

## Occupancy Rights and the Wrong of Removal

In 1864, the United States Army removed ten thousand Navajo Indians from their homeland in Arizona to a reservation in New Mexico. Two hundred people died on the trek, which the Navajos still refer to as their “Long Walk.” Prior to the Long Walk, the Navajos had been a raiding society, stealing livestock from white settlements. To stop the raiding, the United States moved them to an isolated location. But the removal was not a success: the Navajos were unused to farming and their crops failed; they were required to live in adobe villages rather than their traditional hogans; and they had to share their reservation with the Apaches, tribal enemies. During their time at the reservation, the Navajos became dispirited and suffered from hunger, drought, and disease. Many tribe members died, and more ran away. Finally, in 1868, the United States allowed the survivors to return to their lands in Arizona, unlike most other tribes it relocated during the War for the West.<sup>1</sup>

The moral issues raised by the Navajo case are typical of territorial removals, including the expulsions of Germans and Poles following

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1. The Navajos were not a politically organized group—their fundamental unit was the clan, an extended family group that often operated independently of other bands. The Navajo nation did not exist as a political entity until 1923. See L. R. Bailey, *The Long Walk: A History of the Navajo Wars, 1846–68* (Los Angeles: Westernlore Press, 1964); Gary Witherspoon, “Navajo Social Organization,” in *Handbook of North American Indians* (Washington, D.C.: Smithsonian, 1983), 10:533.

World War II, the population exchanges between Greece and Turkey in 1923, removals of tribal peoples in South Africa and Australia, and the displacement of Palestinians at the moment of Israel's creation. We tend to think such removals are wrong because the people who live in a place, like the Navajos, have a right to be where they are. Indeed, defense against such dispossession is widely considered to be a just cause for war. But what gives people the right to occupy a particular geographical space?

To answer this question, we might look to theories of property, since the right to occupy a particular space shares important features of a property right. Both rights involve external resources: much as property owners claim rights to use and control objects, people claim rights to use and control particular parts of the globe. And since one function of property rules is to specify who may be in a place and who may not, theories of property may shed light on the claim to settle and reside in certain spaces. As an approximation, we can divide property theories into two broad schools of thought. While *institutionalists* understand property as a conventional right conferred by social practices or systems of law, *preinstitutionalists* see property as a moral right that binds independently of law and convention. (Various hybrid views also exist, which see some aspects of property as preinstitutional, while others depend on law or convention.)

This article investigates the justification of rights to occupy particular places as follows. In Section I, I clarify the nature of the claim to territorial occupancy with which I am concerned, and distinguish it from related claims, such as rights to private ownership and rights to territorial jurisdiction. In Section II, I turn to the role that property theory can play in theorizing this occupancy right. I argue that strong institutionalist accounts of property are inadequate to theorize occupancy. Instead, an adequate property theory must make space for some preinstitutional claims to land, thus adopting a hybrid (partly preinstitutional) approach. Section III offers a *plan-based* account of occupancy that connects it to our interest in pursuing our conception of the good, and Section VI shows that this plan-based interest is weighty enough to ground a right. Section V argues against an alternative view that holds territorial removal is wrong because it involves coercion or force, not because it violates occupancy rights. Section VI takes up the question of whether this occupancy right is best attributed to individuals or to groups, and Section VII

discusses some distributional and other constraints to my account. Section VIII summarizes my argument and concludes.

#### I. THE CONCEPT OF OCCUPANCY

Since territorial occupancy is not a familiar concept, I begin by saying something more about it. To capture what I have in mind, consider three different “property-like” entitlements that could apply to roughly the same location. First, there are rights of private ownership, such as my right over my house and the lot on which it rests. My property right in my house encompasses a bundle of particular incidents: the claim to possess, use, and alienate it, to exclude others from it, and to enjoy the income if I rent it, as well as the right to manage it (e.g., to make decisions about its upkeep), to bequeath it to my heirs, and to consume or waste it. As Honoré states, these rights of liberal private ownership represent “the greatest interest in a thing admitted by a mature legal system.”<sup>2</sup>

But my private ownership right is not the only “property-like” entitlement that applies to the space in which my house is situated. A second right also applies here: the right of territorial jurisdiction. Both the United States and the state of New Jersey claim the right to make and enforce law in the space where I live. This includes the power to change my rights over my house by modifying property rules (say, enacting new zoning laws) or by exercising the power of eminent domain and taking my house with compensation. States have the power to determine what kind of control, over which aspects of which material objects, can be exercised by the holders of property rights within their legal systems.

Yet neither private ownership nor territorial jurisdiction captures the particular right violated in the Navajo removal. The Navajos did not form a state with a defined territory and a mature legal system, so removal did not violate their territorial jurisdiction. Removal also seems to have wronged the Navajos themselves, not any Navajo political entity. We might therefore conjecture that removal violated the Navajos’ ownership rights. The Navajos did recognize private ownership rights, especially in livestock and in their hogan dwellings. But they were a seminomadic people: although they lived in loosely defined areas, they traveled all over their country, following their animals. To the extent property in land was

2. A. M. Honoré, “Ownership,” in *Making Law Bind* (Oxford: Clarendon Press, 1987), p. 161.

recognized—for grazing and agriculture—it belonged to the women who headed Navajo clans.<sup>3</sup> But those Navajos who owned no land also seem to have been wronged in the removal. Whatever wrong was done to them was not a violation of their ownership rights.

Private ownership and territorial jurisdiction do not exhaust our entitlements with respect to geographical space, however. Instead, people have a third “property-like” claim in their territory: the right to reside permanently in that place, to participate in the social, cultural, and economic practices that are ongoing there, and to be immune from expropriation or removal. Thus, I have a right to reside on U.S. territory, and when I go abroad, I do not just have a right to return to my own private land; I have a right to reenter this territory and to move around within it. My occupancy right allows me to access various places within civil society that are important to me, like my workplace, my house of worship, shops, restaurants, and public spaces, such as roads or parks. Occupancy is more geographically capacious than private ownership, though it confers more limited control over resources. Children, nonproperty owners, and homeless people also possess occupancy rights that entitle them to reside in a place, to travel freely through that area, and to participate in social, cultural, and economic practices there, even though they lack private property. So we can distinguish at least three different entitlements to geographical space: rights of private ownership, rights of territorial occupancy, and rights of territorial jurisdiction. It is with this second right—the right of occupancy—that our discussion will be concerned.

What exactly is an occupancy right? As I understand it, an occupancy right comprises two main incidents. First, it includes a liberty to reside permanently in a particular space and to make use of that area for social, cultural, and economic practices. This extends to the liberty to travel freely through the area in order to access the places in civil society where those practices take place. Occupancy rights do not grant the freedom to access others’ private property, but they do confer access to public spaces—such as parks, roads, and byways—as well as businesses or buildings that offer services to the general public, whether these are publicly or privately owned. Second, an occupancy right also includes a

3. Witherspoon, “Navajo Social Organization,” p. 525; L. R. Bailey, *If You Take My Sheep* (Pasadena, Calif.: Westernlore Press, 1980), pp. 119–26.

claim-right against others not to remove one from the area, and not to interfere with one's use of that space in ways that undermine the shared social practices in which one is engaged.

Occupancy does not extend to full liberal ownership of a territory. It does not include rights to income from the natural resources situated there, nor does it involve the power to alienate or bequeath the territory. Occupancy may not always extend to a right to exclude outsiders from access to the territory, if their access is not disruptive to one's residence there and one's ability to participate in shared social practices.<sup>4</sup>

There is an obvious question as to the identity of the bearers of occupancy rights: are they groups or individuals? Occupancy could be primarily grounded in the collective claim of a group to its "homeland," and then derivatively attributed to the group's members. Or occupancy could be primarily grounded in the claims of individuals to reside in a particular place, and derivatively attributed to the groups in which they participate. For now, I remain agnostic about this question: I do not yet specify whether the right to occupy a place is a corporate right held by a group or a bundle of rights held by individuals. As I explain below, I believe that occupancy is an individual right, though the justification for the right is in part that it enables individuals to participate in collective social practices. But I defer discussion of this important issue until Section VI.

