the individuals of concern would not have to become members of the same society, in virtue of the fact that one of them would not be admitted. However, there might still be questions about fairness between the two individuals under consideration here. While there may not be continued conditions of inequality that persist in a shared society, we might still think that choosing the reparative refugee is still reasonably objectionable from the perspective of the humanitarian refugee such that it cannot be justified.

Souter points out in the conclusion of the book, that we must be careful with the relationship between asylum and reparative justice. Indeed, reparative obli-

gations always need to be balanced with other humanitarian needs and concerns of capacity. A purely reparative approach, as Souter puts it would be ‘highly unjust, insofar as it would ignore the important humanitarian duty to refugees on the basis of their need basic rights protection’ (173). Asylum’s reparative function is always going to play just a part in how questions of admission or resettlement are answered. There are also, of course, concerns about how states might respond to the implementation of an asylum system that foregrounded reparations. But there is a possible world in which some form of reparative justice could intersect with entry to a new state, albeit carefully and at the behest of the refugee herself. In other words, asylum can function as a form of reparation, though its exact power is still up for grabs. Whether it should function in this way, in this world of continued hostility towards the globally displaced, is a matter of debate. Souter’s book helps up to trace a path towards a world in which reparation and asylum might interact with one another. It seems far away, but it is much clearer after Souter’s important contribution.⁴

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⁴ With thanks to Jamie Draper for comments on a draft of this review.

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