

David Lefkowitz
University of Richmond
January 9, 2013

On a State's Right to Territorial Jurisdiction

(Draft for presentation at Nathanson Center, Osgoode Hall Law School, York University – please do not cite without permission)

Modern states assert (or assume) a right to rule not only particular people – their subjects – but also particular places – their territory.¹ States' territorial rights are typically thought to include claims to control over people's entry into, and continued presence in, their territory, control over natural resources located within it, and the right to exercise legal jurisdiction over all those present within that territory. My focus here will be on the last of these territorial rights, commonly referred to as the right to territorial jurisdiction.² Specifically, I propose to investigate a certain approach to justifying the territorial dimension of a state's political authority – its right to enact, apply, and enforce the law over all those present in the territory it claims a right to rule – while leaving open the justifiability of any other territorial rights claimed by (or on behalf of) states. Indeed, I will not even argue for a full account of legitimate political authority, but simply assume a natural duty or functionalist account so that I can consider how it might be amended or extended in order to justify states' jurisdiction over specific geographical places.³

¹ Indeed, at least in those states, like the U.S., that grant citizenship to anyone born in their territory, the latter claim informs the former.

² See Anna Stilz, 'Nations, States, and Territory,' *Ethics* 121:3 (2011): 573; David Miller, 'Territorial Rights: Concept and Justification,' 253; A. John Simmons, 'Territorial Rights: Justificatory Strategies,' (draft on file with author): 3.

³ Roughly, on a natural duty or functionalist account states enjoy legitimate political authority insofar as they facilitate the performance of certain morally necessary tasks, ones that all moral agents have natural or non-voluntary duties to perform and that they can perform only via the institutions of a legal-political order.

The need for such an extension or amendment follows from two criteria for a plausible account of states' territorial rights, and the inability of a pure natural duty or functionalist account of political authority to meet these criteria. The first criterion, which I have already mentioned, requires that states, or at least legitimate states, be shown to enjoy a right to rule over a *particular* territory, and not merely some territory or other. The second criterion requires that a (legitimate) state's territorial rights survive violation, at least for some period of time. That is, we ought to reject as implausible any account of states' territorial rights according to which aggressors acquire an entitlement to rule a particular territory immediately upon establishing de facto control over it. Instead, we need an account of states' territorial rights that is responsive to history, one that explains and justifies the persistence of territorial claims and, perhaps, their supersession, as well as the steps that various parties ought to take to remedy violations of these rights.

A pure natural duty or functionalist account of political authority fails to satisfy either criterion. The state's justifiable claim to political authority, on accounts of this type, follows from its moral necessity: the fact that justice can only be achieved via the operation of a legitimate state's institutions. Insofar as a legitimate state implements a legal order via which it exercises control over a particular territory, thereby enabling those who live there to realize justice (or just relations with one another), it enjoys a right to territorial jurisdiction over that territory.⁴ Suppose, however, that one legitimate state forcibly annexes a portion of

⁴ Like many other contributors to this debate, I assume here that states can perform this morally necessary function only by exercising more or less exclusive control over a given territory. See, e.g., David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007): 214;

the territory of another legitimate state. As long as the aggressor state continues to meet the criteria for legitimacy – say respect for all of its (old and new) subjects’ basic rights – it immediately acquires a right to exercise jurisdiction over the territory it controls. This is because on a pure natural duty or functionalist account, *de facto* legitimate rule over a given territory is necessary and sufficient for a *de jure* right to rule that territory. Thus on a pure natural duty or functionalist account of justified political authority, even legitimate states lack a right to any particular territory. Instead, they only have a right to rule whatever territory they presently happen to control, and they lose the right to rule that territory (and so any remedial right to its return) immediately upon another legitimate state’s seizing control of it. Those who think these implications absurd must either reject a natural duty or functionalist approach to justifying political authority, or add to it a distinct moral consideration (or considerations) that account for the particularity of states’ territorial rights and their persistence in cases of violation.

A right to political self-determination will not serve here, as the example sketched in the previous paragraph demonstrates. The citizens of the state that has had a portion of its territory forcibly annexed may well be able to continue governing themselves via the institutions of an independent state in the territory over which they retain control. Those residing in the annexed territory may be permitted to relocate to that territory; indeed, the annexing state may force them to do so. My point is not that these individuals suffer no wrong at the hands of the annexing state; indeed, I believe they do. Rather, I wish to highlight that it is their

Christopher Heath Wellman, *A Theory of Secession: The Case for Political Self-Determination* (Cambridge: Cambridge University Press, 2005): 16.

right to politically self-determine *in a particular place*, and not their right to self-rule *per se*, that the annexing state violates. Evidently, then, an appeal must be made to some moral consideration or value other than political self-determination to account for the particularity and persistence of a state's territorial rights.