4. In this, I follow early natural rights theorists, such as Vitoria, Grotius, and Kant, who held that outsiders had claims to *hospitality*, including the right to access foreign territory, as long as their access was not harmful. These theorists interpreted the hospitality right differently, with Kant arguing that foreigners were entitled to "visit" other lands, though not necessarily "to be a guest" there; Grotius suggesting that outsiders must be allowed free passage and a temporary stay; and Vitoria holding that they ought to be allowed to settle permanently. On a hospitality view, current occupants may still exclude foreigners under certain conditions, namely, when their entry would be harmful to occupants' legitimate interests. And though visitors ought to be allowed harmless access, they may also lack the *security* in use and access that permanent occupants possess. Unlike visitors, occupants have a second-order right not to have their first-order liberties of use and access to a particular area undermined or revoked. They have, for example, the right to leave their territory and to return at will. See Francisco Vitoria, "On the American Indians," in *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), pp. 278–84; Hugo Grotius, *On the Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), pp. 433–49; Immanuel Kant, "On Perpetual Peace" and *The Metaphysics of Morals*, in *Immanuel Kant: Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), pp. 328–31, 489–90. See also Georg Cavallar, *The Rights of Strangers* (Aldershot, UK: Ashgate, 2002).

Following Hohfeld and Honoré, it is a commonplace that property comprises a bundle of separate incidents, which may vary from case to case.<sup>5</sup> Thus, people may hold property in a more restricted sense than that captured by “full liberal ownership,” and different rights over things may be parceled out among resource users in different ways. Someone may have, say, rights to use and manage a thing, but lack the right to alienate, destroy, or alter it.<sup>6</sup> Following this line of thought, one might say that occupancy is a form of (limited) property in an area of the earth, in the broad sense in which “property” can be used to describe any bundle of Hohfeldian liberties, claims, powers, and immunities over material resources, including bundles that fall short of private ownership.<sup>7</sup> I think this characterization of occupancy as a kind of limited property is correct.

Still, I do wish to emphasize that occupancy rights, as I understand them, are quite distinct from private ownership rights. Occupancy rights are not assigned *exclusively* to a particular individual or corporation; instead, many people share occupancy in the same area. Occupancy also does not include a number of incidents typically associated with private ownership, such as rights to derive income, to give, to sell, or to bequeath. Instead, occupancy confers secure rights of *use* and *access* to a particular geographical space: the right to use that place as one’s permanent residence, to conduct important social, cultural, and economic activities there (including accessing the spaces where these activities unfold), and to be immune from expropriation by others.

## II. THE LIMITS OF INSTITUTIONALISM

If occupancy is a kind of limited property right in the earth, what is its grounding? Is it best understood as a preinstitutional moral right, or as a conventional right conferred by legal or social institutions? As noted above, institutionalist approaches hold that property is dependent on a

5. See Honoré, “Ownership”; W. H. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Essays* (New Haven, Conn.: Yale University Press, 1919).

6. Lawrence Becker, *Property Rights: Philosophic Foundations* (Boston: Routledge and Kegan Paul, 1977), pp. 19–21.

7. See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), chap. 2, for a similar distinction between property and private ownership.

background practice of conventional social rules. In this perspective, rights to material resources, including land, do not precede the construction of these rules. While all institutionalists argue that property depends on background rules, there are different ways to interpret this dependence. Some hold that the relevant rules are the joint social conventions of a community, while others invoke the laws promulgated by a state.

The first approach is exemplified by David Hume. Hume argues that property is determined by social conventions that assign ownership of objects and define the conditions for valid contracts and transfers. These conventions develop because humans have needs that must be met through social cooperation, and because the scarcity and instability of goods pose an obstacle to stable cooperative enterprises.<sup>8</sup> As each individual is sensible of the benefit to society of these rules, each conforms to property conventions, provided others are willing to do so, and—over time—the members of society acquire a disposition to approve of rule-conforming conduct.

A second view holds that property depends on a background system of positive law. According to Hobbes, “*Propriety* is an effect of Commonwealth . . . the act onely of the Sovereign; and consisteth in the Lawes.”<sup>9</sup> Bentham offers a similar account, arguing that “property and law are born and die together. Before the laws, there was no property: take away the laws, and all property ceases.”<sup>10</sup> On this view, positive law is required to generate rules with sufficient publicity, determinacy, and assurance of enforcement to ground property rights. Only a legal system can create the commonly shared and secure expectations that are necessary for property to exist.

Institutionalist approaches have two important virtues. First, institutionalists recognize that property rights can be structured differently in different times and places. To have common rules concerning property, we must solve a number of coordination problems. Different systems may recognize different configurations of holdings (e.g., the means of

8. David Hume, *A Treatise of Human Nature*, ed. P. H. Nidditch (Oxford: Clarendon Press, 1978), pp. 484–513.

9. Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), p. 171.

10. Jeremy Bentham, *Principles of the Civil Code*, in *The Works of Jeremy Bentham*, ed. John Bowring (New York: Russell and Russell, 1962), p. 309.

production may be collectively or privately owned), or specify rights in different ways (as one can own a condominium in some countries but not others). The duration of property rights can also be more or less extensive, and the right to transfer more or less limited.

Second, institutionalists also appreciate that many forms of property depend on the complex background of a modern society, including rules about contract, tort, corporate and inheritance law, fiscal and monetary policy, zoning, and environmental regulation. Consider intellectual property, like patents or copyrights, rights to bequeath one's estate, or rights over complex financial instruments, like bonds or securities. These forms of property extend far beyond any rights we could imagine obtaining in a "state of nature." Moreover, since different definitions of these rights will have important social consequences, the rules regulating them ought to be designed with the justice of these social outcomes in mind.

Institutionalists are therefore correct to point out that property depends significantly on a background of social and legal convention, and any adequate theory must account for this fact. But we can distinguish between a stronger and a weaker institutionalist thesis. The strong thesis holds that there can be no property outside shared social or legal institutions. On this view, a moral duty to respect others' property is activated only with the development of background laws or conventions.<sup>11</sup> The weaker, hybrid institutionalist thesis holds that there can be limited forms of property outside shared social institutions, and that these limited rights partly constrain how conventional institutions should be designed. But preinstitutional property rights are underspecified: they leave many aspects of property undetermined, including the solutions to various coordination problems, the rules that should regulate transfer and bequest, and the forms of complex private ownership mentioned above. For that reason, they require the construction of further conventions to be fully fleshed out.

I believe the weaker, hybrid position is the more attractive one. To see why, consider the problems that strong institutionalism faces in

11. Even strong institutionalists accept that there can be *some* moral rights and duties independent of shared institutions, for example, the right not to be assaulted and the duty of nonaggression; but they do not believe these preinstitutional rights extend to rights of *property*.

theorizing what is wrong with territorial removals like the Navajo case with which we began. Think of how a legal institutionalist, like Hobbes or Bentham, might approach this case. Their theory presupposes the existence of a system of positive law, and then, in a second step, it defines property entitlements with respect to the rules laid down by this system. But this overlooks some important questions. First, what about people who lack legal institutions, such as nonstate tribes? Do they have rights to the land they occupy? Or is their land *res nullius*, available for acquisition by some sovereign state? Second, what if the legal institution that defines property rights in an area itself came to exist *wrongly*, through the dispossession of a prior state or group? Surely these facts about how an institution came to exist are relevant to the legitimacy of the entitlements it creates.

