

SYMPOSIUM  
PEOPLE AND TERRITORY



A PRÉCIS OF  
*A POLITICAL THEORY OF TERRITORY*  
BY  
MARGARET MOORE

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# A Précis of *A Political Theory of Territory*

Margaret Moore

**I**n my book, I defend a political theory of territory, which is a theory of the appropriate, normatively defensible relationship between the state, the people, and land. Any theory of territory has to explain how these three elements are related, and to justify the particular configuration.<sup>1</sup>

## I What is territory?

Territory, as I understand it, is the geographical domain of political or jurisdictional authority. It is a *political* concept and so distinct from land, which I define as the part of the earth's surface that is not covered by water. Of course most land is claimed by a state, and so is also territory, but there could be unclaimed land or land that is contested between two states; and the territorial extent of the state also extends to the airspace above and to the sea off shore, so territory can extend beyond land. Territory is also distinct from property, which we normally understand as a cluster of claim rights, liberties, powers, and immunities that, when held together with respect to a material

<sup>1</sup> David Miller, "Territorial rights: Concept and Justification", *Political Studies*, 2012, vol. 60, no. 2, 252-268.

thing, represent a form of ‘ownership’. For many theorists, jurisdictional rights conceptually precede property rights since the state typically defines the kind of property relations that are legal in the state: they define the rules surrounding acquisition, transfer and the like.

## II

### Why do we need a theory of territory?

Is a political theory of territory really necessary? After all, in the current inter-state order, all states by definition have territory. As the 1933 Montevideo Convention on the Rights and Duties of States (Art.1) makes clear, having territory is definitional of a state: states are defined as “entities *with fixed territories* (and permanent populations) under government control and with the capacity to enter into relations with other states.”<sup>2</sup> Why not then justify states and so, in the process, justify their possession of territory as necessary to fulfil state functions?

This has been the dominant attitude to the issue of territory in international relations, international law and political science, but is inadequate for two reasons. First, territorial statehood requires a *defence*; the existence of territorially-ordered states should not be assumed as part of the natural ordering of the world, but comes at a cost. In particular, the division of the world into distinct territorial entities is challenged by the cosmopolitan idea that views borders and territory as inimical to the moral equality of all human beings. Cosmopolitans typically object to two features that are often associated with territorial state: rights to control resources within the jurisdiction of the state; and rights to

<sup>2</sup> A. John Simmons, “On the territorial rights of States” in Ernest Sosa and Enrique Vellanueva, eds., *Social, Political and Legal Philosophy: Philosophical Issues* 2003, vol. 11, 321, note 5. Italics are mine.

regulate borders. Cosmopolitans have argue that resources are part of the common stock of mankind and that exclusive control by the territorial state is unjustified: the bounty of the earth should be used to benefit everyone.<sup>3</sup> State control over borders is criticized too on cosmopolitan grounds: that it violates individual's rights to free movement and equality of opportunity.<sup>4</sup> More generally, some argue that the territorial state is an outmoded form of organization. As the world has become more interdependent, many world problems require global responses, which cannot be effected by the system of independent territorial states: this is true of human-induced global climate change and environmental degradation generally; poverty which is exacerbated by global capitalism and a race to the bottom on the part of competing territorial jurisdictions; and international crime and terrorism, which many argue require a global response. On both philosophical and practical levels, then, the territorial state needs defending.

The usual defense of a territorial state appeals to the functions that it performs. There are obvious benefits to be had from the state applying uniform laws and common policies to people living in proximity to one another, regardless of their status or identity.<sup>5</sup> The territorial state, its defenders may claim, is essential to the

<sup>3</sup> Christopher Armstrong, "Justice and Attachment to Natural Resources", *Journal of Political Philosophy* 2010, vol. 18, no. 3, 313-334/

<sup>4</sup> See Joseph H. Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013); Kieran Oberman, "Immigration as a Human Right" in *Migration in Political Theory: The Ethics of Movement and Membership*, ed., Sarah Fine and Lea Ypi (Oxford: Oxford University Press, 2016).

<sup>5</sup> Christopher H. Wellman, *A Theory of Secession. The Case for Political Self-determination* (Cambridge: Cambridge University Press, 2005); Jeremy Waldron, "Proximity as the Basis of Political Community", paper presented to the Workshop on Theories of Territory, King's College, London, 21 February 2009.

realization of equal freedom, equality before the law, predictability, and social justice. But this argument isn't really adequate, because, while it defends a territorial state system, it doesn't defend or define the precise *territory* or domain of the state. It tells us that the state ought to be ordered territorially, but not where the state's territory ought to be. To answer this question, which is usually dubbed 'the particularity question', we need to connect particular states with particular geographical areas. This is necessary to address territorial conflicts, such as when two or more states claim the same piece of land, or, in the case of secession, to define the boundaries of the seceding unit, or to sort out claims to the seabed or the High Arctic or Antarctica, which require us to think about the principles on which boundaries should be drawn.

### III The theory

In this book, I offer a defense of an international order comprised of territorially-organized states, which I justify on the grounds that it realizes the value of political self-determination. There are two aspects to the argument. One links the people with the land (and so responds to the particularist challenge); the second links the people with the value of political self-determination (and so justifies the political entity). Let me explain how these elements function within the overall theory.

To address the particularist challenge, I examine the relationship between people and place. This is a complex argument, because this investigation leads me to defend three kinds of place – related rights, some of which are held by individuals, some by groups, and some by institutions. Rights of residency are held by individuals; rights of occupancy are held by

groups; and territorial rights are held by political institutions. In all three cases, the rights are justified in terms of a deeper appeal to the fundamental interests of persons, who have important relational and associative interests, which ought to be protected by both individual and collective rights. The conception of rights that I rely on is an interest-based conception and the rights are conceived of not as absolute claims, but as subject to certain limitations, especially limitations imposed by justice (respect for rights of other kinds).

What are the three place-related rights? I understand a moral right of residency as a right that belongs to individuals and has two components: a liberty right to settle in an unoccupied area, and a right of non-dispossession, a right to remain, at liberty, in one's own home and community and not be removed from it. I also argue, as an extension of this right, that it involves a right of return, when an individual has been unjustly excluded from land on which s/he has a right to reside. I understand a collective moral right of occupancy as a collective right, which a group may have, over and above the individual residency rights that its members have. What justifies a collective right of occupancy? The basic idea here is that individuals have, in addition to individual identities, collective identities, which are integral to who they are; and many of these groups are attached to specific areas, specific bits of land, which form an important source of the collective identity and locus of people's collective lives. To make this argument, I appeal to empirical evidence, not only of indigenous people who have suffered from dislocation and social problems by removing them from the area to which they are attached, but also farmers, and nomadic people, and people living in distinctive local communities or neighbourhoods, all of whom may have attachments to place, which ought to be recognized. Like residency rights, they give the members of the occupancy groups rights to remain in a place, but also addition right to

exercise some forms of local control over the geographical area on which the people live and in which they have a special interest. The function that occupancy rights perform in my theory is to define the domain or area of individual residency rights and to solve the particularity problem for territorial rights. To see the importance of the first role, consider the case where an individual has been expelled from an area, and we think that they have a right of return. Now the question is: where do they have a right to return to? It can't be the specific house (which may be destroyed): how then do we specify the scope of the right of return? The answer is in accordance with occupancy rights, which appeals to various collective connections that we think are salient to individual identity. Occupancy rights also function to solve the particularity problem. I argue that territorial rights can be held only when the group in question has occupancy rights, and again, occupancy is more than just physical presence: it requires a stronger connection to land. The group must occupy the land legitimately (meaning that it has not displaced some other group) and it must be rooted in that geographical space by the individual life-plans and collective projects of the group's members. The answer to the particularity question is at the same time an answer to the scope question: it helps to address the question of the boundaries of territory, by which I mean, where the state ought to hold territorial right.<sup>6</sup>

Let me turn now to the justification for *territorial rights*, which is separate from the scope and particularity questions. On my account, states (or sub-state units) hold territorial rights by acting

<sup>6</sup> This account can specify heartlands, but not the precise boundaries, which are often somewhat conventional. In my chapter on boundary-drawing, I discuss a range of innovative response to overlapping territory that is responsive to the group interest in collective self-determination.



as a vehicle of self-determination for some group G.<sup>7</sup> However, not just any group can qualify as a potential source of territorial rights. Three specific conditions are required: political identity, political capacity and political history. The political identity condition requires that the group is united by a shared aspiration for wide-ranging powers of jurisdictional authority or political control over the territory. The political capacity requirement refers to predicted and /or demonstrated ability to exercise self-determination and maintain effective forms of governance. The third condition requires that the members of the group have a history of shared practices and mobilization in terms of political projects. Unless these conditions are fulfilled, a group will not be equipped to exercise jurisdictional authority over an extensive territory. The territory itself over which jurisdiction is to be held is determined by the fact of occupancy (although obviously some groups who don't meet the three conditions will still count as occupancy groups, whose rights should be respected by the state).

The main argument then of the book can be formulated as follows: when group G (which meets the three conditions above) legitimately occupies territory T (understood as geographical space) it can be said to hold territorial rights over T and this is justified by the value V of the collective self-determination of the said group.

In later chapters, I argue that this theory of territorial rights can be applied to a range of issues that implicate territory. Consider the issue of resources, for example. It is usually thought that a legitimate state has control over the natural resources within its territory. This is sometimes called the permanent sovereignty over resources claim. Can this account justify such a right? I argue that the interest in collective self-determination

<sup>7</sup> Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press, 2015), esp. ch. 3.

does suggest that the state, as a vehicle of self-determination, ought to have control over resources – indeed, that it would be hard to think of a group as having robust self-determination rights unless they exercise some control over the land that they live on, the rivers that they fish in, swim in, and navigate, and so on. However, I also argue that this control is subject to important limitations, because other people, outside the state, also have important claims on resource based on their right of subsistence; and there may be occupancy groups within the state that have justified claims to resources or land. Moreover, a self-determination argument justifies a right to *control* resources, but doesn't justify a right to the full stream of benefit that flows from the exploitation of resources. It is compatible therefore with significant taxation in the interests of the global poor when the self-determining group does make the decision to exploit the resources in question.

Another important question that is connected to rights over territory is the right to control the flow of goods and people across borders. Here, the most contentious issue is control over human migration. I argue that states are justified in exercising control over migration, which is connected to their interest in self-determination, but that this interest is limited in various ways, especially when it conflicts with the human rights of the prospective migrants.

The theory also applies to secessionist conflict and territorial conflict over unoccupied areas that don't seem to implicate self-determination at all (and which I argue are really properly conceived of as property disputes), and just war theory, where I examine whether groups have rights to defend their interests in self-determination through the use of force.

In all these cases, I show that the value of self-determination both justifies some control, some rights, but that these rights

ought not to be conceived exactly how the current state order conceives of them. The scope of these rights is defined differently from the current inter-state order. It is justified through a self-determination argument for jurisdictional authority, and the rights are also subject to very important limitations, which are typically given by other, competing rights (which are justified by other pressing human interests).

#### IV Comparative Justifications

Although territory has, until now, been under-theorized, the book also argues that many of the competing theories of territory—Kantian theories, utilitarian theories, nationalist theories—are problematic in ways that my theory is not. Against nationalist theories, this political account is more inclusive and avoids the problematic categories of cultural nationalism as necessary to the exercise of territorial rights. The principal advantage of my account against statist, functionalist and Kantian theories is that it vests territorial rights directly in the groups that with the requisite political capacity to be self-determining, rather than in the state. This is far more intuitive. The problem with the other accounts is that it seems that people would lose territorial rights—the right to form their own political entity to exercise self-determination—if the state in which they live is a failed state or an unjust state. By contrast, the implication of my account is that external actors may have a third party duty to help the right-holding people create the conditions in which they can be collectively self-governing, *not* that external actors can gain territorial rights by exercising power justly in the territory of an unjust or failed state. Thus, it explains why the defeat of Nazi Germany did not result in the Allied powers exercising territorial rights over the German territory; but led to a situation where an

unjust regime was replaced, but the right to be self-determining over their own territory was still vested in the German people (though not on ethnic or cultural nationalist grounds).

*Queen's University*

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RIGHTS OF RESIDENCE

BY  
CARA NINE

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## Rights of Residence

Cara Nine

The system of territorial rights is generally taken to be grounded in collective political self-determination. Nonetheless, collective self-determination is a problematic ground for territorial rights, because it tends to beg questions of location and boundaries. Why do these people hold the right to territorial self-determination over these particular lands? And why are people on the other side of the border excluded? An initial answer to these questions can be found in the reasons why people have the right to remain where they currently reside. If people have the right against displacement, then they also have the right to rule themselves where they currently live.

A right of residence, then, is at the core of territorial rights. Margaret Moore develops a complex account of this right in *A Political Theory of Territory*.<sup>1</sup> This essay aims to clarify and critique Moore's account of the right of residence, and offer an alternative 'functionalist' account.

Moore's analysis starts with the plausible claim that "If we are to have any control over our lives, we have to have control over the most fundamental elements in background conditions of our existence, and among these is the ability to stay in our communities" (p. 38). However, many fundamental elements of

<sup>1</sup> Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015). Unless otherwise specified, all page refer to this work.



our background conditions are out of our control. Loved ones leave or die; the weather ruins economic and other pursuits; time withers landscapes; cities and resource use change under complex collective action. Given that so many fundamental elements are out of our control and not considered to be valid objects of individual claims, it remains for Moore to show that residency rights are justified and, further, that they are strong enough to ground territorial rights. She establishes this justification with a two-fold argument. According to Moore, residency rights are justified on the basis of our interests in the pursuit of plans and in our interests in maintaining relationships. I take each of these accounts in turn. Despite the wonderful nuances of Moore's account, I argue that she still has not established a coherent theory of residency rights.

## I

### **Plan-Based Account**

One half of Moore's theory of residency rights emphasizes individual's interest in place because stability of place is crucial for realizing plans (p. 38). A right of residence involves an individual's liberty right to continue to reside in an area and a claim right to not be removed.<sup>2</sup> Moore justifies the right of residency as an interest-based right. Under interest-based theory, an agent has a right only if the agent has an interest sufficiently

<sup>2</sup> See also Anna Stilz, "Occupancy Rights and the Wrong of Removal," *Philosophy & Public Affairs*, Vol. 41, no. 4 (2013): pp. 324-356. Stilz calls this individual right the right of occupancy and defends a straight-forward plan-based account. Moore calls the individual right the right of residency and calls the right of occupancy a collective right. For consistency, and to distinguish an individual residency right from a collective occupancy right, I use the term residency to encompass also Stilz's theory when I also reference Stilz.

important to warrant holding others to be under duties to respect or promote that interest.<sup>3</sup> The arguments progress by first establishing that remaining in one's area of residence constitutes a significant personal interest. Second, they argue that the interest is weighty enough to warrant others' having a duty to protect that interest.

To explain how residency is a weighty interest, Moore appeals to the role that place plays in the making and execution of plans. A plan is contextual; it involves an executable action. One may have an abstract goal, such as obtaining financial security. Reaching this goal requires real-world planning, such as training for and maintaining a job. These plans involve attending school, completing assignments, applying for jobs, going to work and performing job tasks, etc. Each of these activities happens in a place, and completing them often requires continued access to those places.

Place features in our contextualized plan-making in two broad ways. First, our relationships with other persons (such as maintaining religious, political, familial, and social affiliations) happen in a place and can be contingent on continued access to mutual places. Stability in residence “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” (Stilz 2013, 336). Located plans and activities are associated with most life-goals, such as maintaining religious and social affiliations, planning for raising children, and engaging in political projects. Because carrying out plans requires continued access to the located context of those plans, then persons have a

<sup>3</sup> Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986), p. 166.

strong on-going interest in continued access to those places (p. 38).

Second, one's goals regarding employment and subsistence are formed around the continued use of certain spaces. Economic opportunities are shaped by the geography, climate, and culture of the area. Existing employment is based in the availability of local resources. A sled-dog trainer can only pursue her chosen profession in areas that receive sufficient snow, for example. Even corporate positions in the technology industry rely on access to sufficient electricity and internet connections (p. 39).<sup>4</sup>

From this evidence, it seems reasonable to conclude that most, if not all, individuals have an interest in continuing to reside in a region without fear of displacement. Further, these interests are strong enough to ground a right, because they are often central to the agent's well-being. We structure our lives to be meaningful, and this structure grows around having continued access to the places where our plans can be carried out.

Further, the corresponding obligation is, in the first instance, undemanding. Others have a duty only to refrain from removing persons from regions of residence and to continue to allow them access to this area. Assuming that others can continue to flourish within a stable place, then it is not unreasonable for them to leave alternative populations to reside in their own areas.<sup>5</sup> Given the weighty interest in stability in residency, and the relative undemanding nature of the corresponding duty, it seems reasonable to designate this as a *prima facie* right.

Despite its virtues, this account has at least two problems. The first is a geographical ambiguity. Moore draws lines around regions where one is likely to have located plans. Internal

<sup>4</sup> See also Anna Stilz, "Occupancy Rights and the Wrong of Removal," p. 338.

<sup>5</sup> *Ibid.*, p. 342.

displacement *within* a region—displacement from one’s home to another home within the region—is of little moral concern.<sup>6</sup> However, these regional lines don’t follow the object of moral concern within plan-based moral theory. Plan-based theory is both too narrow and too broad to follow its geographical target. It is too narrow, because objects of life plans are not restricted to a region. If the object of moral concern is the completion of life plans, then the life plans of those who wish to leave the region should be included. Plan-based theory should conclude that relevant geographical lines lie around the objects of individual life plans, regardless of whether the objects lie within one region. The theory is also too broad. Life plans don’t require access to most areas within a region. The problem isn’t size, it’s the collective, *region*-way of drawing the lines. Even most city-dwellers do not require access to most parts of their city to act on their located life plans. They can go their whole lives without visiting the ‘west side’.

This geographical ambiguity can be alleviated, if the theory is radically contextualized to the individual. Two neighbours in a Minneapolis suburb that do not share hobbies, religions, cultural interests, jobs, or familial ties, could each have rights to regions that barely overlap. One, a Mexican-American Catholic, works as a local district school teacher and coach, has life plans within his suburb of Minneapolis as well as within parts of Mexico but not within the city itself. Because his wife has generations of family nearby, the majority of his life plans are fixed locally. His neighbour, a Somalian-American Muslim, commuting into the city center as a technical engineer, could have life plans in the city center and within a different suburb where many Somalians have settled, but have little interest in her local community. Because of

<sup>6</sup> An exception is when staying in the home features significantly in one’s plans (p. 157).

her relatively solitary way of life, the Somalian-American could realize her life plans within any area of the US or Canada where Somalians have settled and she can continue her career; she need not stay in Minneapolis. Relocating the Somalian-American from the suburb to another suitable area would not obstruct her life plans, and, on the plan-based theory, would not violate her right of residence. Individualizing the theory makes sense of the geographical nature of the right of residence. But it does so at the cost of theoretical parsimony—the theory cannot, as originally designed, justify a *regional* right of residence wherein each resident has a right against removal from the same particular region.

The second problem is that Moore does not disambiguate features of place that *make life functional* from features that are *objects of plans*. And this seems like an important distinction. A plan is a rational course of action towards some goal. On plan-based theory, the individual's attainment of that goal is the foundational moral concern. By contrast, functioning is conceptually independent of goals. Human functioning includes biological processes, like digestion, and emotional processes, like having a sense of contentment. Human functioning can also include more sophisticated processes such as the ability to organize one's day. These items are identifiable and valuable independently; they do not need to be objects of one's plan. The social and geographical components that feed into our ability to recognize options and pursue them are not typically objects of a plan, but rather they are part of how one functions as a rational agent. Suppose that the Mexican-American grew up in rural Mexico. He functioned well in that community, because the way of life, values, and activities were ingrained in him as a way of life. But he did not want to stay there. His life plans were achievable only in a distant, unfamiliar place, even though the ways of life in that place would be much less familiar. On the plan-based account, this person had weighty interests in accessing the distant, unfamiliar places while he still

lived in Mexico. But this gives rise to a puzzle, because it seems that it would have been wrong to forcefully remove him from his native village. It is difficult on the plan-based account to explain why forcefully removing him from his native village would have been wrong.

## II

### **Relationship-Based Account**

To respond to these worries of geographical ambiguity, Moore expands the moral foundation of residency rights to include the importance of relationships. By referencing the geography of relationships, particularly community relationships, she attempts to locate the relevant area for residency rights.

Moore's account highlights the role of place in forming and maintaining important relationships as well as institutional and cultural ties. In fact, she ties the geography of residence to the relationships themselves rather than to only the object of plans. "[S]pecifying the location of residency rights depends on a further argument about group occupancy rights" (p. 40). The relevant group that maintains occupancy rights is a group that shares a collective identity and maintains a way of life, history, and identity that is tied to their particular location (p. 40). She illustrates this point with examples of clearly identifiable communities, such as the Inuits and the residents of Africville, with distinct histories and ethnicities tied to their locations. In these cases, the particular historical area that matches these communities identity and way of life establishes the domain of members' individual residency rights. I believe the argument works in these isolated and important cases. Nevertheless, the arguments fail to establish clear residency rights for much of the rest of the world's

population. In particular, Moore's arguments regarding residency right of the typical urban resident, I believe, are unsuccessful.

Moore itemizes the harms of displacement suffered by typical urban residents as personal harms: increased stress, moving schools frequently, lack of identification with neighborhoods where one will live short term, and living in an area where one needs a car when one prefers not to drive (pp. 44-45). These arguments are less persuasive than community-unique arguments, where members of a distinct ethnic group, such as the Inuit, have unique relationships with their fellow community members and geographical area. First, the generic disruptions and loss of moving are felt by anybody who moves house, and are not specific to coerced moves (and this is a level of loss that Moore thinks is not significant (p. 39; p. 189)). Second, several of the harms are dependent on the person moving frequently. The inability to settle into schools and a neighborhood is significant if one believes that they will have to move away from the area in the near future. Again, this problem is not suffered by people who are forced to move only once or twice, but only by those who are vulnerable to excessively frequent moves. This category of harm points to more significant problems than lack of residency rights. In particular, it points to the failure of institutions to provide persons the means to not be vulnerable to frequent moves. This includes steady economic employment in populated areas, protection against poverty, the provision of robust services such as hospitals in the area, and so on. Third, these arguments tend to suffer the same problems of the plan-based account. That is, the relevant areas of residency rights are geographically generic, disperse and ambiguous, especially given the great diversity of urban residents.

Finally, the relationship-based account defended by Moore is too weak to ground residency rights in any way that matches the

original intent of proposal. Moore relies on a national relationship-based argument to map certain occupancy rights for those who may not have special ties to their immediate locales. “At minimum, they think of themselves as British or French or Canadian, as the case may be; and there is a certain map-image of what that involves, and a corresponding institutional and political structure which relates this identity and which defines the location of this collective identity” (p. 42). Certain relationship-dependent goods come from living and participating within a geographically located community with which one identifies. A relationship-dependent good is distinctive to the relationship itself. Like friendship or love, relationship-dependent goods come from interaction with particular others; substitutes cannot produce the same good. Similarly, says Moore, co-citizens have relationship-dependent interests in sharing activities of co-creating the rules and practices that govern the collective conditions of living together (p. 64). These goods can be achieved only with particular others, co-citizens. However, the analogy between friendship and citizenship is not clear. National members are substituted all of the time by birth, death and migration. This substitution does not lessen the interest one has in participating with others to construct collective rules. And so this group-membership cannot give us a clear mapping of the area of residency rights (or at least it cannot do so without being circular.) In fact, Moore stresses that any person may be a member of the relevant collective, as long as that person is not part of a massive group that will dominate the normal political processes of the collective (200). Effectively, this means that any person who shares very general political and cultural values with me may be a part of my relevant collective. (Think Canadians blending with Americans.) The relevant area of residency rights for most residents of Canada and the US is the massive northern part of the Americas. Moore intended the residency right to resist



things like gentrification—that a person may not be removed from one’s immediate neighborhood. But instead the arguments seem to conclude that removal from one’s neighborhood is of little moral concern for most people. And instead removal from a very large region (a continent?) is impermissible.

### III

#### **A Functionalist Account of Rights Against Removal From The Home**

For whatever reason, Moore and other theorists have avoided the argument that one has a right against removal from the home (p. 39). Instead, they stress the importance of place-based attachments outside of the home. This region-based line of argument leads to ambiguous and contradictory results, as I have tried to show above. In the remainder of the essay, I outline an argument for the right to secure access to one’s home. I believe this captures the intent of a right of residency, and explains why displacement is wrong even for those who live in heterogeneous places. I argue that attention to functionality draws clearer moral and geographical conclusions about the role of place in personal interests. In particular, the functional role of one’s home in the capacity to be an autonomous agent indicates that individuals have weighty interests to secure access to their homes.

Autonomy involves choosing and acting according to values and beliefs that are one’s ‘own’. ‘Ownness’, on procedural theories of relational autonomy, involves appropriate processes of coming to hold values and motivations.<sup>7</sup> For example, one might believe

<sup>7</sup> Catriona Mackenzie and Natalie Stoljar (eds.), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press 2000), pp. 519-520.

that she is not capable of making good decisions without her husband's guidance. The content of the belief on its own does not affect whether or not this person is an autonomous agent. If she came to have this belief through emotional manipulation and abuse, then it may be the case that the process has undermined her capacity for autonomy. In contrast, she may have arrived at this belief through a series of repeated experiences where her decisions regularly produced improved results when she consulted with her husband. In the latter case only, the process by which she formed the belief is appropriate to an autonomous agent. Relevant procedures constitutive of autonomous agency are causally dependent on the agent's interpersonal relationships and circumstances. Sometimes the causal element can be purely physical. Suppose the woman has been severely malnourished such that her brain function has been compromised. This causal factor would indicate that her autonomous capacity is undermined.

Coercion undermines autonomous capacities by subverting or warping processes so that the agent responds to beliefs, values, or desires held by others. On Onora O'Neill's account, coercion has propositional content; the coercing agent desires that the victim do something specific. The coercion operates on the agency of the victim, making the victim's 'choice' not an authentic expression but rather *merely* a matter of compliance. Coercion is more harmful than unintentional or 'natural' barriers to individual agency, because coercion doesn't merely block the agent from autonomous processes and expression. It also subverts their agential capacities to some other will.<sup>8</sup>

<sup>8</sup> Onora O'Neill, Onora, *Bounds of Justice* (Cambridge: Cambridge University Press 2000), p. 89.

Relational autonomy analyses the processes of autonomous agency along three dimensions.<sup>9</sup> Each level may be an entry point for coercion to subvert autonomous agency. First, the developmental dimension examines how a person forms attitudes and beliefs. Second, the competency criterion evaluates the capacity of the person to perform mental procedures constitutive of autonomous agency. And the final criterion examines the agent's ability to perform actions consistent with autonomous agency. In the remainder of this section I explain how secure access to the home is central to autonomous functioning on each level.