Stilz's Account of Occupancy Rights

Anna Stilz has recently offered an account of states' jurisdictional rights that grounds their claim to jurisdiction over a particular territory in its members' individual rights of occupancy in that territory. Only if its citizens have a right to be where they are, Stilz maintains, does the state that represents them have legitimate jurisdiction over the territory they occupy (584).⁵ Stilz characterizes the right of occupancy as "a claim to be in *legal residence* on that territory: to be physically present and to have one's rights defined and enforced by whatever state has jurisdiction there" (582). Autonomy, conceived of as an individual's capacity to form and act on a conception of the good, provides the moral basis for a right of occupancy. In practically all cases, the conception of the good individuals form and pursue rests on the assumption that they will enjoy stable legal residence in the place they reside (unless they voluntarily give it up). As Stilz writes, "we build our lives on the assumption that our goals, relationships, and pursuits will not be unexpectedly destroyed through forced displacement" (583). Respect for

⁵ Citations in the text are to Stilz, 'Nations.' Stilz defends three additional conditions that must also be met for a state to have a morally justified claim to exercise jurisdiction over a particular territory, namely that it effectively implement a system of law regulating property there, that its system of law protect basic rights and provide for political participation, and that the state not be a usurper, i.e. that it not deny a political people's exercise of self-determination.

individuals as autonomous creatures, then, requires among other things respect for their rights of occupancy.

Stilz notes, however, the possibility that a person may be morally at fault for coming to reside in a given territory, and forming and pursuing life plans premised on continued legal residence in it. For example, she may do so by forcibly displacing those who rightfully occupy the territory. Stilz maintains that such a person cannot acquire a right of occupancy to the territory in question, even if she resides there and her ability to advance her goals, relationships, and pursuits depends upon legal residence in that territory. In sum, a person enjoys a right of occupancy if “(1) he resides there now or has previously done so; (2) legal residence within that territory is fundamental to the integrity of his structure of personal relationships, goals, and pursuits; and (3) his connection to that particular territory was formed through no fault of his own” (585). Following Stilz, I will refer to this account of the conditions under which a person enjoys a right of occupancy as the **occupation principle**.

On Stilz’s account, state A enjoys a right to territorial jurisdiction over territory T at time t1 only if those individuals who reside in T have rights of occupancy in T. Suppose that at time t2 state B seizes territory T (i.e. unilaterally imposes its rule on that territory), forcibly expels all of the individuals residing there, and repopulates T with some of its own citizens. Though state B may exercise de facto jurisdiction over territory T, it will not enjoy a right to do so. Rather, at time t2 and for some time thereafter, state B will have a duty to right the wrong (or wrongs) it has committed. In Stilz’s words, the aggressors must “restore the

territory to those they expelled" (585).⁶ Ideally state B will discharge this remedial duty (under duress, perhaps, from state A and other states as well). But suppose it does not. What then?

Suppose that state B's wrongful seizure of T and forcible expulsion of its then population goes uncorrected long enough for all of the current residents of T to have been born there, while all of the people displaced from T have died. At this point, Stilz maintains, all of the residents of T (who we will assume are all full and equal citizens of state B) enjoy rights of occupancy in T. Each of them resides in T, the integrity of their structures of personal relationships, goals, and pursuits almost certainly depends on stable legal residence in T, and none of them has formed a connection to T as a result of a morally faulty act. Assuming that state B meets the other criteria for a right to territorial jurisdiction Stilz sets out, state B enjoys a right of jurisdiction over T.

What of the descendants of those forcibly expelled from T by state B? Do they have any claim to stable legal residence in T? Stilz responds that it depends on whether the descendants have established stable legal residence elsewhere – or, more precisely, if they enjoy full and equal status as citizens in some other legitimate state (586). If they do, then their autonomy is sufficiently secured where they now reside, and so they have no moral justification for demanding stable legal residence in T. That is, they have no claim against those who now reside in T or against the state that exercises jurisdiction over it that they be permitted to take up

⁶ At a minimum, remediation will require that the original inhabitants be readmitted to T. It may also require the resettlement of those who settled or were born in T after state B unjustly seized control of it, and the withdrawal of state B's governance over that territory. I discuss these points in greater detail below.

permanent residence as full and equal citizens in T.⁷ However, if the descendants of those forcibly expelled from T by state B do not enjoy full and equal citizenship in another (legitimate) state, then Stilz maintains that they have a right of return to T (586). That right is grounded in the treatment owed to them in virtue of their autonomy.

I find the occupation principle attractive for three reasons. First, like Stilz, I both defend a natural duty account of legitimate political authority but find myself very uncomfortable with the implication that a state's right to rule a given territory follows straightaway from the fact of its rule over that territory. The occupation principle, it seems to me, offers a solution to this problem that does not require endorsing either a Lockean or Nationalist account of how it is that states acquire a right to rule a particular territory. Endorsement of either of these accounts of territorial right might well imply that one ought also to endorse their respective accounts of political authority, and since I find both those accounts wanting I have good reason to seek an alternative justification for the particularity and persistence of states' territorial rights. Second, the occupation principle coheres with a general but vague intuition I have regarding the persistence of territorial claims in the face of their violation, namely that they are eventually superseded but that this requires some passage of time.⁸ The occupation principle holds out the hope of providing a

⁷ Stilz notes that the supersession of an agent's occupancy right in T need not entail the loss of any claim on that agent's part to compensation for harm or reparation for confiscated property. Though I accept the logical claim here, it is not obvious to me why Stilz's argument for the supersession of occupancy rights does not apply equally to the supersession of property rights.