Thus, the legal institutionalist approach seems incomplete, since a state can put into place a perfect *internal* system of property for its subjects, and still be participating in an expropriation with respect to prior occupants. Suppose—as occurred in the aftermath of many other Indian removals—that Arizona had distributed what were formerly Navajo lands to poor white settlers. And further suppose that it performed this distribution in accordance with the correct principles of distributive justice, say, Rawls's two principles. In that case, its internal property system would have been fully just. But intuitively, the entitlements of its citizens would have remained defective. A rancher who drew forty acres should not have regarded himself as having title to his new farm, since the state that granted him title was dispossessing people with continuing claims over the area.

Of course, if we adopted a more informal, Humean institutionalism, we might explain why the Navajos held property rights against one another, even though they lacked a state: these property rights were rooted in their own social conventions. But this more informal approach is still unable to show why the Navajo removal was wrong. Though it can explain why the *Navajos* were bound to recognize one another's property claims, it cannot explain how *an outsider* should regard their practices. Are the land rights established by Navajo conventions normatively binding on this outsider, such that it would be wrong for him to dispossess them? If so, it is not because he is a party to their social practices. And the Humean also cannot invoke an *international* convention requiring states and their citizens to respect the territorial rights of other

groups, since no such rule existed at the time.<sup>12</sup> So it seems a strong institutionalist must concede that the settlers could displace the Navajos without wrongdoing. But this is surely wrong: an outsider ought to respect the Navajos' occupancy of their land, whether he shares property conventions with them or not.

These reflections give us reason to adopt a weaker, hybrid institutionalist account. On such a hybrid view, limited forms of property can obtain in the absence of social institutions, though these forms of property are underspecified and leave many incidents of ownership undetermined. If we understand occupancy as a preinstitutional property claim, we can explain why occupancy rights bind even people who don't share a community's conventions. On this approach, Christopher Columbus ought to have recognized the occupancy rights of the inhabitants of Hispaniola in 1492, though he shared no social practices, conventions, or legal institutions with them.<sup>13</sup>

Not all rights to place, then, are the conventional products of a state's laws, or of a particular community's social practices. At least one *preinstitutional* right precedes these: the right of individuals to live in a certain area, and, together with others, to authorize a legal institution to enforce rules regarding ownership, or to engage in social practices defining their ownership. By a preinstitutional right, I mean a claim that could logically exist prior to a legal system or social practice, and whose binding force is moral, not legal or conventional. (This is more or less equivalent to a natural right: a claim that could be possessed by persons even in a "state of nature," and that is independent of legal

12. The right to territory conquered in war was recognized in international law until the early twentieth century. In the nineteenth century, this right was thought to apply with special force to the territory of "noncivilized peoples," such as the Navajos. See Sharon Korman, *The Right of Conquest* (Oxford: Clarendon Press, 1996).

13. One might object that the contrast between institutionalism and preinstitutionalism is not as sharp as I have drawn it, since most institutionalists hold that we have moral interests we are entitled to see protected by a scheme of property. But for an institutionalist, people do not have duties to respect these interests unless a system of conventions has arisen among them. On a preinstitutional account, however, the duty to respect others' interests is a *moral* duty, whose binding force does not depend on its being generally recognized and respected by a given population. For a similar argument with respect to promises, see T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), chap. 7.

recognition.)<sup>14</sup> Preinstitutional occupancy rights also constrain institutional schemes: whatever legal or social institutions are set up, they ought to respect the claims to land that already exist. Such claims may not morally determine all aspects of legal regulation regarding territory, but they determine some of them. Finally, this preinstitutional claim is *particularized*: it is a claim not to some general slice of territory somewhere in the world, but to a specific area.

Adopting this hybrid approach means conceding that some aspects of property are preinstitutional.<sup>15</sup> But this view does not entail that all private ownership rights are similarly preinstitutional. Modern private ownership extends far beyond claims to occupy land by including further incidents of property, like the right to alienate, to bequeath, to derive income, and to possess apart from use. I do not think these additional incidents are preinstitutional in character, nor do I think that contemporary legal institutions are morally constrained by “natural” rights in defining and regulating them.

### III. THE PLAN-BASED INTEREST IN OCCUPANCY

How might we ground such a preinstitutional right of occupancy? I begin from the observation that occupancy of a particular place is of central importance for an individual’s life-plans and projects.<sup>16</sup> What is most

14. Sometimes further metaethical premises are associated with the term “natural right,” implying that such a right is inscribed in the fabric of the natural universe, or is binding because it derives from human nature itself. I do not mean to endorse any of these metaethical premises, and the term “preinstitutional right,” as I use it, does not rely on them. For more on natural rights, see A. John Simmons, *The Lockean Theory of Rights* (Princeton, N.J.: Princeton University Press, 1992), pp. 87–92; and Charles Beitz, *The Idea of Human Rights* (Princeton, N.J.: Princeton University Press, 2009), pp. 48–72.

15. There are some historical antecedents for a hybrid institutionalist view. Grotius conceives of preinstitutional rights not as full property entitlements, but rather as *use-rights* that can impose duties on others in a state of nature. Grotius, *Rights of War and Peace*, p. 184. Kant distinguishes in his *Doctrine of Right* between provisional claims to *possession*, which demand respect even in a state of nature, and conclusive claims to *property*, which depend on the state. For another potentially hybrid account, see T. M. Scanlon, “Nozick on Rights, Liberty, and Property,” in *Reading Nozick*, ed. Jeffrey Paul (Totowa, N.J.: Rowman and Littlefield, 1981), p. 126.

16. Jeremy Waldron, “Superseding Historic Injustice,” *Ethics* 103 (1992): 17–18. This account is similar to what Jeremy Waldron sketches as “the most plausible account of initial acquisition.” It is also close to John Simmons’s reinterpretation of Locke’s labor theory as “bringing things within our purposive activities” in Simmons, *The Lockean Theory of Rights*, chap. 5.

arresting about the Navajo case is that removal severely disrupted their ability to enjoy the lives they had built in Arizona. As many theorists argue, our personal well-being depends substantially on our success in pursuing the morally reasonable projects and relationships that we adopt.<sup>17</sup> The endeavors a person is committed to play an important role in determining what counts as a flourishing life for him. My theory of occupancy builds on this idea, highlighting the connection between particular places and people's comprehensive pursuits. The basic thought is that stable territorial occupancy is a necessary background condition for personal well-being, and for carrying out almost all conceptions of the good.

On an interest-based theory of rights, " 'X has a right' if and only if an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."<sup>18</sup> In order to show that our interest in pursuing life-plans grounds occupancy rights, we must therefore show two things: first, that people have an interest in occupancy of a particular place, derived from their interest in carrying out their fundamental projects; and second, that this interest is of sufficient weight to hold others under a duty to respect their occupancy.

How are a person's projects connected to his occupancy of a particular place? Most complex goals and relationships require us to form expectations about our continued use of, and secure access to, a place of residence. Geography and climate may affect the economic and subsistence practices we take up, making it difficult for us to reconstitute these practices in some very different place. Suppose you run a dairy farm, an economic practice that structures much of your life. You could not continue to pursue this practice if you were moved, say, to the Brazilian rainforest or the American Southwest. Our religious, cultural, or recreational activities also often have territorial components: think of how sled-dog racing belongs in the Arctic and surfing in coastal areas, or of

17. See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), pp. 288–320; and Scanlon, *What We Owe to Each Other*, pp. 119–26. The qualification "morally reasonable" is meant to accommodate our intuition that a Nazi's commitment to the goal of exterminating the Jews does not make his life go better. But to be "reasonable," a goal need not be the most valuable pursuit available to a person: it need only be nonharmful. Though some nonharmful pursuits are more valuable than others, these pursuits do not contribute to a person's well-being unless he endorses them. For more on this, see Ronald Dworkin, *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press, 2000), pp. 267–74.