According to developmental analysis, a person's practical identity is formed within relationships and shaped by complex, intersecting social determinants. This progression occurs at in childhood and throughout adulthood and requires a corresponding, appropriate sequence of maturation.<sup>10</sup> Through childhood and beyond, we form a meaningful sense of self required to reason and act autonomously. The autonomous adult is not static, but rather continually engages in the process of reflection and renewal. We are always working on ourselves. When we grow out of the normal stage of extreme dependency, it remains necessary to sustain social and environmental networks to maintain our capacities for autonomy.

A home is functional; it provides secure space and materials to meet basic human needs, to express, create, and reinforce values and identity. Activities such as sleeping, washing, and urinating are only achieved with dignity if a person has secure access to a place to perform these actions. Without a home, a person has no place to exercise many basic freedoms without first seeking

<sup>9</sup> Catriona Mackenzie and Natalie Stoljar (eds.), *Relational Autonomy*, p. 21.

<sup>10</sup> Linda Barclay, "Autonomy and the Social Self," in Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy*, p. 56.

permission. While these simple activities may happen in hotel rooms, a home safeguards a location for these fundamental needs as well as many other basic and non-basic activities. It permits reliable organization of space over time allowing for the natural gathering and storage of material goods for future use. Storage implies a capacity to plan, allocating materials between now and the future. Homes are the site of intricate storage functions to cover a broad scope of intricate, intimate personal and family needs. It provides us with the physical capacity to form plans for ‘meeting future needs.’<sup>11</sup>

For most individuals, the home plays a crucial role in the development of identity and values. In almost all cultures and eras, the home is the sphere under which family relations manifest and sustain themselves.<sup>12</sup> Even if the inhabitants are not biologically related, they may come to consider each other as ‘family’, to denote that when one is at home, ‘she feels that she is with others who understand her in her particularity.’<sup>13</sup> Inside, inhabitants feel that the place is their own; they understand and identify with the rules and norms governing the space, and they see themselves reflected in the home’s material goods and organization. They see their faces in photos, remember where they picked up that special shell displayed on the shelf, and embrace the significance of religious symbols. Homes have ‘patterns for how to live are largely settled ... Even if we do not like our ‘house rules’ or do not feel it to be a place ‘run by us,’ we still typically experience this not as an imposition from the outside, but rather simply as ‘the way things are with us’ ... and it

<sup>11</sup> Mary Douglas, “The Idea of a Home: A Kind of Space,” *Social Research* vol. 58, no. 1 (1991): pp. 287-307, p. 295.

<sup>12</sup> *Ibid.*, p. 289; May Wright Sewall, “The Idea of the Home,” *The Journal of Speculative Philosophy* Vol. 16, no. 3 (1882): pp. 274-285.

<sup>13</sup> Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press 1997), p. 146.

is a way that an alien other cannot easily penetrate; it is my, our, own.<sup>14</sup>

This aspect overlaps with the feature of the home as a place of storage and planning. Within the home, things are preserved in a way that sustains identities. For example, because of the multifaceted storage and planning uses of the home, the home is run by a set of complex rules; it is the first place where we are embedded with moral conceptions such as fairness and kindness. These values are shared by and reflect our family values. Iris Marion Young describes this kind of preservation as the main role of homemaking. Homemaking—the acts of cleaning, preparing meals, doing laundry, decorating, etc.—“consists in the activities of endowing things with living meaning, arranging them in space in order to facilitate the life activities of those to whom they belong, and preserving them, along with their meaning.”<sup>15</sup> The preparation of a meal, for example, is imbued with the peculiar identity and values of the persons who will be eating. Tastes, flavours, smells, ingredients, methods of preparation, as well as customs of eating—these all tell a story about the people living together in that particular home. Preservation is an active, creative pursuit wherein the homemaker creates her own space of rest and renewal, using material goods that reflect her and her family’s identities. Preservation “makes and remakes the home as a support for personal identity without accumulation, certainty or fixity.”<sup>16</sup>

<sup>14</sup> Kirsten Jacobson, “Embodied Domesticity, Embodied Politics: Women, Home, and Agoraphobia,” *Human Studies* vol. 34, no. 1 (2011): pp. 1-21, p. 14.

<sup>15</sup> Iris Marion Young, *Intersecting Voices*, p. 151.

<sup>16</sup> *Ibid.*, p. 135.

These values reflect our family identities, and developmentally influence our own values. Homemaking develops and sustains the individual identities within the home, nurturing and sustaining the capacities necessary for autonomy, such as the formation and maintenance of values, language, and belief frameworks. Most members of the household are both passive and active in the act of homemaking. Children, for example, learn to prepare meals and to clean and present their clothes and possessions in meaningful ways that embody their identity. Adults continue, reinforce, and pass on this meaningful process. Through the presentation, functional use and storage, and arrangement of goods, the home symbolizes and continually reinforces the identities of its inhabitants.

The second, competency, dimension of analysis evaluates how a person has relevant capacities for autonomy, such as self-reflection, self-direction, and self-knowledge. On this view, the capacity for reflection, like the formation of identity, is shaped and constituted by context. Agents must experience appropriate conditions to develop and sustain these capacities. The process of forming desires and ideas requires social, environmental, and historical contexts. Sharing ideas, inspiration, aspirations, and beliefs must, at minimum, be expressed and interpreted through an embedded linguistic and cultural context.<sup>17</sup> We work on ourselves through a process of reflecting on smaller parts of our belief-system or desires while at the same time holding other aspects of our embedded identity constant. The contextual nature of individual identities allows for the smaller scale reflection to occur.

The self-reflection inherent in the home serves as an object of reflection and as context. A visitor might ask, why don't you have

<sup>17</sup> Linda Barclay, "Autonomy and the Social Self," p. 57.

a TV? Or, why do you have so many paintings of the desert? Because these displayed objects (or lack thereof) say something about the family's identity and values, they are manifestations that prompt question and reflection. The conversation about household objects and habits with others provides a space for interlocutors to express, interpret, and reflect on their beliefs. In a Minnesota house full of desert paintings, the family displays the paintings in order to remind themselves of their Mexican identities. Individuals have a need to control a space and belongings of their own so that they can engage in reflection with their selves that is mediated by their relationship with their belongings.<sup>18</sup> After a while, the family may decide to integrate more into the Minnesotan context, and reflect on this decision by thinking about whether or not to put away the paintings.

Moreover, the privacy of the home assures safety in the expression of controversial ideas, thoughts, and attitudes. The private, territorial control of the home preserves a sphere where one can be at rest. Inside the home is familiar; it is mine or ours—a space where the inhabitants have the freedom to form comfortable habits without worrying about the demands of others. It creates a zone of control over which outsiders have limited access. The implication is that the privacy of the home allows for families to behave in ways that express their identities. Privacy thus enhances the function of the home as a place that reflects the peculiar identities of the persons residing inside the home.

The expression of controversial attitudes is necessary for autonomy, to have the capacity to form and reflect on ideas that modify one's identity in ways that defy social conventions. Only through this kind of safe, private reflection is autonomous self-

<sup>18</sup> Allison Weir, "Home and identity: In memory of Iris Marion Young" *Hypatia* Vol. 23, no. 3: pp. 4-21, p. 18.

direction possible. The intimacy of life inside the home may make us vulnerable to critique and conflict inside. However, this does not mean that the home cannot be a safe haven for productive reflection and construction of beliefs. Instead, the openness and engagement with others inside the home creates opportunities for change, commitment, and strengthening of supportive relationships.<sup>19</sup> These opportunities may be the best avenues for critical reflection and engagement.

The final, action, dimension of analysis examines whether or not an agent is able to act on relevant values and motivations. If a person is physically, mentally, or emotionally unable to act, then the person is held captive by whatever is keeping her from acting. Contemporary psychological studies show that having secure access to one's home is significant in having a healthy life.<sup>20</sup> It gives individuals a place to sleep, rest, rejuvenate, and ready themselves for self-directed work in and outside the home. At home one can rejuvenate, because it is her haven, a restful place of safety and refuge. Outside the home, the world can be oppressive, chaotic, and challenging—outside is less familiar, where systems are designed around dominant socio-economic structures that can be frustrating, opaque, and exploitative. The home serves as a safe place beyond the full reach of outside systems, where one can enjoy more familiar and easy social

<sup>19</sup> *Ibid.*, p. 8.

<sup>20</sup> Nasir Warfa, et al, "Post-migration geographical mobility, mental health and health service utilisation among Somali refugees in the UK: A qualitative study," *Health & Place* Vol. 12, no. 4 (2006): pp. 503-515; Gloria Simpson and Mary Glenn Fowler, "Geographic Mobility and Children's Emotional/Behavioral Adjustment and School Functioning," *Pediatrics* Vol. 93, no. 2 (1994): pp. 303-309; T. Jelleyman and N. Spencer, "Residential mobility in childhood and health outcomes: a systematic review," *Journal of Epidemiol Community Health* Vol. 62: pp. 584-592.



relations.<sup>21</sup> “Everyone needs a place where they can go to be safe. Ideally, home means a safe place, where one can retreat from the dangers and hassles of collective life.”<sup>22</sup> By being a place of embedded meaning, reflecting the identity of the inhabitants, the home is comfortable. Consequently, for most of us, the home serves an essential psychological function as a place of rejuvenation, where we collect the mental and physical strength required to carry out intended actions. The home is a feature of lives that greatly facilitates our capacities to act autonomously.

If one already has a home, then the home environment is embedded as a non-fungible contextual element of her procedural autonomy. It cannot be traded for or found in another dwelling. It is not the case that any other house would have the same value for me as my home. Only one particular space can, at this time, serve as my ‘home’. Another dwelling may become my home in the future, but only after I have gone through the process of making it home, of imbuing it with functionality, identity, and meaning that will make it my haven. Usually, at any one time, no other house has the value for its inhabitants that their particular home has.<sup>23</sup>

Abrupt, permanent removal from one’s home severely disrupts the functional processes of autonomous agency. These damages are minimized when one desires and plans for a move away from home. The home is the place where one nurtures one’s identity in a private and restful space, and the space is constituted in part by the fact that it stands in opposition to the outside world. While life outside the home is outside of one’s

<sup>21</sup> Allison Weir, “Home and identity,” p. 7.

<sup>22</sup> Iris Marion Young, *Intersecting Voices*, p. 161.

<sup>23</sup> In unusual circumstances, more than one place can serve as one’s home. For example, children whose parents live in separate houses often form a home in both places.

individual control, the dynamism and opportunity makes going outside valuable. Part of the function of preservation inside the home prepares its inhabitants to be autonomous agents outside; it is expected that many individuals, especially grown-up children, form autonomous plans that take them away from their formative homes and towards developing a separate, functional home of their own. One's interest in secure access to her home is thus consistent with autonomous moves away from the home. While moving temporarily undermines functionality, most people are able to repair and build new contexts for self-reflection and other processes when their move is consistent with their overall set of desires, beliefs and values.

A coerced move, by contrast, undermines the valuable connection between the home and autonomy. Within the home, autonomous capacities are developed and maintained such that our primary values, beliefs, capacities for reflection and goal-formation are structurally tied to the home. These beliefs, values, capacities and goals are authentic; they sufficiently express the self-perceived identities of the inhabitants. When a government coerces person out of their home, these are subverted to the will of the coercive agent. These fundamental aspects of autonomous agency are no longer in the control of the inhabitant—they are no longer authentic. Rather, they are subject to the demands of another. The new home reflects the coercer's set of beliefs and values, impeding the inhabitants from using the home as a space of self-reflection. The impact of the coercion is reflected and imagined in the new home; it is a constant, intimate reminder and continuation of that coercion. Rather than functioning as a safe, private space of self-reflection for family members, the new home continues to reflect the coercer. Even when the family moves their belongings, activities, and ways of homemaking into the new home, the home itself remains as a background of coercion. Adjusting to the new home is a much more difficult task, when it

can be accomplished at all, because it is difficult to overcome the coercive context to create an environment that facilitates the processes of autonomous agency. This difficulty can explain why many displaced persons fail to adjust to new homes even though they are given robust support.

A full defense of the right to secure access to one's home is not possible here. There are many objections to be answered, including feminist worries about domestic oppression and economic and political worries regarding homes located in areas that are too costly to protect and service.<sup>24</sup> My intent here is to show that there is an obvious supplement to the emerging literature on residency rights, that of the right to remain in one's home.

## IV

### **Conclusion and Implications for Territorial Rights**

'Attachment to place' in territorial rights theory has a variety of explanations. For example, on achievement accounts, when an agent purposefully works on material objects in a place to create value, the agent develops a relationship with that particular place. Presence views, by contrast, do not build from any purposeful action but instead rely on passive, unintentional, or ascriptive connections to place. Presence theories rely on the natural validity of 'being there.'<sup>25</sup> Avery Kolers has argued, rightly, I think, that many contemporary theories of territorial rights rely on presence

<sup>24</sup> I defend this right in more detail in Nine, C. 'Water crisis adaptation: Defending a strong right against displacement from the home' *Res Publica*, forthcoming.

<sup>25</sup> Avery Kolers, "Attachment to Territory: Status or Achievement?," *Canadian Journal of Philosophy*, Vol. 42, no. 2 (2012): pp. 101-123, p. 105.

views. For, even achievement must justify the original occupation, or the original ‘being there’ that allows agents to act. If sufficient justification is not forthcoming for ‘being there’, then these theories seem to be founded on an unstable premise.

My analysis here contrasted Moore’s defense of a residency right to a region with the right to secure access to one’s home. Contrary to accounts focused on rights to a region, the theory advanced here has clear geographical conclusions and also a clear statement about why a person who is coerced is harmed in ways that a person who voluntarily moves is not. This account holds that the connection to the home may be at least as important as the connection to a region.

The point is to highlight the moral importance of places that actually feature into the individual’s ability to function (and plan). This could go some way to explaining why some people would face death rather than leave their homes. Leaving home is not an option for them. Forcing them to leave home is a deeply invasive measure into their person.

The functionalist account offers a distinct and, I think, better account of the normative sense of ‘being there’ than plan or relationship-based accounts. While I do not dispute that these other interests are important, I believe our ability to function along the lines described above are at least as important. For, first, one must be able to function in order to form and pursue plans and relationships. Second, paying attention to functionality reveals morally relevant features of our environment that are not apparent in conscious plan-making. At the very least, the right against forced removal is a constraint on territorial powers. Because rights to the home should constrain the jurisdictional authority of the state, then we may conclude that rights to the home are normatively prior to territorial rights, although I do not

have space to argue this fully here. Theories of territorial rights may find ultimate grounding in individual rights to the home.

*University College Cork*

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SYMPOSIUM  
PEOPLE AND TERRITORY



TERRITORY, SELF-DETERMINATION,  
AND INDIVIDUAL AUTONOMY

BY  
IAN CARTER

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# Territory, Self-determination, and Individual Autonomy

Ian Carter

**M**argaret Moore's book *A Political Theory of Territory* makes an important contribution to the recently renewed effort of contemporary political philosophers to make sense of states' territorial rights from a broadly liberal ethical perspective.<sup>1</sup> Moore's own theory is that territorial rights are possessed by collective actors called 'peoples' in virtue of their collective right to self-determination. An important and apparently liberal premise in her justification of this collective right is the idea that it protects both collective and individual autonomy. In what follows I shall focus critically on this autonomy-based aspect of her theory.

## I

### Rival Theories of Territory

Moore's theory of territory contrasts with three broad families of alternative theories, all of which have received some support in the recent literature. A first group of theories descends from Locke, and derives territorial rights from individual property rights: individual property owners of (more or less) contiguous

<sup>1</sup> Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015). Unless otherwise specified, all page or section numbers refer to this work.

pieces of land actually consent to the state's jurisdictional rights over that land.<sup>2</sup> The requirement of consent makes this justification of territorial rights particularly demanding. A second family of theories is functionalist, and does not depend on actual consent. In its best-known 'statist' version descending from Kant, this kind of theory sees territorial rights as necessary for a state to carry out its proper function of guaranteeing the freedom, equality and independence of the individuals living within the relevant geographical area.<sup>3</sup> A third family of theories is more collectivist and bases territorial rights on the interests of a particular culture or nation that has developed in a particular geographical area.<sup>4</sup>

Lockean theories have been criticized for making secession too easy, given that any group, or indeed any individual, may withdraw their consent at any time, taking their land with them.<sup>5</sup> Too easy for what? The answer is: too easy to allow for territorial rights as they are commonly understood—that is, as irreducibly collective rights of collective actors that include an immunity against secession by any dissenting individuals and a power of groups to secede only on certain (more or less strict) conditions. The Lockean view 'does not justify territorial right *as we know it*, where territorial rights and especially jurisdictional authority are

<sup>2</sup> See, for example, Hillel Steiner, "Territorial Justice", in P. Lehning (ed.), *Theories of Secession* (London: Routledge, 1998); A. John Simmons, "On the Territorial Rights of States", *Philosophical Issues*, 11 (2001), pp. 300-326.

<sup>3</sup> See, for example, Anna Stilz, "Why Do States Have Territorial Rights?", *International Theory*, 1 (2009), pp. 185-213; Anna Stilz, "Nations, States, and Territory", *Ethics*, 121 (2001), pp. 572-601.

<sup>4</sup> See, for example, David Miller, *On Nationality* (Oxford: Oxford University Press, 1995); David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

<sup>5</sup> This was not Locke's own view, but it is doubtful that Locke's own view of secession was compatible with his theory of territory.

consistently or evenly applied across the territory’ (p. 20, emphasis in original). Although Moore does not consider this last fact to represent a problem in itself—normative theory need not, after all, endorse the status quo—she does think that it highlights a problem: Lockeans cannot ‘explain territorial right in a way that is related to the performance of functions relating to the exercise of jurisdictional authority’. I take this to mean that Lockeans fail to recognize the importance of a state exercising its jurisdictional authority efficiently, and that territories that are shaped like Swiss cheeses are difficult to govern efficiently whereas territories ‘as we know them’ are not. More generally, the requirement of actual consent on the part of all individuals makes all existing states illegitimate to some degree, and ‘this does not seem persuasive to the non-anarchists among us’ (p. 21). Indeed, Moore appears not to see the Lockean position as a ‘theory’ of territory at all, as she sets it aside in an early chapter about the *concept* of territory.

The Kantian statist theory, by contrast, has been criticized as according too much territorial scope to well-functioning states: while the Lockean theory makes secession too easy, the Kantian theory seems to make it too difficult, if not normatively impossible. Indeed, the Kantian theory would seem to permit a well functioning state to annex the territory of a neighboring state, ignoring the right of a distinct people to govern itself independently. According to Moore, Kantians are unable to solve the ‘attachment problem’ (sec. 5.2.2): a good theory of territory must explain why a particular state should have jurisdiction over a particular geographical area, and not over some other area.

The shortcomings in the Kantian approach point naturally in the direction of a theory of territory based on a people’s right of self-determination, a right that is anchored in that particular people’s attachment to a particular geographical area. The holders of territorial rights are indeed collectives, but they are not states;

rather, they are peoples, which states might or might not represent, which can exist (and possess territorial rights) in failing states, and which can survive the destruction of their state. This thought brings us closer to the position occupied by the third family of theories: cultural or nationalist theories, which ground territorial rights in the strong sense of belonging provided by membership of a culture or nation that shapes, and is in turn shaped by, the land on which it has developed.

Moore bases her own account of territorial rights on the collective right of self-determination, but she also distances that account from cultural or nationalist theories by grounding that collective right in a thinner account of community according to which a people exists in virtue of its members' sharing, and jointly pursuing, a common political project. On Moore's account, individuals establish a plurality of relations both with each other and with the land on which they live. These relations might (or might not) give rise to a plurality of cultures and even nations that can co-exist within one 'people'. It is the complex of valuable relations involving people and land that explains the 'attachment' of a particular community to a particular geographical site. Such attachments ground (interest-based) 'residency rights' for individuals, and (interest-based) 'occupancy rights' for groups, and the need to manage these and other rights collectively, in the light of the above-mentioned attachments, implies a collective interest in controlling the relevant territory. The scope of the relevant interest in territorial control is determined by the existence of a shared political project arising out of the complex of relations just mentioned and allowing us to identify 'a people' that lives on the relevant territory. The interest in controlling the relevant territory is a collective one because it is based on an interest of 'the people' in self-government. Territorial rights are therefore irreducibly collective rights belonging to peoples.

Faced with this account of the emergence of a collective right of self-determination anchored in the attachment of ‘a people’ to a particular geographical site, the liberal theorist will want to hear more about the crucial step in Moore’s argument from individual attachments to collective attachments, and from individual agency to collective agency. Liberal political theory has taught us to be wary of such moves, for individual freedom and collective freedom are distinct and are not always compatible. Let us therefore take a closer look at Moore’s justification of the collective right of self-determination.

In order for a group to possess a collective right of self-determination, it must be something more than just an uncoordinated class of individuals. Rather, it must be a collective agent. An example of an uncoordinated class of individuals is that of an ethnic group (pp. 46–47). Unless it is politically organized in some sense, an ethnic group is not a collective agent, even though it possesses a common identity. A collective agent, Moore says, is constituted by a group that is capable of *joint actions* involving its members. When two or more individuals go for a walk together, they perform a joint action: they collectively realize a ‘we-intention’, and in this sense constitute a collective agent (sec. 3.3). Such we-intentions must similarly be present in any group aspiring to be called ‘a people’. More specifically, Moore specifies three conditions for the existence of the kind of collective agent that can reasonably be called ‘a people’: first, the group in question must have a ‘common political project’ (which is to say, its members must ‘share a conception of themselves as a group’, be ‘engaged, or desiring to be engaged’ in that project, and be ‘mobilized in actions oriented towards that goal’); second, they must have the collective capacity to establish and maintain political institutions; third, they must have a ‘history of cooperation together’ (p. 50), so that their sense of identity is ‘rooted in a valuable history of shared practices’ (p. 52).

Moore considers herself a ‘value-individualist’ (p. 46): although she holds the right of self-determination to be an irreducibly collective right, in her view the *value* of collective self-determination derives ultimately from the *value it has for individuals*. What is the nature of that value for individuals? According to Moore, institutions of self-determination ‘give expression to the communities in which people live; they express people’s identities; and they are an important forum in which collective autonomy can be expressed, and people can shape the context in which they live’ (p. 64).<sup>6</sup> ‘People who exercise collective self-government have the institutional mechanisms to shape the conditions of their existence, and their future together, and are thereby more autonomous – or experience a different (collective) dimension of autonomy than is involved in most liberal accounts of autonomy, which are mainly focused on protecting autonomy through protecting the individual private sphere’ (p. 65).<sup>7</sup>

In attempting to clarify this value-individualist account of the value of collective self-determination, Moore also points to an *analogy* between the value of individual autonomy and that of collective self-determination. The value of individual autonomy derives from being able to shape and control one’s own life, to control one’s own destiny. The same surely applies to collective self-determination. If individual self-control is valuable, then so too is collective self-control. After all, both are forms of self-control. ‘If it is valuable for the individual to be in control of his or her own life, then it is also valuable to have control as a member of a collective, in which the collective itself has a range of powers from which to choose’. If individual autonomy is

<sup>6</sup> ‘People’, in this quote, presumably means individuals.

<sup>7</sup> Does ‘people’, in this quote, refer to individuals or to ‘the people’? The answer is not clear to me, and the resulting ambiguity seems to be theoretically relevant (see secs. 3 and 4, below).

valuable, then so is ‘our capacity to affect decisions, and to participate in a collective group that itself exercises control ...’ (p. 65).

## II

### Collective Agency and Democratic Inclusion

Before considering Moore’s autonomy-based argument in favour of the value of collective self-determination of peoples, it is worth scrutinizing more closely her account of the collective agency of a people. It is not clear how this account is supposed to include all the members of a people as ‘participating’ in the collective actions of that people. The problem I have in mind here is logically prior to any liberal worries about the special interests of minorities within a self-determining people (pp. 61-62). Moore thinks that a group can hold territorial rights only if it counts as a collective agent, and that a collective agent is a group that performs collective actions. It follows that membership of the collective agent called ‘the people’ must depend on participation in the collective actions of the people.

Do all the members of a people participate in its collective actions? The example of a group of people ‘going for a walk together’ is deceptively inclusive. There is in fact an important difference between the following two kinds of collective agency:

- (a) the kind of collective agency involved in a ‘joint action’ of the members of a group, where each member’s performance of a contributory action is a necessary condition for the group’s performance of that joint action, as exemplified by a group of people ‘going for a walk together’ (rather than some people dragging others along) or, say, by two people successfully pushing a car up a hill;

(b) the kind of collective agency involved in arriving at, and implementing, a collective decision on the part of some kind of organization, such as a college or a corporation or a people.

In (a), each and every one of the individuals who ‘go for a walk together’, or who push the car together, *necessarily* contributes to that joint action through her voluntary individual bodily movements. In (b), by contrast, it is not clear that each and every one of the members of the relevant group can be said to participate in the same unproblematic way in a collective action carried out physically by *some* of the members of that group in the light of a given *decision procedure* for that group.<sup>8</sup>

Consider, moreover, those forms of collective action that Moore believes can constitute a people even when it is not actually represented by political organizations with institutional decision procedures. How are the contours of a people related to those of the subset of its members who are ‘mobilized’ in some sort of political action on behalf of ‘the people’? If we are to avoid the utopian requirement of universal participation in the ‘mobilization’, and yet are equally keen to avoid Lockean Swiss cheeses, dissenting or apathetic individuals or minorities will presumably be absorbed into the collective agent called ‘the people’ thanks to the mobilization of other individuals who are related to them in certain morally significant ways. How many such others need to be politically mobilized in order for the

<sup>8</sup> Moore seems to shift attention rather quickly from the first of these kinds of collective agent to the second, as if the shift were unproblematic: ‘two people dancing the tango can be a collective agent, as well as more conventional examples such as: a soccer team [yes, this could be like the couple dancing the tango, IC], a university [this isn’t, IC], the board of directors of a company, or a country (state) [neither are these, IC]’ (p. 48).



dissenters to count as having been non-voluntary absorbed into the people?

Perhaps worries about the non-voluntary inclusion of dissenters can be assuaged by insisting that a self-determining group—the only kind of group that can exercise jurisdictional rights over a particular territory—is necessarily a *democratic* group, one that at least aims to give equal weight each individual voice within it. However, Moore does not make this claim explicitly, and she says surprisingly little about the precise relation between self-determination and democracy.

It seems to me that the role of democracy in Moore's theory might be interpreted in one of two ways. On the one hand, she might hold that a people's collective control over a territory can be morally valid even if the political culture of that people is not democratic. In her account of the foundations of territorial rights she generally avoids referring to democratic government, preferring more neutral terms like 'political institutions of self-determination'. If democracy were a requirement for the possession of territorial rights, there would be no obvious reason for this preference for the neutral language of 'institutions of self-determination'. Certainly the concept of 'territorial right as we know it' does not include democracy as a necessary condition: territorial right 'as we know' it is much closer to the Rawlsian conception, which allows overtly non-democratic peoples to hold such rights.