⁸ A defense of that intuition does not require endorsement of the occupation principle; Miller, for example, also defends the eventual supersession of territorial rights on the basis of his Nationalist account of territorial rights. See Miller, *National Responsibility*, 219-20. Simmons, in contrast, rejects the supersession of rights – explicitly in the case of “mere passage of time,” but also implicitly via his

principled account of when, and why, claims to territory lapse; that is, it offers a structure and rationale for my general and vague intuition. Finally, I approve of the priority Stilz assigns to individuals over the collective. The state's right to rule a particular territory follows from its individual subjects' rights to occupy that territory, rather than the state's (or, what is not the same, the nation's) members having a right to (stable legal) residence in a particular territory because the state (or nation) has a right to rule it.⁹

Nevertheless, I believe Stilz's account of the alleged right of occupancy stands in need of several clarifications and corrections before it can be fairly and properly assessed. That is the primary task I undertake here, though I conclude with a preliminary remark on the corrected account's plausibility. I begin in the next section by exploring what it is to occupy a territory in the sense relevant to the occupation principle, before turning in the following sections to revisions to the occupation principle's implications for both the acquisition of a right to occupy a given territory and a right of return to it.

On the Nature of Occupancy

Consider, first, the nature of occupancy. What is it to occupy a territory? Until we have an answer to this question, we cannot determine what sort of actions violate a person's right to occupy a territory.¹⁰ Moreover, insofar as the scope of a

critique of Jeremy Waldron's account of rights supersession and legal doctrines such as adverse possession. See 'Historical Rights and Fair Shares' in A. John Simmons, *Justification and Legitimacy*.

⁹ Compare to Miller, 'Territorial Rights,' 258.

¹⁰ Similarly, and by way of illustration, unless we know what counts as speech, we cannot determine what counts as a violation of the right to freedom of speech. This comparison suggests an intriguing possibility, namely that our conception of the act – e.g. speech or occupancy – develops or evolves in tandem with the development or evolution of our conception of the right to perform the act in question.

state's territorial rights – that is, the boundaries of the territory over which the state has a right to exercise jurisdiction – depends on the scope of the occupancy rights of its subjects, we cannot determine the former until we determine the latter. The path to a proper understanding of the scope of an individual's occupancy right presumably begins with an account of the nature of occupancy.

On Stilz's account occupancy clearly involves extended residence in a particular place together with a person's formation and pursuit of a conception of the good premised on continued residence in that place – or, a bit more precisely, premised on the assumption that one will not be involuntarily displaced from that territory (583). Normally an agent's conception of the good will include participation in various personal relationships, setting and striving to achieve various goals, and adopting various pursuits. Many of these relationships, goals, and pursuits will have a particularized territorial dimension. For example, many of my relationships will be with people I regularly engage in face-to-face interaction, such as my neighbors and my co-workers. Similarly many of my goals and pursuits will involve a connection to a particular place, as in my goal of renovating and redecorating my home. Notice, though, that the formation and pursuit of plans like these require more than extended residence in a particular place; they also require a relatively stable set of social norms that structure the interactions between the people who reside there.¹¹ In the absence of relatively stable social norms that both promote and reflect a degree of shared understanding regarding the normative

¹¹ Unless this community lives in splendid isolation from others, it also requires a relatively stable set of social norms that structure interactions between long term residents of the territory, visitors to it, and long term residents of other territories. I leave these complications aside here.

structure of relationships such as friendship, family, and co-membership in various political and social groups, as well as the normative structure of possession and exchange, agents are likely to find it impossible to form and act on all but the most minimal of plans. Of course, an increase in the stability of such norms, and/or in the extent to which people share a common understanding of their content and relation to one another, or how disagreements on such matters should be resolved, can enhance people's ability to form and pursue conceptions of the good. The point on which I wish focus here, however, is the practical necessity of some minimal social order if agents are to exercise their autonomy at all.

In the sense relevant to understanding occupancy rights, then, a person occupies a particular territory if he forms and pursues a conception of the good life that presumes continued residence in that territory, and that is informed by the social norms that structure the interaction of those who reside in it. But what sort of social norms? Non-legal conventions? Legal norms? The legal norms of a legitimate state? Stilz's answer, I think, is legal norms.¹² She defines a right of occupancy as "a claim to be in *legal residence* on that territory: to be physically present and to have one's rights defined and enforced by whatever state has jurisdiction there" (582 – Stilz's italics). Furthermore, she includes among the necessary conditions for a person's right to occupy the fact that "*legal residence* within that territory is fundamental to the integrity of his structure of personal

¹² Note that the question here concerns the existence conditions for individuals' occupancy rights in a particular territory, not the moral justifiability of the state's right to territorial jurisdiction over it. On Stilz account, only legitimate states enjoy the latter.

relationships, goals, and pursuits” (585 – italics mine).¹³ Thus I think it safe to conclude that, on Stilz’s view, if a person has come to be present in a territory through no fault of his own, and having resided there for an extended period of time has formed and pursued a conception of the good life structured by the laws of the state that governs that territory and premised on continued residence in it, then he enjoys a right to occupy that territory. Henceforth I will refer to this understanding of occupancy and the right thereto as the legal account.