18. Raz, *The Morality of Freedom*, p. 166.

how religions incorporate places or natural formations into their rituals of observance. The Pueblo Indians' rituals center on Blue Lake in New Mexico, and the Black Hills have religious significance for the Sioux. Finally, people form personal bonds and enter work, religious, educational, and friendship relations in part because they expect to remain spatially arranged in certain ways: we structure our daily activities and associate together under the assumption that current patterns of residence will not be massively disrupted. We can call these situated goals, relationships, and projects our *located life-plans*.

Note that pursuing located life-plans generally requires individuals to access spaces that are shared with other people. For a person to undertake a religious, recreational, educational, or work activity means being able to participate in the social practices that constitute these options. A key reason why occupancy of a particular place is important for us, then, is because it facilitates our access to social practices and to the physical spaces in which they unfold. Especially important are spaces like the workplace, the place of worship, the leisure or recreational facility, the school, and the meetinghouse. Of course, this list is culturally biased and reflects life in a modern industrialized society. But though types of shared space will differ across societies, some shared spaces will be necessary within any society. This is an implication—for territory—of the fact that our projects depend upon collective social forms.<sup>19</sup>

Note too that our interest in accessing these shared spaces seems distinct from our interest in private property. My interest in my workplace, my school, my soccer field, or my town hall is not like my interest in my backyard. It is an interest in joint activity with others, not an interest in privacy and exclusion. Rather than a claim to own something, occupancy is a claim to securely enjoy the life one has built somewhere, including participating in the social practices important to one's endeavors.

Not all located life-plans are equally significant in grounding a claim to territorial occupancy. Some plans are *comprehensive*, in the sense that they organize many choices, and are fundamental to our sense of our lives as our own. Our goals are hierarchically organized: we make

19. See *ibid.*, p. 308: "A person can have a comprehensive goal only if it is based on existing social forms, i.e. on forms of behavior which are in fact widely practiced in his society."

everyday choices in part because they contribute to the achievement of more abstract, pervasive aims.<sup>20</sup> Careers or economic pursuits; family, friendships, and other personal relationships; religious and cultural activities; and some recreational pursuits are good examples of comprehensive projects. But other life-plans are *peripheral*: they do not structure many choices and do not contribute to our sense of our lives as our own. What color to paint my house and which supermarket to shop in are examples of peripheral plans. Our flourishing is not threatened by interference with peripheral plans, since they are normally of little weight. But loss of territorial occupancy is very likely to undermine flourishing when it destroys people's comprehensive plans.

Finally, the interest in carrying out located life-plans does not depend upon those plans having been autonomously chosen. Many people—particularly in modern, pluralist societies—embrace an ideal of character that holds that individuals should freely select their goals from among a range of options, based on their own critical evaluations. An autonomous person creates his own conception of a worthwhile life. He has not merely accepted, without critical reflection, whatever traditional pursuits he has been socialized to adopt. Joseph Raz defines personal autonomy in this way as the ability to be “part author” of one's life, fashioning it through successive decisions to embrace goals and relationships.<sup>21</sup>

I do not deny that personal autonomy is an important value. But my account of territorial occupancy is not grounded in the interest in autonomy, but in a broader interest in carrying out the located projects that we happen to have, whether or not these projects were acquired through a process of evaluation and choice. The ability for a person to act on the values that make life meaningful for him is morally significant, even where he has not arrived at his values through critical reflection. Consider a Navajo herdsman, who was simply socialized into the pastoral traditions of his people. As long as his herding pursuits are not harmful to others, and as long as the Navajo endorses them, he has an interest in continuing these located practices. Thus, even people who reject autonomy as a fundamental value can have an

20. For this point, see Raz, *Morality of Freedom*, p. 292; Scanlon, *What We Owe to One Another*, p. 122.

21. Raz, *Morality of Freedom*, pp. 370–73.

interest in the occupancy of their territory, if their located life-plans require residence in that place and access to the social practices that are ongoing there.

We can separate out several significant categories of located life-plans:

- (1) *Economic practices*: Many economic practices can only be carried on in a territory with certain geographical, ecological, or infrastructural characteristics. The mainstay of the Sioux Indians' economy was hunting wild buffalo, so they had an interest in living somewhere that could sustain these animals. Many modern Americans work in white-collar professional jobs, so they have an interest in living where there is office space, copy machines, broadband Internet, and so on. People are significantly dislocated by having to move where they cannot maintain their economic practices.
- (2) *Membership in religious, social, and cultural organizations*: Many located life-plans require individuals to have access to associational spaces shared with other people. For a person to have the option to undertake a religious, recreational, educational, or work activity means being able to access the physical spaces and infrastructure—churches, mosques, schools, meetinghouses, and so on—where these activities occur.
- (3) *Personal relationships*: People are engaged in networks of relationships—with colleagues, family, and friends—that are fundamental to their well-being. They have an interest in continuing these relationships with the particular people who matter to them, and that requires living near enough to do so. Since each individual is tied to differing associations, friends, and networks, it is hard to draw bounds around a community such that one could move all and only the members of that community without breaking personal ties. Sustaining people's important personal relationships will often require maintaining their current spatial arrangements to a significant degree.
- (4) *Attachment to locality*: Some, though not all, people have projects based on a special identification with a unique locality. As mentioned above, the Taos Pueblo's religious rituals center on Blue Lake, the Sioux attribute spiritual significance to the Black Hills, and the highland culture of Switzerland is focused on the

Alps. Such projects are closely linked to attitudes that people direct specifically at the physical objects around them, and these projects are hard to keep intact without sustaining people's occupancy of that unique location.

Taken together, these reflections show that the people who live on a territory have important *plan-based interests* in continuing to occupy that place, and in using it for the located social, cultural, and economic practices that they value.

Let me now consider three objections to my argument connecting territorial occupancy to our interest in located life-plans. First, one might object that our social practices could theoretically be translocated to a different spatial location without disruption. Perhaps the university where I work could be taken down and reconstructed, brick by brick, someplace else. Perhaps the inhabitants of the area could be carefully resettled in a way that reproduces precisely the patterns of residence people now inhabit. Would there then be any harm in relocation? I find this case difficult to imagine, for two reasons. First, the *process* of removal usually involves significant disruption, even if the removed group is eventually able to reconstruct their lives and practices somewhere else. Ethnographic accounts speak of "upheaval" and "uprooting": people tell of losing their family and friends on the journey, of being detached from their workplace and associations, and of reconstructing these things only with much effort, and after a difficult process of adjustment. Second, even if a new technology (e.g., teletransportation) were created that could replicate an entire social infrastructure in a different place instantly, it still seems unlikely that we could move people without undermining their located life-plans. Short of relocating humanity to a new planet, we cannot draw geographical bounds around communities so as to undermine no one's personal ties. And since all places on earth are currently inhabited, there is nowhere to put people that will not involve transforming their life-plans, simply by the fact that a different social world already exists there. The translocation objection indeed shows that the connection between territorial occupancy and well-being is not a logical one, but depends on certain empirical facts. Still, I believe these facts are fundamental to human life, and universal across existing societies. In a world like ours, the interest in located life-plans grounds an interest in secure occupancy of a particular place.