On a second interpretation, Moore does hold that the kind of self-determination that grounds territorial rights—the kind of self-determination that is valuable on her theory—is *democratic* self-determination, but holds, in addition, that it is the collective *capacity to achieve* this kind of political organization that makes a people a territorial right-holder. In this way, she can preserve the necessary relation between territorial rights and democratic

political institutions while also maintaining the non-statist view according to which territorial rights can be held by a group that has not yet *achieved* democratic self-government because it is actually governed by an oppressive state (p. 60). This more democratic interpretation is supported by Moore's isolated references to the value of democracy. She states, for example, that democracy is 'an important source of legitimacy' (p. 116), and that her account of territory, along with other 'jurisdictional domain views' of territory, shares some of the fundamental values of 'popular sovereignty', such as the idea of 'equal moral and political status of citizens' and the view that 'government ought to be in the interests of, and authorized by, the people [presumably meaning the set of all individual members, IC] who are governed by it' (p. 27). She also warns against endorsing the 'realist view of international relations', which 'does not ... sit easily with the liberal democratic norms which animate other aspects of our thinking about the state and its relationship to people' (p. 5). On this second interpretation, we might say that a people has a general moral power to exercise jurisdictional control over a territory, and in this sense, though only this sense, 'has' territorial rights even if it is not organized democratically, but that the moral legitimacy of any actual exercises of that jurisdictional control depends on those exercises of jurisdictional control being the outcomes of democratic procedures.

The first interpretation is in tension not only with liberal democratic norms in general (as Moore herself seems to be saying) but also with Moore's declared value-individualism and the appeal to individual autonomy in her account of the value of collective self-determination. The second interpretation seems more plausible in the light of those premises. Even if we assume the second interpretation, however, the move from the value of individual autonomy to that of collective self-determination is not

at all simple, as I shall now try to spell out in the next two sections.

### III

#### **What is Collective Self-determination?**

It might be thought that the value of democracy follows automatically from the value of collective self-determination—that a genuinely self-determining or self-governing people is necessarily democratic. Such a move would be much too quick, as we can see from the fact that the concept of collective self-determination is itself ambiguous. Collective self-determination might be understood either as a kind of negative collective freedom or as a kind of positive collective freedom, and in the latter case ‘positive collective freedom’ might be understood either democratically or non-democratically.<sup>9</sup>

If we understand collective self-determination as a kind of negative collective freedom, a people is self-determining if its collective decisions (arrived at on the basis of some kind of collective decision procedure) are respected by outsiders and are thus free of any external interference. This idea of self-determination, constrained by the requirement of universal respect for basic human rights (not including a right to democracy), is assumed in the United Nations Charter, to which Moore initially appeals in her account of the value of collective self-determination of peoples.<sup>10</sup> Since a right, in the strict sense, is

<sup>9</sup> I do not try here to distinguish clearly between freedom and autonomy. The two terms overlap to some extent in ordinary language, and their precise relation depends on the theory adopted. My aim here is only to distinguish clearly between the individual and collective applications of these concepts.

<sup>10</sup> See p. 63. See also pp. 199-200, where Moore suggests that self-determination promotes non-domination at the international level

nothing other than the presence of a duty in other agents, presumably when Moore and others speak of a ‘right of self-determination’, and ascribe it to a people understood as a collective agent, they mean self-determination in this negative sense.<sup>11</sup> The negative sense of self-determination leaves open the nature of the decision procedure on the basis of which we recognize the relevant collective agents as such. Collective agents are to this extent viewed as opaque.<sup>12</sup>

By contrast, if we understand collective self-determination as a kind of positive collective freedom, a people is self-determining only if its collective decisions are made in the right sort of way. What is the right sort of collective decision procedure for ‘a people’? On one account, a people is positively free, and thus self-determining, only if its decision procedures are democratic, for only then can ‘the people’ really be said to be in control of

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(presumably, an irreducibly collective form of non-domination). Note that at the individual level, the presence of non-domination, like that of negative freedom, is ascertained without looking inside agents to see how rationally they act, whether their first-order desires are in line with their second-order desires, and so on. Like the negative concept of freedom, the concept of freedom as non-domination involves conceiving of freedom as a social relation, a relation *between* agents, not as a set of relations among different components of the agent.

<sup>11</sup> The correlative duties (and hence the right of self-determination itself) might be positive as well as negative. For example, outsiders might have duties of assistance where internal circumstances, such as those involving extreme poverty, constrain a people’s capacity for self-government (p. 51). However, the idea of leaving open the nature of the internal decision procedures (and hence the central assumption of what I am here calling a negative concept of self-determination) is compatible with the existence of such positive duties.

<sup>12</sup> This opacity might be said to ground the moral *equality* of different (more and less democratic) peoples in the Rawlsian sense, by analogy with the basis of moral equality among individual persons that I have defended elsewhere (Ian Carter, ‘Respect and the Basis of Equality’, *Ethics*, 121 (3) (2011), pp. 538-71).

their own destiny. Moore implicitly assumes this account of positive self-determination (on the more democratic interpretation of her theory), in combination with the negative sense (which she presumably sees as entailed by the positive sense). However, this is not the only available account of the positive freedom of a people. On another account, in which a positively free collective is considered analogous to a positively free individual, true self-determination occurs only when the agent's rational nature dominates over her more irrational or less reflective nature. We do not say that an individual person exhibits self-control merely in virtue of her following the strongest or weightiest of her actual desires—quite the contrary. Analogously, one might say, a people is not really in collective control of its own destiny if it merely follows the actual preferences of a majority of its members.<sup>13</sup> Applied to a people, the idea of positive freedom can involve conceiving of the collective as an organic whole, the rational part of which might well consist in an aristocracy—the great and the good of society. It is not at all obvious, then, that an *irreducibly collective* notion of self-determination must entail democracy—both because the negative sense does not entail the positive sense, and because the positive sense can be interpreted in various non-democratic ways.

We have seen that Moore's account of the value of collective self-determination does indeed draw on an analogy between individual and collective autonomy. If our aim is to justify a democratic conception of collective self-determination, the above reflection suggests that such an analogy might well backfire. In this connection, consider an objection Moore raises against the Lockean analogy between individual property rights and the territorial rights of states. The Lockean analogy, she says, leads us

<sup>13</sup> See Isaiah Berlin, 'Two Concepts of Liberty', in Berlin, *Liberty* (Oxford: Oxford University Press, 2002).

to treat the state as a sort of ‘owner’ of territory, as if territory were something that states have the power to dispose of as they wish, and this view is in tension with the modern liberal democratic tradition. While it is true that the Lockean requires the state to treat its own property-owning individual citizens in particular ways, ‘this further requirement sits uneasily with the conception that state territory is analogous to property, since we don’t normally require that property-owners treat the property in a particular way in order to remain an owner’ (p. 16). Similarly, in drawing an analogy between individual autonomy and the collective autonomy of a people, Moore might attempt to remain within the confines of the liberal democratic tradition by adding the further requirement that the people exercise control over the lives of its individual members only in particular ways—for example, in ways that emerge from democratic decision procedures. In response, the Lockean might paraphrase Moore as follows: such a requirement sits uneasily with the conception that collective autonomy is analogous to individual autonomy, since we don’t normally require that an individually autonomous agent must give equal weight to all of her individual desires in order to remain autonomous.

In short: if individual autonomy involves arranging one’s desires hierarchically and allowing the more rational desires to dominate, and if the value of collective autonomy is analogous to that of individual autonomy, then we should think of the autonomous collective as one that is organized hierarchically so that the preferences of the more rational and informed individuals dominate. If the Lockean analogy implies that Lockeanism are unwittingly endorsing the idea of the state as a kind of ‘owner’ of territory, the Moorean analogy implies that Moore is unwittingly endorsing the idea of the collective as a system of domination.

## IV

### Collective Self-determination and Individual Autonomy

Moore's argument is not, however, *merely* an argument from analogy. She is surely also saying that collective self-determination, which we are here interpreting as *democratic* collective self-determination, is good because it is *good for* individuals, including for individuals' autonomy. She is not saying merely that collective autonomy is valuable because it is 'just like' individual autonomy; rather, she is saying that collective autonomy is valuable because it *amounts to* a promotion of individual autonomy. This much surely follows from Moore's endorsement of value-individualism. It also follows straightforwardly from the claim that, to paraphrase Moore, *if* individual autonomy is valuable, *then* so too is (democratic) collective self-determination—*assuming*, as we now must, that the analogy between the two is not itself sufficient to establish this entailment.

How, then, might Moore justify the claim that democratic collective self-determination actually amounts to a promotion of individual autonomy? Three argumentative strategies seem to be available. The first involves referring, as Moore herself does, to the value of an individual's *having control* over the collective affairs of the people to which she belongs. The second involves a Rousseauian appeal to a specifically *democratic conception of individual positive freedom*. The third involves appealing to an *instrumental relation* between democracy and individual autonomy.

The first argumentative strategy appeals to the idea of individual control. We have seen that, according to Moore, '[i]f it is valuable for the individual to be in control of his or her own life, then it is also valuable to *have control as a member of a collective*' (p. 65, emphasis added). And again: 'It is morally important—

both important to individuals and morally valuable in an objective sense—that *individuals have control over the collective conditions* of their lives’ (p. 6, emphasis added). Democratic collective self-determination, then, would seem to be implied by the requirement that each and every individual be able to exercise this kind of control over the collective decisions that touch her interests.

It is not true, however, that there is *individual* control over the outcomes of democratic decisions. When the individual members vote in a democratic decision procedure, and the outcome of that decision is consequently carried out, the group *as a whole* is in control. By contrast, even where a single member votes with the majority rather than against it, that member’s degree of *control* over the outcome of the procedure is normally non-existent. It is the group itself, the group as an irreducible whole, and not the individual member, that exercises control in a democratic decision procedure. Andrew Altman and Christopher Wellman have argued this point at some length: ‘the individual does not choose laws; the group does’.<sup>14</sup> ‘Democratic rule is a matter of collective, not individual, self-determination’.<sup>15</sup> Indeed, when understood as a conceptual relation (not merely a causal one), individual and collective autonomy seem to be mutually exclusive: ‘[w]hen Alvin votes for a candidate in his country’s presidential election, for instance, he and his compatriots as a group make the decision, and his vote (in all but the most exceptional cases) is not decisive. When Alvin sells his house as an individual, on the other hand, then he determines the new owner, and his neighbors as a

<sup>14</sup> Andrew Altman and Christopher Heath Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009), p. 19.

<sup>15</sup> *Ibid.*, p. 26.



group, have no control over the matter.<sup>16</sup> Similarly, according to Allen Buchanan, as quoted by Altman and Wellman, ‘an individual can be self-governing only if he or she dictates political decisions. Far from constituting self-government for individuals, majority rule, under conditions in which each individual’s vote counts equally, excludes self-government for every individual’.<sup>17</sup> Moore does not appear to perceive this inherent conflict between control on the part of an individual and control on the part of the irreducibly collective whole of which she is a member.

A second argumentative strategy involves abandoning the claim that democratic procedures promote individual autonomy by promoting individual *control*. Instead, it says that democracy preserves or promotes individual autonomy by establishing and

<sup>16</sup> *Ibid.*, p. 19. To make the point even clearer, Altman and Wellman should have written: ‘*he and his neighbors as a group*, have no control over the matter’.

<sup>17</sup> Allen Buchanan, ‘Democracy and Secession’, in Margaret Moore (ed.), *National Self-Determination and Secession* (Oxford: Oxford University Press, 2001), pp. 17-18. Quoted in Altman and Wellman, *A Liberal Theory of International Justice*, p. 19. Altman and Wellman themselves claim that the irreducibly collective right of self-determination nevertheless justifies democracy at the constitutional level: ‘A free and fair referendum is required for constitutional choices because, in order to determine the group’s preferences [including preferences for or against democracy], a vote must be taken to discover what the collective as a whole wants to do’ (p. 29). I believe that this last claim falls foul of Altman and Wellman’s own arguments against confusing the collective right of self-determination with individual rights of equality or inclusion within a political community. Either that, or their position is based on the groundless assumption that democracy is the default when it comes to identifying a collective decision procedure for a given group considered ‘as a whole’. If ‘the collective as a whole’ is really an irreducible collective, then ‘what the collective as a whole wants to do’ needs to be decided through *some* kind of collective decision procedure, not necessarily one involving equal voting power for all. This point applies both to first-order decisions (legislation), second-order decisions (constitutional decisions about how to make decisions), or indeed to any yet higher-order collective decisions.

enacting a general will, so that when individuals conform to such a will they act in accordance with their *own* will. The individual does not *control* the general will, but *identifies with* the general will, which is arrived at through democratic decisions. As Rousseau famously put it, in the process of reaching such decisions each person submits to the will of everyone else and in that sense submits to the will of no one, and so remains *individually* free (*The Social Contract*, Book 1, ch. 6).

This is a highly controversial conception of individual positive freedom, for a number of reasons, of which the following two are particularly relevant in the present context. First, it is a highly idealized conception of individual freedom, depending as it does both on the existence of a general will that takes account of the interests of all the individual members of the collective and on each individual's identification with that general will. Thus, if territorial right is based on self-determination and self-determination on this kind of individual freedom, we seem to be no closer than the Lockean to justifying 'territorial right as we know it'. Second, the more feasible and less-than-ideal practices that such a vision of individual freedom has tended to inspire have involved the coercion of individuals in the name of their freedom, an implication that liberal critics have referred to as the 'paradox of positive freedom'.<sup>18</sup> I doubt that Moore thinks of individual autonomy in this way; but if she does, more needs to be said in defence of such a conception.

A third argumentative strategy in deriving the value of democratic collective self-determination from that of individual autonomy involves pointing to a purely *instrumental relation* between the two. The idea that democratic self-government is an effective means to safeguarding individual freedoms is familiar

<sup>18</sup> See again Berlin, *op. cit.*, and the subsequent literature on positive freedom.

and plausible, so this third strategy might look more plausible than the first two.

If we adopt this third strategy, however, our account of territorial rights will start to look more like a *functionalist* account. Not a *statist* functionalist account, to be sure, but a functionalist account nonetheless: the holder of territorial rights is that collective actor that is best able to carry out the function of safeguarding individuals' interests, including their interests in individual autonomy, a sense of identity, various relational goods, and so on. On this account, the value of democratic self-determination is justified by how well it allows for the performance of functions defined independently of it. According to my initial reconstruction of the debate between rival theories of territory, we were supposedly led to the self-determination account in the light of a dissatisfaction with functionalist accounts. The proper functions of government did not seem to be sufficient to justify territorial rights; it mattered, in itself, that those functions be carried out by the people whose interests they serve. If, however, collective self-determination is merely instrumentally valuable as a means to safeguarding various individual and relational goods, this stronger foundational role seems to fall out of the picture. The appeal to collective self-determination looks like one element of a broader functionalist theory, rather than a fundamental moral premise in a rival theory.

## VII

### Conclusion

I have raised some doubts about the connections Moore has made between individual autonomy, collective agency, and the value of collective self-determination. It is not clear that collective self-determination, on Moore's ostensibly value-individualist

account, can serve both to safeguard or promote individual autonomy, on the one hand, and to justify ‘territorial right as we know it’, on the other.

If we remove the appeal to the value of individual autonomy, what remains of the theory of territory based on the value of collective self-determination? The answer seems to be: a broadly communitarian justification of collective self-determination referring to the value of certain goods that are produced in, or by means of, various relations between individuals and groups and that can be properly managed only through collective control over a given territory. To repeat an earlier quote, but in truncated form: institutions of self-determination ‘give expression to the communities in which people live; they express people’s identities; and they are an important forum in which collective autonomy can be expressed’ (p. 64). None of these reasons for valuing collective self-determination presuppose either the value of individual autonomy or value-individualism more generally.

*University of Pavia*

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SYMPOSIUM  
PEOPLE AND TERRITORY



SELF-DETERMINATION  
AND TERRITORIAL RIGHTS

BY  
A. JOHN SIMMONS

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# Self-Determination and Territorial Rights

A. John Simmons

The principle of national self-determination clearly lies near the center of the last century's reasoning about the rights of states, both in the actual development of international legal standards and in the theorizing of philosophers and political and legal theorists. The *United Nations Charter* identifies the U.N.'s purpose partly in terms of securing self-determination for all peoples. The U.N. aims "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" (Chapter 1, Article 1, part 2). Similarly, the first article of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social, and Cultural Rights* reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." There is, of course, a widely recognized tension between peoples' legal rights of self-determination and the (even more firmly entrenched) legal rights of established states to maintain their territorial integrity (for instance, in the face of demands that they cede territory to internal or inter-state groups seeking independence).<sup>1</sup> And it is

<sup>1</sup> The principle of territorial integrity is widely acknowledged to have precedence over the principle of self-determination, resolving the tension in



widely acknowledged as well that international law is at best obscure on the question of precisely which kinds of groups count as the “peoples” that have these rights of self-determination (and whether [or when] non-state groups are supposed to be entitled under the principle of self-determination at most to “internal” self-determination or limited political autonomy).

Theorists of global justice and territorial rights, exploring the moral rights of nations, states, or peoples within the international order, have likewise identified a right of group self-determination as central to understanding groups’ moral standings; and they have tried in the process to resolve some of the tensions and ambiguities that appear to infect the legal principle of self-determination. Political philosophers have tailored their specific conceptions of group self-determination to fit their nationalist, Lockean, Kantian, or choice-based commitments, appearing to disagree more on the question of which groups possess rights of self-determination than on the question of what *follows* from that possession. For the most part, it seems, recent authors take the *content* of the principle of self-determination to be relatively transparent; and they have mostly found in the idea of national self-determination precisely those rights they are predisposed to believe that legitimate states possess. But this discovery typically proceeds with relatively little specific argument in support of the relevant inferences.

In the most recent systematic study of territorial rights, Margaret Moore’s *A Political Theory of Territory*, we find a defense of (what Moore calls) “a political self-determination theory of territory.”<sup>2</sup> A people’s territory, Moore argues, is the geographical

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favor of preserving the territorial status quo. But numerous real-world cases seem to defy that resolution.

<sup>2</sup> M. Moore, *A Political Theory of Territory* (Oxford University Press, 2015), 7. Subsequent references to this work will be in parentheses in the text.

domain where that people collectively exercise self-determination (p. 27). With territory so defined, it is not surprising that the idea of self-determination is required to shoulder much of the argumentative load in Moore's account of states' territorial rights. And Moore's theory again, I think, focuses more on the question of which kinds of groups qualify for rights of political self-determination than it does on precisely how the concept of self-determination necessitates groups' possession of specific territorial rights. It is on that latter issue that I want to focus here. While I do in fact have some concerns about whether Moore extends rights of self-determination to the correct groups (or to groups that distinguish her position from those of other recent theorists), I will be concerned here primarily with Moore's claims about the kinds of group territorial rights that can be derived from that group's right to self-determination.

According to Moore's theory of territory, a 'people' has rights to jurisdictional authority over the land on which its members reside if (a) the group occupies that land in a morally legitimate fashion, (b) a large majority of the group share a commitment to political self-determination,<sup>3</sup> (c) the group has the capacity to establish and sustain institutions of public self-determination, and (d) they possess an objective history of political cooperation together (pp. 35-6, p. 50). Like most nationalist theorists, Moore adds specific requirements of "attachment" to (portions of) groups' particular claimed land, attachments that involve the group's identification with the land, engagement in projects that use the land, or symbolic or religious value conferred on the land

<sup>3</sup> Which Moore understands as seeking either the institutional organization of a *state* or organization in some "less formal" way (which remains unspecified)(*ibid.*, 79). Moore does emphasize the typical need for (but not the necessity of?) "institutional mechanisms" to accomplish this (*ibid.*, 65).

(pp. 118-20).<sup>4</sup> Importantly, it is, according to Moore, the value of collective self-determination that establishes for qualifying peoples not only their rights to jurisdictional authority over their land, but also robust, property-like territorial rights to control the natural resources in those territories and to (within limits) exclude would-be immigrants (pp. 40, 162, 166, 175, 189, 195-6).

The importance of self-determination has also, of course, been cited in previous theories as crucial to the derivation of groups' territorial rights. And the groups identified (as entitled to self-determination) in Moore's theory obviously have much in common with the groups described by others. Functionalists (like Stilz<sup>5</sup>) and voluntarists (like Altman and Wellman<sup>6</sup>) have also stressed the need for groups' shared commitment to and capacity for political self-determination. Nationalists (like Miller<sup>7</sup>) have also emphasized groups' shared histories, collective identities, and solidarity, while even groups' histories of political cooperation in certain ways resembles a requirement (like Nine's) that they share a "common conception of justice".<sup>8</sup>

Moore distinguishes her position from those of nationalists like Miller chiefly by denying that the "shared political identity"

<sup>4</sup> These arguments, Moore contends, are sufficient to identify groups' "heartlands", but may not be able to precisely identify the boundaries of groups' territorial authority.

<sup>5</sup> Anna Stilz, "Nations, States, and Territory", *Ethics* 121 (2011), 572-601.

<sup>6</sup> Andrew Altman and C. H. Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009).

<sup>7</sup> David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007).

<sup>8</sup> Cara Nine, *Global Justice and Territory* (Oxford University Press, 2012), 3, 45-7. The "common conception of justice" requirement is Nine's (broadly Rawlsian) way of understanding the unique identity of a particular unified people with "common sympathies", but doing so without any appeal to national or cultural qualities.

required (on her account) for a group to count as a “people” needs to involve a shared national *culture* (p. 71, pp. 79-80). She distinguishes her position from Altman and Wellman’s brand of voluntarism by arguing that voting patterns are insufficient to indicate a shared political commitment, instead of which she insists on a shared past history of political cooperation (p. 69 fn 25, fn 30). And Moore insists, against functionalists like Stilz, that groups that qualify for jurisdictional authority over a territory need not actually be *states* (pp. 71, 96-7, 106-7).

But (on the first point) it seems very likely (though it is not, of course, necessary) that most (if not all) of the groups that satisfy Moore’s conditions for territorial rightholding will *also* share a culture, at least to the extent that such sharing is required by most (cultural) nationalist theorists. And (on the second point) Moore’s groups are still identified in majoritarian terms (like Altman and Wellman’s—so nothing like *unanimity* of purpose is required); and the requirement of a shared political history seems mostly just to be an empirical indicator of likely future success in political endeavors (p. 52) and so to be just another way of determining the group’s *capacity* for self-determination. Indeed, it seems clear as well that most (if not all) of the groups that Moore’s account selects for self-determination will also be states (on some reasonable, commonsense view of what counts as a “state”). So in the end it is not apparent to what extent (if any) the groups Moore’s theory picks out for rights of self-determination will *in practice* differ much from those picked out by others who have written on this subject.

That, of course, is not to argue that Moore’s view is mistaken. It may simply be the case that these theories all converge to correctly pick out roughly the same set of real-world groups as entitled to jurisdictional authority and territorial self-determination. What is less satisfactory—in Moore’s account as in

the others I have mentioned—is that nations' (states', groups') broad, over-arching rights of self-determination seem mostly to be discussed as if we not only know and agree on what it *means* to be self-determining but know and agree about which more specific rights are *implied* by the right of self-determination. In fact, neither of these subjects seems to me to have been satisfactorily resolved (or even very carefully addressed) in the existing theoretical literature.

We are not helped much, of course, by examining more carefully the references to self-determination in international covenants and declarations. We know from those sources that groups' rights of self-determination include the rights "to freely determine their political status and freely pursue their economic, social and cultural development". But what exactly does any of that mean? Is it only forcible imposition by outsiders that violates such rights to freedom? Most groups' "cultural development" is regularly and inevitably affected, often profoundly, by a wide array of (non-coercive) outside influences. Do such limits to domestic "free determination" violate groups' rights of self-determination? Most groups' economic development is limited and shaped by the geography and the human and natural resources in their territories, by the nature of foreign markets, by others' trade arrangements, by war or famine in their own or in nearby nations, etc. And groups' decisions about how to structure their legal and political institutions are routinely responsive to foreign influences, pressures, or examples. When, exactly, do these kinds of limits on groups' free "determinations and pursuits" count as violations of groups' rights? International law provides little apparent guidance in answering such questions, being largely concerned with prohibiting more obvious and uncontroversial forcible violations.

The precise content of the right of self-determination might plausibly be thought to be best approached not by trying to analyze the various existing conventions and covenants, but rather by discussing that right's moral foundation or grounding. The nature and importance of national or group self-determination is often, for instance, discussed by analogy with the importance of personal *autonomy*. The ideal of *collective* autonomy is what is taken to undergird or justify group rights of self-determination, and the value of collective autonomy is modelled on the value of personal autonomy. In this spirit Moore argues that “the reason why collective autonomy is valuable mirrors some of the considerations or arguments underlying the value of personal autonomy” (p. 65). Personal autonomy, as this is ordinarily understood, requires (internally) that we be guided by reasons and values that are our own, that we can on reflection endorse or affirm. When this is the case not only are our lives not simply directed or controlled by others, they are guided in some acceptable measure by our own authentic selves.

Further, true personal autonomy requires (externally) that persons have an adequate range of real options from which to choose. We cannot (at least normally) freely choose our life's course unless we confront some reasonable menu of life options.<sup>9</sup> So personal autonomy has both internal and external requirements; only when both are satisfied will a person count as the “author” of her choices and her life. Living our personal lives in a way that is “authentic” and uncontrolled—in a way that adequately tracks our own values or own aims in life—does seem

<sup>9</sup> Jeremy Waldron defends the view that while these options, in order to be meaningful, need to involve *culturally* defined goods, they do not need to be drawn from any *particular* culture (as opposed to coming from some multicultural “menu”). J. Waldron, “Two Conceptions of Self-Determination”, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law*, (Oxford University Press, 2010), pp. 402-3.

undeniably important, perhaps even essential, to really *living* our lives (rather than merely being a part of something governed by alien forces), and so it appears to indeed have great value. *Collective* autonomy, then, along with the right of national self-determination that is said to follow from it, appears by analogy to be a similarly important value, since it allows a group's decisions, laws, and policies to express the true values and commitments of the group, to guide the group in a fashion adequately free from external control. The people are then the joint authors of their shared lives.