The legal account of occupancy may seem to provide a circular argument for a state’s right to exercise territorial jurisdiction over a particular territory.¹⁴ States get a right to do something, namely exercise jurisdiction over a particular territory, because their subjects do something, namely occupy that territory. But their subjects occupy that territory only because they enjoy legal rights there; that is, only because the state exercises jurisdiction over it. If a state’s exercise of jurisdiction over T is necessary for a person to enjoy a right of occupancy in it, then how can that person’s occupancy right serve to justify the state’s exercise of jurisdiction over T? The impression of circularity arises, however, only if we conceive of occupancy in Lockean terms: as a pre-political activity (i.e. one whose performance need not be characterized as taking place within the context of an existing political, or even social, order), and something that individuals do to take possession of a particular piece of territory. But the acquisition of a right of occupancy does not involve

¹³ In the accompanying footnote she makes clear that it is a person’s existing or actual structure of goals, pursuits, and personal relationships that matter, not those to which a person may aspire. That a person aspires to pursue various goals, develop various relationships, etc., in a particular place does not give him a claim to legal residence in that place.

¹⁴ Kolers, for example, suggests that it does. See ‘Attachment to Territory: Status or Achievement?’ *Canadian Journal of Philosophy* 42:2 (2012): 108-9.

essentially doing something *to* a particular territory; it is not, for instance, a matter of increasing its value, however that might be understood.¹⁵ Rather, the acquisition of a right of occupancy in a given territory is the result of something that individuals do *in* a territory, namely forming and pursuing life plans structured by the legal regime that governs the territory and premised on continued residence there. Of course, in forming and pursuing their life plans people will surely do things to the territory that transform it in myriad ways. The legal regime to which those who reside in the territory are subject may well treat many of those transformations as giving rise to, or as violations of, property rights. But forcible displacement from the particular territory individuals have a right to occupy wrongs them not simply by violating their property rights but by uprooting the entire latticework of concrete legal rights that gives structure to their lives and informs their plans. In the sense of 'life' invoked when we speak of the life a person lives, forcible displacement literally rips a person's life away. Individuals' occupancy rights, then, enjoy a justificatory priority over a state's right to territorial jurisdiction; the basis for a state's claim to rule a particular territory is the fundamental contribution doing so makes to its subjects' autonomy.

A second worry regarding the legal account of occupancy concerns its implications for those who do not live under a legal regime. Consider those Somalis living in the region once governed by the state of Somalia. Stilz describes the region (at least for argumentative purposes) as a "severe failed state," one in which there

¹⁵ Locke, *Two Treatises of Government*, Chs. 5 and 8; A. John Simmons, 'On the Territorial Rights of States,' *Philosophical Issues* 11:1 (2001); Miller, *National Responsibility*, 218-19, and 'Territorial Rights,' 259-262.

exists no collective agent capable of organizing and sustaining legitimate political authority. Indeed, the region is one in which there exists no centralized political authority at all, let alone a legitimate one. Suppose we were to treat the existence of a centralized political authority as a necessary condition for the existence of a legal order, properly understood. The failure of the Somali state would entail the absence of a legal order in the region, which (perhaps after some time has passed) would entail in turn that those living in the region – call them Somalis - enjoyed no occupancy rights there.¹⁶ This is so because one of the conditions for the enjoyment of an occupancy right in a particular place is that *legal residence* within that territory is fundamental to the integrity of a person's structure of personal relationships, goals, and pursuits. Yet if Somalis do not enjoy occupancy rights in the region once governed by the Somali state, then their forcible relocation from that territory to another would not necessarily constitute a wrong done to them. Insofar as forcible relocation did wrong them, it would not be due to the fact of forcible relocation itself but, say, some feature of how it was carried out such as physical harm done to the Somalis as part of their expulsion from the territory. This will likely strike many readers as absurd, and in fact Stilz rejects it. In a footnote she asserts, but does not argue for, the claim that while tribal or clan groups in the region formerly governed by Somalia may lack territorial rights, they do have “rights of occupancy in their territory, which means that even if they are incorporated into another state justly... they may not be resettled or deprived of their land” (599).

¹⁶ For simplicity's sake I will use the term 'Somalis' to refer to those living the area formerly governed by the Somali state, though in fact not all of those who live in the region are members of the Somali ethnic group (and not all ethnic Somalis live in the region in question).