A second worry is that perhaps the stability of located life-plans is not fundamental to each and every person's well-being. Some people may have only very generic located life-plans, for example, an individual who lives in a cookie-cutter suburb, telecommutes, and needs only fiber-optic cable and an Internet connection to feel at home. Would this "loner" be harmed by removal from his territory? I should emphasize that on my view, it is not only the inhabitants of traditional communities who have located life-plans. Even this suburban loner would be dislocated by a requirement to move, say, to an Amazonian tribal region, which shows that his life-plans are not as generic as they seem. Instead, they are highly tied to the geography and environment of a modern, urban, industrialized society. Mastering a new social organization and cultural environment is costly, and we should not require people to pay these costs unless they choose to do so.<sup>22</sup>

Still, there is a plurality of modern, suburban, English-speaking social settings, and perhaps it does not matter to the loner which one he inhabits. While that conclusion may be correct in his case, it does not show that the stability of located life-plans does not matter for modern people generally, nor does it undermine the argument for a right of occupancy. A peculiar feature of the loner is that he has no social ties. He is indifferent in his choice between suburban environments primarily because he has no family, friends, workplace, or other personal connections anywhere. There may be some individuals as disconnected as this person. But clearly most people are not as socially disconnected as this, nor can we expect them to be. Social ties are essential to a fulfilling human life, and it would be unreasonable to ask people to forgo them. Even the loner should enjoy the background preconditions for forming stable social ties, should he revise his life-plans and decide to do so. Since rights are grounded in broadly shareable interests, the idiosyncrasies of the loner's case do not affect the argument that territorially stable access to social relationships and practices is a necessary background condition for a wide variety of plans of life.

Finally, we might wonder whether removal would still be wrong in a "pure" case, where we could be certain that it would not undermine any located life-plans. Suppose a self-contained indigenous tribe could be

22. See Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), p. 85.

instantly relocated, via some new technology, to a different but geographically similar place, where their social infrastructure had already been replicated, and their lives could immediately resume. Would there then be any wrong? In such a case, I believe the tribe members still retain a general claim not to be forced or coerced without sufficient justification. If there are no important social values at stake, we ought not to move them against their will. But the case against territorial removal will be significantly weaker here, since our *pro tanto* claim against compulsion can be overridden in the face of a compelling social rationale. Competing social values may more easily suffice to justify relocating people in such “pure” cases, where no harm to their located life-plans is involved. But I doubt that these “pure” cases are realistic possibilities.

#### IV. JUSTIFYING AN OCCUPANCY RIGHT

Showing that people have an important interest in occupying the area fundamental to their located life-plans is the first step in an argument that they have a preinstitutional *right* to this place. But while residents of an area certainly have an interest in it, we have not yet shown that their interest is of sufficient weight to hold others under a duty. To argue for a *right* of occupancy, we must compare the strength of the interests protected under the proposed right to the strength of possible countervailing considerations.<sup>23</sup> Once a right has been justified, it grounds duties with preemptive force: these duties exclude our direct consideration of the underlying merits case by case.<sup>24</sup> The assertion of a right sums up our assessment, from a general perspective, of a number of more fundamental, intersecting, and potentially competing value-considerations. Since the interest in located life-plans is just one such consideration, we must assess whether it is defeated by conflicting reasons.

Looked at in this light, the occupancy interest seems quite robust. Removing someone from his territory destroys many of his life-plans at

23. My remarks here have been influenced by T. M. Scanlon, “Freedom of Expression and Categories of Expression,” in *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003), pp. 84–112; and by Raz, *Morality of Freedom*, pp. 165–92.

24. Raz, *Morality of Freedom*, p. 186. A right, as Raz defines it, grounds not only a first-order reason to act, but also a second-order, *exclusionary* reason not to act for certain other reasons. Duties to respect rights thus support reasons not to act on considerations that would ordinarily count against respecting the rights-grounding interest in the case at hand.

once; it harms not just his peripheral plans, but also his most comprehensive endeavors; and his projects tend to be rapidly and thoroughly undermined in ways that are difficult to compensate. Since imposing duties on others to respect occupancy rights involves costs, however, we must consider their interest in being free from such duties. In most cases, it is difficult to conceive of a weighty interest in being able to remove or expel others, or to interfere with their occupancy in ways that undermine their shared social practices. Nor does compliance with duties to respect others' occupancy seem especially burdensome: as long as an outsider enjoys flourishing life-plans where she lives, depriving her of the liberty to interfere with others' occupancy does not seem unduly costly to her. It is worth recalling here that I am arguing for a quite limited entitlement to geographical space: the right to reside permanently in an area, and to make use of it for social, cultural, and economic practices, immune from removal or expropriation. The limited nature of the right is important, since outsiders may have weightier interests in other aspects of territorial control. For example, they may have an interest in some access to other areas of the globe—to visit family and friends, or to see natural wonders—or they may have an interest in sharing in the value of the earth's resources. Rights to exclude outsiders from a territory or to control its natural resource wealth face a higher burden of justification.

There is an important class of cases, however, where imposing duties to respect others' occupancy does seem unduly burdensome. When someone does not enjoy flourishing located life-plans where he now is, he has a significant interest in acquiring some space in which to pursue these plans, even if that space is now occupied by someone else. This suggests that we should further constrain our account by adding distributive principles, and I discuss these constraints in Section VII. Imposing distributive constraints does not undermine our assertion of an occupancy right, however, since rights need not exclude all conflicting reasons. Duties to respect occupancy rights exclude many potential reasons for interfering with occupancy, such as the fact that we could increase economic efficiency by removing people, that we could enable other, desirable uses of an area, that we could alleviate social conflicts, and so on. The assertion of an occupancy right means we ought to refrain from acting on these competing considerations, even where, on balance, they seem to outweigh the occupancy interest in the case at hand.

But a duty may exclude a range of countervailing considerations—giving it force sufficient to determine our action in normal circumstances—without excluding all competing reasons.<sup>25</sup> Exclusionary reasons have a certain scope: they are not absolute or conclusory in every case. Thus, my duty to respect your property in your house excludes the fact that I would get pleasure from sitting on your couch as a reason for entering without your permission. But it does not exclude the fact that I could save the life of a victim of a car accident, by calling the emergency squad from your phone, as a reason for entering.<sup>26</sup> Similarly, the fact that we could increase economic efficiency is excluded as a reason for interfering with occupancy rights, while the fact that a group of refugees is in desperate need of a place to live may not be. I elaborate on this issue in more depth in Section VII.

As long as the appropriate distributive constraints are respected, however, I believe that the interest in located life-plans is significant enough to justify imposing duties on others not to remove us from our territory and not to interfere with our use of it in ways that undermine our shared social, cultural, and economic practices. This is because (1) the increased security afforded to located life-plans by recognizing such duties is of great benefit to us, and (2) our interest in not having such a duty imposed is quite weak by comparison.

A final worry I wish to consider is whether recognizing an occupancy right—based on an interest in stable located life-plans—would entail undesirable implications for other aspects of our economic and social life. Consider a group that has historically practiced mining in a particular location, and has evolved a way of life based around it. If mining becomes economically unprofitable, do these people have a right against the state to subsidize their dying industry, so as not to disrupt their located life-plans?

25. For more on how exclusionary reasons can have restricted scope, excluding some first-order reasons but not others, see Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1975), pp. 40, 46; and Raz, *Morality of Freedom*, p. 184. For useful discussion, see J. E. Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997), pp. 8–13.

26. In U.S. law, the doctrine of “private necessity” can be invoked as defense against charges of trespass in an emergency situation. See *Vincent v. Lake Erie Transportation Co.*, 109 Minn 456, 124 NW 221 (1910).

In response, I deny that the occupancy right extends to a duty to subsidize others against economic and social change.<sup>27</sup> As mentioned above, a right is an intermediate conclusion that summarizes our assessment of a variety of intersecting, and potentially competing, value-considerations. Depending on this balance of reasons, a right may justify imposing some duties to protect an interest, but not others.<sup>28</sup> The fact that we ought not to interfere with others' territorial occupancy, then, does not necessarily entail that we are also obliged to subsidize them in maintaining their located life-plans.

It is doubtful that the occupancy right grounds a duty to subsidize others against economic change, for two reasons. First, located life-plans are typically less drastically affected by economic restructuring than by territorial removal. As long as there are alternative jobs available in their community, the miners' loss of their occupation—though a significant blow—need not undermine all their other located commitments, including their relationships with friends and family and membership in religious, cultural, and social organizations.