The analogy between (the values of) personal and collective autonomy begins to look inapt, though, the moment we try to use it to illuminate the rights of real-world territorial groups. While persons are often sufficiently unified that their choices can be said to genuinely reflect their true, considered values and commitments, modern nations (and other groups that are in any part territorially-defined) are almost never so unified. There is nothing even approaching unanimity of values or commitments in any existing (territorially-specified) group, each substantial territory containing significant dissenting minority individuals and groups within the specified territorial boundaries. Cultural, ideological, and economic divisions are routine within any geographical region that might qualify as a "people's" territory. What, for instance, is the "true self" of Turkey or Israel or Spain or Pakistan (the list of such cases, of course, can be extended almost indefinitely)? This simple fact of national/group heterogeneity by itself means that the purported value of collective self-determination rests on something more like the value of "autonomy" for a schizophrenic or deeply ambivalent person than like the value of autonomy for a self-guided person in touch with her true self. It is, of course, not only far less clear what counts as autonomy in such schizophrenic cases, but far less clear that anything that *does* count has great value—let alone the

kind of *overriding* value that could ground fundamental group rights.

One feature of the analogy between personal autonomy and national self-determination, however, is illuminating despite the analogy's obvious limits. Personal autonomy, like national self-determination, is plainly a matter of degree, with at best a very thick gray line dividing acceptable (or valuable or adequate) from unacceptable (or inadequate) levels of either. The degree of my personal autonomy is plainly limited by such simple things as natural and social facts about the world (e.g., the career choice of "blacksmith" is largely closed to me), by the choices of others (e.g., the woman whose affections I am bent on winning chooses to marry another), and by the peculiarities of my own, non-pathological desires and values (e.g., my modest compulsiveness makes only relatively orderly relationships and lifestyles eligible options for me). Am I (or is my life), as a result, unautonomous?

Any autonomy in evidence is certainly not *perfect* autonomy. But personal autonomy plainly need not be perfect in order to have the value normally ascribed to it; a reasonable or satisfactory autonomy still has obvious value. As Moore rightly maintains, there is a difference between loss of autonomy and a mere "reduction in one's opportunity sets". "There are many opportunities that we don't have and yet we still live autonomous lives" (p. 144). Autonomy requires a range of valuable options, she says, but not "maximal scope for choice or maximal options" (p. 205). And the same seems clearly true of collective autonomy. That my group's autonomy is limited in familiar, undramatic ways—by outside cultural influences, by our own limited resources or the state of the world economy, by non-coercive political pressure—does not appear to undermine claims to (or the value of) collective autonomy.



But if collective autonomy, like personal autonomy, still has great value even when limited in such ways, then the right of group self-determination that is based on the value of collective autonomy may also be a correspondingly weak or interestingly limited right. Nations may be entitled to be self-determining (just as persons have a right to freedom from interference by others), and so they may (both) be entitled to pursue policies that others regard as unwise or even bad. But a national right to self-determination (like a personal right to freedom) does not include any right to *wrong* others in the process of determining the self. We know that a group's appeal to its right of self-determination cannot suffice to justify the group's violating the human rights of its members or outsiders, or its violating the autonomy of other groups. As Moore says, appeals to self-determination do not "show that people are entitled to do anything they please to give effect to their control over places—for example, they cannot violate human rights in the process" (pp. 195-6).

And if the right of self-determination is limited in that way by the weight of strong competing moral considerations, there is no reason in principle why other kinds of moral limits on self-determination might not also be justified. Moore in fact mentions another kind of limit of this sort: peoples' rights of self-determination must be understood as "consistent with" their discharging their duty of global redistribution, their duty to (help) insure the satisfaction of every person's right to a "basic minimum" (p. 174, p. 182). But once Moore in this way acknowledges some of the plausible moral limits to peoples' rights of self-determination, her remaining arguments, the arguments intended to support other kinds of strong territorial rights for peoples, begin to look vulnerable as well.

Moore, remember, argues that it is the value of collective self-determination that "generates" both the right of a people to

territorial jurisdictional authority and their right to control the natural resources within that territory (p. 162, p. 175). Her central argument for groups' resource rights is that they are required for a group to be self-determining, since the rules in a territory that govern the extraction and use of resources "impinge on many different aspects of the collective life of the community" (p. 166). While Moore argues from the value of self-determination only to "a limited and defeasible right to control the rules governing the acquisition, transfer, and use of natural resources" (rather than "a right to the full stream of benefit from the resource") (p. 174), she does maintain that "if people lack this kind of control, then, to that extent they lack robust forms of self-determination" (p. 175).

That same kind of self-determination argument, Moore says, also justifies for states "a pro tanto, qualified right to exclude immigrants" (p. 189). "Jurisdictional authority is a mechanism by which members of political communities implement and maintain their own conception of how they want to organize their society, and so it is a necessary condition for exercising the right of self-determination" (p. 196). And, Moore argues, "there are good reasons why a collectively self-determining group, which has significant forms of control over the conditions of their existence, would seek to have control over who and how many enter their community" (p. 196). Groups naturally try to "prevent unwanted changes in their environment" and to preserve the "character of their community" (pp. 195-6). "If members of the group collectively lack this power," Moore claims, "they also lack the ability to exercise robust forms of self-determination" (p. 197).

I find puzzling the appeals in these arguments to what is required for "robust forms" of self-determination. Do qualifying groups actually have a right to "robust" self-determination, or will lesser degrees of self-determination satisfy their rights? And what exactly is it that makes a group "robustly" self-determining? Is the

idea supposed to be that “robust” self-determination has “the most” value, while lesser degrees have less value? Or is robust self-determination the only kind of “real” self-determination, the only kind that has value (or that has value sufficient to ground a collective right to it)? The fact, noted above (and confirmed by Moore’s arguments) that there are *degrees* of personal autonomy, all of which are valuable and few of which are perfect, strongly suggests that the same is true of collective autonomy. In that case, though, while preserving “robust” self-determination for groups (however “robust” is ultimately defined) might require that those groups have the kinds of territorial rights Moore describes, simply *adequately* respecting groups’ self-determination may not.

And on the face of it, it is hard to see why just any kinds of externally (say, internationally) imposed limits on states’ rights to govern their resources or to exclude would-be immigrants would necessarily reduce states to inadequately self-determining entities or to entities that no longer count as self-determining in important and valuable ways. Can we not respect an autonomous state’s right to be self-determining without also permitting it to simply choose as it pleases in the matter of excluding aliens or controlling resources? Can’t it count as self-determining in virtue of its having independently constituted itself as a political entity, combined with the self-governing practices of its members, practices operating independent of outside interference—without also needing, say, to have that membership itself determined solely in accordance with its own will? So our question(s) here should be: can states or nations or peoples be acceptably or adequately self-determining *without* holding property-like territorial rights over all resources in their territories and *without* holding property-like discretionary territorial rights to exclude aliens? I can myself see no very good reasons to support a negative answer to that question. But worse, it is difficult to see

why we should expect any *clear* answer at all to flow merely from gesturing to the value of group self-determination.

Moore's arguments for a "robust" right of group self-determination—and consequently for relatively "robust" territorial rights for those groups—are forced to rely centrally on simple facts about what those groups might identify as "unwanted changes" to their communities and to what would or would not be consistent with the groups' "conception of how they want to organize their society". But surely our respecting groups' desires in such matters seems no more essential to their societal lives being (acceptably) collectively autonomous than respecting my desires not to be precluded from being a blacksmith or from marrying the woman I most desire seems essential to my life being (acceptably) personally autonomous. Why, after all, should we suppose that groups have a moral right to simply legislate their tastes and preferences in these ways, especially when their doing so has obvious and possibly severe consequences for outsiders? Not, I think, because they would fail to count as having a real or adequate right to be self-determining if they did not. If affluent nations were required to accept some reasonable quota of unwanted immigrants or to permit some outside control over how they dealt with some of their resources, it would seem a bit hysterical to assert that they, as a result, no longer really counted as self-determining polities or that the self-determination they continued to exercise had no real value.

We surely enjoy no general moral right as individuals simply to be free of unwanted changes. And we should be similarly skeptical about the claim that groups have a right to use their jurisdictional authority over a territory to protect themselves from such change. Simply appealing to the facts that my collective *wants* to maximize its wealth, *wants* to keep other groups from using or profiting from what is closer to us, or *wants* to exclude immigrants

seems to give us little reason to think that a basic group *right* is at issue. The (slightly romanticized) image most of us have of exotic or aboriginal lifestyles, destroyed by outside influences, tends, I think, to mislead us here. It is undoubtedly true that many “unwanted changes” forced on the lifestyles of groups like the Lakota, the Maori, the Inuit, or the Bedouin had profound and enduring negative impacts on the quality of life of group members. The internationalization of trade and communication, however, have resulted in contemporary peoples enjoying lifestyles that are far less distinctive and vulnerable; they overlap significantly with the lifestyles of other groups and are far less fragile in the face of change. Such groups’ having to accept some unwanted changes to their lifestyles—say, because of policies (governing in some ways their control over immigration or resources) that are not self-chosen—may make these peoples less happy or less fully free to control their environments than they might otherwise be. But their collective lives are unlikely to be ruined, and their senses of being genuinely self-determining are unlikely to be permanently undermined, so long as such external influences or control remain relatively limited. Where genuinely harmful change is at issue, we have one kind of moral concern; where merely unwanted change is at issue, we have quite another. Precisely *where* the limits on what counts as “real” self-determination need to be set is certainly not clear or obvious. But I think Moore has given us little reason to agree with her that they must be set in exactly the places she has identified.

Drawing on the analogy between personal and collective autonomy (and the rights to or reasons for valuing each) thus does not appear to generate even a clear outline of the nature of a moral right to group self-determination, let alone to explain what more specific territorial rights are derivable from it. The analogy is, in short, an unhelpful analogy to employ in an effort to justify the kinds of territorial rights that modern states claim. A better

comparison for these purposes, I think, is the comparison between the territorial authority claimed by states and the property rights claimed by individuals and groups. This, of course, is one of the approaches to territorial rights that Moore rejects early on (in Chapter 2 of her book). But I think this (broadly Lockean) approach deserves a better hearing than it gets there.<sup>10</sup>

*University of Virginia*

<sup>10</sup> For an extended defense of the Lockean, property-based justification of states' territorial rights, see my *Boundaries of Authority* (Oxford University Press, forthcoming).

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SYMPOSIUM  
PEOPLE AND TERRITORY



TERRITORIAL JURISDICTION  
AS AN INTERNATIONALLY  
RECOGNIZED RIGHT

BY  
KOK-CHOR TAN





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# Territorial Jurisdiction as An Internationally Recognized Right\*

Kok-Chor Tan

## I

### Two Aspects of Territorial Rights

**M**argaret Moore's *A Political Theory of Territory* offers a novel and systematic account of territorial rights.<sup>1</sup> A theory of territorial rights aims to explain and justify the conditions under which states enjoy rightful jurisdictional authority over a *particular* bounded geographical space. Territorial jurisdictional authority includes the legitimate authority of a state to make and enforce laws against individuals within its bounded space. Why should a state, or any entity for that matter, have this coercive power over persons within a geographical area? Why *that* particular state and not another? This right also includes the right of exclusion in at least two respects. In one, it grants the state the right to regulate the entry of outsiders into the state. In another respect, and more fundamentally, territorial rights also grant states an exclusive title over the particular territory they have jurisdictional authority over. That is, it gives states a claim-right over a tract of space and not a mere possession that other states are entitled to challenge. Rather, this territorial right of states is

\* I thank Pierce Randall for helpful discussion of this topic.

<sup>1</sup> Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press 2015). References to this work will henceforth be noted in parenthesis in the text.

one that all other states and agents in the world are expected to respect and honor.<sup>2</sup> This last point raises the question as to what morally transforms a specific territorial possession on some natural part of the earth's surface into an internationally recognized territorial right.

The above questions identify two distinct aspects or questions of territorial rights. What we might call the *domestic question* is concerned with how a state can come to have jurisdictional authority over a specific space and over persons living within it. What we may call the *international question* is concerned with why outsiders must respect a state's territorial claim over a particular tract of space. These are of course related dimensions of territorial rights. But nonetheless there are distinct questions in that what counts as a satisfactory response to the domestic aspect may not work at all for the international question. For instance, suppose one endorses a social contract theory that explains the right of the state over its individual subjects by reference to the voluntary consent of individuals subject to power. This can very well solve the internal question—the state's authority comes about because individuals in that state grant it that authority. But this consent says nothing about why other states have to respect its territorial possession. We may have to invoke another social contract account, this time at the global level. This move might well succeed. But the point is that something more has to be said—the domestic justification alone does not suffice. Indeed, one might even say that if the domestic question is to be properly addressed, one has to presume some resolution of the international question. At any rate, these are two distinct

<sup>2</sup> Secessionist demands are demands against jurisdictional authority from within. But the form of the challenge is similar to that of outside annexation threats: both are challenges to a state's claim of exclusive jurisdictional right over a given bounded space.

problems that a complete theory of territorial rights must resolve coherently.

Moore certainly deals with these aspects of territorial rights in her work. But in distinguishing these two dimensions more vividly, we can gain a better grip on the overall strengths and weakness of the contending theories of territorial rights including Moore's. With Moore's work as a springboard, I will explore the challenges the international question poses for theories of territorial rights.

To clarify, the international question I will be focusing on is not that of immigration, but the state's exclusive title over a physical region. While immigration restrictions and exclusive territorial possession are related issues, the difference is significant. One could, for example, argue against open immigration by appealing to the right of the citizens of a country not to associate with persons they don't wish to. Whether or not this argument holds as a counter to open borders ultimately, it says nothing about exclusive territorial possession. Outsiders may have no wish to gain membership in an existing state jurisdiction, but want, rather, to claim a part of that state's territory for themselves in order to set up their own political association and authority therein. What gives any state the default moral standing to block such demands?

## II

### **Justifying International Territorial Right**

I begin with some general remarks on some common approaches to territorial rights to see how each can deal with the international question. The three main approaches of territorial rights may be labeled the voluntarist, culturalist, and functionalist

approaches.<sup>3</sup> Voluntarists hold that the state has territorial jurisdictional authority because of the voluntary consent of those who are subject to it. This was the (contract) example I alluded to above. The culturalist approach says that states have jurisdictional authority because of a historically based cultural tie to a specific territory. The functionalist approach holds that a state has authority because the state realizes justice for its citizens. The creating of rightful conditions for the realization of justice is the state's basic function, and it's a function that it can serve only by maintaining the authority to make and enforce laws within its domain.

There is a growing number of works discussing the merits and demerits of each of these approaches and Moore herself very helpfully engages in that discussion. I will not recount in detail Moore's considerations for the moment. Rather, I will point out that two of these approaches, in their basic form, elide the international aspect of territorial rights altogether. The third makes connection with this question, but its solution is only provisional and will require a more basic solution in the end.

First, the voluntarist approach, focusing as it does on the consent of subjects to their state, by passes the international aspect of the question completely. Why should the fact that there is an agreement or contract between two parties bind third

<sup>3</sup> I draw in a very general way from some recent writings. In addition to Moore, see in particular A. John Simmons, "Territorial Rights: Justificatory Strategies," *Oxford Studies in Political Philosophy*, David Sobel et al (eds.) (Oxford: Oxford University Press, 2015). The categories above follow very closely Simmons. Also Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012); Avery Kolers, *Land, Conflict and Justice: a political theory of territory* (Cambridge: Cambridge University Press, 2009), and Anna Stilz, "Occupancy Right and the Wrong of Removal", *Philosophy And Public Affairs* 41/4 (2013): 324-356; and Lea Ypi, "A Permissive Theory of Territorial Rights", *The European Journal of Philosophy* 22/2 (2014): 288-312.

parties? Person A may have agreed to let B rule over her and exercise jurisdictional right over an agreed upon bounded area. But why should other parties be kept out geographically? What is to stop C from making the same deal with D within the same bounded space? Voluntarism, in as far as it is limited to justifying a political jurisdictional authority over those subject to it, says nothing about the obligation of parties outside this relationship to respect that authority's claim right to a territory.

The functionalist approach similarly does not connect with the international question. Even if it is true that the state has jurisdictional authority over individual subjects in light of the state's function to affect justice for them, why should this be of any concern to outsiders? Why can't another society, with its own state, make the same claim concerning the same piece of territory? The functionalist might respond here that this interference will undermine the original state's ability to deliver justice within its domain, and so, for this reason, outsiders have to honor its territorial possession. Yet, if this is the only consideration in favor of an internationally acknowledged territorial right, it is far from satisfactory. It does not explain why, say, the state of Australia, could not be reduced in size considerably, with portions of it parceled out to other peoples to form their own jurisdictional territories. It is not implausible, after all, to believe that an Australia that is half as big can just as effectively realize justice for Australians.<sup>4</sup> One could presumably make the same argument for Canada and even the United States.<sup>5</sup> That is, to simply say that a state has legitimate authority over its

<sup>4</sup> There might be other reasons against doing this, for example, related to the rights of indigenous Australians to what might seem unclaimed land. But this move abandons the functionalist approach for a culturalist one. See below.

<sup>5</sup> Why would the US government's ability to promote justice for Americans be affected significantly if, say, parts of Yellowstone National Park were given away to another people (at least before it was incorporated as a National Park)?

subjects within a given space because it delivers justice for them does not suffice to show why that state (and its people) is entitled to an internationally recognized exclusive right over its territory as demarcated. Why should outsiders be morally prevented from taking some of this space to create their own justice promoting associations where their doing so does not compromise any state's ability to secure justice for its members?

Functionalists can try to block off such objections by appealing to the rights or interests of individuals that stand to be violated if they cannot, through their respective states, enjoy exclusive territorial rights. It is, after all, the protection and realization of individual rights or interests that motivates the functional view of the state in the first place. I will return to some of these remarks below. The point for now is that in as far as functionalism is designed to explain and justify the relationship between the state and its subject within a bounded space, it does not address the obligation of outsiders to respect *that bounded space*. More must be said that goes beyond the functionalist position.

The culturalists do better, in my view, on this score. A historical cultural connection to a given space or land is invoked to justify why it is *this* group, and not another, that has the right to establish a juridical authority in this *particular* region. The approach assumes, thus, that culture and history have moral significance, and hence a group's demonstrable cultural and historical relationship to a particular space, all things equal, can create obligations on others to respect its territorial claims. No doubt the cultural argument can be contested, but the form of argument is not an implausible one. Unlike the above two



approaches, the culturalist approach at least engages with the international question.<sup>6</sup>

However, as I will discuss below, the culturalist approach does not in the end succeed as a solution to the international question. A complete theory of territorial rights, one that can cover both the domestic and international questions, will have to take a different form from the standard approaches, so I will suggest.

### III

#### States, Nations and Peoples

Let me locate Moore's own position in relation to the above considerations. Moore's main opponents are the "nationalists", on the one side, and the functionalists whom she labels "statists", on the other. She calls the functionalist approach a statist position because it defends territorial rights by reference to the *state's* moral purpose of realizing and preserving justice for its members. One of Moore's key objections to statism is that it cannot address "the attachment problem" (p. 97), that is, the question why the state has to realize justice in this particular locale and not somewhere else or under some other territorial configuration. After all, when states make territorial demands they are not just saying that they need somewhere, anywhere, to create the conditions of justice. Typically they are claiming jurisdictional authority and possession over a particular marked-out region or

<sup>6</sup> Whereas the first two approaches are designed to account for the domestic question, are silent with respect to the international question, the culturalist approach engages the international question but seems weak as a solution to the domestic problem. For even if it is accepted that a state has an internationally recognized right to a tract of land in virtue of its historical cultural ties, this does not explain why individuals in the community have any obligation to obey that state's authority.

space that is of some historical and cultural importance to them. A state's claimed territory is not a mere platform from which it hopes to deliver justice for its members. Rather it something that is also intrinsically valued; it constitutes in most cases it what means for a state to affect justice for its members.

Thus, statism cannot explain why a "historic community", that was unjustly displaced and relocated in the distant past, but is now able to realize justice for its members where it is presently situated, can have a pro tanto right of repatriation (to its historic territory). Or, to recall an earlier example, it cannot explain why Australia should have an entitlement over the entirety of its vast political territory when it can just as well affect justice for Australians in a much smaller Australia. A statist might be prepared to bite the bullet and renounce that there is a pro tanto right of return in the above sense, or that Australia enjoys any default claim right over its territory. But this is not what most functionalists would want; at least not with regard to the Australia example. On this last point, most would hold that the present boundaries of states provide the morally acceptable baseline for understanding a state's territorial entitlements. The point is not that no existing boundaries can be challenged; of course they can, and in the real world they occasionally are. The point is that the status quo, where state territorial boundaries now lie, serves as the default from which departures have to be argued for and justified.

A statist might say that when a state's territorial jurisdiction is violated by outsiders, even when this does not significantly compromise the ability of that state to realize justice for its individual members, this offends against the rights of its individual members. The problem here, however, is to show there must necessarily be individual rights violation whenever a state's territorial claim is not honored. Suppose that some newly formed political association wishes to establish a new state and

jurisdictional authority on some untouched interior region of Australia. Whose individual rights are being violated when this tract of land is surrendered to this new state? It is no good to suggest that the rights of some individual Australians who might want later to stake out and claim this space are being violated, for this begs the question by presuming that individual Australians have a moral entitlement to this land. Why should they have this moral expectation in the first place?

A defensible theory of territory will thus have to say something about the significance of a political society's relationship to a land. Here the *nationalist* theory seems more promising since it introduces the notion of a historical connection to a land. But Moore rejects the ethno-national interpretation of culture that she finds in the main nationalist theories as too exclusionary. She opts instead to focus on the socio-political notion of culture. Instead of nations, Moore prefers the concept of "a people". A people consists of individuals who see themselves to constitute a distinct collective that is engaged in a common political project; who have the capacity to maintain political institutions through which they can exercise collective self-determination; and who have a shared political history (e.g., p. 50). A people is a collective with a distinctive political identity. This political identity of a people is what provides the missing link between claims of justice and an attachment to a particular piece of territory.

Nonetheless, with regard to my above categories, Moore's position, like the nationalist theory, can be described as a culturalist theory. The political identity of a people—centered around its common political projects and commitments, public institutions and practices, and a shared history and its relationship

to a land—can be called its *political culture*.<sup>7</sup> In this regard, the dispute between Moore and the nationalist is an internal one, that is, a disagreement over what the morally relevant cultural feature ought to be. To situate Moore's position with reference to my framework, we can say that Moore rejects the functionalist approach altogether on the one side, but accepts the culturalist approach although she offers a specific interpretation of the culturalist approach in contrast to nationalist interpretations. She rejects, to repeat, the significance of an ethno-national culture, preferring instead the ethnically neutral notion of a political culture. The advantage of Moore's theory then, unlike the statist, is that it at least says something about the international aspect of territorial rights. The question, however, is whether the culturalist approach can fully succeed.

#### IV

### **Territorial Right as an International Right**

Let us consider what could make a territorial possession or claim an internationally recognized right. To be sure, a territory is not identical to private property (a matter Moore rightly reminds us several times in her book). Rather, territorial jurisdiction is something that is more basic in that it establishes the parameters and terms for private property rights. That is, it establishes the state and its legal boundaries within which the terms of private ownership can be legally specified and enforced. Still, a territorial right is not a mere possession from which others (e.g., other states) are to be kept out by force only. It is a claim-right, a claim

<sup>7</sup> This is not a terminological quibble. Substantively, what the culturalist approach seeks to do is to connect a society with a particular territory by reference to *how* that society identifies with it. National culture is one way this identification is made. So is what Moore calls "political identity".

that others, all things equal, have an obligation to respect. In this regard, it is not inappropriate to treat territorial right as a form of property claim, that is, as an exclusive but rightful claim over some particular space. Accordingly, it will help to see if the traditional theories of property rights can shed some light on this.

Let's consider in turn, a Lockean *natural rights* argument, the argument from *history and culture* (the culturalist approach, including Moore's), and a broadly *Kantian* argument, that we may call the international conventionalism argument.

The Lockean argument can proceed in different ways. But one way the argument cannot work is by treating territorial right as the sum of the property claims of its individual members. A state territory encompasses more than what its individuals own. It has public lands and other unclaimed spaces within its territorial jurisdiction. A Lockean theory of acquisition that remains individualistic cannot account for these. It will merely result in a state with a territory blotched with tracts of free unclaimed spaces that are up for grabs internationally.

A more plausible move is to give the Lockean argument a "collectivist" twist. That is, one could argue that it is the state as a whole that is doing the initial acquisition, and hence the state as the acquiring agent can come to own more than just the sum of individual ownership. But this collective turn risks making a mess of Locke's theory of acquisition. It will allow, for example, a small band of individuals to constitute themselves as a state, and then lay claim, through their state, to a geographical space of immense size, say the size of Australia, beyond what they as individuals altogether can possibly add their labor to and make valuable. This stands in violation of Locke's own account, unless we want to say implausibly that Locke would agree that merely fencing in a large piece of land qualifies as mixing one's labor with, and giving value to, everything within the fenced area.

But the most basic problem with extending Locke's theory to territorial rights is that it accentuates a fundamental problem commonly associated with Locke's account of property right. The problem is that of reasonable disagreements with respect to the terms of just acquisition. This is distinct from the problem of rights enforcement that Locke is well aware of and which, of course motivated, under his social contract theory, the formation of the state. The problem here is not just that of enforcement of a right that is clearly established, but the difficulty of even establishing that there is a right. For one, Locke's theory of just acquisition, along with its limiting conditions, albeit plausible, is reasonably contestable. And even if the theory itself is accepted, its application in the real world will be fraught with issues of competing interpretations and disputes over applicability. Has a particular state, even if we grant it the status of a Lockean acquiring agent, satisfy the Lockean conditions in its initial acquisition of leaving behind enough and as good for others? Was the land it appropriated really unclaimed and left in nature? If Locke's theory of acquisition is all we have to go on by way of defending territorial rights, the United States and Canada, to name just two countries, will not have any definitive territorial rights.

The problem of contestability is what ultimately unravels the argument from culture and history as well. To recall, the culturalist approach offers an account of "attachment" by reference to history and culture. The problem with this approach is not that cultural claims and historical arguments carry no moral weight—in fact, I would claim that it would be implausible to deny that they did. The problem is that of contestability and genuinely irresolvable competing cultural claims over particular territory. Again, examples are easy to come up with: who has the stronger historical claim to North America? The present jurisdictional authorities, or the various indigenous peoples,

whom the European forerunners of the present juridical authorities displaced? Appeals to history and culture cannot fully justify state jurisdiction in most cases, and rarely can they settle on going international disputes, such as the quarrel between China and other South East Asian countries over the island chains of the Paracels and Spratlys in the South China Sea. Here, one country's account of history is another's fabrication. Moore's reference to political identity does not avoid the problem of contestation any more than nationalist approaches. Whose interpretation of political identity? And what if there are competing claims of political identifications over the same land?