One way for Stiliz to maintain this conclusion, consistent with the account of a right to occupancy she sets out, would be to argue that the failure of the Somali state has not created a region in which no law exists, and so one whose residents cannot form and pursue conceptions of the good informed by a legal order. Rather, the domestic legal order of a modern state has been replaced by one or more tribal or religious legal orders. Alternatively, whether the social order realized in (parts of) the territory in question constitutes a legal order, properly understood, may be irrelevant for an account of occupancy rights. What matters, as I argued above, is that a person form and pursue a conception of the good against a background of social norms that structure his or her interaction with a fair number of those who reside in the same territory. Even in the absence of a state people's lives may be sufficiently well-ordered according to relatively widespread and stable social norms that they are able to form and pursue complex and ambitious (if sometimes precarious) life-plans, in which case their forcible displacement from the territory in which they reside will constitute disrespect for them as autonomous creatures. This appears to be the case for many Somalis, even if some of them regularly interact with others who do not acknowledge the same social norms. The region formerly ruled by the state of Somalia may now be stateless, and perhaps even lawless, but few of its people live outside the ambit of social norms. My suggestion, then, is that we hold that a necessary condition for a right of occupancy in a particular territory is that social norm governed residence within it, rather than the narrower legal residence, is fundamental to the integrity of a person's life plans.¹⁷

¹⁷ Either of the two proposals in this paragraph for reconciling Somali's occupancy rights with

Occupancy Rights and the Right of Return

Stilz's account of the remedial duties generated by the violation of occupancy rights stands in need of correction. Consider, first, the plight of the descendants of those unjustly displaced from territory T.¹⁸ Stilz maintains that if they have achieved full and equal citizenship in the state in which they reside, the descendants of the displaced have no occupancy right in T, and so no right of return to it. However, she asserts that if "they remain a stateless people, reside in an illegitimate state, or form a population of second-class citizens ruled by another people... then they have an outstanding occupancy claim...[that gives them] a right to be readmitted to the territory and granted equal citizenship there" (586). Stilz's account of occupancy does not warrant this conclusion, a fact of which she seems dimly aware, as she remarks in a telling footnote attached to the above quotation that "given the structure of their relationships and pursuits, it may be that the victims' descendants' autonomy would be best guaranteed by granting them equal citizenship in the state to which they have been displaced" (586). Stilz's account of occupancy rights actually commits her to a stronger claim. Not only might the victims' descendant's autonomy *be best* guaranteed by granting them citizenship in the state in which they reside (and, let us assume, have always resided), but given that they have formed and pursued a conception of the good in this state's territory, one informed by the operation of this state's legal regime, they have *a right to occupancy in this state's*

absence of any state ruling the territory in question suffices to refute Kolers's claim that, on Stilz's account, occupancy must consist in mere presence in a place, rather than the enjoyment of legal rights (or other social-norm based claims) in that place. See Kolers, 'Attachment,' 107-9.

¹⁸ Like most contributors to this debate, I ignore the non-identity argument for the conclusion that (many of) the descendants of those unjustly displaced from a given territory suffer no wrong. I believe, however, that such an argument deserves more attention from those writing on territorial rights than it has received thus far.

territory. That right is grounded in respect for their autonomy. Granted, this claim rests on the assumption that neither a state's illegitimacy nor second-class citizenship necessarily precludes individuals' formation and pursuit of a conception of the good premised on stable legal residence in a particular territory. But that assumption seems both true and a claim Stilz might well wish to accept, since its denial would entail that the forcible displacement of billions of people currently living in illegitimate states would not wrong them *per se*. Of course, the descendants of the displaced (and all other people) do have a claim to full and equal citizenship in a legitimate state. That claim, however, is grounded (at least on Stilz's Kantian account) in their right to external freedom (i.e. freedom-as-independence from the will of others, or non-domination). Their claim to full and equal citizenship *in the state that governs this particular territory*, however, is grounded in their right to occupy the territory in question.

What about the descendants of the displaced who remain stateless? Residents of refugee camps, for instance, often enjoy few legal rights within the territory (of the state) in which they reside. The absence of legal entitlements to work, to purchase a home, or to travel freely throughout the state's territory (or across its borders) likely severely restrict an individuals' ability to form and pursue a conception of the good. Suppose that this is in fact true of the descendants of those displaced from territory T by state B; unemployed, living in shelters they do not own, confined to refugee camps, and with no control over their future, these

individuals form and pursue only the most stunted life plans.¹⁹ Contrary to Stilz's claim, even these individuals do not enjoy a right of return to the territory from which their forebears were unjustly displaced, and full citizenship in the state that governs that territory. Rather, they have a claim against the state that displaced them – state B, in our example – that it assists them in achieving stable legal residence in *one or another (legitimate?) state*. While state B may discharge its duty to the stateless descendants of those it displaced by admitting them to its territory as full citizens, it may also do so by arranging for another state to grant them stable legal residence in its territory. After all, the descendants of the displaced have never resided in the territory from which their forebears were expelled, nor is legal residence within that particular territory fundamental to the integrity of the structure of their personal relationships, goals, and pursuits. Stilz's account of the right of occupancy, therefore, provides no basis for the claim that they have a right to establish stable legal residence in the particular territory their forebears once occupied.²⁰

In practice, it may be that state B can only discharge its duty to the stateless descendants of those it forcibly displaced by granting them residence as full citizens in its own territory. We should be careful not to jump to this conclusion too quickly,

¹⁹ This supposition is necessary because lax enforcement of the law may enable individuals to form and pursue conceptions of the good *as if* they enjoyed stable legal residence in the territory governed by a particular state. Whether these individuals thereby acquire an occupancy right in that state's territory is an interesting question, but not one I will pursue here.