Second, other people have strong countervailing interests in not bearing the burdens required to maintain the miners in their current occupations. Citizens have an interest in a market economy that affords them significant benefits—including dynamic innovation, lower consumer prices, and greater opportunities—and we must weigh a representative citizen's interest in these benefits against his interest in the locational continuity of his plans, if he happens to work in an unprofitable industry and cannot find a new job close to home. It is not clear that the interest in located life-plans outweighs the interest in a market economy, when viewed from an appropriately general perspective. As Raz states:

[S]uch conflicting considerations, while sufficient to show that some action cannot be required as a duty on the basis of the would-be right,

27. I do not deny that societies may have other duties to cushion dislocation caused by economic change, for example, by providing social welfare benefits or worker retraining schemes. Here I only consider whether there is a duty to *prevent* those economic changes that threaten the locational continuity of someone's life-plans.

28. See Raz, *Morality of Freedom*, p. 184: "which duties a right gives rise to depends partly on the basis of that right, on the considerations justifying its existence. It also depends on the absence of conflicting considerations."

do not affect the case for requiring other actions as a matter of duty. In such cases, the right exists, but it successfully grounds duties only for some of the actions which could promote the interest on which it is based.<sup>29</sup>

This is not to deny that there may be some instances where the dislocation of economic change is as troubling as territorial removal, and for similar reasons. But there is a strong case against adopting a rule requiring people to subsidize others in their occupations. These countervailing considerations are not equally present in the case of a rule requiring people not to interfere with others' territorial occupancy.

#### V. COMPULSION AND REMOVAL

On the view I endorse, what is primarily wrong with territorial removal is the way it undermines our fundamental plans and projects. But is this correct? An alternative view would highlight the fact that removals often involve physical force or coercion. This view holds that our interest in being free from coercion or force captures all that is at stake in territorial occupancy, without any further reference to located life-plans.

Adapting Nozick's well-known analysis, we can stipulate that P coerces Q when he communicates to Q that he intends to bring about some seriously undesirable consequence if Q does A (something Q might otherwise do), and as a result, Q does not do A.<sup>30</sup> While (following Nozick) coercion is usually used to refer to communicative threats, we can define a broader category of *compulsion* that includes both coercion and physical force. Coercion and force are two modes of a single activity, compelling someone to do something against her will.<sup>31</sup>

I don't deny that the Navajo removal was wrong in part because it featured compulsion. But I do deny that the wrong of compulsion captures all that is problematic about it. Relatedly, I believe that a general claim to freedom from compulsion is insufficient to explain why we have a right to permanently occupy a geographical space. We cannot

29. Raz, *Morality of Freedom*, p. 184.

30. See Robert Nozick, "Coercion," in *Philosophy, Politics, and Society*, fourth series, ed. Laslett, Runciman, and Skinner (Oxford: Blackwell, 1972), pp. 101–35.

31. See Scott Anderson, "Coercion," in *Stanford Encyclopedia of Philosophy*. <<http://plato.stanford.edu/entries/coercion/>>.

reduce the distinctive injustice of territorial removal to the wrong of coercion or force.

A common view of compulsion is that it is always *pro tanto* wrong, though it may be justified, all things considered, in the presence of a compelling rationale. Why is compulsion *pro tanto* wrong? A plausible explanation holds that it is wrong because it subjects someone else's will to our own. When one person coerces another, he deliberately changes the circumstances of her choice—by attaching serious disadvantages to an otherwise desirable option—to place sufficient pressure on her will to induce her to take the action he desires her to take. He “makes” her do what he wishes. But subjecting someone's will dominates that person and violates the ideal of interpersonal relations in which we think people ought to stand. Similarly, using physical force against another person's body makes him serve as a direct instrument of one's desires and intentions. Because it is *pro tanto* wrong to dominate people in this way, substituting one's agency for theirs, it is *pro tanto* wrong to coerce or force them.<sup>32</sup>

Though compulsion is *pro tanto* wrong, this does not mean it is always unjustified. Often there is a good reason for coercing or forcing people to do things. Suppose I am standing in a park after hours and a policeman orders me to move, citing a local “no loitering” ordinance. In this case, I am coerced—since if I refuse to move I may face a fine or imprisonment—and so my ability to determine my own actions is to some degree undermined. But the *pro tanto* wrong is outweighed by public order considerations here: other people have a security interest in not encountering suspicious prowlers who cause them alarm. This interest is sufficiently pressing to justify both depriving me of the option of continuing to hang around the park (an activity in which I do not have a weighty interest), and doing so via a process that subjects my will. Thus, the *pro tanto* wrong of compulsion can be, and often is, overridden.

Though the typical case of territorial removal involves coercion or force, there are cases in which people are deprived of their occupancy rights without compulsion. I believe that an uncompelled removal is almost as wrong as its more forceful variant. Just like the victim of a

32. My discussion here draws on Raz, *The Morality of Freedom*, pp. 150–57, 418–19; and Grant Lamond, “The Coerciveness of Law,” *Oxford Journal of Legal Studies* 20 (2000): 39–62, though it does not duplicate either author's views exactly.

typical removal, the victim of an uncompelled removal suffers the rapid and thoroughgoing destruction of her located life-plans. The only difference between the two cases is that in a typical removal, the victim also suffers one additional indignity: she is necessitated, by coercion or force, to do something she does not want to do.

To illustrate, consider the situation of Palestinian refugees at the moment of Israel's independence. As Benny Morris shows in his landmark history of this event, not all refugees left for the same reasons, and their exodus occurred in stages. In the first stage, many Palestinians fled to nearby countries voluntarily. These people were eager to ensure their security and safeguard their wealth: they felt that their persons and property might be vulnerable in an uncertain scenario. They did not think in terms of a permanent emigration abroad; instead, they expected the imminent defeat of Israel by surrounding Arab states, and they intended to return to their homes after the war was over.<sup>33</sup> On the definition outlined above, this group was not compelled to move.

Then, from April to July in 1948, the Jewish armed forces implemented a plan to secure the emerging state of Israel against an Arab invasion. This plan involved clearing potentially hostile "fifth column" elements—namely, Arab Palestinians—from the new state's territory, cleansing large areas of their historic inhabitants. At this stage, many Palestinians were directly forced out by the Jewish army, which burned villages, harassed local populations, and drove them from the area. In this wave, as Morris illustrates, "the most important single factor . . . was Jewish attack."<sup>34</sup> On the above definition, this second group did suffer compulsion. They were pressured to move by threats or the application of direct physical force.<sup>35</sup>

33. Benny Morris, *The Birth of the Palestinian Refugee Problem* (Cambridge: Cambridge University Press, 2004), pp. 133–39.

34. *Ibid.*, p. 265.

35. One might wonder whether national defense could conceivably outweigh the duty not to interfere with occupancy rights. In response, I distinguish two questions: first, whether the interest in occupancy grounds a generally valid duty not to evict people; and second, whether that duty can ever be overridden in extraordinary circumstances. I believe the occupancy interest does ground a duty not to evict others, even in the face of countervailing security concerns. Assuming that occupancy rights are not absolute, however, it is possible that this duty could be overridden where the infringement of occupancy was the only reasonable means to protecting other, stronger rights or to avoiding a terrible calamity. In my view, these conditions for "justifiable infringement" were not satisfied here. Even

Whether they fled voluntarily or were compelled, however, all Palestinian refugees were deprived of their occupancy rights. This is because shortly after the exodus, Israel banned the return of displaced persons to their homes and villages. Among the measures taken to forestall Palestinian return were destroying their residences; demolishing their religious and associational infrastructure; obstructing economic practices, like cultivating fields or harvesting previously planted crops; settling new immigrants in previously Arab areas; and prohibiting free movement along public roads. This deprivation of occupancy had grave consequences for the Palestinian Arab community: they became scattered in refugee camps throughout the West Bank, the Gaza Strip, Jordan, Syria, and Lebanon. Their businesses and sociocultural associations were decimated, and many Palestinians lost contact with relatives, who fled to other areas. But the refugees suffered these consequences regardless of whether they evacuated voluntarily or were evicted by the Jewish army.