Indeed, the problem of reasonable disagreement about ownership in the state of nature is what prompts Kant's own approach to property rights, and this seems more promising as a basis for territorial rights. A Kantian inspired approach to territorial rights seems more promising then. Given the problem of disagreement over competing ownership claims in the absence of background public rules, Kant says that a claim of possession can at most be a provisional right whilst we remain in a pre-institutional or lawless state. An item that I have acquired in nature and am holding it in my hand physically might be universally consented as rightfully mine. (This is already assuming away potential disagreement over what counts as proper acquisition). But what happens if I were to leave it unattended for a moment? Or if I strayed some physical distance from the object? For Kant, unless there are some publicly known rules specifying who can come to own what, under which conditions, property rights can remain only provisional, subject to reasonable competing interpretation and dissent. So, the solution is the formation of a state that makes and enforces property laws that are knowable and accessible to all. In a sense, a certain established and accepted convention is that which makes a mere possession into rightful ownership.

The basic idea that there has to be a certain background system of rules or convention before possession can become a right-based claim that others must respect provides an answer to the international question. What grounds the right of a state to its current territory is the fact of an international legal convention that all states as a matter of general practice endorse. Even if we invoke some Lockean theory of acquisition to explain the territorial right of states (perhaps this argument can go some way but not all the way for the reasons noted above), at best any possession over territory remains provisional, contestable, and not based on right that other must respect. What grounds territorial rights, what turns any provisional right a state might come to have over its land into a definitive international right, is the fact of an international legal convention that sanctions this right.<sup>8</sup>

In sum, the reason why states are normally entitled to their established territories, at the end of the day, is not because they have some natural (Lockean) right of possession over their space, or that they have some independently verifiable and indisputable cultural historical attachment (ala Moore) to that space. It is rather simply an accepted fact of international relations and practice as given by the norms and conventions of international law. Following Michael Walzer, from a different context, we might well call the “legalist paradigm” theory of territorial rights.<sup>9</sup> But for a more ecumenical label let me for now refer to it as the “conventionalism argument”.

The presumption of an international normative order has implications for how we should think about global justice. For one, it suggests that there is a background global structure that

<sup>8</sup> For a well-developed account of a Kantian approach to international territorial rights, as I see it, see Ypi, op cit 3.

<sup>9</sup> Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), p. 61.



can be subject to the regulative requirements of justice. The difference between the domestic order and the international order, a difference that appears profound to some critics of global egalitarian justice, is reduced to a difference in degree rather than in kind. There is a basic structure in the global domain as in the domestic domain, and hence principles of justice *for institutions* are just as applicable in the global context.

This account of global justice can be described as cosmopolitan. But it is important not to misinterpret the implication of cosmopolitanism. Some worry that cosmopolitanism means that territories, sovereignty and ownership of natural resources have no significance and that thus a world governed by cosmopolitan principles would be a world without political borders, a fantasy world at best. But this is a false inference. Kant does not think that domestic state coercion has to be eliminated just because it restricts personal autonomy. Rather, for Kant, even though autonomy is a bedrock value, state coercion is nonetheless a moral necessity. The task is not to remove state coercion and bounded political authority but to try to resolve the paradox that the necessity of state coercion presents. The solution is to make it such that the coercive institutions are those institutions that nonetheless people can agree to. Likewise, cosmopolitanism does not mean the end of state sovereignty, ownership of resources and territorial rights. After all, as Kant notes, there must be some recognition of state territorial rights if rightful conditions within states are to be realized at all. The challenge then is not to get rid of states and territorial rights but to examine how an international system that grounds and authorizes these rights can be consistent with individual autonomy. That is, how and on what basis should the international order be structured in order for this paradox of coercion to be resolved? In short, borders and territorial claims can remain in place: the question is under what international

background conditions? So, contra Moore, it is not true that cosmopolitanism fails to take state, borders and territory seriously (p. 179). What cosmopolitanism does is to specify *the background conditions* for taking states, borders and territories seriously. One possible response, though this is not the place to argue for it here, is that states can enjoy territorial rights (and they must out of moral necessity) on the condition that the international order that grants this right takes global distributive justice seriously.

In short, of the three possible arguments for an international territorial right discussed above, namely the natural right argument (Lockean), the argument from history and culture (the culturalist), the conventionalist argument (e.g., Kantian), the last seems most compelling to me. Functionalists are typically Kantian conventionalists.<sup>10</sup> That is, they hold that the state is a necessary means by which justice is secured for individuals precisely because the various individual rights, including property rights, remain underspecified and indeterminate in a stateless condition. But to be truer to their Kantian pedigree, the functionalists should also (following Kant himself) extend this reasoning to the international domain, and explain international territorial rights in the same form, as rights that must be constituted by an international public system of rules.

## V

### Conclusion

I agree with Moore that any attempt to defend territorial rights solely by reference to some abstract notion of justice (i.e., a view of justice that is not attached to some particular territorial claim) is a deficient theory of territory. Attachment to a specific land has

<sup>10</sup> See Stiliz, op cit 3.

to take into account actual practices and contingencies, including historical facts. In this sense, her theory of territorial rights as rights of peoples does better. But to the extent that any claims of possession in the absence of background rules or conventions can remain at most provisional and reasonably contestable (if Kant is right that is), Moore's account does not go far enough. A people's (historical) relationship to and identification with a land is subject to disputes, and hard to assess against similar competing claims. A complete account of territorial rights must appeal ultimately to some shared international public system of rules. Contemporary international relations operate under the shared presumption of states' territorial rights. What is remarkable about territorial rights of states in the real world is not their non-arbitrariness, but that they are accorded moral standing in spite of their arbitrariness. (As suggested above, there are moral reasons to accord standing to boundaries, arbitrary and even historically unjust in many cases they might be.) The violation of acknowledged background international standards is what ultimately explains the wrongness of international violations of existing territorial rights. What was wrong with Saddam Hussain's invasion of Kuwait in 1990, or with Russia's incursion into Ukraine in the Crimea, is not that these acts violated the natural rights of states to territory *à la* Locke, or that they violated some indisputable historical and cultural entitlements (though they might well do that too). Ultimately these are wrongful incursions because they violated the accepted norms and rules of international conduct. The world order is fundamentally institutional all the way up, from the domestic to the global domains, and this way of understanding territorial rights has implications for our understanding of global justice.

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SYMPOSIUM  
PEOPLE AND TERRITORY



RE-STATING STATIST THEORIES  
OF TERRITORY

BY  
PIERCE RANDALL

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# Re-Stating Statist Theories of Territory

Pierce Randall

Most contemporary political philosophy focuses on the relationship between people and states. However, significantly less attention has been paid to the normative relationships people and states have with territory. The problems raised by political claims to land are particularly pressing, given that many contemporary international disputes—including ossified conflicts in Palestine and Kashmir as well as new ones in Crimea, the Donets Basin, and Kurdistan—are driven by disagreements over who should control territory. In this context, Margaret Moore's book is a timely and welcome contribution to the growing literature on territorial rights.<sup>1</sup> While her work clarifies many of the points of disagreement between already-existing theories in this area, its major contribution is staking out a political nationalist theory of territory, as distinct from cultural nationalist or statist theories.

In this commentary, I consider Moore's arguments against Kantian-inspired legitimate state theories of territory. I argue that legitimate state theorists can respond to those objections in part by using resources shared by their own theories and Moore's. My purpose is primarily defensive: I do not say much here about the merits of statist theories. However, since part of Moore's argument for her own theory is that it avoids pitfalls that doom

<sup>1</sup> Margaret Moore, *A Political Theory of Territory* (New York: Oxford University Press, 2015). Parenthetical references in this paper refer to pages in this work.

other accounts of territory rights, showing that statism is not ruled out as a plausible theory partially undermines the case for a political nationalism theory of territory. I conclude by discussing the significance of what I see as substantial convergence between statism and Moore's theory on several substantive issues.

## I

### **What is the debate really about?**

Moore discusses three main approaches to territory rights. *Property-based* theories conceive of territorial rights as either deriving from or analogous to property rights over land. Most property-based theorists are influenced by Locke's consent theory of political authority and his pre-institutional conception of property. They argue that individuals transfer jurisdictional rights over land they own to the state when they agree to join it (pp. 15-23).<sup>2</sup> Alternatively, *statist* approaches to territorial rights identify states or some other set of state-like institutions as the primary territorial rights-holder. Statist theories tend to be broadly functionalist, in that they justify a state's having territorial rights in terms of some worthwhile aim that states are supposed to achieve on behalf of their members, such as establishing a legitimate system of laws or of providing security (pp. 89-110).<sup>3</sup>

<sup>2</sup> For individualist Lockean approaches to territory, see A. John Simmons, "On the Territorial Rights of States," *Philosophical Issues* Vol. 11 (2001): pp. 300-26 and Hillel Steiner, "Territorial Justice," in Simon Caney, David George and Peter Jones (eds.), *National Rights, International Obligations* (Boulder, CO: Westview Press, 1996), pp. 139-48. For a collectivist account of territorial rights, see Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press, 2012).

<sup>3</sup> There are numerous statist accounts of territory. Two prominent accounts, both broadly inspired by Kant, include Anna Stilz, "Nation, States, and Territory," *Ethics* Vol. 121, no. 3 (2011): pp. 572-601 and Lea Ypi, "A



Finally, *nationalist* approaches to territory identify preinstitutional groups, such as nations or peoples, as the primary holders of territorial rights. Most nationalist approaches to territory justify a nation's territorial rights on the basis of the cultural or symbolic value of a given piece of land for the group in question (pp. 71-88).<sup>4</sup>

This way of describing the distinction between statist and nationalists can be misleading. The labels “statist” and “nationalist” seem to suggest that the disagreement between the two approaches is mainly over what sort of entity should hold territorial rights. However, nationalist theories will need to leave some room open for states to have territorial rights, since nations or peoples need a state or state-like institutions in order to effectively maintain jurisdiction over a region. Moore claims that states hold territorial rights when they are vehicles of the self-determination of a group that can be the source of territorial rights (p.66). It seems that state institutions having some sort of jurisdiction rights over a territory will be necessary for a group's being able to exercise its territorial rights, even if that group's existence and its right to territory do not depend on the institutional structure of any particular state. On the other hand, the disagreement might be understood as one about what entity is wronged when territorial rights are violated. But it would be implausible to attribute to most statist the view that the state, understood as a collective agent, is primarily the group that is wronged by violations of territorial rights. According to statist, the point of states possessing territorial rights in the first place is

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Permissive Theory of Territorial Rights,” *European Journal of Philosophy* Vol. 22, no. 2 (2012): pp. 288-312.

<sup>4</sup> Two major nationalist accounts include David Miller, “Territorial Rights: Concept and Justification,” *Political Studies* Vol. 60 (2012): pp. 252-68 and Tamar Meisels, *Territorial Rights* (Dordrecht: Springer 2005).

to achieve goods for those living under the state's jurisdiction. So when a state's territory is compromised, it is more plausible to think on this view that their citizens and not the state are the ones who are ultimately wronged.

The dispute between statist and nationalists seems instead to be primarily about how territorial rights are justified. According to statist, the ultimate justification for territorial rights rests on the state's normative relationship with those under its jurisdiction. For nationalists, territorial rights are justified by the existence of group rights or group-dependent interests that members of a national community have in maintaining control over a piece of land. The important contribution Moore's account brings to the discussion is that she provides a political, not cultural, explanation for the group-dependent interests co-nationals have in controlling territory. Moore argues that control over territory is necessary for a people to exercise its collective right of self-determination.

It is worth keeping track of the real point of disagreement between statist and nationalist approaches to territory. Moore makes three main objections to statist theories that I will discuss here:

- (1) **THE ATTACHMENT PROBLEM:** Because they focus only on the normative adequacy of a state's relationship with its citizens, statist theories of territory have difficulty explaining why particular states ought to have rights over particular pieces of territory. For instance, a state may be legitimate or just without having a right to some particular piece of territory.
- (2) **LEGITIMATE ANNEXATION:** Statist theories have trouble explaining why states that better perform the proper function of states may not permissibly annex the territory of states that fail to perform these functions or that perform them less well.

(3) FAILED STATES: Likewise, statist theories have difficulty explaining why states that successfully perform the function of states may not permissibly annex the territory of failed states.

The last two of these objections are primarily directed at the claim that the state is the primary or ultimate holder of territorial rights. The idea is that, without supposing that a territorial right held by people who occupy some region in the absence of a state, statist cannot explain why these cases of annexation seem to us to be morally impermissible. However, as I have suggested, the disagreement between statist and nationalists is not mainly about whether states or peoples primarily exercise territorial rights. Instead, it is about what sorts of considerations ultimately justify territorial rights. It is open for statist to respond to objections (2) and (3) by insisting that whatever explains our intuitions in those cases is not the same thing that does the primary work in justifying territorial rights on the part of states. Perhaps a rational reconstruction of the moral principles that undergird international law excludes annexation without just cause. Or it may simply be that the appropriate remedy for territory held by a state that falls short of the normative criteria that would justify territorial rights is not annexation but assistance, encouragement, or international pressure. One might worry that appealing to something other than what mainly justifies territorial rights to explain why annexation is wrong is objectionably ad hoc. But there's no reason to expect that a single justificatory strategy will explain every feature of the normative landscape surrounding territory. If we think statist justifications for territorial rights are normatively attractive for other reasons (a claim I accept but do not defend here), then we should not be worried if they have to be supplemented by other moral principles. I discuss objections (2) and (3) in section IV.

The worry over how states attach to particular regions ((1) above) does strike at the heart of the approach statistes use to justify territorial rights. If territorial rights are justified on the grounds that they are necessary for states to achieve some good on behalf of those living under the state, then some separate strategy is necessary to explain why particular states ought to have control over particular territories. This is a problem for any theory, including Moore's, that justifies territorial rights on the basis of the general political interests the people living there, such as living under legitimate laws or being part of a self-determining political group. Fortunately, this problem can be solved by determining when individuals or groups can permissibly occupy a given region. I discuss this problem in the next two sections.

## II

### **The Attachment Problem**

Territory is a particular good. People and states have normatively significant relationships to particular pieces of land. So we need an account of territory to explain why *particular* territorial rights-holders should have jurisdiction over *particular* regions. Moore calls this the *attachment problem* (pp. 9-10). This problem is distinct from the problem of explaining why certain types of entities ought to have territorial rights in general. It may be that a potential territorial rights-holder meets the normative requirements necessary to permissibly exercise jurisdiction over some territory without having a right to do so over any particular region. Or it may be the case that some territorial rights-holders legitimately exercise control over some particular territory but not another. (Contrast British jurisdiction over London with British jurisdiction over India prior to 1947.) So the challenge for a theory of territory is to explain not only why territorial rights-

holders may permissibly control some territory, but why also they should control the particular geographic regions they have territorial rights over.

Property-based theories have little difficulty solving the attachment problem because they treat territorial rights analogously to ownership rights over real estate, as particular rights over particular areas of land. According to individualist Lockeans, for example, individuals acquire property rights in some piece of land outside of legal institutions somehow (e.g., by mixing their labor with it while leaving as much and as good land left for others), and then cede some of the rights to control that land to a state when they consent to join it. This cession may be permanent, or it might be contingent on the ongoing consent to live in the state by those subject to its jurisdiction. The state acquires a moral right to exercise jurisdiction over a given region, not directly because it achieves some good for its citizens, but simply because it has been granted those rights by individuals with ownership rights over the particular parcels of land that make up its territory. As Moore points out, individualist Lockean approaches are problematic, because no actual state has ever had the consent of all those subject to it, and this fact about states is not likely to change. Theories that require a state to obtain consent from those subject to its jurisdiction in order to exercise territorial rights have the perhaps unappealing consequence that no existing states have territorial rights (pp. 20-21). For the purposes of this section, however, it is worth noting that Lockean theories don't have trouble solving the attachment problem, because they treat territorial rights as consisting in nothing more than a set of particular rights over particular regions of the planet's surface.

An alternative approach to justifying territorial rights starts with a general justification for why a certain kind of entity ought

to be able to hold territorial rights in general, and then provides a separate explanation for how such entities can gain rights over particular regions. Statist theories of territory usually take this form. For instance, Anna Stilz argues that a state's right to administer territory is justified in virtue of the need to establish a legitimate system of laws within a region, especially laws governing property, in order to secure the autonomy of members of society. Stilz's approach is broadly Kantian, in that she thinks that without a legal system to arbitrate disputes over rights, individuals cannot be assured that their independence will be protected, since in cases of disputes their rights will be subject to the unilateral interpretation of their rights by others. So the general rationale for territorial rights according to Stilz is that states will protect individuals' independence.<sup>5</sup> However, in order to justify a state's rights over a particular territory, Stilz appeals to pre-institutional occupancy rights held by individuals living in the territory under the state's jurisdiction. These occupancy rights are justified by the interests of those living within a particular territory, including the dependence of their life plans on continuous occupancy along with their co-nationals. So while a statist theory like Stilz's can explain when and why states should have jurisdictional authority by appealing to features of the state, a statist solution to the attachment problem involves appealing to rights that are pre-institutional in the sense that they do not depend on the state, such as Stilz's right of occupancy.<sup>6</sup>

Moore claims that statist theories have a difficult time solving the attachment problem. The logic of Kantian theories, she writes, "is distinctly cosmopolitan: there is no reason internal to the theory why the jurisdiction [of a state over territory] should not be universal why we would not end up in a global state" (p.

<sup>5</sup> Anna Stilz, "Nation, States, and Territory," pp. 580-82.

<sup>6</sup> *Ibid.*, 582-87.

97). In other words, since the aim of the state is mainly to establish laws that secure each person's rights, there is no principled reason entailed by that aim to limit a legitimate legal system to one particular region.<sup>7</sup> The same could be said of other statist views that hold that the function of the state is to establish security or to improve the well-being of people living under it. If a state is particularly good at performing the relevant functions that provides a moral basis for statist territorial rights, then, aside from the practical limitations of administering a diverse and wide swathe of humanity, there is little reason to limit a state's territorial rights to any particular region. As we have seen, this sort of worry leads statist like Stilz to go outside of the state and to appeal to pre-institutional occupancy rights on the part of the state's subjects as a necessary condition for its territorial rights.

Moore responds to Stilz's account of occupancy rights by accusing it of being viciously circular. According to Stilz, a necessary condition for a person to have a right to occupy a given territory is that "legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits."<sup>8</sup> Moore argues that, by making *legal* residency a condition of a moral right of occupancy, presupposes that a legitimate legal system exists in the relevant territory. But occupancy rights are supposed to explain (in part) why a state can establish a some system of laws within a particular territory in the first place. So according to Moore's objection, we're left with a narrow justificatory circle in which a state's

<sup>7</sup> Of course, Kant did not support establishing a global state. However, his reluctance stemmed, not from wavering commitment to moral cosmopolitanism, but because he thought that a world-state would be unstable unless it resorted to tyranny to try to keep disparate groups together. See Kant, *Toward Perpetual Peace*, in *Practical Philosophy*, trans. Mary J. Gregor (New York: Cambridge University Press, 1996), p. 328.

<sup>8</sup> Anna Stilz, "Nation, States, and Territory," p. 585.

territorial rights are supposed to underwrite occupancy rights, and occupancy rights are supposed to justify a state's territorial rights (pp. 99 & 103).

Here, however, Moore's objection seems to miss her target. Stilz does not claim that legal residency is a necessary condition of a person's having occupancy rights. Rather, she argues that in order to have an occupancy right, a person must have a morally weighty interest in legally occupying the region in question. Again, here Stilz follows Kant: because all human beings "have a right to be wherever nature or chance (apart from their will) has placed them,"<sup>9</sup> they have, according to Stilz, a "need for stable legal residence."<sup>10</sup> So while occupancy rights on the part of its subjects explains why a state has territorial jurisdiction over a particular territory on Stilz's account, occupancy rights are justified not by legal residence (which presupposes a state), but rather the central interest individuals have in having their residence in some region be legally protected.

### III

#### Moore's Solution to the Attachment Problem

Like statist accounts, Moore's political theory of territory treats the general question of territorial rights separately from her solution to the attachment problem. According to Moore, *peoples*, not states, are the fundamental bearers of territorial rights. Peoples are collective agents whose members are engaged in a common political project and possess both the capacity to govern themselves as a collective as well as a history of political cooperation (p. 50). Moore argues that peoples are justified in

<sup>9</sup> Kant, *The Metaphysics of Morals*, 6:262. Quoted in Stilz, 584.

<sup>10</sup> Anna Stilz, "Nation, States, and Territory," p. 584; emphasis added.



wielding territorial jurisdiction in virtue of their members' interests in exercising self-determination, a kind of collective autonomy, as part of a group that contains normatively significant political attachments among its members. This exercise of self-determination necessarily involves jurisdiction over territory (pp. 49-54 & 62-65).

But the fact that peoples are a kind of agents that can possess territorial rights in general does not show how any given people can come to have an exclusive claim to a particular piece of territory. In order to show that—in other words, to solve the attachment problem—Moore, like Stilz, resorts to a separate theory of occupancy rights. For Moore, occupancy rights are collective rights held by members of groups in virtue of sharing a common identity. Occupancy rights include a liberty to settle on an area, as well as claims against other groups from settling the same region in a way that adversely impacts the community there. Additionally, occupancy rights include some measure of control over a group's environment (pp. 39-46). Not all groups with occupancy rights on Moore's account will have full-fledged rights to administer territory. Some groups, such as indigenous groups or political minorities widely dispersed throughout a population, may lack the means with which to effectively administer territory or exercise national self-determination. While these groups may find their territories embedded in larger states, according to Moore, they retain a moral right to control their communities in virtue of their occupancy rights over a given region, and are entitled to some sub-national autonomy. On the other hand, a people capable of exercising political self-determination has rights over a particular territory in virtue of its also having collective occupancy rights in that region (p. 66).

Part of Moore's argument for her conception of territorial rights is that it avoids what she identifies as major limitations of

alternative approaches, including what she takes to be the failure of statist theories to provide an adequate response to the attachment problem. So it's worth noting that Moore's solution to that problem is essentially the same as Stilz's: both theories must appeal to pre-institutional occupancy rights to explain why particular states have rights over particular territories. This is because both approaches, to the extent to which they are *political* approaches to territory, do not begin with pre-political property rights as on the Lockean account, but instead with some sort of morally weighty interest persons might have in an entity (a state or a people) having jurisdiction over territory. This strategy by itself will leave open the question of which (if any) particular geographic regions may be controlled by a territorial rights-holder in order to advance those interests. In order to answer *that* problem, we have to look beyond which entities the theory claims should have territorial rights in general—legitimate states or peoples—in order to find some way in which those territorial rights are grounded in a particular region.

## IV

### **Annexation and Failed States**

Moore raises two additional objections to statist theories of territory, broadly related to their ability to explain a state's normative relationship with a particular territory. First, she argues that statist theories cannot adequately explain what's wrong with state annexation, because they cannot explain why it would be impermissible for an otherwise legitimate (or just) state to annex an illegitimate (or unjust) state. Second, Moore argues that statist theories cannot explain our intuition that the territory of failed states do not thereby become *terra nullius*, unclaimed by any

appropriate territorial rights-holder. Here, I briefly respond to these objections.

LEGITIMATE ANNEXATION. Suppose that there are two states: *A*, a legitimate state, and *B*, an illegitimate one. According to a legitimate state theory of territory like Stilz's, *B* fails to achieve a crucial function of states, to establish a legitimate system of laws, so *B* lacks territorial rights. This means that *B* lacks a claim against other states, including *A*, to respect its territorial rights. Suppose that *A* fights a just war against *B*, one that ends with *A* occupying *B*'s territory. In this case, we have, according to Moore, a strong intuition that, despite the absence of a legitimate state in control of *B*'s territory, *A* cannot permissibly annex *B*. For example, we have the intuition that the United States could not have permissibly annexed Allied-occupied German territory following the Second World War, even though Nazi Germany was a paradigmatically illegitimate state. Moore thinks that the only way we can explain this intuition is if we think that some other entity, the German people, are the ultimate bearers of territorial rights, whose right persists even when the state that rules over them is illegitimate (pp. 103-04).

A general response can be made to cases like LEGITIMATE ANNEXATION on behalf of statist theories. It does not follow from the fact that a state fails to achieve a standard of legitimacy necessary for territorial rights that any action that would restore legitimacy, including annexation, would be a permissible way to remedy this failure. This point may be made by pointing to an analogous case in just war theory. It does not automatically follow from the fact that a state lacks external legitimacy (understood as a general *pro tanto* moral claim against interference from outside states) that other states may permissibly invade it to establish a legitimate state. In addition to external illegitimacy, a state subject to attack in a just war must also have committed an aggressive act

that constitutes a just cause to go to war. In cases where there is no just cause, other states may not permissibly attack the illegitimate state, even if doing so would result in the formation of a legitimate state. Outside states may interfere in other ways, but there are moral limits to what steps they may take to remedy another state's illegitimacy. Moore employs a similar argument in her discussion of the right of materially burdened peoples' rights over territory. On her account, some peoples lack the means to exercise self-determination, as when they would need outside assistance to do so. Likewise, a legitimate state theorist can respond to LEGITIMATE ANNEXATION by insisting that, even in the absence of another state's right over a region, legitimate states need sufficient moral cause to annex part of another state. This response is similar to the response Moore makes for why burdened peoples do not forfeit their territorial rights. Like illegitimate states on a statist view, burdened peoples for Moore lack an important condition for territorial rights since they are unable to exercise a right to self-determination. In this case, the appropriate response on the part of other peoples to the fact that a burdened people is unable to exercise effective self-determination would not be to treat them as though they lack territorial rights or a right to self-determination at all, but to assist them (pp. 51). Likewise, in the case of occupied illegitimate states, the morally appropriate response to their lacking territorial rights will usually not be to annex them, but to encourage or to assist such states in building legitimate institutions.

FAILED STATES. Some states are unable to exercise control of the territory under their jurisdiction. This will make it impossible for these states to fulfill the function that justifies control over territory (such as establishing a legitimate legal system). We have the strong intuition that legitimate states cannot colonize or annex the territory of failed states, but it's hard to see how a statist theory could explain that intuition, given that failed states

are unable to satisfy the main condition that justifies territorial rights for states. We have the strong intuition that Sweden may not permissibly occupy parts of Somalia or Afghanistan over which their respective states have lost control. Again, Moore thinks that in order to explain this, we will need to appeal to territorial rights held not by states but by the relevant people whose right persists despite the failures of the state (105-06).

My response to the previous objection also applies here. Even though a failed state has lost territorial rights according to the statist theory, the morally appropriate response by legitimate states is not to seize land from the failed state, but to assist it in whatever way practicable in restoring legitimate control over the region. (Again, this is Moore's approach to the case of burdened peoples.) Additionally, it is not clear that Moore's theory fares much better in the case of failed states than do statist theories. On Moore's account, though peoples are the primary territorial rights-holder, peoples *exercise* territorial rights primarily through state institutions (p. 65). In the case of failed states, the problem is often not the unwillingness on the part of a state to administer control over a region, but its inability to do so, sometimes due to structural problems with the state itself. The same kind of threats that make states unable to control territory may also render a people unable to exercise self-determination through a state or state-like institutions. Since the ability to exercise self-determination is a necessary condition for a people to have territorial rights according to Moore's theory, she is as much in need of an explanation for the wrong of seizing territory in regions rendered ungovernable as a statist theory.

