Nationalist Theories of Territorial Rights

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It is tempting to view each legitimate state as having the right to exercise political authority within a historically given set of boundaries. But what gives a state the right to these boundaries?

In this paper, I examine and criticize the account of territorial rights offered by nationalist theories. Nationalist theories hold that the state derives its territorial rights from the prior collective right of a *nation* to that territory: "states can only claim territorial rights…as representatives of the peoples that they govern: such rights…belong fundamentally to the people collectively" (Miller 2007, 217). A people or nation, in Miller's sense, is a corporate group defined by objective *cultural* characteristics that its members believe themselves to share. On the nationalist view, a state has a right to exercise authority over its territory if: a) the nation it represents has a right to the land in these areas and b) the state is properly authorized by that nation.

Nationalist theories come in two types, each distinguished by the particular kind of right over territory they believe nations to possess. One variety claims that nations possess *ownership* rights over territory (Meisels 2005). This view attempts to understand territorial rights as a special right (a right arising from a special relation or transaction) along the lines of original acquisition accounts of property. By performing certain special acts with respect to land—such as laboring it, or constructing a culturally marked infrastructure on it—a nation can generate a strong "natural" entitlement to the resources in question. A second, more plausible, nationalist theory holds that each nation has a general right of self-determination, which includes a claim to *metajurisdiction* over territory: each nation has the right to determine the form of political authority to which the group is subject, by altering a state's constitution, jurisdiction, or form of government (Buchanan 2003, Anaya 1996). Auxiliary principles may come into play to establish the proper territorial location of a nation's right to self-determination. But national metajurisdiction is a general, not a special right: each nation can claim title to it, and the right is not due to a special relation or transaction.

I leave aside national ownership theories for the bulk of this paper, because I believe them to be subject to a fatal objection: they do not adequately distinguish between rights of property and rights of jurisdiction. Yet these two kinds of rights are importantly distinct. The land of the state is generally owned by private individuals and groups, not by the "the nation" as a whole. States exercise rights to *jurisdiction* over territory, which may or may not be delegated to them by nations, not rights of property in it. So national ownership theories seem confused about what sort of territorial right is at stake: property rights are derived from state jurisdiction, not the other way around. For these reasons, I consider only arguments for national metajurisdiction, not arguments that nations have property in land.

The paper unfolds as follows: first, it examines and criticizes three different national

metajurisdiction arguments—an argument from culture, an argument from social justice, and an argument from fairness. It then contrasts nationalist theories with my own view, the *legitimate state theory*, which claims that the state does not derive its territorial rights from the prior right of a cultural nation. My view holds that a state has rights to territory if (a) it effectively implements a system of law regulating property in that territory, (b) its subjects have a legitimate claim to occupy the territory, and (c) the system of law "rules in the name of the people," by protecting basic rights and providing for democratic representation. I conclude by raising what I think is the most important objection to my view, the *annexation objection*. In addressing this objection, I allow that the territorial rights of the state derive from a claim to self-determination on the part of its people. Unlike nationalist theorists, however, I argue that the people is not a cultural group, but is simply the collective subject of the state. And I claim that the people's right of metajurisdiction over territory is a *remedial right*: it can be exercised only when the state has ceased to "speak for" them, by ruling legitimately in their name.

National Metajurisdiction

National metajurisdiction theories argue that nations have the right to determine the form of political authority exercised on a certain territory. On this theory, each nation has a general right of political self-determination, which allows it to form its own state if it so chooses. Most nationalist theories qualify self-determination rights in various ways, holding that national groups claiming territory must establish liberal-democratic institutions, respect minority rights, and settle claims of distributive justice with the state they are leaving (Raz 1994, 143-5). Some theorists also hold that depending on circumstance, national self-determination may not create a right to a state: where more than one nation shares the same territory, the claim may support only lesser forms of self-government or political autonomy (Miller 2000, 113).

A right to national self-determination, if it exists, is not morally primitive. If we ought to grant nations self-determination rights, it is because these rights are instrumental to other important values. Here, I briefly survey three common arguments for granting nations these rights: an argument from the importance of culture, an argument from social justice, and an argument from fairness. Each of these arguments identifies an aspect of individual well-being that national self-determination is supposed to promote, and claims that these interests are significant enough to hold other persons and groups under a duty to respect self-determination decisions (Raz 1986, 208-9).

Joseph Raz, Avishai Margalit, and David Miller all appeal to the interest in national *culture* (Raz 1994, 128-130; Miller 85-88, see also Kymlicka 1989 and 1995). Their argument from the importance of culture has four steps:

(1) Autonomy, on some liberal views, is a central element of individual well-being.

(2) Autonomy requires the ability to choose among valuable life-options.

The presence of these options depends on a flourishing culture that contains various patterns for careers, leisure activities, and family and social relationships, and makes these meaningful to its members.

Individual well-being therefore depends on access to a flourishing culture.

It has been questioned whether the access to culture that is required for autonomy must be access to the person's *native* culture: some people leave their culture of birth and adopt a new one. But, according to Raz, Margalit, and Miller cultural adaptation is very costly and

difficult, and therefore we ought to particularize a person's autonomy-interest to their native culture.

What connects the cited interest in culture to national self-determination? It is claimed that the prosperity of cultures will be difficult to secure without self-determination rights (Raz 1994, 126). Raz and Margalit simply cite the fact that a culture's members are best placed to judge when its prosperity is threatened. David Miller goes further by pointing out that national cultures typically demand public expression in language, architectural styles, education, the arts, and other public goods. Second, as an empirical matter, Miller holds that when a state has authority over two or more national groups the larger or more dominant one will tend impose its culture on the weaker one, preventing them from enjoying the public goods their national culture requires. For him, this tells in favor of a "strong claim" to national self-determination.