One might object that since the Palestinian refugees were forcibly prevented from returning, this example does not prove the intended point, namely, that there is more at stake in removal than compulsion. But I believe it does. Palestinians were prevented from returning to their *homes*, and that is very different from their being prevented from visiting a foreign land, such as Japan or Sweden. For the purposes of this article, I remain neutral about whether it is permissible to coercively exclude people from a territory.<sup>36</sup> But even if exclusion is wrong, surely it is a much more *serious* wrong to prevent people from returning to their homeland than it is to prevent them from entering some country to which they have no important ties. Unlike third-party uses of border coercion, Israel's exclusion destroyed the lives the refugees had built for themselves. We cannot appreciate the gravity of this harm unless we suppose that the Palestinians had important interests in this

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where occupancy rights are justifiably infringed, the displaced individuals are still wronged: they are entitled to have their occupancy restored after the fact, and to be paid compensation for the harm of displacement.

36. For an argument that border coercion is unjustified in the absence of cosmopolitan democratic institutions, see Arash Abizadeh, "Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders," *Political Theory* 36 (2008): 37–65.

*particular* geographical space that they do not have in the territories of Japan or Sweden.

I believe the Palestinian case shows that though the *pro tanto* wrong of compulsion often features in territorial removal, and certainly contributes to its wrongness, it does not fully account for it. Removal is wrong not simply because it is compulsive, but also because it dispossesses people of the place that is central to their life-plans. Undermining people's economic pursuits, destroying their homes and meeting places, and dislocating their social ties are harms of a different type than compulsion: these actions deprive people of the use and control of a geographical space that is fundamental to their lives.

#### VI. A GROUP OR INDIVIDUAL OCCUPANCY INTEREST?

As we noted above, our interest in territorial occupancy is in part an interest in spaces where we participate in collective practices together with others. We might therefore wonder whether the occupancy right is a right held by individuals. Or is it a collective right of the group whose practices take place in these spaces? Liberal nationalist theorists—including Tamar Meisels and David Miller—have argued that territorial rights belong to *nations*, groups that share a common culture and a special attachment to a territorial homeland.<sup>37</sup>

Unlike liberal nationalists, I do not understand territorial occupancy as a corporate right belonging to cultural nations. Such an approach presupposes a world neatly divided into national cultures, each of which maps readily onto a separate area. But this is an unrealistic view: “nations” are not discrete, delineable cultural wholes, coextensive with geographically bounded population groups. And nations do not chronologically precede states, in a way that might serve as a basis for drawing ideal territorial boundaries. Instead, nations are created by state activities, either as a by-product of their efforts to promote the homogeneity of their populations, or through mobilization against these efforts.

If we take these facts into account, three considerations tell against attributing territorial occupancy rights to cultural nations. First, we are interested in theorizing a *preinstitutional* right of occupancy, so we

37. See Tamar Meisels, *Territorial Rights*, 2nd ed. (Dordrecht: Springer, 2009), p. 126; David Miller, “Territorial Rights: Concept and Justification,” *Political Studies* 60 (2012): 252–68.

should not take for granted a demographic picture that depends on the prior homogenizing activity of modern states. Second, by attributing occupancy to national groups, we risk problematizing the residence rights of those who do not belong to the dominant nation. The nationalist view creates two classes of residents: those who belong to the majority culture and have privileged claims on the land, and those who do not and whose claims are more questionable. Finally, the nationalist view may inadvertently incentivize state violence. States that do not have homogeneous national cultures will be prompted to create them—by implementing assimilation programs, or even by ethnic cleansing.

Instead of attributing occupancy rights to nations, I believe we should attribute occupancy to the individual residents of a place, and only derivatively to the various cultural and other practices in which those people participate. Each person will require access to the shared spaces on which her located life-plans depend, but persons living in close proximity may have interests in different spaces and participate in different practices. A Cuban immigrant may have an occupancy right in Miami because it contains his family, his workplace, his Catholic church, and his Spanish-speaking coethnics, while a Jewish Miamian may have an occupancy right in the same area because it contains his soccer club, his synagogue, and his school. Though there is little overlap between the “cultures” of these two individuals, each has an occupancy right *in Miami* because it contains shared spaces that are fundamental to him.

My approach can also recognize some derivative group rights to territory, grounded in the importance of located social, cultural, and political practices for their participants.<sup>38</sup> To illustrate, consider a town inhabited by a religious community (Hutterites), members of a majority national group (Canadians), and an immigrant subculture based around a shared language (Somali). Alongside their individual interests in occupancy, members of these communities also have interests in their groups’ use of public and civil society spaces for their shared purposes. They may wish to hold meetings in a local coffee shop, gather in the park, speak their language, or celebrate their holidays in public places.<sup>39</sup> They

38. For this notion of collective rights, see Raz, *Morality of Freedom*, pp. 207–8; Peter Jones, “Group Rights and Group Oppression,” *Journal of Political Philosophy* 7 (1999): 353–77.

39. Since different groups will likely wish to use the area in potentially incompatible ways, this may give rise to disputes. Though I cannot develop the argument here, I hold that

may wish to have their jointly held right to access and use these spaces recognized by the town's other inhabitants, and by outsiders. We should allow that such groups have derivative rights to use the territory, grounded in their members' interests in the shared practices that matter to them.

So my view can still recognize some group occupancy rights, based on the joint interests of residents in located social practices. But unlike nationalist views, my approach does not derive individuals' occupancy rights from the prior right of a nation to its "homeland"; instead, individuals hold occupancy rights directly. And my approach also allows that as the patterns of residents' participation in social and cultural practices shift, so too will the distribution of groups that have occupancy rights in a particular territory. If some residents of Quebec begin to engage in a Swahili-speaking subculture, that subculture will possess occupancy rights alongside the Quebecois nation.

#### VII. NO WRONGDOING CONSTRAINTS

As I mentioned in Section IV, in order to justify a right to territorial occupancy, we must show that the duties imposed on others are not so onerous as to require them to sacrifice their own interest in located life-plans, and in the space necessary to carry them out. Several important issues are involved here. First, if current residents have kicked out prior occupants, and then built located life-plans involving that place, are the expelled persons obliged to respect the wrongdoers' present possession? Second, can people claim as much territory as they like, regardless of others' situation? Answering these questions requires placing further constraints on my account. For reasons of space, I can only sketch these additional constraints here, though I hope to elaborate them further elsewhere. My discussion will necessarily be restricted. For now, let me simply point out two salient ways of violating such constraints:

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when people come into conflict about the use of material resources, they are obliged to set up a state that can fairly regulate these matters. Following Kant, I accept a *natural duty of justice* to enter a juridical state that can stabilize people's expectations about the use of resources (by instituting a regime of property law), and serve as an impartial arbiter for resolving their conflicts. The disputes generated by diverse occupants may therefore generate moral pressure to construct a more formal property system.

- (1) *Expulsion*: In occupying a place, one must not remove or expel prior claimants who had a right to be where they are.
- (2) *Equitable Distribution*: In occupying a place, one must leave others with access to enough space to secure *their* interest in located life-plans.