## V

### **Conclusion**

A major contribution of Moore's theory is that it carves out logical space between cultural nationalist and statist theories of territory. Unlike the former, Moore's account is grounded in a political and not cultural account of peoples. Unlike the latter, Moore does not justify territorial rights on the basis of assessing the justifiability of states. Given that statist and cultural nationalist theories of territorial rights do not seem to share many common assumptions, it is significant that Moore presents a plausible account of territorial rights that captures some of the motivation of both views.

In this paper, I have argued that statist accounts of territorial rights have many of the same resources available to address challenges to their views as Moore's political nationalist theory of territorial rights. My purpose has not been to argue that statist theories of territory are a better approach than Moore's. Instead, I think that it is significant that two different approaches to territorial rights can arrive at many of the same substantial conclusions about territorial rights. The justification for territorial rights on Moore's theory and that of legitimate state theorists follows the same basic pattern of justification and responds to a similar set of concerns. Both approaches give a general justification for territorial rights, and then provide a separate justification for why particular territorial rights-holders attach to particular territories. To accomplish this latter task, both theories need to appeal to some sort of individual or group right of occupancy that is not dependent on the existence of either a people or a state, and which depends on the value people have in occupying a particular geographic regions. Finally, both statist and political nationalist theories will need to be able to explain why failure on the part of a territorial rights-holder to satisfy the

necessary conditions of having territorial rights will not automatically leave their territory open to permissible annexation by other territorial rights-holders. The observation that theories that ground territorial rights in different sets of normative considerations end up converging on similar solutions to problems raised by territory points to significant theoretical progress with respect to territorial rights, and hopefully provides a useful guide for further theorizing.<sup>11</sup>

*University of Pennsylvania*

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SYMPOSIUM  
PEOPLE AND TERRITORY



TERRITORY, RIGHTS  
AND HISTORICAL INJUSTICE

BY  
VITTORIO BUFACCHI

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# Territory, Rights And Historical Injustice

Vittorio Bufacchi

**M**argaret Moore's *A Political Theory of Territory* is arguably the most erudite treatment of territorial rights on the market.<sup>1</sup> Considering that territorial rights are a very relevant and prevalent topic in contemporary political theory, with a fast-growing and increasingly sophisticated body of literature, this is no mean achievement. I expect this book will become the reference point for all future publications on territorial rights for many years to come, and rightly so.

The premise of Moore's book is that the concept of 'territory' is under-theorized in contemporary political philosophy. She is right, and in this book Moore gives a very thorough analysis of why political theory needs to take territory seriously. More specifically Moore puts forward a moral and political theory of territory centred on the idea of self-determination, characterized by two moral rights: a moral right to residency (individual) and a moral right to occupancy (collective).

I want to take issue with two different aspects of Moore's treatise, on the subject of rights and the question of corrective

<sup>1</sup> Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015). Unless otherwise specified, all page or section numbers refer to this work.

justice. First, why does Moore assume that moral and political concerns about territory are disputes about ‘rights’? In other words, notwithstanding the fact that it has become prevalent in the literature to talk about ‘territorial rights’, does a political theory of territory need to be formulated in the language of rights? And if so, what are the requirements of a theory of territorial rights? Secondly, Moore’s assumption that territory raises political and moral issues that are best understood in terms of ‘rights’ has implications for the way we understand and address questions of historical injustice. Moore deserves to be praised not only for putting forward an elegant and convincing abstract theory of territorial rights, but also for suggesting how this theory can guide us in resolving extremely complex and morally challenging practical dilemmas. Nevertheless, there is the suspicion that her theoretical framework, grounded on a theory of rights, distorts the injustice of historical wrongs, and consequently misrepresents the best way to correct such wrongs.

## I

### **The Right to a Territory?**

Our relationship with a territory is morally significant, but do we have a right to a territory? Moore thinks so. She is not alone in this regard of course, in fact the majority of authors in political theory writing about territory often assume that this is part of a larger discourse on rights: the received opinion is that ‘territorial’ and ‘rights’ are a natural combination, they are meant for each other, like Ben and Jerry, or fish and chips.<sup>2</sup> Security in numbers

<sup>2</sup> For an overview on ‘territorial rights’, see D. Miller, “Territorial Rights: Concept and Justification,” *Political Studies*, Vol. 60, no. 2 (2012): pp. 252–268; T. Meisels, *Territorial Rights* (Dordrecht: Springer 2009); A. J. Simmons, “On the Territorial Rights of States,” *Philosophical Issues* Vol. 11, no. 1 (2001): pp.

is a rational strategy, but the issue will not go away. Why territorial rights? Why rights? Why not territorial justice, or territorial morality? It seems to me that if we assume that territorial concerns are best understood as rights issues, then we need a fully comprehensive theory of rights.

It is surprising, and perhaps slightly disappointing, that a detailed analysis of rights is missing from Moore's otherwise careful and in-depth theoretical framework. Instead Moore deals with a number of pivotal but complex issues in a set of footnotes, touching on the nature of rights and the way to resolve the inevitable conflict of rights. I'm going to suggest that this is not sufficient; furthermore what she presents us with is not always persuasive.

At the outset of her treatise Moore tells us that "Everyone has an interest in land, and this general interest is important to grounding rights to it" (p. 9). Moore goes on to reiterate this message even more emphatically on the next page:

In this book, I argue that people have an important interest in access to land that supports the way of life that is fundamental to their projects and identities, the place where they live and have relationships, the geographical domain of their self-determination, and the property that they hold, and that these interests are sufficiently important to be protected by right and hold others under obligations to protect or promote those rights (p. 10).

On the bases of these claims, it would appear that the logical structure of Moore's main argument unfolds along the following lines:

P1 There is value in collective self-determination.

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300–326; A. Stilz, "Why do States have Territorial Rights?", *International Theory* Vol. 1, no. 2 (2009): pp. 185–213.

P2 There are normatively significant relationships between peoples and places (projects; identities; attachments; etc.).

P3 Self-determination (P1), residency and occupation (P2) constitute ‘morally important human interests’.

P4 ‘Morally important human interests’ generate rights.

Therefore:

C1 We have territorial rights to protect our self-determination, residency, and occupation.

Clearly Moore is endorsing an interest theory of rights, which has notable advantages, but also some well-known complications. I’ll return to Moore’s interest theory of rights later, but first the logical structure of her argument requires closer inspection.

Premises P1, P2 and P3 are not sufficient to justify C1. Even if we give Moore the benefit of the doubt and accept her views on the nature and importance of self-determination, residency and occupation, the move from acknowledging that there are special interests attached to territory to recognizing territorial rights is suspicious. The only way that Moore can make C1 follows from P1, P2, and P3 is by including another premise, P4: the assumption that rights are derived from ‘morally important human interests’. In what follows I’m going to suggest that P4 is the weak link in Moore’s argument.

No one denies that there are special interests attached to territory, but special interests don’t automatically translate into rights. The special interest that we are told generates from our relationship with a territory is, perhaps, an argument for making territory a question of justice. But Moore is not defending a

theory of territorial justice, but a theory of territorial rights.<sup>3</sup> The reason why it is tempting but logically illegitimate to move too quickly from ‘interests’ to ‘rights’ is captured by Joseph Raz in his critique of what he refers to as ‘traditional’ accounts of human rights,<sup>4</sup> in particular those put forward by Alan Gewirth and James Griffin:

Traditional theories fail for several reasons. ....here I will point to three problems. They misconceive the relations between value and rights. They overreach, trying to derive rights which they cannot derive. And they fail either to illuminate or to criticize the existing human rights practice

The first point he raises is crucial for us: misconceiving the relations between value and rights. Raz criticizes Gewirth for “ignoring the possibility of believing that certain conditions are essential to our life, and even of striving to secure such conditions, without either claiming or having a right to them.”<sup>5</sup> Raz returns on this point in his critique of Griffin, who like Gewirth fails to show that value establishes rights. The fact that something is of value to us is not sufficient to attract the special protection of rights, since as Raz: “By that argument if the love of my children is the most important thing to me then I have a right to it.”<sup>6</sup>

<sup>3</sup> Of course some political theorists would argue that justice is fundamentally about rights. For example a left-libertarian like Hillel Steiner argues that rights are the basic blocks of a theory of social justice, but he is appealing to a right to self-ownership, and of course he embraces a will (or choice) theory of rights, and not an interest theory of rights, like Moore.

<sup>4</sup> J. Raz, “Human Rights Without Foundations,” in S. Besson and J. Tasioulas (eds.), *Philosophy of International Law* (Oxford: Oxford University Press 2010), pp. 323-324.

<sup>5</sup> *Ibid.*, p. 324.

<sup>6</sup> *Ibid.*, p. 325.

A critique along similar lines applies also to Moore: she simply assumes that something being valuable, or in her language a ‘morally important human interest’, is enough to turn it into a right.<sup>7</sup> But it’s not necessarily so: the fact that territories are necessary for our collective self-determination, and that there is value in self-determination, is per se not sufficient to establish a right to a territory.

Translating what is deemed to be valuable to a right is a common move amongst interest theories of rights. In her book Moore appeals to what she calls a ‘modified’ interest-theory of rights. In Chapter 2 Moore explains what she means by this in a footnote:

I rely on a modified interest-theory of rights, which combines the idea of wrong or disrespect to the equal moral status of the right-holder with the idea of damage or harm to important interests of the right-holder. It is a *modified* interest theory, because I am persuaded that that an account rooted only in welfare fails to account for the trumping character of rights (p. 32, fn. 31).

Moore is right to ‘modify’ the interest theory of rights, but this may not be enough. There are potentially three problems with Moore’s ‘modified’ interest-theory of rights, and therefore three reasons why it remains problematic to assign rights on the basis of our territorial interests. I will refer to these as the inflationary problem, the conflict problem, and the instrumentalization problem.

<sup>7</sup> The language used by Moore and Griffin is very similar. While Moore talks about ‘morally important human interest’, Griffin appeals to ‘especially important human interests’: “It is only because they [autonomy and liberty] are especially important interests that rights can be derived from them; rights are strong protections, and so require something especially valuable to attract protection.” J. Griffin, *On Human Rights* (Oxford: Oxford University Press 2008), p. 35.



### 1.1. *The Inflationary Problem*

One area of concern is that Moore's modified interest-theory simply generates even more right claims, which contributes to the inflationary trend that has seen every political claim, every moral argument, every policy, being justified in terms of 'a right'. The Inflationary Problem in rights discourse is well documented, and it applies especially to entitlement theories of rights such as H.J. McCloskey's, but also to interest theories of rights. Regarding the entitlement theory, James Nickel warns us that if a moral right exists whenever there are strong moral reasons for ensuring the availability of a certain good, "the list of entitlements will be nearly as long as the list of morally valuable goods ... this conception has no built-in assurance that the demand side of rights will not outrun the supply side."<sup>8</sup>

Joseph Raz is also aware of the inflationary tendency within rights discourse: "An ever-growing number of rights are claimed to be human rights, for example, the right to sexual pleasure; the right to sexual information based upon scientific inquiry; the right to comprehensive sexual education. It is declared that all persons have the right to a secure, healthy, and ecologically sound environment. Future generations have rights to equitably meet their needs. All persons have the right to protection of the air, soil, water, sea-ice, flora and fauna.... Some academics argue that there is a human right to globalization."<sup>9</sup> To this expanding list of rights Moore wants to add territorial rights. The issue is not that we don't have sexual rights, or that we don't have a right to an ecologically sound environment. In fact we may even have territorial rights. But what we need is a theory which clearly indicate what rights we have, and why. Simply adding to the list is almost too easy.

<sup>8</sup> J. Nickel, *Making Sense of Human Rights* (Oxford: Blackwell 2007), p. 30.

<sup>9</sup> J. Raz, "Human Rights Without Foundations," p. 322.

The problem being of course that the currency of rights loses value the more widespread it is used. Admittedly this is a bigger problem for the literature on ‘human rights’, but since the line between a ‘right’ and a ‘human right’ is somewhat blurry, and Moore switches freely between talking about territory as a political right and a moral right, people would be forgiven for thinking that perhaps territorial rights are not just legal rights but also human rights. In fact, her thesis on self-determination is a perfect complement to, for example, Griffin’s interest theory of human rights grounded on the concept of personhood, which he defines in terms of autonomy and normative agency.

### *1.2. The Conflict of Rights Problem*

Related to the Inflationary Problem is a second problem, namely, that as we create more rights based on important interests, we increase the inevitable risk of rights (and duties) coming into conflict. How to resolve conflicts of rights has always been a thorn on the side of interest theories of rights, and Moore is fully aware of it:

I treat rights as possessing moral stringency in the sense that they generally override competing moral (welfarist) considerations. ... However, rights may conflict (or more precisely the duties generated by a right may conflict). This is hardly surprising: if the interest is sufficiently morally important to ground a right, it will give rise not to a single corresponding duty but to a number of duties” (32, fn. 32).

From this statement we can deduce that according to Moore territorial rights are, in Hohfeldian terms, claim rights and not privilege or liberty rights, since they are correlated with a number of duties. It would also appear that Moore is fully aware of the problem of dealing with conflict of rights. There are many different ways of dealing with this problem. In another footnote,

Moore (pp. 32-33, fn. 33) considers giving rights lexical priority, but she dismisses this strategy on the grounds that we cannot assess trade-offs between rights along a single metric. Moore is probably right, but the problem still stands: how do we resolve conflicts of rights?

Moore's solution is the following. She argues that rights have to meet two criteria: they have to be feasible, and they have to be compatible. By 'feasible' Moore means that they cannot be impossible, while the 'compatibility' requirement is explained in the following terms:

What do I mean by the compatibility requirement? I mean that the right should be defined in such a way that it does not come into necessary conflict with other fundamental rights, which also identify and protect fundamental human interests (p. 29).

This is ingenious, but I'm not convinced this is going to work, at least not for Moore. The compatibility requirement may be an option for choice or will theory of rights—this is what Hillel Steiner refers to as the condition of compossibility, a term he borrows from Leibniz—but not the interest theory of rights, not even the 'modified' theory of rights.

It is very attractive to appeal to the discourse of rights, and a theory of 'territorial rights' has a more urgent and authoritative appeal than 'territorial justice' or 'territorial principles' or 'territorial doctrines'. But theories of rights are messy, and merely adding 'territory' to the existing list of rights creates more problems than it solves. If Moore is serious about people having a moral right to territorial occupancy and residency, she needs to tell us how her theory of rights works: Are territorial rights claim rights or liberty rights? If they are claim rights who is under a duty to provide the right-holder with her rights? When does an interest generate a right and when does it not generate a right?

Should we be concerned with the inflationary tendency of rights? And crucially how do we resolve conflicts between rights and between duties? These are complex issues, which cannot be dealt with in a series of footnotes.

### 1.3. *The Instrumentalization Problem*

There is a third potential problem with Moore theory of territorial rights, namely, the Instrumentalization Problem. ‘Rights’ are powerful tools, both conceptually and rhetorically. Being on the side of rights makes one’s argument not only stronger, but also correct from a normative perspective. Those who champion rights claim to have morality on their side, which is not insignificant. But rights discourses can also be incendiary, and even engender intolerance.

In Chapter 2 Moore tells us that territorial rights are not absolute rights: “In all cases, however, I regard these rights not as absolute claims, but as subject to certain limitations” (p. 29). Moore is right of course, indeed this is a standard view held by most authors writing about rights, including human rights. For example Nickel reminds us that “human rights are high priority norms. They are not absolute but are strong enough to win most of the time when they compete with other considerations.”<sup>10</sup>

One potential problem with the language of ‘territorial rights’ is that political actors who demand and fight for their territorial rights often choose to assume that rights are absolute. This is to be expected of course, since political actors are in the business of promoting their interests at all costs. The Instrumentalization Problem arises when people start to appeal to self-determination and territorial rights in order to justify territorial wars. In other

<sup>10</sup> J. Nickel, *Making Sense of Human Rights*, p. 9.

words, there is the risk that unscrupulous politicians and activists use the language of territorial rights to justify territorial gains and territorial wars. Perhaps political theorists need to be more cautious before using certain terms.

It is of course tempting to dismiss this concern, on the grounds that we cannot take issue with philosophers if people make improper use of philosophical ideas. Be that as it may, in Ch.7 of her book Moore discusses the idea of the acquisition (and diminution) of residency or occupancy rights and the related right of return, in terms of ‘legitimate expectation’. This suggests that perhaps she is aware of the Instrumentalization Problem, or at the very least she realizes that she needs to specify what the ‘certain limitations’ are which makes territorial rights not an absolute claim. But what exactly are those ‘legitimate expectations’? According to Moore, “[it] means something like ‘what it is reasonable to expect to happen’” (p. 146). This is an interesting claim, and a good starting point, but per se it doesn’t go far enough. First of all it may be necessary to distinguish ‘legitimate expectations’ from ‘rational expectations’, and secondly the term ‘legitimate’ requires detailed analysis. It is not enough to replace ‘legitimate’ with ‘reasonable’, since the concept of ‘reasonableness’ is doing a lot of work here, but it is a famously opaque and obscure concept, perhaps even more so than the term ‘legitimate’.<sup>11</sup> One thing is certain: when it comes to territorial politics, people have all sorts of ‘illegitimate expectations’, sometimes driven by questionable motives (vengeance or revenge or retribution), sometimes driven by thinly disguised self-interest (access to natural resources), and only occasionally in good faith.

<sup>11</sup> For example, it is not clear to me whether Moore is using ‘reasonable’ in the Rawlsian or Scanlonian sense of the term. For an analysis of ‘reasonableness’ see V. Bufacchi, “Reasonable Agreement,” *Imprints*, Vol. 2, No.3 (1998).

## II Territorial Rights and Historical Injustice

Moore deals with issues of historical injustice in Chapter 7. As historical injustice is a complex issue, understandably Moore points out that in this chapter she does not deal with all kinds of corrective justice, but “just on corrective justice with respect to land, and even then, not all kinds of corrective justice ... the moral wrongs involved in the taking of land are certainly worth theorizing” (p. 140). She is right; the moral wrongs involved in the taking of land are certainly worth theorizing, and we need a political theory of territory to do so, and Moore provides us with the tools to do just that. But what is peculiar about her theory is that she does not seem to be concerned about the acts of violence involved in the taking of territory, instead she is concerned about the specific good that is being taken: land and territory. It follows that according to Moore colonialism is wrong because the process of unlawfully and illegitimately taking of land disrupts our social attachments, and in the process undermines our self-determination:

Most people think that the wrong of colonialism isn't captured just by the fact that the imperial authorities failed to include the colonial peoples fully in their political projects, and instead erected forms of political and legal domination over them.... This was part of the problem, to be sure, but we also think that a significant part of the problem was that the imperial powers were involved in the taking of territory ... The problem with colonialism wasn't simply the violation of the equality condition (equal treatment of persons); it was that the imperial power was engaged in taking territorial rights from another people, through extending political authority (rules of justice) over them (p. 100).

Moore returns on this point in a footnote in Chapter 7, where she explains exactly why the violation of territorial rights is wrong: “I am using the term ‘imperialism’ to refer to a situation where one group occupies the land of another, thereby violating

their territorial rights, and also subjugates them, thereby denying them the capacity to be self-determining” (p. 160, fn.4).

There are valid reasons why Moore uses the lenses of territorial rights in order to make sense of the historical injustice of colonialism, especially as it highlights certain aspects of the horrors and wrongness of colonialism, yet in the process of stressing why territorial issues are crucial to an understanding of the evils of colonialism Moore risks to downplay other important aspects, to the point where those other evils of colonialism are left out of the equation altogether. In other words, the starting point of Moore’s analysis is to lament the fact that territory is under-theorized, but in her effort to put territory at the forefront of our analysis she ends up under-theorizing the violence of colonialism. So while what Moore is saying is not wrong, it is surprising how the violence that accompanies colonialism is not even mentioned.

The only place where the violence of colonialism is remarked on by Moore is in the following passage:

We can identify at least four sorts of potential wrongs involved when land is taken, primarily through expelling people from their homes and communities, in addition to the coercion that usually accompanies such events: (1) being deprived of individual rights of residency; (2) being denied group rights of occupancy; (3) being denied collective self-determination; and (4) having individual or collective property rights violated (p. 140).

What is worrying about this passage is the way Moore deals with the abhorrent violence of colonialism. Moore merely touches on the ‘coercion that usually accompanies’ colonialism and imperialism, before leaving this issue aside and never returning to it. She goes on to consider what should be done to remedy territorial rights violation, as if that is the main issue to be confronted. The fact that the violence of colonialism plays a

minor role in Moore's argument about the wrongful taking of land and territory is not inconsequential: not taking violence seriously is potentially problematic because it distorts the way we think about corrective measures.

This is what Moore says about corrective justice:

Most theorists writing in the corrective justice tradition distinguish between three different mechanisms for correcting historical injustice: *restitution*, giving back whatever it is that has been unjustly taken; *compensation*, giving something of a certain value but not the thing itself, either because restitution is impossible or in addition to restitution to make good the loss the victim has suffered meanwhile; and *apology*, again either because restitution is not possible or because there is independent reason to acknowledge the wrong even if it is. All of these can apply when land is taken, and which remedy is appropriate depends on identifying which particular rights are violated, and the justificatory arguments for the rights (p. 139-140).

Because of her preoccupation with self-determination, grounded on attachment to a specific piece of land and territory, it is perhaps to be expected that the way Moore thinks of corrective justice is in terms of identifying and rectifying specific rights violations, associated with territorial rights. But prioritising a moral discourse centred on the idea of territory and the rights to occupancy and residence come at a cost, as it demotes other moral considerations, and other ways of thinking about corrective justice. It is one thing to put forward a political theory of territory, but quite another to be monistic about territorial rights and expect to explain most things through the lenses of this one theory.

Moore argues that the right to return to the land from which you were unjustly expelled is not eternal, but has time-limits. This is in order not to fall foul of the first-occupancy principle. This is probably correct, which is why sometimes an apology is as much



as one can hope for, and that in any case an apology can go a long way to heal a wound. But what matters here is the reason for the apology, or in other words what it is we are apologizing for. Given the appalling violence that accompanies colonization, I'm not convinced that apologizing for the violation of a territorial right is the issue here.

Consider the following hypothetical scenario:

*The Case of the Apology.* The colonial power known as Engerland colonized Eireland for many centuries, using brutal violence, reducing the local population to dire poverty, occupying their territory, and expelling the people of Eireland from their ancestral land. Engerland now argues that while they acknowledge that what their ancestors did many centuries before was wrong, too much time has passed for the people of Eireland to return to the land that was wrongly taken from them. All Engerland can do now is to issue a formal apology for the historical wrong associated with a violation of territorial rights.

There is something deeply problematic about this scenario, and yet it is consistent with Moore's political theory of territorial rights, and in particular with her views on corrective justice. It would be consistent with Moore's theory to suggest that it is not the barbarity of the oppression, the arbitrary nature of the violence, the physical and psychological disintegration of many generations, but the violation of a right to a piece of land that is the reason for an apology. This strikes me as counterintuitive. Yes, our relationship with place is morally significant, and it has value, but we don't have a right to everything we find valuable, and it does not mean that corrective justice regarding land should focus exclusively, or even primarily, on territorial rights.

### III

## Conclusion

In this chapter I have raised two issues with Moore's political theory of territory, dealing with a fundamental assumption in her argument. First, I argued that even if we give Moore the benefit of the doubt in terms of recognizing our special important interest in self-determination, and in accepting that territory is crucial for our self-determination, both as individuals and as groups, we must not assume that the fact that territory is valuable to us automatically translate into the language of rights. The relationship between 'value' and 'rights' is perhaps misconceived, to use Raz's language, and one cannot move from one to the other as quickly as Moore does. Therefore even though it is common practice to talk and write about 'territorial rights', this concept is fundamentally problematic, since introducing 'rights' in this moral equation only complicates matters: the more we use the language of rights the more rights are devalued, we also introduce more conflict of rights which we don't know how to resolve, and finally we generate 'legitimate expectations' about territorial rights, even though we don't necessarily know what these amount to. Secondly, I argued that putting too much emphasis on territorial rights could potentially distort our views on historical injustice, and how this is to be corrected.

Notwithstanding my reservations, Moore has written the sort of book that deserves the widest possible readership: this book belongs to that small minority of academic publications that simply cannot and should not go unnoticed. Moore deserves the highest praise for the accomplished scholarship that informs every twist in her argument in every page of an ambitious tome that explores both the theory and practise of one of the most

fascinating but controversial issues in political theory (and international politics) today.

*University College Cork*

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SYMPOSIUM  
PEOPLE AND TERRITORY



RETHINKING LAND  
AND NATURAL RESOURCES,  
AND RIGHTS OVER THEM

BY

ALEJANDRA MANCILLA

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# Rethinking Land and Natural Resources, and Rights over Them

Alejandra Mancilla

**M**argaret Moore's *A Political Theory of Territory* is an engaging attempt to build a normative account of territory, understood as 'the geographical domain of a political entity' (p. 15).<sup>1</sup> Moore steers a third path between statist theories, which justify territorial rights in terms of certain important functions performed by the state, and non-statist theories, which justify territorial rights in terms of their importance to protect certain key values of a group—like, in the case of cultural nationalists, cultural identity. Moore sides with non-statists insofar as she defends a self-determination view, whereby territorial rights are justified in terms of allowing a people to be self-determining. She stands apart from them, however, in that the people are constituted *politically* (rather than culturally or ethnically or linguistically) by a shared commitment to be self-governing, a capacity to establish and sustain political institutions, and a history of political cooperation (pp. 50-53).

<sup>1</sup> Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015). Subsequent references to Moore's book are by page number only.

There is a lot to be said regarding Moore's exposition and critique of competing theories of territorial rights, her characterization of a *people*, the connection she makes between individual autonomy and collective self-determination, and the conclusions she draws from applying her theory to well-known cases of contested areas, secession and historic injustice. Some of these issues are addressed by other contributors to this volume. My attention in what follows, instead, is focused on what I take to be one of the most thought-provoking parts of Moore's theory, and one in most need of further development; namely, her treatment of rights over occupied and unoccupied natural resources which she understands, respectively, as those lying within and outside already established territorial jurisdictions. First, I expound Moore's account of the role that natural resources should play in a political theory of territory, and compare it to other recent theories of territorial rights in this regard. I then discuss some implications of her view that unoccupied natural resources should be considered as property rather than territory, and put into question her unstated assumption that there is no land left to be claimed as territory. I go on to show how the right to control resources that Moore wishes to leave in the hands of states may be more constrained than she seems to allow for, and conclude by pointing to what seem to me to be the most innovative aspects of Moore's discussion of territorial rights over natural resources, as well as to those that would be worth developing further.