There are two difficulties with the cultural argument for self-determination. One is that the interests pointed to—particularly the interest in individual autonomy—are not sufficient to ground a claim to cultural *preservation*. An adult who has been educated into one national culture will find it hard to access life-options in some other culture. This shows that we ought to extend adults cultural accommodations. But *children* can easily be educated into new cultures, while still maintaining familiarity with the language and traditions of their parents. This is the traditional pattern of second-generation assimilation in immigrant countries. So we might conceivably protect everyone's autonomy interests without preserving national cultures at all: i.e. by granting adults temporary cultural rights, while assimilating children into a new culture (Gans 2003, 50-51).

Second, even if we grant that cultural preservation is required for autonomy, securing preservation does not obviously require self-determination rights. Instead, minority national groups might be granted minority rights over language, land, or education that aid them in preserving their culture (Kymlicka 1995). If these lesser rights can adequately protect the interest in culture, then the argument does not support a right of self-determination (Buchanan 1991, 58-59). Moreover, granting national self-determination rights at the expense of minority rights runs the risk of undermining diverse and multicultural societies, by presenting uninational states—which can only be attained by assimilation or exclusion—as the "first-best" option for national groups. So I conclude that the argument from culture fails on two grounds: first, it does not show that cultural preservation is really necessary to safeguard autonomy; and second, it does not show that self-determination is the best way to guarantee cultural preservation.

Let's consider a second case for national self-determination: the argument from social justice. David Miller claims that obligations of distributive justice are associative obligations between co-nationals. When the boundaries of the nation coincide with those of the state, these associative obligations can be better defined, assigned, and enforced. Without national states, our obligations of distributive justice would remain diffuse and amorphous; it would be hard to know exactly what duties they impose upon us, and social justice might go unrealized. Therefore, according to Miller, there are good reasons to want the borders of nations to coincide with the borders of states, to the extent this is possible without undue harm, since in that situation the prospects for social justice are likely to be greater.

There are two problems with Miller's argument from social justice. First, he might be wrong about the national basis of distributive justice obligations. Other theorists have argued that obligations of justice are owed to fellow-citizens, not co-nationals (Blake 2001, Nagel 2005, Sangiovanni 2007). If Miller is right, and distributive justice *does* have a national basis, then it would seem to follow that nationals who do not share a state already

have distributive obligations to one another. But this is not obviously true. Is a Kurd in Turkey currently under an obligation to redistribute wealth to fellow Kurds in Iraq? It is not clear that the answer is "yes."

Second, by grounding obligations of distributive justice in facts about national identity, Miller leaves open the possibility that those who do not identify with the majority nation have no distributive obligations to their fellow-citizens. This is of particular concern in multinational states, where members of a sub-state nation may not identify with the wider political community. 16% of Catalans identify only with Catalonia, while 69% declare some form of dual identity as Catalan-Spanish (Montserrat Guibernau 2008, 50-52). On Miller's view, would this mean the 16% who feel only Catalan have no obligation to contribute tax money to Spain's central government? This is counterintuitive. In other cases, we don't hold that the existence of special obligations depends on the feelings or self-conception of the persons involved. Even parents who do not identify with their children are still under an obligation to take care of them. Identification may help *motivate* the parent to fulfill the obligation, but it is not the obligation's ground. Similarly, national identification might help motivate compatriots to fulfill their obligations of distributive justice, but these obligations may be grounded independently. Lastly, it is not even clear that nationhood is an *indispensable* motivation for the achievement of distributive justice. There are motivational alternatives to nationhood—such as a sense of justice or a feeling of common citizenship (Wellman 2005, 104-108; 115-117). If these alternatives can bring co-citizens to fulfill their distributive obligations, then common nationhood is not required. Miller's argument from social justice thus fails to show that granting nations rights of self-determination is the best way to establish social justice. Distributive justice might not be grounded in duties to co-nationals, and it might not be motivationally dependent on nationhood, two facts, which, if true, would undermine the claim that national states are necessary conditions for its attainment.

The final, and perhaps most plausible, case for national self-determination is grounded in *fairness*. Margaret Moore argues that the placement of political borders privileges some nations over others (Moore 2001, 120). A person who finds herself in a state where her national group is in the majority can use her language in public life and feel culturally "at home" there. But those in the national minority are comparatively disadvantaged. They and their children may have to learn a second language, and will not feel "at home" in a state that reflects the history and traditions of another group. Nations are thus differentially advantaged by political borders: some groups enjoy the good of institutional expression of their identity, while other groups are denied it (Moore 2001, 122). Moore argues that remedying this unfairness requires granting nations the right to alter jurisdictions, by redrawing boundaries.

There are also two problems with Moore's argument. First, what distinguishes national groups from other kinds of minorities? Suppose that I am a member of a music club who happens to live in a locality largely populated by baseball fans. My fellow club-members and I would like to use public funds to subsidize a symphony, but the majority chooses to fund a stadium. If borders were drawn differently, though, my friends and I could cobble together a majority (let's say we voted to join the college town a few miles away, filled with music-loving professors). On most democratic theories we do not have a claim to self-determination. But why not, since we are differentially advantaged by the current borders? Allowing all minorities to redraw borders would undermine democratic authority, since any minority could secede in the face of laws it disagreed with. For Moore's argument to go through, then, it seems she must explain why national groups have a special status, such that a border-drawing which differentially impacts a *nation* should be treated differently than one that differentially impacts other groups.