²⁰ Admittedly, Stilz only identifies the conditions that together constitute the occupation principle as jointly sufficient, but not necessary, for the enjoyment of a right of occupancy. It remains open to her, therefore, to argue that these conditions do not apply in the case of descendants who have failed to achieve full and equal citizenship elsewhere. Presumably a defense of a right of return on the part of such individuals will need to avoid implying a right of return for those who have achieved stable legal residence elsewhere.

however. For it may be that some states would be willing to grant these individuals stable legal residence in their territory in exchange for money, resources, favorable trade terms, or even some of state B's territory (which may not include any of the territory state B seized from state A). Moreover, suppose Stilz is right to maintain that other states may justly pressure state B to fulfill its duty to the stateless descendants of those it displaced (586). Third party states may do so more effectively and at less cost by, for example, seizing some of state B's assets abroad and using them to negotiate for stable legal residence for these individuals in a state other than state B. The foregoing argument entails that this would be a fully appropriate solution to the injustice suffered by these stateless individuals, not a merely second best one. Regardless of what the practical consequences might be, the theoretical point remains: properly understood, the argument for occupancy and the right thereto does not entail that stateless descendants of those unjustly displaced from a particular territory enjoy a right of return to it.

Thus far in this section I have focused on clarifying the implications that Stilz's account of occupancy has for the descendants of those unjustly displaced from territory T. These clarifications also highlight an implication of Stilz's view for those who actually suffer the injustice of forcible expulsion from T, namely that they may cease to have occupancy rights in T and so have no right of return to it. As we have seen, Stilz maintains that a person's right to occupy a territory depends on legal residence within that territory being fundamental to the integrity of his structure of personal relationships, goals, and pursuits. That is why she concludes that descendants of the displaced who have achieved full and equal citizenship in

another state have no right of return; legal residence in the territory from which their forebears were expelled is not fundamental to their life plans. Yet the same may come to be true of those forcibly displaced from a particular territory. If they achieve stable legal residence elsewhere and begin to form and pursue a conception of the good premised on that fact, then over time legal residence in the territory from which they were expelled will likely cease to be fundamental to the integrity of their life plans. While Stilz writes that the descendants of the Germans forced out of what is now western Poland in 1945 have no right to return there (586), her account of the right of occupancy suggests a stronger conclusion, namely that even many of the Germans expelled from western Poland likely lost their claim to return within a few decades of their expulsion. Properly understood, then, Stilz's account of the right of occupancy entails that even those forcibly expelled from a territory may have their right to return to it superseded. Moreover, and contrary to Stilz's assertion, it follows that those who unjustly expelled them, or who are at fault for taking advantage of their expulsion to settle in that territory, can acquire a right to occupy it. Or so I will now argue.

The no-fault condition for occupancy rights

On Stilz's occupation principle, a person enjoys a right to occupy a territory only if "his connection to that particular territory was formed through no fault of his own" (585). The inclusion of what I will call the no-fault condition among those that must be met if a person is to enjoy a right to occupy a particular territory serves two purposes. First, it prohibits those who establish residence in that territory by culpably displacing those who previously occupied it, or who culpably take

advantage of others' unjust displacement of the previous inhabitants to settle in it, from acquiring a right to occupy that territory. This is so even if they have enjoyed stable legal residence in that territory (albeit in all likelihood under a different legal regime than the one that structured the affairs of the previous occupiers) for a long enough time that the integrity of their structures of personal relationships, goals, and pursuits depends upon continued legal residence there. Second, the no-fault condition does not similarly disqualify the children of these wrongdoers who are not culpable for their presence in the territory, either because they were too young to be held morally responsible for settling in the territory when they did so, or because they were born there. If these individuals proceed to form and pursue conceptions of the good structured by stable legal residence in that territory, then they do acquire a right to occupy it.

Each of these implications of the no-fault condition may appear to enjoy some intuitive support. If I steal your car, then surely I cannot gain rightful possession of it no matter how long I drive it, or how much I may build my life plans around the assumption that I will continue to possess it. True, you may severely disrupt my life plans when you (or the state) reclaim your car from me, but I could have avoided that disruption by not stealing your car (or by not making any plans premised on the possession or use of it), and I should have known this. Those who have this intuition in the case of property may well draw an analogous conclusion in the case of occupancy rights. Even if righting the wrong the unjust displacers committed severely disrupts their life plans, say because it requires them to leave the territory in question, they could have avoided that disruption by not invading

the territory and unjustly displacing the previous inhabitants, and they should have known this. The same is not true for the non-culpable children of the wrongdoers, however. To severely disrupt their life plans, say by expelling them from the territory in which they have grown up, would be to punish the children for the sins of their fathers (and mothers).