Following Moore, *natural resources* are hereinafter understood as 'anything derived from the environment and not made by humans, that is instrumental to satisfying human wants and needs' (p. 163). Natural resources, in this view, have a relational quality, in that they do not constitute a fixed list, but are contingent on time, space and culture.



## I

### Disaggregating Rights over Occupied Natural Resources

Recent theories of territorial rights have questioned the canonical triad that is supposed to constitute territorial rights proper. This triad, as presented by David Miller, is composed of the right of jurisdiction over people living within the territory; the right to control the movement of persons and things across borders; and the right to control and use the natural resources within the territory.<sup>2</sup> When it comes to the latter right, particularly, different theorists have pointed to its limits and have suggested alternative understandings and justifications. Cara Nine, for example, holds that a precondition for holding resource rights is that the land where those resources lie must be a site for the exercise of justice. This means that it must be occupied by people, or it must be shown that holding territorial rights over it is not excessively tangential to the establishment of jurisdictional authority. This leaves claims by states over the deep seabed and underground resources, the Arctic and the Antarctic and other uninhabited spots on earth void. Moreover, it suggests that a new approach is required to deal with them.<sup>3</sup> For Avery Kolers, resilience and sustainability are prerequisites that must be fulfilled by any territorial agent, which means in practice that resource rights must always be constrained by these two parameters.<sup>4</sup> Chris Armstrong suggests that the currently accepted doctrine of Permanent Sovereignty over Natural Resources in international law is ‘an obstacle rather than a boon from the point of view of

<sup>2</sup> David Miller, “Territorial Rights: Concept and Justification,” *Political Studies* vol. 60, no. 2 (2012): pp. 252–68, p. 253.

<sup>3</sup> Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press 2012), p. 42.

<sup>4</sup> Avery Kolers, *Land, Conflict and Justice* (Cambridge: Cambridge University Press 2009), p. 3.

justice', and stands in need of major revision.<sup>5</sup> Along similar lines, I argue elsewhere that, to be consistent, accepting full permanent sovereignty over natural resources would require us to accept full permanent sovereignty also over natural disasters, so that states should compensate all parties affected by them. This unpalatable implication should entice us to rethink the limits of this internationally accepted doctrine.<sup>6</sup>

With cosmopolitans, Moore agrees that disaggregating the resource rights of territorial agents (paradigmatically, states) is necessary for achieving the fulfillment of basic human rights at the global level. At the same time, with statist, she does think that some degree of control over one's natural resources is necessary to realize the value of self-determination of the people politically constituted. She offers three arguments in defense of this claim. First, it would seem that to avoid the well-known tragedy of the commons it is a good idea to leave the administration of resources to states. Second, given that the state must regulate and enforce property laws, it is necessary for it to have a right over its resources. Third (and this is Moore's own argument), 'self-determining political communities need to have jurisdictional authority over resources, mainly because rules around the extraction and use of resources where they live impinge on many different aspects of the collective life of the community' (p. 166). This amounts to the claim that, while the right to control, use and transfer the natural resources within one's territory is required by the collective to achieve meaningful self-determination, the right to fully profit from them is not.

<sup>5</sup> Chris Armstrong, "Against Permanent Sovereignty over Natural Resources," *Politics, Philosophy & Economics* Vol. 14, no. 2 (2015): pp. 129–51, p. 146.

<sup>6</sup> Alejandra Mancilla, "The Volcanic Asymmetry or the Question of Permanent Sovereignty over Natural Disasters," *Journal of Political Philosophy* Vol. 23, no. 2 (2015): pp. 192–212.

Furthermore, even the former right is defeasible when what is at stake are the basic rights of others; for example, their right to subsistence. I examine these claims in more detail in section III.

While states are the relevant controlling agent when it comes to *occupied* natural resources, Moore thinks that a different jurisdictional authority should be put in place when it comes to natural resources over *unoccupied* areas of the earth. According to her list, these include the High Seas, the deep seabed, small uninhabited islands, the earth's underneath resources, the Arctic and Antarctic, the airspace and the atmosphere. Why is this so?

From the outset, Moore rejects what she calls 'the property account of territory' as a general normative approach to territory, whereby states stand to land in the same relationship as individual owners to their property (p. 16). However, she endorses this approach when it comes to specific conflicts over unoccupied areas of the earth. When countries dispute among themselves the use and exploitation of areas such as the deep seabed, for example, Moore's point is that they should not be seen as arguing about jurisdiction, but about property rights, where the resources in question are valued as possessions, and as having purely instrumental value (p. 17). This property-approach to territory is in fact still present in international law and politics and, although Moore does not wish to build a theory to match the current state of affairs, she admits that here the latter may offer normative guidance.

## II Unoccupied Natural Resources as Property

An implication of viewing unoccupied natural resources as being subject to property claims rather than territorial claims is that a new, currently nonexistent authority (or more than one)

ought to be put in place to adjudicate disputes over them. Moore suggests that this authority should take the form of a multi-lateral agency, with the right to establish and regulate property rules for the common good of all, as well as with coercive powers to tax the use and exploitation of resources.<sup>7</sup> This should be the preferred solution, Moore claims, to administer commercial fisheries and the deep seabed, small uninhabited islands claimed either for strategic reasons or for their natural wealth, the subterranean depths of the earth, and the atmosphere over the territorial airspace.<sup>8</sup>

Moore is aware that by proposing this she is taking a step toward—if not ideal—immediately unfeasible political theory. In one sense, feasibility has to do with logical consistency, but in

<sup>7</sup> For a similar view, see Cara Nine, *Global Justice and Territory*, p. 43.

<sup>8</sup> Moore does not mention outer space resources, but given her broad definition of natural resources, they could easily fit in the category of unoccupied ones. A further question is whether they should also be treated like property and administered by a multi-lateral body for the common good of all. To answer this it seems necessary to distinguish two types of resources: on the one hand, those the overuse of which could lead to a tragedy of the commons; on the other, those the use and/or extraction of which do not seem to generate this problem, at least not in the foreseeable future. An example of the first group is the geostationary orbit 35,000 kilometers above the earth: it is not fortuitous that there is already an international body in place to grant and administer access to the limited slots available on it for telecommunications, broadcasting and weather satellites. See the International Telecommunications Union (ITU), <http://www.itu.int/en/about/Pages/default.aspx>, accessed March 30, 2016. An example of the second group are rare minerals on near-earth asteroids and on the moon. Private companies are already planning path-finding missions to prospect available resources in them, while NASA scientists promote this ‘sustainable’ new industry. See Siceloff, Steven. ‘Study: Asteroids Provide Sustainable Resource,’ NASA News, June 13, 2013. [https://www.nasa.gov/mission\\_pages/asteroids/news/asteroidmining.html#VwJsMXqpfqQ](https://www.nasa.gov/mission_pages/asteroids/news/asteroidmining.html#VwJsMXqpfqQ), accessed April 4, 2016.

another sense it refers to a measure of probability, i.e. to how likely it is for something to happen, or to be agreed upon, or to be implemented. Accordingly, the establishment of a multi-lateral agency or agencies with jurisdictional powers over these unoccupied resources is feasible in the first sense, but not straightforwardly so in the second. This is not surprising, since it would require that all agents agree upon the right use and distribution of profits from them; something that will be typically contentious, as Moore herself recognizes when she says that ‘we should expect different societies, with different cultures or different values or different projects, to favor different property regimes and to have different approaches to the treatment of land and potential resources’ (p. 166).<sup>9</sup> This is why, as a second-best solution, Moore suggests that states should at least try to agree on some common principles to distribute the right to control unoccupied resources among them.

Two questions that remain to be answered are, first, who the relevant *demos* should be if a multi-lateral agency were put in place—or, to use Moore’s own terminology, who should count as *the people* to be represented by these multi-lateral agencies. It seems that, for Moore, states would be the obvious candidates. But is it obvious? After all, if unoccupied resources are to be treated as property, then at least in principle it seems plausible that individuals and other types of organized collectives (like companies, foundations and associations) may lay claims to them. This may be the case especially insofar as their interests are affected by the way in which the resource is administered. Just to

<sup>9</sup> A tangible proof of how contentious it can be to reach agreement on the use of the commons were the two United Nations Conferences on the Law of the Sea (UNCLOS 1958 and 1960), where the proposal to create an international agency to regulate fishing was presented and failed (pp. 168-69).

give one example, from an environmental point of view it could be argued that Marine Protected Areas (MPAs) located in the High Seas would fare better if owned by, or leased to, specific conservation NGOs rather than states.

Second, as for the shape that such an agency should take, Moore says very little, but there are some examples already out there from which one might draw inspiration. One is the International Seabed Authority (ISA), which regulates deep seabed mining and is mandated to ensure that the marine environment is protected from any harmful effects that might arise as a result of exploration and exploitation. Another is the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which establishes and administers fishing quotas—especially of krill—in the Southern Ocean, with an ecosystem-based management approach.<sup>10</sup> To be sure, these agencies suffer from the sempiternal problem of entities of their type: namely, they are binding for members only, and have weak powers of enforcement even over the latter. Their presence, nonetheless, signals the interest of their members in arriving at least at some minimal agreement regarding the use of the commons, while putting some peer-pressure on non-members and dissenters.

One of Moore's main goals in writing this book was 'to develop coherent principles to govern our international order as we enter... a potentially more dangerous, more conflict-ridden period' (p. 243). While most of the conflicts she examines are long-standing, historic ones, I would entice her to further develop her idea of one or several multi-lateral jurisdictional authorities

<sup>10</sup> See, respectively, International Seabed Authority (ISA), <https://www.isa.org.jm/>, and CCAMLR, <https://www.ccamlr.org/>, both accessed March 29, 2016.

governing unoccupied natural resources as a way in which present and future conflicts over the latter should be resolved. In a context where current territorial arrangements are showing themselves to be insufficient to guarantee the long-term sustainability of the planet, conceiving alternative ways of governance such as these seem all the more urgent. That they seem not immediately feasible should not prevent us from theorizing about them, and giving arguments as to why it would be commendable to adopt them.

### 2.1. *Unoccupied land on earth and off-world*

Two further points to be discussed in Moore's account of unoccupied natural resources regard her definition of land as the 'portion of the *earth surface* not covered by water' (p. 15, my emphasis), and her unstated assumption that all potentially inhabitable land has already been claimed as territory. Because both are tightly knit, I discuss them together.

Moore conceives of all the land that is left unoccupied in the planet as having a purely instrumental value: what remains unoccupied, thus, are only resources, but not any geographical spots of the kind where political, self-determining collectives could gain jurisdiction. In short, her belief seems to be that there is no physical space left to found new territories, and this leads her to ignore altogether the question of what would count as just first acquisition today.

But this is not the case. While presently some sub-antarctic islands and the northern tip of the Antarctic Peninsula might not have the most cheerful weather, thanks to global climate change it is not far-fetched to suppose that these areas will become inhabitable all year long in the middle and long-term. In fact, they already are: the Chilean base, Villa Las Estrellas, has a permanent

population of around 80 people in winter time that doubles in summer time, while the Argentinian Esperanza base lodges around 50 people year-round.<sup>11</sup> To be sure, Moore could reply that the geographical area where these bases lay is already claimed by the United Kingdom, Chile and Argentina as part of their respective ‘antarctic territories’ and so is, in a sense, already *occupied*. These claims, however, were *frozen* in 1959, when the Antarctic Treaty System (ATM) was created, and it seems at least questionable that, were they to *melt* (if, for instance, the ATM came to an end or changed dramatically), standard territorial rights would straightforwardly be gained by any or all of these countries over that area.<sup>12</sup> Put differently, Antarctica remains ‘the world’s last store of natural resources’ and is, in this respect, a potential site of conflict for property-like claims.<sup>13</sup> In the case of living marine resources, as already mentioned, these claims have partially been dealt with through the CCAMLR, by setting fishing quotas and issuing fishing permits to its 25 member states. In the continent itself, meanwhile, the Protocol on Environmental Protection put a moratorium upon all extractive activities until 2048, seeking to preserve it exclusively for peace and science. This does not preclude, however, that Antarctica might also become a potential site of conflict for politically-minded collectives pursuing their projects of self-determination; that is, a potential site for the expansion of already existing territories, but

<sup>11</sup> See, respectively, <http://www.visitchile.com/es/villa-las-estrellas/>, and <http://www.marambio.aq/baseesperanza.html>, both accessed March 30, 2016.

<sup>12</sup> See, specifically, Article IV of the Antarctic Treaty: [http://www.ats.aq/documents/ats/treaty\\_original.pdf](http://www.ats.aq/documents/ats/treaty_original.pdf), accessed March 30, 2016.

<sup>13</sup> Keith Suter, *World Law and the Last Wilderness* (New South Wales: Friends of the Earth, 1979, p. 22).



maybe also for the formation of new ones.<sup>14</sup> Furthermore, just as the definition of natural resources proposed by Moore depends on the context, what counts as land to be turned into territory should also be understood in this way. If this is so, even if Antarctica remained inhospitable, it could become increasingly inhabitable as building, transport and telecommunication technologies improve.

Moore's narrow definition of land as earthbound only should be challenged on the same grounds: while talk of space colonies and off-world territories today might sound restricted to Hollywood productions, their coming into existence is a matter of time. Envisaging this and taking advantage of a loophole in the Outer Space Treaty (which precludes the appropriation of outer space resources by states, but says nothing about individuals or commercial enterprises), the American entrepreneur Dennis Hope started a profitable business called *Moon Estates*, selling and administering patches of land in the Moon, Mars and Venus. Almost two decades after its inception, the company claims to have six million customers, including George Bush, the Hilton Hotels and Tom Cruise.<sup>15</sup> Hope's self-appointed status as land

<sup>14</sup> For how the former might happen, see Doaa Abdel-Motaal, "Antarctica: The Battle for the Seventh Continent" (Praeger, 2016). As for new territorial agents developing their own self-determination projects in Antarctica, this could eventually happen as growing colonies of people living there on a permanent basis decide, for example, to become independent from their sending states. This might sound science-fictional under the current restricting provisions of the ATM and its Environmental Protocol, but it could take place if, for example, the mining ban is lifted and the continent becomes a new global pole of economic activities.

<sup>15</sup> In its Article II, the Outer Space Treaty establishes that '[o]uter space, including the moon and other celestial bodies, is not subject to *national* appropriation by claim of sovereignty, by means of use or occupation, or by any other means' (United Nations General Assembly 1967, my emphasis). This

administrator in these celestial bodies might be regarded as irrisory by down-to-earth lawyers and policy-makers. His business success as much as the silence of both governments and international organizations regarding the legitimacy of his actions reveal, however, that issues of extra-terrestrial settling will have to be tackled sooner or later by theories of territorial rights and by international law.

In sum, while a tacit assumption along Moore's book seems to be the unavailability of land to be turned into territory, I have suggested that this assumption is unwarranted. In a world where the last frontiers for human presence are being extended both in heaven and on earth, a normative account of just first acquisition and just territorial expansion (or their impossibility) would be a timely addition to her theory of territorial rights.

### III

#### **Disaggregating Rights over Occupied Natural Resources: A Further Twist**

To recall, when it comes to states' rights over their occupied natural resources, Moore suggests that a certain degree of control is necessary for politically-constituted collectives to meaningfully exercise their self-determination. From this does not follow, however, that states should fully profit from their use and exploitation. Furthermore, integrating an important valuable

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leaves open, according to Hope, the possibility of individuals and other non-governmental entities appropriating bits and pieces of outer space. See Rachel Hardwick, "Dennis M. Hope Has Owned the Moon Since 1980 Because He Says So," *Vice*, April 11, 2013. <http://www.vice.com/read/ive-owned-the-moon-since-1980>, and <https://www.moonstates.com>, accessed April 4, 2016.

insight from cosmopolitans, Moore recognizes that the collective right to self-determination must be consistent with the basic right to subsistence of everyone. By this she means that: ‘(1) political communities in which people are collectively self-determining are themselves necessary for people to secure their basic rights; (2) the subsistence rights of others can be met without violating collective self-determination; and (3) collective self-determination is not the reason why these rights aren’t met’ (p. 182).

Moore thinks that fairer rules regarding trade and development at the global level, as well as more redistribution from wealthy to poorer areas of the world should be enough to guarantee the satisfaction of the basic subsistence rights of everyone. In other words, the collective right to decide how to administer and use resources within one’s territory should not be affected if these measures were implemented. What is more, following Jeremy Waldron, Moore points out that the relevant question when pitting subsistence rights against the right to self-determination is not only which right is more important, but also the interest that the right is supposed to protect and the policy.<sup>16</sup> In practice this means that, when striving to fulfill the basic rights of everyone, the first solution to consider should not be to violate people’s right to self-determination. Other policies to achieve the same result should be tried first.

Notwithstanding, Moore recognizes that this view is too optimistic. There might be cases, she says, where the only way to guarantee that global subsistence rights are met is by exploiting some resource located in a given territory, even against the will of the people. Her example is that of a country that uniquely possesses a mineral needed to cure a serious illness that causes

<sup>16</sup> Jeremy Waldron, “Rights in Conflict,” *Ethics* vol. 99, no. 3: pp. 503–19.

many deaths somewhere else in the world. Despite of knowing this, the people in the country decide to leave the mineral in the ground. Their presumptive right to make this sort of decision should be outweighed by the right to subsistence of those likely to contract the disease.

The fact that this is the only example given by Moore suggests, in my view, that she does not take seriously enough the possibility that the collective right to control natural resources may be constrained much more often and more substantially depending on how one understands subsistence rights in claims (2) and (3) above. If subsistence rights are not only about the immediate survival of the individual, but also about the middle and long-term prospects for the human species, then there seems to be a third category of resources in need of independent normative treatment. These are natural resources that are within occupied territory, but are at the same time part of the *systemic commons*. By these I mean geographic areas of the earth that provide key water or ecosystem services, or help to regulate the climate system, so that their loss would greatly jeopardize the lives of human beings on earth. The classic example are rainforests, which act both as biodiversity hot-spots and carbon sinks, and are crucial for regulating the planet's overall temperature and climate patterns. If rainforests should be preserved for the good of all mankind, then their control, use and exploitation by independent self-determining collectives seems less plausible, or at least in need of further defense—especially if their plans involve chopping them up unsustainably rather than conserving them on a long-term basis.<sup>17</sup>

<sup>17</sup> Megan Blomfield makes a similar point when she says that, when it comes to territorial rights over carbon sinks (she calls them 'greenhouse gases sinks'), the interests of the state and of the individuals and collectives within it should

When pitted against basic subsistence rights, then, the right to self-determination of states over their natural resources may be constrained not only in that the latter may be forced to *exploit* a given resource (as in Moore’s example), but also in that they may be forced *not to exploit* it.

The question that follows, then, is how territorial rights should be granted accordingly. Theorists writing about the ethics of climate change and, more precisely, about the specific issue of mitigation via preservation of carbon sinks, have tended to assume that, if properly compensated, states with large extensions of rainforest (which are mostly poor states) would happily leave their valuable ecological resources on the ground. That is, they have tended to assume that opting for conservation instead of exploitation would not damage in any fundamental way their projects of self-determination.<sup>18</sup> But what if they did? And what if they were not willing to give these projects up? Would it then be legitimate for an external agent to dictate what should be done for the sake of the global common good? I think that the answer

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be taken into account, but without disregarding the important interests of outside actors who may be reliant on the resource, or who may be harmed by certain uses of it. The conclusion is that territorial rights over carbon sinks should be tempered by these considerations: Megan Blomfield, “Global Common Resources and the Just Distribution of Emission Shares,” *Journal of Political Philosophy* Vol. 21, no. 3 (2013): pp. 283–304.

<sup>18</sup> See, for example, Chris Armstrong, “Fairness, Free-Riding and Rainforest Protection,” *Political Theory* Vol. 44, no. 1 (2016): pp. 106–30, and Ed Page, “Qui Bono? Justice in the Distribution of the Benefits and Burdens of Avoided Deforestation,” *Res Publica* (2015), advance online publication: doi:10.1007/s11158-015-9313-y. Here it could also be argued that states’ right to control, use and exploit vast oil and gas deposits lying under their occupied territories should be constrained in a similar manner, insofar as the unleashed exploitation of the latter puts further stress on the planetary systems and thus seriously affects the prospects of human life on earth.

is a qualified *yes*. Just as use of the atmosphere's absorptive capacity by states should ideally be regulated by a multi-lateral authority, so should the use of carbon sinks, wherever they lie. This would mean extending the jurisdictional scope of such an authority so that it includes not only unoccupied resources, but also the occupied systemic commons. It would also mean asking in what ways governance over these two kinds of natural resources should be similar or different (for example, whether some sort of compensation to states should be given in exchange for control of the occupied systemic commons). Given that this seems an even greater leap in the direction of immediately unfeasible political theory, it is an open question whether Moore would be happy to take it.

#### IV Concluding Remarks

There are two major moves that characterize Margaret Moore's theory of resource rights, as part of her more encompassing theory of territorial rights. On the one hand, Moore *ensovereigns* one or more still nonexistent multi-lateral agencies to establish, administer and enforce property rules over the unoccupied natural resources of the earth, for the common good of all. On the other hand, she *desovereigns* territorial entities in two steps. First, she denies that a right to fully profit from their occupied natural resources follows from the right to self-determination of their members. Second, she makes their right to control natural resources defeasible in situations where basic subsistence rights are at stake.

In this article I have suggested directions in which her theory may be fruitfully expanded and refined: by developing an account of how one or more multi-lateral agencies for the governance of

unoccupied natural resources should be framed, and by defining the *people* that are to be part of them; by not foreclosing the possibility that new or extended territorial claims may arise both on earth and extra-terrestrially in the not-so-far future, and by elaborating on what just first acquisition or just expansion of territory would look like; and by saying more on the balance between subsistence rights and rights to self-determination over natural resources, specifically when it comes to the occupied systemic commons.

Moore has done a great job providing us with a plausible theory of territorial rights that is however not shy about disagreeing with the status quo. If anything, these comments have purported to present her main ideas when it comes to natural resources and the rights of self-determining collectives over them, while at the same time signaling to those aspects of her work where further theoretical elaboration would be welcome.

*University of Oslo*

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SYMPOSIUM  
PEOPLE AND TERRITORY



REPLY

BY  
MARGARET MOORE

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# Reply

Margaret Moore

I am both grateful and humbled by the attention and care that the contributors to this symposium have given my book, and I will try in this *Reply* to reconstruct the main differences between us as generously as I can and respond to their criticisms.

Let me begin by outlining my basic position on territorial rights. I argue that a ‘people’ (defined in non-cultural and non-statist terms) has jurisdictional rights and the related liberties, claims and entitlements that generally flow from this, subject of course to justice constraints, over land on which members of the group reside, if the group is in legitimate occupancy of the land. There is, at the core of the argument, a theory about the relationship between people and place, and my substantive argument begins by thinking about why territory or place matters. Individuals, I argue, have a plurality of relations both with each other and with the land on which they live, and it is this the complex of valuable relations involving people and land that explains the ‘attachment’ of a particular community to a particular geographical site. Such attachments ground (interest-based) ‘residency rights’ of individuals and (interest-based) occupancy rights of groups. These rights are necessary to address what I call ‘the attachment problem’, which is the problem of how to justify particular pieces of territory for particular groups. Cara Nine’s

paper is focused on the account of place-related rights developed in chapter three.

I argue that, in order to manage residency, occupancy and other rights collectively, people require territorial control. On my view, territory is a geographical domain of jurisdictional authority, and the right to hold territory—to have jurisdiction, to have some control over borders and natural resources—is justified in terms of the moral value of collective self-determination, which in turn is predicated on these collective rights and identities.

The comments and criticisms above are all challenging in different ways, and raise questions about almost every aspect of my argument. In addition to Nine's criticisms of my argument for place-related rights, Ian Carter, in his chapter, examines the idea of collective self-determination and its relationship to individual self-determination. He also analyzes different possible configurations of the relationship between democracy and self-determination that might be implied by my account. In chapters four and five, I argue for the superiority of my theory vis-à-vis other theories of territory, and both Kok-Chor Tan and Pierce Randall raise different sorts of questions about my negative argument. In the remaining chapters six to ten, I apply my theory to issues of boundary drawing, secession, immigration, control over resources, and defense of territory. The relationship between the justificatory argument developed in chapter three and their implications in later chapter is discussed particularly by Bufacchi and Simmons, in terms of methodological worries about my rights-based justificatory argument and the relationship to the so-called applications of my theory. As both Bufacchi and Carter approach my argument by raising fairly fundamental methodological issues—my reliance on an interest-based accounts of rights, how I deal with conflicts amongst rights, how

I determine the scope of territorial rights—I will deal with their arguments together, and first in the Response that follows.

## I Methodological Challenges Bufacchi and Simmons

In his chapter, Vittorio Bufacchi argues that my interest-based account of rights is incomplete (p. 111); potentially inflationary (p. 113); and that it can't deal with conflicts amongst rights (p. 114). Simmons' concerns are somewhat different, but they dovetail with these criticisms: he raises questions about the relationship between the descriptive and normative arguments, and expresses the worry that showing that people want *x* does not show that they are entitled to *x*, and that identifying the interest in *x* does not itself show what rights and duties we have.

While I adopt an interest theory of rights, I do not *argue for* it, and so my theory has nothing to say to those people who do not believe in either individual or collective rights, or who hold a different theory of rights. However, the criticisms of Bufacchi and Simmons are such that, if I am vulnerable to them, then, this is true of all people who hold an interest theory of rights, at the stage of political theorizing that we are at (as Simmons himself concedes). I believe nevertheless that there is merit in the methodological approach I adopt, and that the more ambitious alternative that would satisfy their worries is so ambitious that it may actually stymie progress on ethical and political theory.

Let me turn to their specific criticisms. Bufacchi points out that just showing that there is a morally important human interest in something does not translate into a right to something: “the fact that territories are necessary for our collective self-determination, and that there is value in self-determination, is per

se not sufficient to establish a right to territory”, he writes (p. 112). He raises questions about what to do when rights conflict, and, the potential inflationary implications of an interest based account.

Simmons raises similar worries, but focuses on the scope of the right, and how we can generate the precise shape and content from identifying the interest in the right. “[W]hat is less satisfactory—in Moore’s account and in the others I have mentioned—is that nations (states, groups)’ broad overarching rights of self-determination seem mostly to be discussed as if we not only know and agree on what it means to be self determining but we know and agree about which more specific rights are implied by the right of self-determination. In fact, neither of these subjects seems to me to have been satisfactorily resolved (or even very carefully addressed) in the existing theoretical literature” (pp. 59-60).