One way Moore's argument might be made out is to hold that border-drawings are unfair when they generate *permanent minorities*, and that nations, unlike other groups, are permanent minorities. A common view of what makes democratic politics legitimate is that each person can expect to be in the majority on some issues some of the time, even if he will not prevail on every issue (Christiano 2006, 90-1). Thus, although the music-lovers may lose out to the baseball fans on the stadium, each music-lover is likely to be on the winning side on some other issue. This means the music-lovers' minority status is not unfair or oppressive. When someone is on the losing side on *all* issues, though, it is difficult to say he is being treated fairly overall.

This argument is interesting; but whether it can be applied to nations depends on the empirical premise that every national minority is a permanent minority. What does it mean to be a permanent minority? A plausible view would hold that one is in a permanent minority if there are *no* issues on which one's preferences are implemented as public policy. But this is unlikely to be the case for many national minorities. Consider the Flemish, Catalan, or Quebecois minority: each member of these groups may lose out on cultural issues, but she is likely to be in the majority on other issues, like foreign or economic policy. Only where a national minority faces severe discrimination and political exclusion (the Israeli Arabs, perhaps), would they form a permanent minority in this strong sense. In that case, fairness may require them to be granted a separate state, but such a right of self-determination would heavily limited.

Finally, Moore's argument faces the major difficulty that there is *no possible redrawing of borders that will eradicate the presumed unfairness*. She proposes a system of "rolling cantonization" for redrawing boundaries: under this system, all localities could vote on whether on not to be part of larger administrative units. This would allow local *majorities* to elect to be part of a state that reflects their national culture. But, on Moore's system, local *minorities* will continue to live under culturally "foreign" institutions. And if it is significantly unfair to be a national minority in a large state, then shouldn't it be equally unfair to be a national minority in a small state? Granted, applying rolling cantonization might reduce the absolute numbers who face this unfairness, but it does not do away with it.

I conclude, then, that the argument from fairness also does not establish a general right to national self-determination. It fails to show why the differential impact of borders is more problematic for nations than for other minority groups, and it fails to show how allowing local majorities to exercise national self-determination rights will eradicate the presumed unfairness. Having surveyed three common arguments for national self-determination—the argument from culture, from social justice, and from fairness—I believe we ought to doubt that nations possess general rights of metajurisdiction over territory.

Before moving on, we should reflect on two general weaknesses of the nationalist view. The first weakness is that on any self-determination account, the state's authority is not derived from features of the institution itself—such as its justice, efficiency, or democratic qualities—but must instead be arbitrarily conferred upon it by some other party. Even a perfect state therefore faces the threat of having its authority arbitrarily revoked, if the will of the self-determining party changes. But if just, efficient, and democratic institutions are morally valuable, then surely it is wrong to expose them to the specter of permanent instability. To do so would undermine the pursuit of these values in the world.

The second arresting aspect of the nationalist position is its view of the self-determining party: the culturally defined nation. This too seems a weakness. Given our current territorial situation, and short of dramatic demographic reconfigurations, states will always contain national minorities. Are these minorities not bound by the laws of even a perfectly

just state, because they did not participate in the act of self-determination that gave the state its authority? If self-determination is so valuable for cultural groups, then it seems minorities should enjoy it too. And if they cannot enjoy it due to demographic constraints, then it is hard to see how the state has authority over them, since *ex hypothesi* institutions only get their authority from an act of self-determination in which these minorities did not participate. To take this approach is to concede from the start that states cannot hope to have authority over parts of their population.

The Legitimate State Theory

Since the nationalist theory has these weaknesses, it pays to examine an alternative: the legitimate state theory. On the legitimate state theory, a state's claim to territory is rightful if: (a) the state effectively implements a system of law defining and enforcing rights, especially property rights, in a territory; (b) its subjects have a legitimate claim to occupy that territory; and (c) that system of law "rules in the name of the people," by enacting legislation that represents a minimal public interest and grants the people a democratic voice in defining that interest. On this view, states have territorial rights because their jurisdiction serves the interests of their subjects. As we will explain further below, individual rights to property can be coordinated with others' rights and rendered interpersonally binding only when there is a state to define and enforce them.

We should highlight one area of agreement and two important contrasts between the legitimate state theory and the nationalist theories we examined above. First, the legitimate state theory agrees with the nationalist view that "states can only claim territorial rights…as representatives of the peoples that they govern" (Miller 2007, 217). On the legitimate state theory, the state represents the people when it enacts legislation in the public interest and grants the people a voice in determining this legislation. The state's claims to territory are thus not independent of how well it does at representing its people: as we shall explain further below, a state only has a claim to territory if it meets a basic threshold for being a *legitimate* representative of its people. The state also has no claim to territory that its people have no prior right to occupy. But, despite the fact that a state gains territorial rights by representing the people, state rights to territory are *primitive*: only states—not any other actor—can exercise this kind of right.

One contrast with nationalist theories is that the legitimate state view does not require that the state be *authorized* or *consented to* by the people in order to rule in their name. The state does not derive its title over territory from individual loyalty oaths or a group plebiscite. Instead, the state is like a guardian who represents the people, but is not directly appointed by them. Consider the analogous case of a child who has a guardian. The child has various rights but cannot exercise these rights in his own name. Instead, the guardian acts like a proxy for the child, representing his interests in court proceedings or exercising his rights in everyday decision-making (e.g. he decides how to manage the ward's estate). What gives the guardian the right to represent his ward? Not the ward's consent. The guardian's right to represent derives from his ability to *act in his ward's interests*. The legitimate state theory applies this model of representation to the state. The people possess basic rights in their territory. But—for reasons to be discussed below—the people cannot exercise these rights directly; instead, these rights must be exercised for them by a proxy (the state). In assuming this role as proxy, then, just like the ward's guardian, the state speaks and makes decisions as though it were the people. But its title to perform these functions derives, not from the people's consent, but from its capacity to act in the people's interests.