Despite the initial intuitive appeal of the no-fault condition on an individual's enjoyment of a right to occupy a particular territory, we ought to reject it. Moral fault, or culpability, makes no difference to whether a person successfully acquires a right to something, including a right to occupy a particular territory. Rather, moral fault or culpability figures in the justifiability or appropriateness of blame, and perhaps also punishment and liability to remedy wrongdoing or compensate for harm done. For example, suppose I take your jacket, reasonably but mistakenly believing it to be my own. Since I am not morally at fault for violating your property right in your jacket, I ought not to be blamed or (I will assume) punished for doing so. The absence of culpability on my part does not empower me to change the existing structure of rights, however; you continue to enjoy a property right in your jacket, one that correlates to a duty on my part to return the jacket to you. Of course, you may cease to have a right to the jacket if you voluntarily abandon your claim to it, or of particular relevance here, if my claim to the jacket supersedes yours. As I will now demonstrate, in the case of a right of occupancy supersession turns on the original right-holder no longer meeting the first two conditions for a right of occupancy in the particular territory in question, while the subsequent inhabitant does. The fault, or lack thereof, of those who subsequently occupy that

territory makes no difference to the supersession of the original right-holders' claims, or to the subsequent inhabitants' acquisition of a right to occupy that territory. In short, we ought to replace Stilz's no-fault condition with one that makes the enjoyment of a right to occupy a particular territory conditional on occupancy not constituting a violation of other agents' rights.²¹

Consider, first, the claim that those who unjustly displace the original inhabitants of T cannot acquire a right to occupy it, even if they legally reside there for a long time and their life plans come to reflect that fact. Why should the fact that a person's connection to a particular territory was formed via some morally faulty act bar her from ever enjoying an occupancy right there? Admittedly, we tend to think that a person who first acquires something via a morally faulty act has no claim to it subsequently. But I suspect that is because we typically assume that the original possessor continues to have a rightful claim to it. That is, it is not the initial act of unjust acquisition but the current act of unjust possession that leads us to conclude that this person has no moral title to the thing in question. If the initial possessor ceases to have a right to the thing, however, then the way is open to the initially unjust acquirer to establish rightful possession of it. She will succeed in doing so just in case she meets the conditions for rightful possession of that thing, which in the case of a right to occupy a particular territory T involves actual or recent residence in T and a structure of personal relationships, goals, and pursuits that depends for its integrity on continued legal residence in T. Earlier I argued that if those unjustly displaced from territory T have established stable legal residence

²¹ As I explain below, those rights may be either rights of occupancy or rights to political self-determination.

elsewhere, and their life plans largely reflect that fact, then they no longer have any claim to occupy the territory from which they were unjustly expelled. If so, then T is available for occupation, and it is the displacers who now reside in T, and who have formed and pursued life plans premised on stable legal residence there, that meet the conditions for rightful occupancy of T. Thus if as I previously suggested the Germans forcibly expelled from what is now western Poland did in fact lose their right of occupancy in that territory, and so their right of return to it, within a few decades, then those Poles who participated in the expulsion of these Germans and who then settled in that territory acquired a right to occupy it (so that, had Poland met the conditions for legitimacy Stilz sets out, it would have enjoyed a territorial right to that region).

It bears emphasizing that on the foregoing account it is not the unjust displacers' wrongful seizure of territory T that generates a rightful claim to occupy it. Rather, as long as the unjust displacers' residence in T constitutes a violation of the occupancy rights of those they have unjustly displaced, their residence and pursuit of conceptions of the good premised on stable legal residence there generate no claim to occupancy in it. Only when the occupancy rights of those they have forcibly displaced lapse do the displacers' de facto stable legal residence in T generate an entitlement to stable legal residence there. Rightful occupation, then, does not depend upon rightful original acquisition. Note, however, that the unjust displacers' acquisition of a right of occupancy in T does not necessarily entail the impermissibility of punishing them for the injustices they committed when they first forcibly displaced the previous inhabitants of T, and when they failed to discharge

their remedial duties to those individuals. Whether punishment would actually be justifiable in such cases, and if so what form it ought to take, are questions that lie beyond the scope of this paper.