I agree that on an interest theory of rights, it is not sufficient just to point to the human interest which is protected or promoted by a right. As Bufacchi points out, more needs to be done. The right has to be described in a way that the duties that are generated by the right can be discharged without excessive cost by the duty-bearer. Rights possess moral stringency at least in the sense that they override welfarist considerations that may compete with them, but rights can conflict, or more accurately, the duties that are generated by the right can conflict. It is important, therefore, in thinking about the right, that we consider not only whether the right protects a morally important human interest, but the cost of that right, especially the cost to the duty-bearer, and how the right can cohere with other rights that the person may also possess. Bufacchi interprets my claim that rights will conflict as evidence that I am assuming that all territorial rights are claim rights (p. 114), but this is not true: in my view,

claims to freedom that impose, at least in the first instance, duties of non-interference may conflict, too, because they typically involve more than just the one duty. For example, my right to be free of coercion (which is a liberty right) not only generates a duty on you to not coerce me, but may also generate duties to protect people from coercion, to prosecute offenders, to educate people about the harms of coercion, and so on.<sup>1</sup> We should expect that a human interest that is sufficiently important to be protected by rights, will generate what Waldron argued was a ‘wave’ of duties that are related to the interest. Waldron proposed ways to think about how to deal with conflicts among rights, appealing especially to the closeness and directness of the duty to protecting the human interest in question. Of course, in a perfectly complete theory, the scope of a right to x would be dealt with in a theory that explains X’s limits vis-à-vis other rights that are based on those human interests that are important enough that they too will generate duties that we might expect would conflict (though not necessarily conflict, as we can then pare down the rights accordingly). To figure out all this in advance would require that we have a full theory of moral value, generated by reflection on the moral value of various human interests, and a full account of the duties that this gives rise to, which potentially might conflict, thereby establishing limits with all these rights and duties in place. This is a very ambitious model of what is necessary to give an account of territorial rights (or any kind of right) in moral and political theory. As Simmons points out, I do not do that, but neither do any of the other theorists that he considers (nationalists, statist, functionalists and so on). I do have a picture of a coherent set of rights and duties in view *as an aim* for moral and political philosophy generally, but I do not think that progress on different dimensions requires that we are able to

<sup>1</sup> J. Waldron, ‘Rights in Conflict’, *Ethics*, vol. 99, no. 3 (1989), 503-519.

articulate a complete account of values, rights and duties first. What I try to do is make progress with a more limited aim: to discuss the obvious and directly relevant duties that are generated by my account of territorial rights. I do this throughout the book, (with respect to public policy re: housing (p. 42, p. 67); with respect to control over resources (ch. 8) and borders (ch. 9) and the implications of past injustice (ch. 7). In each case, I do not discuss every possible limit, but I do discuss *obvious* tensions among rights and how these suggest limits to the rights themselves. I discuss, for example, limits on the state's control of borders or control over resources, which are generated by recognizing a right to subsistence. In this way, I try to prune the scope of territorial rights, both by looking at what was directly justified by the value of self-determination, and at the costs of holding others to the duty, where the cost is ascertained by looking at the obvious challenges posed by other rights.

## II

### **Rights Conflicts Over Place and Resources Simmons, Nine, and Mancilla**

One of the interests that I argued was sufficiently morally important to be protected by rights was an interest in stability of place, as a place that we care about and are attached to, as a locus for our other relationships, and our plans and projects. There are two sorts of objections to this part of the argument, somewhat in tension with one other.

One might claim, as does Simmons, that my appeal to the fact that human beings care about place does not itself show that they have a normatively relevant interest. I agree that this is tricky, but I do not appeal simplistically to people's subjective wants and attachments. I cite empirical evidence about people who have



been dispossessed of their land, or exiled from the place that they lived in. I appeal to the role that land or place plays in people's lives and why we might think that this is morally important, connected as it is with other interests (in relationships, in autonomy) that we do give moral importance to. I agree with Simmons that the rights over place at the beginning of my argument cannot just stem from subjective preferences. As Simmons says, "The fact that a collective wants to maximize its wealth, wants to keep other groups from using or profiting from what is closer to us, or wants to exclude immigrants seems to give us little reason to think that a basic group right is at issue." This is right: what needs to be shown is whether people have a legitimate interest, which is sufficiently weighty that we should protect it, in controlling their environment in these important ways. This is why I argue that a group—based *desire* to have control over unoccupied islands does not reflect a morally significant interest in self-determination. It is, I argue, a kind of property claim, and so requires an impartial body (like an international body) to regulate these (property) claims. I also try to show, by citing evidence of peoples' trauma at forcible displacement and by reflection on the preconditions for having control over the background conditions of their existence, what would be needed for groups to be collectively self-determining. I then try to limit this kind of right when there is a legitimate weighty interest of another kind, which can conflict with it. No doubt there will be, in Millian spirit, some disagreement over the precise lines where limits should be drawn. I have a sufficientarian approach to basic rights to redistribution, whereas others may have a more egalitarian view, and this dispute is germane to debate on the state's right to resources. The idea here is that we should argue about these interests, bringing to bear evidence and critical reflection on what people need to live worthwhile lives and have some control as collectives over the conditions in which they live.

This does not generate clearly and precisely the exact limits of each right, for that would require a full assessment, not only of that right but its relationship to all other important human interests, and the duties that these rights might generate. Nevertheless, I think it does represent moral progress to indicate in a number of respects (resources, boundaries) what those limits might be.

Somewhat in tension with Simmons' reservations about such arguments, Cara Nine accepts that people do have place-related rights, which are based on deep-seated human interests. Her challenge is quite different from Simmons': she points out that the very same arguments that justify control over territory, understood as geographic space and community land, should generate a right to a home, understood as a private space that is as important, perhaps more important, to human functioning. In her view, I do not recognize the full implications of my own argument, but that the kind of argument that I am developing, and the way that I argue for place-related rights, is convincing.

Here again, let me emphasize the limits of my argument. This is not a book about place-related rights but about *territorial* rights, and I erect my argument for territorial rights on two kinds of place-related rights: rights of residency and rights of occupancy. It may well be that there are other kinds of place-related rights, which we have only begun to theorize, and that once we recognize that people are both territorial animals and migratory animals, we need to have a carefully balanced theory that gives due recognition to both kinds of human interests. I did at times recognize that a full theory of place-related rights could be developed, and that parts of my argument would have implications for other debates. For example, in chapter 3, footnote 7, I noted that the justifications I offered for the importance of place might have implications for how we think

about tenants' rights. However, then, in the spirit of my interest-based theory of rights, and aware of the possibility of a conflict among rights, I pointed out (p. 67) that, if a right of residency was interpreted to permit tenants to stay in their dwellings in spite of their failure to pay their rent, it would not be compatible with a market-based economy in rental housing. This, I argued, was a case where rights need to be balanced: markets themselves are not morally free zones, but are justified almost entirely as third-best non-ideal institutional arrangements (in terms of efficiency understood in Pareto optimal terms). A strong residency right (or in Nine's terms, a right to a home) that simply allowed non-paying tenants to reside in a home forever could not be reconciled with market arrangements, although I do think that a recognition of place-related rights, which encompassed a home, could result in fairly strong sitting tenant legal rights (p. 67, note 9). In other words, I was aware, to some extent anyway, that my argument had implications for a number of different debates about people and land, but I did not focus on these, but only on the ones directly relevant to my argument for territorial control.

In somewhat similar spirit, Alejandra Mancilla points to a number of competing interests which my discussion of territory and resources either didn't address at all, or touched on briefly but not in the kind of depth that was warranted. I argued that we are under an obligation to establish a multi-lateral agency or agencies with jurisdictional powers over those resources that are not directly related to self-determination (to administer the commercial fishery, the deep seabed, small uninhabited islands and so on). She notes that I say little about how these agencies should be organized, but only briefly suggested different possible mechanisms to achieve international regulation, such as establishing an international agency with full coercive powers over a range of such issues, to the more limited, and achievable, goal of some kind of agreement on common principles to

regulate these resources. I agree that there is a lot of work still to do in considering the normative shape that such agencies should take; and that we have some models to rely on—the International Seabed authority; The Commission for the Conservation of Antarctica Marine Living Resources; and so on. It is moreover far from obvious that the participants ought to be confined to states, rather than include, say, conservation NGOs, especially if these regulatory bodies are mainly supposed to fill an environmental trusteeship role. There is also further work to be done, which I did not consider, on what to do with unoccupied territory within states that is presently uninhabitable but could become habitable; and here again I think that the right to subsistence may play an important role in considering how to regulate the initial right of occupancy in the current international order (rather than in the Bermuda scenario that structures the book), and that this is a further important line of inquiry.

In my book, I argue that the right to control natural resources, which I justify as necessary for collective self-determination, needs to be constrained by subsistence rights. Mancilla is correct to note that I focus only on the immediate survival of particular existing individuals, but not the medium and long term survival of persons, including persons not yet born. I welcome this as a friendly amendment to my theory: I agree that control over resources may also be constrained by the need to preserve carbon sinks, or key water resources, or biodiversity hotspots, which are important for regulating the planet's overall climate. It is not that my theory lacks the conceptual resources to deal with this, as I think my constraint (a subsistence principle) also applies in this case. The more serious problem is that we lack the institutional mechanisms to reliably ensure that these areas will be protected, and ensure the medium and long-term health of human beings, including those yet to be born. This is a problem of feasibility,

which Mancilla also raises, and which I discuss at the end of this Reply.

### III The Moral Value of Self-determination Ian Carter

Carter notes that the account of territorial rights is based on the collective right of self-determination, and that that collective right is held by a ‘people’. As a self-identified liberal theorist, Carter is interested in the crucial step from individual attachments to collective attachments, and from individual agency to collective agency, noting that individual freedom and collective freedom are distinct and not always compatible. I also claim liberal credentials, arguing that the value of self-determination derives ultimately from *the value it has for individuals*. So I claim that my account is value-individualist even if territorial rights are collective in the sense that they attach to collective agents.

Carter outlines a number of possible positions on collective and individual autonomy, and their relationship to democracy, which are logically prior to liberal worries about the special interests of minorities (which I do address, pp. 61-2). His argument is pitched at a more fundamental level of analysis.

On the relationship between collective self-determination and democracy, Carter notes that my terminology tends to avoid language that could be interpreted as requiring democratic governance, making use of more neutral terms like ‘political institutions of self-determination’. There are though a number of possible relations between the two, which Carter considers: 1 - that a people’s collective control over a territory can be morally valid (valuable) even if the political culture of that people is not democratic; 2—that a people has a general moral power to exercise jurisdictional control over a territory, but the moral

legitimacy of any actual exercises of that jurisdictional control depends on those exercises of jurisdictional control being the outcomes of democratic procedures; and 3—that territorial rights are justified by self-determination and collective self-determination requires democratic control (p. 7). My position is 1—that a people is self-determining if it has institutional mechanisms that allow it to make collective decisions over important areas of life, and if these collective decisions are respected by outsiders and thus free of external interference or the threat of interference. This is close to the international norm. On this view, collective agents are viewed “as opaque” presumably because we do not inquire how exactly those collective decisions are made (although the presence of active dissent negates the presumption). It is not co-extensive with liberal non-interference, because I also argue that self-determination requires relations of non-domination, which is a more demanding position, since it suggests that we should eliminate dominating power relations and not just ensure non-interference.

I reject interpretation # 2 as too restrictive. Not all decisions need to be made democratically in order to be legitimate. They could be in accordance with justice, for example, or established custom. Moreover, established custom could suggest a different procedural mechanism for producing elites than standard majoritarian democracy. This non-democratic form could be consistent with collective self-determination if the leaders that were thereby chosen were recognized (internally and externally) as having the right to speak on behalf of the people. Of course, all exercises of coercion prompt a demand for justification and democratic government is one important reply to this demand.

I reject interpretation # 3 on the grounds that it's just not true that democratic governance, justice and collective agency are

tightly linked such that one (collective self-determination) is valuable only if the others (either democracy or justice) are in place. I believe that democracy and collective self-determination are linked historically and in terms of some key fundamental principles, but they do not require the presence of the other in order to realize their key value. Each of them—democracy, self-determination, and justice—represents an important source of legitimacy, but they respond to different concerns and questions. Justice is an answer to the question: What substantive principles ought a group live in accordance with? And the answer is that the principles ought to be principles that pass some kind of bar of justice (however that is defined). Democracy is an answer to questions of procedural decision-making: How should the government be chosen? How should the rules and practices of the society be decided? And collective self-determination is an answer to the question: why ought a group, or people, exercise jurisdiction over its own life? Of course, it is desirable that a group that has jurisdictional authority be organized democratically and that the rules that they make are substantively just (or not unjust), but these are not necessary to their possession of territorial rights, nor to realize the value of collective self-determination.

The value of collective self-determination appeals to the idea that most individuals see themselves not just as free-floating individuals, but as embedded in a complex of relations with other people, and with place, and that often these group-based identities and attachments and relations are an important part of what gives value to their lives. Institutions of collective self-determination are the institutional means by which individuals, as members of groups, control the collective conditions of their existence, shape their relations with each other, and their interactions as members of these groups. Their exercise of

jurisdiction is necessary to protect the interests and goods that arise from these relationships.

It might be objected, at this point, that, while this explains the value of collective self-determination, it does so in a way that fails the value-individualist test. It appeals to the idea that relationships and collective identities are valuable, but in fact not all individuals will share the collective identity. There are two concerns embedded in this observation. The first is that my argument, at base, is suspiciously collectivist and communitarian. I have already explained why I reject this. I offer reasons for valuing these political institutions of self-determination: they give expression to the communities in which people live; they express people's identities; and they are an important forum in which collective autonomy can be expressed. This is value-individualist in a broad sense, because it recognizes that these collective identities and these relationships only matter because they matter to individual people. They are not 'objectively' or intrinsically valuable 'in themselves' but their value has to be connected appropriately to individuals: it is individual human beings, after all, who, ultimately, live lives, experience happiness and sadness, pleasure and joy and various other kinds of well-being. And it would be an impoverished view of our lives and its value if we could only recognize those interests that each individual has as individuals, over their individual lives.

Perhaps though the concern about value-individualism is based on the fact that the right-holder is a group and there will inevitably be some people who don't share the group—based identity. I agree that there will always be dissenters, and that this raises a very interesting and important question of political obligation. This would be a very serious problem for my theory if I were a libertarian or an anarchist, because I would have no resources to include them in the political project. I do think



however that there are good reasons why people are subject to political authority, and so there is no problem for me in particular in explaining political obligation. In my book, I argue that the state has to recognize the individual and collective rights of people, and I believe that, as long as it does that, and treats people fairly, people have an obligation to obey. If an individual dissenter is not part of the collective, the state is not violating his or her rights in recognizing the collective rights of people who are members of right-holding collectives.

There is however still a worry about the presence of substantial minorities who don't see themselves as part of the political project that's taking place where they live. This is a problem for the long-term health or viability of the political community. I try to deal with this by suggesting a number of institutional arrangements in cases where people constitute different collectives. These range from secession to various mechanisms for power-sharing (both at the executive level and territorially, as in a federal or confederal arrangement).<sup>2</sup>

<sup>2</sup> On the issue of dissenters, it is interesting that there is an analogous problem in democratic theory. Democracy is widely recognized as a valuable institution, but, like self-determination, its value cannot be reduced to a particular value for individuals, or an enhancement to individual self-determination. Even when every person is entitled to vote, it doesn't make democratic decision-making enhance individual self-determination, for reasons noted by both Allen Buchanan, "Democracy and Secession" in Margaret Moore, ed., *National Self-determination and Secession* (Oxford: Oxford University Press, 1998) and Andrew Altman and Christopher H. Wellman, *A Liberal Theory of International Justice* (Oxford: Oxford University Press, 2009)—viz., that no individual in fact controls the outcomes of democratic decisions.

## IV

### **Is my theory better than its principal rivals?**

**Tan and Randall**

My account claims to be distinct from the principal rivals. It is distinct from nationalist theory because I deny that people need to share a particular culture in order to be a people. It is distinct from voluntarism because I argue that choice alone is insufficient to indicate a shared commitment to uphold a political order, and be a people of the right kind. It is also distinct from functionalist/statist arguments, because I argue that the ultimate holder of territorial rights is not a state, but a group that I call ‘a people’. In many cases, as A.J. Simmons notes, these different theories converge in the sense that they frequently pick out the same group as entitled to hold territorial rights, but for different reasons. This is hardly surprising, since, although a voluntarist account privileges choice, it could be that the reason why individuals make the choice that they do is that the choosers have a deeper relationship with one another, e.g., they share a culture or a political identity. A similar logic applies to a political identity account: it could be that the reason why people have a shared political identity is rooted in the fact that they share a culture, or it could be because they have shared a state and it is this that has forged their identity. In addition, functionalist considerations can never be entirely set aside: if one thinks that the justification for holding territorial rights is to realize justice or self-determination, then, the holder of the right has to be at least capable of these things. It has to be functional relative to the justificatory good. It is nevertheless important to be clear about what is doing the work in the argument, even if there is some convergence on real world cases. This is especially true if we adopt a broader methodological commitment to Rawlsian reflective equilibrium, which require us to reject some commitments and accept others, honing both principles and policies in accordance with their consistency with

each other, and with our deeper normative commitments, or ‘fixed points’ from which we are to reason. For something as basic as our rights over territory, much might hang on the arguments that we accept, even if there is a broad consensus in practice on a range of cases.

In writing the book, I tried to navigate what sometimes seemed a fairly narrow path between cultural nationalism on the one hand and justice/functionalist theories on the other, while also avoiding voluntarism, and it is somewhat gratifying that I am identified in the preceding Comments as both a species of cultural nationalism, by Kok-Chor Tan (p. 79), and as similar to, indeed on all fours with, Stilz and the various functionalist/statist arguments that she makes, by Pierce Randall (p. 98). Perhaps perversely, I think that the fact that I am identified with two quite distinct theories, which are in many ways the opposite of one another, shows that I successfully navigated these rocks, at least in the sense that there is disagreement on how best to describe my position. Whether my argument as a whole is successful or convincing is another matter, of course, and I hope in what follows to go some way to addressing some of the concerns raised.

Both Tan and Randall adopt a similar critical strategy. They aim to show that my theory collapses into another kind of account—for Tan, it is a species of cultural nationalism and for Randall, it is a similar strategy to that adopted by Stilz, which places it in the functionalist-statist camp. Then they show that it is not superior to its rivals: Tan claims that a conventionalist account of our internationally recognized territorial rights is superior; and Randall, more modestly, claims that Stilz’s account is able to deal with hard cases—of acquisition and failed states—as well as mine, which means that my account cannot claim superiority.

On the issue of whether it is appropriate to assimilate my account to a cultural nationalist one, Tan notes that my account focuses on the “political identity of the people centred around.. common political projects and commitments, public institutions and practices” and that this can be called a political culture. “In this regard”, Tan writes, “the dispute between Moore and the nationalist is an internal one, that is a disagreement over what the morally relevant cultural feature ought to be” (Tan, p. 80). This is not accurate: I offer an account, not in relation to history and culture, but in relation to political identity and presence. This is the work that occupancy rights do in my theory: occupancy justifies the connection to a particular place. Tan misunderstands this, and then asks how such an account can justify rival claims to the Spratley Islands, which are unoccupied and to which a number of claimants make historical and cultural arguments for territorial authority. I do not however appeal to history and culture to justify state jurisdiction, and in the case of contested unoccupied islands, where my key feature of presence (or occupancy) is absent, I regard the claim to be a kind of property claim, but not one that implicates self-determination, and not therefore a claim that can confer territorial rights.

I argued in my book that my account is superior to justice/statist theory in part because that approach to justifying territorial rights is vulnerable to the legitimate annexation and failed state objections, that is, the criticism that justice theory cannot explain our intuitions that legitimate (just) states should not annex unjust or failed states. Randall points out the similarities between my account and Stilz’s and claims that it is open to the legitimate state theorist to insist on assistance rather than annexation.

I agree that Stilz’s legitimate state theory of territory represented a significant modification of Kantian or statist theory

by making use of a pre-statist occupancy right in order to solve the attachment problem. However, I also argued in my book that her approach was Kantian in the sense that the general rationale for territorial rights is that states are necessary to secure justice, which she interprets as protecting individual autonomy through establishing a legitimate system of laws within a region. Since I finished writing my book, Annie Stilz has in several manuscripts moved even further away from a Kantian account, in part to render her theory invulnerable to these two objections. *Contra* Randall’s claim, it is not open to the legitimate state theorist simply to insist that “the morally appropriate response to their [an unjust state] lacking territorial rights will usually not be to annex them, but to encourage or to assist such states in building legitimate institutions” (p. 102). The only way to make sense of the intuition that assistance is normatively preferable is to appeal to the idea that it is important that people/states/groups make their own rules over their own lives, that is, to appeal to the value of either individual or collective self-determination.

In a recent work on the wrong of colonialism, Stilz rightly points out that the problem with colonialism is not simply that the colonial rule was unjust and tyrannical, nor that the colonized people were typically denied democratic voice: it is that the subject people were unable to affirm the political institutions their rulers imposed on them.<sup>3</sup> This is surely right: colonized people did not simply want better government, nor more efficient government, although probably they wanted that too: they wanted a government that they could identify with as theirs. By emphasizing the importance of subjective affirmation of political institutions, Stilz correctly explains not only the main defect of colonial rule, but a very good response to the annexation and

<sup>3</sup> Anna Stilz, “Decolonization and Self-determination”, *Social Philosophy & Policy*, vol. 32, no. 1 (fall 2015), 1-24.

failed state objections. It explains why we should assist people in creating their own effective government, rather than annex the territory, because that way they will be able to realize what Stilz calls “Maker Freedom”.

What exactly is ‘Maker Freedom’? Citing Hegel, Stilz explains that in addition to Objective Freedom—a sphere of personal freedom within which individuals can act—there is also Subjective Freedom, which Stilz identifies as ‘maker freedom’. The central contrast, she argues, is between citizen *as taker*, as recipient of justice and the various benefits and entitlements of the state; and citizen *as maker*, which involves a form of freedom, that is not passive but imagines the citizen as free in relation to the rules and policies of the state. The instrumental argument for requiring subjective affirmation of political institutions is clear and uncontroversial: the state functions better when citizens freely accept its authority, are willing to pay taxes, abide by laws, cooperate with police and state officials. But the intrinsic goods that are realized by subjective affirmation rather depends on what Stilz means by the concept of ‘maker freedom’.

On one interpretation, Stilz means something like what I mean by collective self-determination—the idea that the colonized people want a government that they *identify with*, meaning that the governed and the government (the people who occupy dominant positions in the state) share the same group identity. This is not helpfully described as an issue of freedom, however, because it is not individual freedom that is preserved when a person affirms her political community and its institutions. It is rather a matter of individual people caring about the collective dimensions of their lives and especially their relationships with each other, and viewing the institutions of the state as reflective of their collective identity, on land that they regard as theirs. If Stilz means something like this, in her reference to ‘Maker Freedom’, then she

does escape the criticisms that I made of her account, but only by making her account very similar to my own.

There is however another interpretation of her remarks about colonialism and ‘maker freedom’ which would distinguish her account from mine. On this interpretation, her reference to ‘maker freedom’ applies to individual persons, rather than to a group or collective agent. If this is so, her theory looks much more like a voluntarist account, in which *individual freedom* is at stake in colonialism, and in replacing unjust and failed states. This move, however, would be deeply problematic, not only practically—as a recipe for political fragmentation, if individuals can freely decide with whom to associate—but also philosophically, because it’s not clear that states or governments can be rendered compatible with *individual freedom*, since decisions, even in a democracy, are made by majority decision, and are coercively enforced. In any case, this voluntarist response is a major departure from Kantianism, which asserted a duty to enter the civil condition, which I think only serves to reinforce my argument that Kantianism cannot respond to these serious objections.

Tan’s critique is more ambitious than Randall’s: he claims not simply that another account could do as well as mine, but that it can do better. He defends a conventionalist account of territorial rights, noting that territorial rights must appeal ultimately to some shared international public system of rules and that, while these rules are arbitrary, they are granted moral standing because they are necessary. Tan writes: “The violation of acknowledged background international standards is what ultimately explains the wrongness of international violations of territorial rights. What was wrong with Saddam Hussein's invasion of Kuwait 1990, or with Russia's incursion into Ukraine and the Crimea, is not that these acts violated the natural rights of states to territory or that

they violated some indisputable historical and cultural entitlements... Ultimately these are wrongful incursions because they felt violated the acceptable norms and rules of international conduct. The world order is fundamentally institutional all the way up, from the domestic to the global domain and this way of understanding territorial rights as implications for our understanding of global justice” (p. 87).

Tan’s analysis here relies on a familiar distinction between internal and external legitimacy, where the former refers to the moral standing of a governing regime or state in relation to its people, and the latter has to do with the moral standing of a state with respect to other states. Tan is right to say that in the external, or international relations, sense, a state is legitimate if it is recognized as an actor among like actors in the community of states, and that this community is rule-governed. But the deeper question—with which my book is concerned—and is somewhat occluded by Tan’s treatment is: what is the moral basis of this institutional practice? After all, a fully institutional approach makes sense only if the institutional rules are justified. The point of my theory is to give us an underlying moral argument for arranging our institutions in one way rather than another. I accept that we live in a public institutional order that confers certain rights on certain kinds of entities; but my concern is to ask what further grounds this kind of rule, or confers privilege x on a certain kind of entity. And unless we answer that question, there will be disagreement on what ought to be the rule. Indeed, this is the current state of affairs, where boundaries are viewed, by international law, as inviolable, but there are a number of disputes involving territory where the boundaries are what is precisely in question: secessionist conflicts; irredentist conflicts; contested unoccupied lands; disputes over the sea. Different justifications for these rules suggest different kinds of limits or different



implications, but cannot offer a coherent analysis to address these challenges.

## V Feasibility Mancilla, Again

Finally, let me return to the issue of feasibility, which is raised by Alejandra Mancilla's very helpful comments on my treatment of resources and territory. She points to a number of possible scenarios, especially concerning the relationship between resources and territorial rights, which I didn't consider in my original manuscript, and which seems to suggest the need for multilateral institutions, or international governance over systemic commons, or rules governing settlement of newly habitable land, occasioned by global warming. Her claim is not that my theory lacks the conceptual resources to deal with these questions, but that I didn't consider some of these cases (which is true) and that it is not clear how immediately feasible I wanted my theory to be.

I would be of course extremely gratified if my book does spark further research in these areas, even if it does so by revealing the conceptual and theoretical gaps in our theories of territory and resources. On the issue of feasibility, I argue in my book that political theory has to be feasible, not only in the sense that it is not impossible (not in violation of laws of nature, logical consistency and so on), but feasible in the sense that we can map out a path from our current state of affairs to the desired state of affairs, even if the path is indirect and can only be pursued over time. I do not think a normative theory ought to be too captive to feasibility in the crude sense of whether people are likely to agree to the principles proposed. I have no reason to think that a better world order, with a coherent approach to territorial rights, which

may be significantly different from our current institutions and practices, is infeasible in the indirect and long term sense that I propose. Indeed, I hope that debates such as the ones in these pages can contribute to reflection on justifiability of many of our current territorial practices and principles.

*Margaret Moore, Queen's University*

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