A final contrast with nationalist views is that on the legitimate state theory, the "people" are made into one collective body by being subject to state institutions and by participating

together in shaping these institutions. No cultural nation pre-exists the state and, in an act of self-imposition, confers authority upon it. Instead, *the state defines the people*. Consider again the analogous case in which a guardian has more than one ward. Nothing has to connect these wards other than the fact that the same person serves as guardian for all of them. Over time, these wards will likely come to share some connections through their history with the guardian. But the wards do not need any prior bond among themselves to be represented by the same person.

To unpack the legitimate state view further, we must first explain why it is that the people lacks the capacity to exercise their own rights directly. To answer this question, it will be helpful to borrow elements of Kant's account of state authority. His view is complex, but the main elements can be briefly summarized as follows:

Each individual has an innate claim to freedom-as-independence, which requires that he not be forced to obey the will of another person. To fulfill this claim, he must enjoy a set of guaranteed rights, including: (a) rights of control over his own body and (b) rights to property in external things.

Each individual has a basic duty to respect the freedom-as-independence of others, including their rights to control over body and property, and he can be coerced to perform this duty.

Individuals cannot respect others' freedom-as-independence if they interpret and enforce their rights *unilaterally*, i.e. on their private initiative.

The only way to respect others' freedom-as-independence is to set up a state that can serve as an *omnilateral* arbiter and enforcer of everyone's rights.

If a state legislates and enforces a system of rights to body and property that protects a subject's freedom-as-independence, then it represents that person and rules in his name. A subject also has an obligation to comply with the state if it protects other people's freedom-as-independence, because that is the only way to fulfill his basic duty to them.

I am unable to expound Kant's arguments here. I focus only on propositions (3)-(5), which are particularly useful for our purposes, since they address the question of why the *state* is a necessary intermediary for the interpretation and enforcement of rights, especially rights to property. Understanding these propositions will help us to see why only states—not individuals or non-state actors, like the nation—can claim jurisdiction over territory.

States are the proper possessors of territorial rights because of two intractable problems involved in any exercise of jurisdiction by non-state actors: the problem of unilateral interpretation and the problem of unilateral coercion. Both of these problems are particularly severe when it comes to jurisdiction over property. This is because an individual's right to a sphere of property is not naturally particularized. Freedom-as-independence requires that I have rights of control over a particular body (my own), but it does not specify which particular objects I should have rights of property in. Property rights are thus partly conventional. In any stateless condition, each actor would therefore have to interpret for himself which particular share of property he has rights over, how he might signal to others that this share belongs to him, and how far his claims over it extend. This conventional aspect of property rights contains the potential for grave conflict when these rights are interpreted and enforced by actors in an uncoordinated way.

Unilateral interpretation of rights undermines our independence because interpretations of

partly conventional property rights may diverge, and other people's good-faith interpretation is just as authoritative for them as our interpretation is for us. Therefore when someone else's interpretation of my property rights disagrees with my own, what *I think my rights are* does not place him under any duties. As an equally authoritative interpreter, he has title to enforce his own view of property rights—not my view—which means that he may try to use force on me whenever he judges the claims to property that I make to be unjustified. The less generous his interpretation of my property rights and the more powerful he is at enforcing it, the more threatened my independence becomes.

There is an additional problem of unilateral coercion involved in any non-state enforcement of property rights. Kant thinks that this second problem undermines my independence even if my state-of-nature neighbors and I happen to *agree* on the bounds to our property "all the way down," that is, even if there are no problems of interpretation between us. That is because even when you agree on the limits of my property rights, I am still dependent on your arbitrary will to sustain this agreement at every moment, and this is itself a form of insecurity that compromises my basic claim to independence. You might respect my rights now, but your will could change at any time, and so you retain the *power* of interference with me and my rights, even if you do not in fact exercise that power. To be fully independent, I should not have to depend on your will as the only source of security for my rightful claims; instead, I must have a mechanism to *assure* me that my rights will be guaranteed, no matter what the condition of your will. The proper mechanism of assurance is the state's framework of public law.

Because of the two problems of unilateral interpretation and unilateral coercion, allowing non-state actors to exercise jurisdiction and enforcement over their property is inconsistent with guaranteeing freedom-as-independence. Instead, we require an intermediary that can conclusively place all citizens under a duty to respect *one unitary* view of what everyone's property claims are. The intermediary must also coercively enforce this view, thereby assuring each individual that others will not interfere with his property, which puts him under a conclusive duty to respect theirs. Kant therefore argues that each person has a duty to accept the authority of a state that can serve as an intermediary for the interpretation and enforcement of his rights. Because a state is required in order to secure everyone's independence, and because we already have a basic duty to respect others' independence, we do not have to consent to the state in order to be bound by it. Even if the state that rules us has acquired sovereignty simply by seizing power, we still have a duty to obey it (Kant, *MM, 6*:372). If a state exists and enforces a legitimate system of property law, it *necessarily represents me*—whether I agree to its establishment or not.

Recall that the legitimate state theory asserts that a state has a right to its territory when: 1) the state is in control of that territory and legislates laws defining property rights there, 2) its people have a prior right to occupy that territory, and 3) it meets a set of legitimacy conditions showing that it "rules in the name of the people." Our argument up to now has established only Condition 1. I have claimed that only states can have territorial jurisdiction, because only they can promulgate and enforce a unitary, public, and objective criterion of rights, especially property rights, that binds everyone in a given area. But this argument does not yet show which *particular* states ought have authority over which *particular* territories. This is what Conditions 2 and 3 are meant to do.