The formation of located life-plans does not confer occupancy rights when the establishment of those plans involved dispossessing people with prior claims (Expulsion). Like many other rights, the right to occupancy may be forfeited through wrongdoing. Just as someone who commits an assault renders himself liable to bodily harm by his victim or the police, so too wrongful dispossessors make themselves liable to territorial removal.<sup>40</sup> This is despite the fact that they may have formed located life-plans in the area, and that they may have an interest in sustaining those plans. Analogously, an assaulter has an interest in bodily security, but the police are not bound to respect that interest when using necessary and proportionate force in the victim's defense, since the assaulter has forfeited his *right* to be free from such interference. Wrongful dispossessors likewise have no justified complaint if they are expelled by way of their victims' reclaiming their place of residence. It may be that even the first generation of expelled victims can never fully reconstitute the social and physical environment they once enjoyed, but their ties to the place will remain quite strong.<sup>41</sup>

One might worry that the No Expulsion requirement renders our earlier appeal to located life-plans superfluous. For if one needs to have a right to establish located life-plans in a place, then doesn't

40. Jeremy Waldron argues that entitlements based on life-plans can fade after dispossession, perhaps even within the victim's own lifetime. See Waldron, "Superseding Historic Injustice," p. 19. But to hold that a wrongdoer can acquire rights simply by forcing his victim to radically reorder his life seems perverse. An account of rights forfeiture avoids this implication. For other discussions of forfeiture, see Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009), pp. 1–37; and Christopher Wellman, "The Rights Forfeiture Theory of Punishment," *Ethics* 122 (2012): 371–93.

41. I should note that my account does not necessarily imply that occupancy will be inherited by victims' descendants, nor that wrongdoers' descendants always lack occupancy rights, because the passage of time will often be accompanied by shifts in the moral basis of these rights, allowing for the supersession of old injustices. Victims' descendants may form located life-plans elsewhere, and while wrongdoers may forfeit their own occupancy rights, they cannot forfeit the rights of their children. Fully specifying the implications of my view for rights of return and territorial restitution is unfortunately beyond the scope of this article.

that prior notion of right do all the argumentative work in grounding territorial occupancy?

I think not. We should instead conceive of the prior right to establish located life-plans as a bare liberty-right—the absence of a countervailing duty not to establish such plans—and not as a claim-right to a particular place. Since a bare liberty does not establish any claims against others, an affirmative act is additionally necessary to explain the genesis of such claims. To illustrate, consider an analogous case of study carrels in a library. We generally act as if people can establish rights of possession just by making use of these carrels. These possession rights are not simply rights to occupy the carrel while one's body is in the chair, but also, for example, a right to get up and find a book and return to the carrel one has claimed. It is wrong to kick out a prior occupant who is still clearly using his carrel by placing his books and papers on the floor and taking the carrel for oneself. So I must have a prior moral liberty to occupy this carrel for my act of occupation to have the requisite effect. Still, being at liberty to occupy a carrel is not the same as actually occupying one. I may walk past ten unoccupied carrels before getting to the one I decide to use. I am at liberty to occupy any of these ten, but I *establish* an occupancy right only in the eleventh. For that reason, though the No Wrongdoing constraint matters, this liberty must also be supplemented by located life-plans in order to generate claims of occupancy against others. The addition of a further constraint to our account does not render located life-plans superfluous.

A second salient way of violating the No Wrongdoing constraint is by failing to leave others with enough space to carry out their own located life-plans (Equitable Distribution). There are important distributive limits to territorial occupancy. Deciding which of many candidate distributional principles—including sufficiency, equality, or the difference principle—should apply to territorial occupancy is a complex question, and one I lack space to adequately consider here. For now, I briefly sketch an account based on sufficiency, which I take to be a plausible *minimal* requirement for the equitable distribution of occupancy. If it turns out that some more demanding principle applies—say, if residents have rights to *equal* per capita shares of space—then I assume my view can be adapted accordingly. So I do not claim any special status for the principle of sufficiency here: I use it simply to illustrate the role that distributional constraints play in the structure of my view.

On a sufficiency approach, if others lack access to enough geographical space to carry out their fundamental life-plans, then those people will have a claim of necessity to demand surplus land from current occupants. An adequately flourishing life requires a share of all-purpose means (including a share of the territory of the globe). Current occupants can place others under a duty not to interfere with their use of territory only if these others enjoy sufficient means.

What makes a territory sufficient for an adequate life? I cannot develop a full account here. But let me highlight two types of means essential to adequate flourishing: outsiders must enjoy access to sufficient *natural* and *social* resources if they are to be bound by a duty to recognize current occupants' claims. First, outsiders must enjoy sufficient material prerequisites: each person must live in a space where his subsistence is guaranteed, that is, he has access to adequate food, shelter, basic health, and a livable environment. If outsiders lack these basic natural resources, then current occupants will be obliged to share their territory with them, or to provide these resources in some other manner, if those occupants are to have a claim that the outsiders refrain from interfering with their use of territory. Second, these outsiders must also have access to minimal *social resources* necessary for well-being.<sup>42</sup> This includes political institutions that ensure (1) their security needs are guaranteed, that is, they are free from torture, arbitrary imprisonment, or threats to basic liberty and personal safety; and (2) their most basic interests in life-plans are protected—they can practice their religion and culture, and associate together with others, including being free to establish long-term family relationships. If outsiders lack access to these minimal social resources, then—on a sufficiency approach—current occupants will be obliged to share their territory with them, or provide these resources to them in some other way.

Again, I have only barely sketched the Equitable Distribution constraint here, and explored only one candidate principle for elaborating it, namely, sufficiency. There is obviously much more to be said on this issue. But the general idea should be reasonably clear: our interest in

42. My argument here is similar to arguments made by David Miller and Christopher Wellman about states' rights to exclude migrants in urgent need. See Miller, *National Responsibility and Global Justice*, pp. 220–30; Christopher Wellman, "Immigration and Freedom of Association," *Ethics* 119 (2008): 127–29.

located life-plans is not weighty enough to ground a duty for outsiders to refrain from using our territory when they lack access to a “fair share” of geographical space. If there are outsiders with such outstanding distributive claims, then current occupants are obliged to share territory with them, or to provide these resources in some other way, unless sharing space would threaten their own basic interests in a “fair share” of the same kind. This is so even if the outsiders’ inclusion in the territory would interfere with current residents’ social and cultural practices, for example, because these practices require the use of more natural resources than would be available once outsiders are included. Current occupants’ *nonbasic* interests in the protection of their social and cultural practices cannot trump outsiders’ *basic* interests in an equitable distribution of space.

If these additional constraints are met, then I believe one’s plan-based interest in a territory can ground a preinstitutional right to occupy that territory. Again, this right of occupancy does not amount to full ownership of the territory—it does not include incidents like the right to income from its natural resources, or the right to alienate or bequeath. Instead, it is a lesser claim to *use* the territory as a physical space for one’s residence and important social practices, and to be immune from expropriation or removal. I sum up the plan-based account of occupancy, finally, in a formal statement:

*Occupancy Rights:* A person has a preinstitutional right to occupy a particular area if (1) he resides there now, or has previously done so, (2) access to shared spaces in that area is fundamental to his located life-plans, and (3) his connection to the territory was established without any wrongdoing on his part, involving (at a minimum) no expulsion of prior occupants or infringement of others’ claims to an equitable distribution of geographical space.

#### VIII. CONCLUSION

In conclusion, I have argued that not all rights to land are the products of a state’s laws, or of a society’s conventional practices. Instead, there is an important preinstitutional moral claim to territorial occupancy. This claim to occupy a particular place is rooted in the role that geographical space plays in individuals’ most important projects and relationships. If

occupancy of a particular place is fundamental to a person's located life-plans, and if he has established these plans without wrongdoing, then he has a moral right to occupy it. Even people who lack legal institutions—like nonstate tribes—can have such moral claims to their territory, and it is for this reason that actions like removal, ethnic cleansing, and exile are wrong. While this right to occupy a particular place commands respect independently of legal institutions, it is a very limited form of property. Occupancy does not include many of the conventional incidents associated with full ownership, like rights to transfer, bequeath, and derive income: these further incidents depend on the existence of background laws or social practices in order to bind. Finally, I have claimed that we should see the holders of this preinstitutional occupancy right in the first instance as *individuals*, not national groups.