Rights of Occupancy

Let us first consider Condition 2. How can we show that the people have a right to occupy their territory? We should note first that a right to occupy a territory is not the same as a right to property there. Instead, it is a right to be in *legal residence* on the territory: to be physically present, and to have one's rights defined and enforced by whatever state has

jurisdiction there. Thus, even non-property owners can have rights of occupancy on a particular territory. This right of occupancy is an important precondition for almost all other rights. If I can be displaced off a territory at any moment, then my property, my other rights, even most of my goals and pursuits mean little to me. The question of what gives a people the right to occupy their territory is very difficult to solve, not least because appeals to history are insufficient to establish such a right. Even if the very first occupants of a particular territory could be established (through archeology) and their descendants somehow identified (by genetic evidence), we should not reallocate rights of occupancy on the basis of these historical claims. Any such reallocation would involve massive wrongs—involving the displacement of populations—and would leave many present-day persons with no place to live.

Some nationalist theories have also addressed the people's right to occupy territory, and we can learn from their answers. Chaim Gans and David Miller both invoke auxiliary principles to establish the territorial location of a nation's right to self-determination:

> *Identity*. A people has a right to a territory if that territory plays an important role in its cultural identity (i.e. the territory is the nation's "homeland," or important events in the nation's history occurred there) (Gans 2003, 109-123).
>
> *Settlement*. A people has a right to a territory if it has settled that territory, constructing an infrastructure that reflects its culture (Miller 2007, 218-220).

But neither identity nor settlement is strong enough to establish rights of occupancy. Consider first the identity claim: Kosovo plays an integral role in Serbian identity because the battle of Prince Lazar against the Ottomans occurred there in 1389 (Malcolm 1999). But this does not show that non-Kosovar Serbs have a right to occupy the territory today. Consider too a parallel example based on settlement. Many towns in Poland possess a physical infrastructure (architecture, public monuments, churches) reflecting the Germans who once lived there. But this fact—while it provokes a certain amount of nostalgia—is not alone sufficient to ground the *current* title of the Germans to occupy lands they settled in the past.

So principles of identity or settlement can't establish a right to occupy territory on their own. That might prompt us to think the following: "Why not just base a people's right to occupy territory on the fact that they currently reside there?" But this approach has problems too. Specifically, it does not rule out the following case:

> *Forced Removal*. Suppose a group of mercenaries gets together, overthrows the state of Chad, and drives out all the inhabitants, who become refugees in neighboring states. This group of mercenaries then sets up an absolutely perfect state on the territory. It rules justly and enjoys the unanimous consent of all its inhabitants.

We will still want to say that this perfect state does not have a right to the territory, at least not at the moment of its founding. This is because its *people* have no right to the territory at that moment. In constructing a theory of occupancy rights, we want to avoid legitimizing acts of wrongful displacement like this one.

Part of the appeal of using considerations like identity or settlement to establish occupancy rights is that they help us to rule out cases of wrongful displacement, without necessarily resorting to a full-blown theory of historical rights to territory. It takes a while—perhaps a few generations—to identify with the territory, and to transform it in accordance with a particular culture. This means we could say that the mercenaries do not

yet have a claim to occupy the territory they have seized, because they aren't identified with it or haven't transformed it. A few generations down the line, though, perhaps the mercenaries' descendants *would* be identified with the territory and *would* have transformed it, so they would gain the right to occupy it. This is in line with our general intuition that the claim to restitution for ancient wrongs weakens with time (Sher 1981, Waldron 1992).

Although supersession of ancient wrongs is important, I believe that settlement and identity do not properly identify the conditions under which supersession occurs. What really counts for supersession is a person's *legitimate expectation* of continuing to occupy a territory (Waldron 1992, 17-18). If Person A has such an expectation, and if he has formed the expectation through no fault of his own, then Person A has a right to occupy the territory or, if he has lost occupancy of it, to have that occupancy restored.

Occupancy of territory plays an important role in almost all of our pursuits and our plans for the future. If I structure my goals and choices against the background expectation of continuing legal residence in a particular territory, and if I am there through no fault of my own, then respect for my autonomy tells in favor of allowing me to remain there, since it would be impossible to move me without major damage to nearly all my life-plans. Because the expectation of territorial occupancy is so fundamental, each person has a right to a stable legal residence. We therefore have reason to restore occupancy to those whose expectations have been wrongly violated in the recent past. But note that a certain balancing is called for here. Over time, the expectations of the displaced will change, and new expectations will form.

Reflection on the importance of legitimate expectations, I think, shows us why we should avoid a robust historical rights account of territory, and also why settlement and identity are not the heart of the matter. I might require occupancy of the territory for the integrity of my goals and pursuits even if I haven't settled it or identified with it. The morally significant feature of the situation is that I have formed expectations of continued occupancy, I have formed them without wrongdoing (perhaps by being born on the territory), and that others' respect of these expectations is fundamental for my autonomy. So consider a more refined occupation principle:

> *Rights of Occupation*. A person has a right to be on a territory if he expects to occupy the territory in the future, if his expected occupancy of the territory is an assumption that structures his major life-pursuits, and if he formed that expectation through no fault of his own.

How would this principle deal with cases of unjust displacement? In our mercenary case, it would call for the mercenaries to restore the territory to those whom they have expelled, and would place a duty on other states not to recognize the mercenaries' state at the moment of its founding, since it does not have a right to its territory. Other states could justly go to war against the mercenaries to enforce the displaced people's claim to reoccupy the territory. So the refined occupancy principle has the benefit of disallowing any claims to occupancy on the part of wrongdoers.

But suppose that the mercenaries' injustice goes unrectified and now we are dealing with the second or third generation of mercenaries' descendants. On the above principle, these people *would* have a legitimate claim to remain on the territory they currently occupy, since their expectations were formed without fault, and displacing them would undermine their autonomy. But what about the descendants of the victimized population? Do they have a claim to come back? Whether or not they have a claim to reoccupy the territory depends on how their expectations have developed since. Suppose that they are now incorporated as full citizens in some other legitimate state, with an expectation of continuing to reside there.

I believe the American and Israeli descendants of Jews expelled from Eastern Europe meet this criterion. On my view, their claim to occupy lands that their ancestors once occupied has therefore been superseded. But suppose that the victims' descendants have not been incorporated as full citizens in a legitimate state. They remain a stateless people, reside in an illegitimate state, or form a population of second-class citizens in a democracy ruled by another people. If this is the case, then they have a continued claim to occupy the previous territory. That does not give them the right to expel the descendants of settlers, but rather a right to be readmitted to the territory and granted equal citizenship rights there. This is an enforceable right, and other states could justly pressure the settler state to grant the expelled descendants readmission. The principle behind the refined view of occupancy, then, is the following: each person has a general claim to stable legal residence in a legitimate state, and to be treated by that state as an equal citizen. Where this claim is met, the wrong of displacement is superseded. Where it is not met, the claim to occupancy on the part of the displaced population continues in force.

It should be emphasized here that a claim of *occupancy* can be superseded without a claim to *compensation* for harm or *reparation* for confiscated property also being superseded. If a victimized group's property was taken, or if they suffered grievous harm as a result of their displacement, then the settler state owes them compensation even if it does not owe them current occupancy. A state that rests on a past act of dispossession ought to make reparation to the dispossessed population (as Germany, for example, did to the Israeli Jews). This obligation to compensate is also potentially enforceable. Other states and international organizations can justly demand that reparations be paid, and sanction the settler state if it refuses to do so.

Conditions of State Legitimacy

Let us now consider Condition 3, which stipulates that a state has territorial rights only if it adequately represents the people who occupy that territory. Recall that our main argument for why states should have jurisdiction over territory is that their exercise of such jurisdiction is of benefit to individuals. We require a state to legislate and enforce a set of rules that define rights to body and property. But there are many possible sets of rules the state could put into place. Some of them will protect freedom-as-independence well, some not-so-well, and some not at all. Since our reason for granting states territorial rights is that state jurisdiction is of benefit to individuals, we will want to grant territorial rights only to states that *actually protect freedom-as-independence to a sufficient degree*. We need some more precise criterion by which to judge whether the laws the state puts into place meet this standard.

Kant offers a useful heuristic for addressing this problem: he argues that a law is not rightful if "an entire people could not possibly agree to it" (Kant, *TP*, 8:297). Indeed, he glosses the basic right to freedom-as-independence as "the warrant to obey no other external laws than those to which I could have given my consent" (Kant, *PP*, 8:350). We can see why this criterion is relevant by returning to our guardian/ward analogy. A good guardian is a guardian that does more-or-less what his ward would have done were his ward able to speak and act for himself: he acts in the ward's interests. In many cases, though, it may be difficult to know what the ward would have done for himself, especially in cases where the ward can't tell us, or in cases (like the political one) where he does not speak with one voice. But we can know with a greater degree of confidence what the ward surely would *not* have done, had he any reasonable regard for his interests.

A guardian who steals his ward's estate, for example, will not be acting in the interests of his ward, on any reasonable definition of those interests. He therefore fails to pass the threshold for being a *legitimate guardian*, and it would not be reasonable for others to take

him as representing the ward. A legitimate guardian may still fall far short of being an ideal guardian: there may be better interpretations of his ward's interests and more effective ways to pursue them. But a legitimate guardian will be engaged in an activity that we can call "representing his ward's interests," at least in some minimal sense.

In the case of the state, we are also looking for a standard of legitimacy, not ideal justice or perfect representation. A state defines and coercively imposes a set of rules that define its subjects' rights, including their property rights. It claims that these rules are based on the public interest, i.e. that they protect an interest each member can share. But interpretations of the public interest will vary, and which rules best instantiate it will be subject to reasonable disagreement. What we wish to know is whether the activity the state is engaged in is reasonably viewed as acting in the public interest *at all*. (This interest should be understood in a distributive, not an aggregative sense—i.e. securing the public interest requires securing an interest shared by each-and-every member).

So where are we going to set the legitimate state standard? We must demand that a legitimate state give at least *minimal consideration* to each member's interests, since the public interest is supposed to be an interest each member could share. We can best define this minimal consideration by delineating a set of basic rights as a standard for state legitimacy. Since speaking in its people's name is a condition on the state's possession of territorial rights, any state that fails to provide these basic rights to its members fails to possess title to territory.

The particular list of basic guarantees that states ought to provide each member is properly subject to debate, and ideally would be rendered authoritative by international institutions. There is also reason to believe that these standards may change over time, as our understanding changes (for example, with a better understanding of the interests of hitherto excluded groups) and as institutional capacity grows (a right to basic health care could not have been provided in the nineteenth century). But a minimal set of standards will include most of the core rights set down in the UN Declaration of Human Rights, including rights to life, liberty, and security; rights against slavery, torture and cruel and inhumane punishment, and arbitrary imprisonment; rights to equal protection of the law, a fair trial; to a sphere of property and privacy; freedom of movement, freedom of conscience, and freedom of association; and rights to political participation.

Human rights are designed to ensure that states are like legitimate guardians in two different ways. First, these rights show that the state's laws are not just forcible impositions on the state's subjects, but regulations that these subjects could endorse, on a reasonable conception of her interests. If the laws are to impose putative obligations, they must give a member some moral reason for her compliance. If the law grants each member these minimal guarantees, then it makes moral demands, since such a system of law secures a degree of freedom-as-independence for herself and her fellow-citizens, and each citizen has a basic duty to cooperate in securing such independence. Where the laws make no pretension to being based on common interests, they make no pretension to imposing any obligation.

Second, rights of free association, free speech, and democratic participation put into place additional safeguards for ensuring that the state represents a public interest, since it allows the people collective input into what the state does. This means that the people are not just the passive recipients of government directives; they also have the active capacity to influence the laws made in their name. When the public interest, as they see, it is clearly contravened, they can do something about it: they can contest and object to the laws, and sanction the government that imposes them. This gives us an additional reason to believe that the state represents the people, since when it does not, there are channels by which they

can contest and change the decisions made in their name. If the state grants these democratic rights, its laws and institutions must be responsive to the values of the people and come to reflect these values over time.

If a state exists and meets conditions 1-3, then according to the legitimate state theory, other states ought to respect its right to jurisdiction and control over public land and resources. Any aggressive use or threat of force against a legitimate state and its territory is wrong and should not be allowed, and where a legitimate state is overthrown in an unjust use of force, it should be restored. To hold otherwise would give incentives to wrongdoers not to respect territorial rights.

The Annexation Objection

With this account of the internal legitimacy conditions of state control over territory now in place, let me conclude by considering what I think is the most important objection to the legitimate state theory.

> *Annexation*. In 1945 the Allies occupied Germany in a legitimate use of force. Suppose that instead of restoring the territory to the German people, the US had simply annexed their zone of occupation. After annexation, the US governed legitimately, protecting the Germans' human rights and granting them rights of democratic participation in the now-unified state. Could the annexed people of Germany legitimately have attempted to recover their territory?

I think it is a widely shared intuition that for such an annexation to be legitimate, there must at least be a democratic referendum held. Nationalist theories of territory have an advantage in explaining this intuition. Germany is a nation, and that the consent of a nation (in a plebiscite, say) is required for a state to have a right to rule the nation's territory. But our theory denies that there is a pre-political nation independent of the state. It also denies that the consent of the people is necessary for state legitimacy. So can it accommodate this intuition?

I believe we may accommodate it by appeal to the value of collective autonomy. Recall that on the legitimate state theory the people are made into one body by being subject to common institutions and by participating together in shaping those institutions. Democratic peoples undertake two important shared activities together. First, they sustain the state institutions that define and enforce their rights, including property rights. It is in an important sense their cooperative activity, by obeying the law and paying taxes, that makes these institutions possible. Laws are not just enforced through directly coercive acts on the part of the authorities; they depend much more pervasively on large-scale patterns of behavior on the part of the people, who orient their actions to these laws. By paying taxes, the people also contribute to sustaining the institutions that enforce their rights against those who refuse to respect them. So it is "the people's" shared activity that makes their system of public legislation and coercion—the state—possible. Additionally, when their state is a democracy, the people not only help to sustain an apparatus of legislation and coercion, they also have a voice in determining the particular scheme of rights protected by the state. Through exercising their political rights—voting, debating political issues, associating in political parties and interest groups, and taking part in social movements—they produce the laws they live under. The role of the people's shared activity in sustaining the state and—in a democracy—in producing law helps explain why, over time, political cooperation can constitute a group of citizens into a collective with important ties binding them together

(Pettit 2005, 2006).

Consider an analogous example: like states, universities are also sustained through the shared activity of their members. What binds together the members of a university is their engagement in an ongoing practice of higher learning. As with states, there is no pre-institutional answer to the question of how many universities we should have in the world, or which particular people should be members of which ones: universities are not bound together by pre-institutional bonds. But over time members of a university become more than an aggregate of separate individuals because of what they do together. They shape their institution in accordance with their values and priorities, debating, say, the best curriculum, departmental structure, and professional requirements. New members, in turn, understand themselves as part of an enduring collectivity not because they share a culture, but because they are heir to a continuous practice of debating and influencing the rules of the institution, and upholding these rules through their shared practice. I think there is independent value to institutions that are shaped by their members in this way. Suppose the US government forcibly merged Harvard and Yale without consulting their membership. And suppose that faculty and students were allowed to retain their positions in the new, merged institution. I believe we could say that this forced merger is wrong, because it violates the autonomy of the institution's members. Members value their shared practice and they have shaped its rules in accordance with their goals and principles.

A common objection to invoking the value of collective autonomy in the case of states, however, is that states are not like universities. Membership in a state is not voluntary. We are born into states, and whatever options we may have to leave, they usually are far too onerous to render membership an act of free association, in the way membership of a university is. Indeed, following Kant, we may even argue that membership in a state is a moral imperative rather than a choice, since living under a common system of law is the only way to respect others' freedom-as-independence. And if the coercive authority of the state can be legitimate in the absence of its members' consent, then why can't the coercive authority of some external body—like the rule of the US over Germany—be equally legitimate? If the citizens of Alabama do not need to consent to the US government in order to be legitimately ruled by it, then it would seem the citizens of Germany wouldn't have to either. What distinguishes the one from the other (Beitz 1979, 80)?

This objection is powerful, but I think it is misguided. To see why, consider an analogous involuntary relationship: the parent-child relation. From the perspective of the child, this bond is always unchosen: he is merely born into it. But that does not mean that his relationship with the parent is a forcible imposition on him or that we can depose the old parent and replace him with a new one without doing the child any wrong. For over time, the child is likely to have developed a bond with the parent he originally had, and that bond will be of significance to him. If the parent is a good parent, he takes account of the child's interests and allows the child input into the relationship. If that is the case, then the relationship, even if originally unchosen, is not a forcible imposition on the child. A bad parent should be removed; a good parent should not be, even if a slightly better one is waiting in the wings. For there may be a wide range of good parenting styles, and a significant part—perhaps even the most important part—of what is valuable in the

parent-child bond is the way it is shaped by the history of interaction among the particular parties involved.

Our bond with our fellow-citizens is equally unchosen. But as in the previous case, that does not mean that this relationship is forcibly imposed on us, or that an outsider can forcibly amalgamate one people with another without doing them any wrong. Although it is unchosen, the citizenship relation will be collectively autonomous if a) it guarantees basic rights, thus securing each citizen's autonomy and independence; and b) allows these citizens a voice in determining the rules under which they must live. Over time, we shape our institutions together with our fellow-citizens in accordance with shared values and principles of justice, even though we did not choose *these* institutions or *these* compatriots. An important part of what is valuable in the bond between compatriots, then, is the way this bond is shaped by their history of interaction. For that reason, the forcible merger of democratic states disrespects the collective autonomy of citizens in much the same way that replacing the parent disrespects the autonomy of the child. In any good unchosen relationship, the bond between the parties will be shaped by the free input of those involved, even though it is unchosen.

To make these ideas more concrete, consider how democratic peoples—while all protecting certain core liberal values—often produce schemes of law that differ a great deal in their particularities. But these differences are not dispensable details to be overlooked in a forced merger, because they reflect different patterns of entitlement that matter to people and around which they have structured their lives. For example, German citizens had provided one another with a highly developed social welfare system by the late nineteenth century, which was expanded in the Weimar years. If the US had annexed Germany in 1945, and imposed its own system of law, it would have done away with these entitlements, forcing Germans to restructure their lives in painful ways.

These remarks—though sketchy—point to the view that "peoples" who have historically shared a state deserve collective autonomy when they possess, and can sustain, a democratic tradition that is worthy of our respect. When their state fails or becomes illegitimate, it is the collective institutional subject of this state, "the people," that retain metajurisdictional rights over their territory. As long as they possess a distinctive political tradition and can sustain their own legitimate institutions, an outsider cannot annex their territory without doing them wrong. To do so without their consent would be to abolish a valuable relationship around which many have structured their lives.

We should note three implications of accepting such a view of "the people." First, this view differs from the national one in that it does not hold that to qualify as a people, a group must share objective cultural characteristics. All they need to share is a history of political cooperation. Individuals with very different cultural characteristics—as the citizens of India, South Africa, Switzerland, or Canada—can share such a history. The bond that constitutes a democratic people can therefore be quite thin. All that is required

is a *shared intention* to act together politically. On a plausible view, such a shared intention is constructed out of a set of individual intentions that a) have a propositional content referencing a group act; b) contain a set of subplans that are properly related to one another, and c) are common knowledge among the participants (Bratman 1999). This kind of intention is often generated from a prior history of interaction.

Second, unlike the nationalist view, the legitimate state view does not conceive of metajurisdiction as a primary right that the people can exercise at any time (Buchanan 1997). It cannot exercise this right at any time, because in order to make a collectively binding choice, a people must organize itself into a state. Peoples are not *organized collective agents*, but rather unorganized groups. Consider another unorganized group: a mob. A mob may be able to share sufficient solidarity to carry through a joint action, like storming the Bastille (May 1986). But a mob is not an organized collective agent that can undertake an indefinite number of actions. This is because a mob has no procedures in place by which to aggregate information, deliberate about the reasons that apply to its situation, and make decisions that are binding on its members. Each individual participant can decide whether to join the mob, to throw his rock, etc. But the mob itself, as an agent, cannot decide what *it* chooses to do, since it cannot choose to execute any intention other than the one its members happen to share at that moment. Likewise, an unorganized people may share sufficient solidarity to carry through a one-off action. But if peoples are to exercise their agency over time, then they must set up representative procedures and offices—in other words, they must set up a state. *But once it has constituted itself as a state*, *the people can only act in accordance with the procedures through which it has organized itself.* The people's residual rights over their territory come into play only when the state has ceased to represent them, and in order to exercise these rights, they must set up a new state. Since—as an unorganized group—the people cannot deliberate or make binding decisions, they cannot administer their territory directly.

Finally, this account of peoplehood will not rule out all territorial annexations, and I am not certain that it should. Consider severe failed state cases, such as present-day Somalia, for example. When there is no collective agent capable of constituting a state to secure basic rights, it may not be wrong for another state to annex the territory, if they can commit to ruling legitimately. The purpose behind a people's self-determination is the provision of justice for its members: where there is no people capable of sustaining a legitimate institution, this purpose must be fulfilled in some other way. I realize these thoughts would need to be considerably elaborated to provide a full defense against the annexation objection. But if the self-determination of democratic peoples is a value that we ought to respect, then I believe the argument for such respect must be rooted in considerations like these.

To conclude, I believe that if it can meet the annexation objection, the legitimate state theory can provide a more plausible account of territorial rights than do nationalist views. It is more plausible because it is able to explain why legitimate states ought to enjoy territorial integrity: since legitimate states are essential to securing the rights, especially property rights, of their members, both its subjects and outsiders have a reason to respect

their authority. Second, the legitimate state theory can better explain why states ought to have authority over cultural minorities within their population, since the state derives its legitimacy from its ability to secure justice, not its mission to preserve a particular cultural tradition. Although there is certainly more work to be done in providing a full explanation of territorial rights, I hope to have shown that the legitimate state theory provides a promising avenue to pursue.

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