It might be objected that the speed with which individuals' rights of occupancy can be superseded, as well as the absence of a duty to grant the descendants of the displaced full citizenship and residence in the territory from which their forebears were expelled, will encourage unjust expulsions of people from territories in which they have a right to enjoy stable legal residence. After all, those tempted to engage in such acts will know that their control over the territory they seize may well become morally legitimate within one generation, and perhaps even sooner. Yet it seems unlikely that there will be any actors for whom this consideration tips the balance in favor of unjustly seizing a territory and expelling its current population. Moreover, it may be possible to justify international legal rules regarding legitimate control over territory that deviate to some extent from the correct account of the conditions under which states enjoy a moral right to exercise jurisdiction over a given territory. For example, if law serves to mediate between agents and the reasons that apply to them, then law may justly deviate from a moral norm in some cases if in doing so it produces greater overall compliance with that norm. International law, then, might refuse to recognize a state's claim to rule a piece of territory it unjustly seized and whose inhabitants it displaced for at least two generations, say, if doing so led to greater respect for states' morally justified claims to territory and for individuals' rights of occupancy than if the law mirrored exactly the moral account of occupancy rights (and so

territorial rights) described here. If that account ought to be rejected, it is not because of the wrongs it might tempt people to commit, but because it provides a flawed understanding of the considerations that morally entitle individuals to reside in, and states to govern, particular pieces of territory.

Recall, now, the no-fault condition's second implication, namely that the non-culpable children of those who unjustly displaced the original inhabitants can acquire rights of occupancy in T. There is reason to be skeptical of this conclusion too. Suppose the previous inhabitants of T constitute a political people (or some portion thereof), a status in virtue of which Stilz maintains they enjoy a right to political self-determination.²² Suppose, further, that their right to political self-determination gives them a defeasible claim to control entry into T, and in particular, a defeasible right to deny outsiders the opportunity to establish the sort of long-term residence in T that is necessary if individuals are to acquire an occupancy right in T.²³ Non-culpable settlers in T violate that right just as much as culpable ones do – they all construct a life plan premised on stable legal residence in T without permission from those with a justified claim to control who may establish long-term residence there. Though the former deserve neither blame nor punishment for doing so, this does not change the fact that they have lived their lives in a place they are not entitled to live. If the original inhabitants of T do not establish stable legal residence elsewhere (so that they continue to enjoy a right to

²² Stilz characterizes a political people as a group that “has established a history of political cooperation together by sharing a state (legitimate or otherwise) in the recent past, and... possesses the ability to reconstitute a legitimate state on their territory today” (591).

²³ The right is defeasible insofar as it does not entitle those who have it to refuse entry to outsiders who cannot otherwise securely enjoy their basic moral rights.

occupy T), and if they continue to constitute a political people (so that they enjoy a right to political self-determination, including control over entry into the territory they have a right to rule), then when they regain control over T they have the right to expel from it even the non-culpable settlers.²⁴

The expulsion of the non-culpable settlers may well seriously damage the integrity of the structure of personal relationships, goals, and pursuits they have built against the backdrop of stable legal residence in territory T. Responsibility for the wrong done to them, however, lies with those at fault for making the non-culpable settlers morally vulnerable to this kind of severe disruption to their life plans; typically, the same agents at fault for the original unjust annexation of T and the forcible displacement of those with a right to occupy it.²⁵ These agents have a duty to remedy the injustice they have done to those who non-culpably settled in T, and to compensate them as best they can for the harm they will inevitably suffer as a result of having to relocate. If they refuse or are unable to do so, then the original inhabitants of T – i.e. those with occupancy rights in T who together constitute a political people entitled to exercise political self-determination in T – may not render them stateless. Instead, they have a duty to work with other states to help the non-culpable settlers achieve stable legal residence somewhere, possibly but not

²⁴ The most commonly cited reason for exercising such a right is the desire to maintain a particular kind of culture (e.g. political, religious, social, or economic, or some combination thereof) that is likely to be threatened if the non-culpable descendants of the displacers are permitted to remain (as full and equal citizens) in territory T. See, e.g., Miller, 'Territorial Rights,' 265.

If the unjustly displaced original inhabitants of T acquire occupancy rights elsewhere, then the non-culpable settlers in T may acquire a right to occupy it, on the same grounds as I set out earlier for those morally at fault for expelling the original inhabitants or for settling in T.

²⁵ Analogously (and all else equal), the imprisonment of a convicted (and truly guilty) thief may well damage the integrity of the structure of her children's relationships, goals, and pursuits, but responsibility for the harm they suffer lies with the thief, not the state or the political community on whose behalf it acts.

necessarily in territory T. The duty here is a general one incumbent upon all states, not a special obligation owed by those with a rightful claim to rule T to those who, through no fault of their own, built their life plans around stable legal residence in a territory they are not entitled to occupy.

Suppose, however, that those originally displaced from T have died, and that their descendants have failed to acquire occupancy rights in another state's territory. Suppose, further, that the state that displaced their forebears is compelled to admit the descendants of the displaced to T. Stilz maintains that the descendants of those displaced have no right to expel the non-culpable descendants of those who did the displacing. I agree; the non-culpable descendants of the displacers have a right of occupancy in the territory in question. They have that right, however, not because they are not at fault for forming and pursuing a conception of the good premised on stable legal residence in this territory. Rather, they have that right because they have formed and pursued a conception of the good premised on stable legal residence in this territory *and no other agents have rights over that territory that precludes their doing so*. The original inhabitants of the territory, who may well have had such rights for at least some period of time after their expulsion, have all died, or so I am assuming. Their descendants, who have never resided in the territory in question, do not have occupancy rights in it; rather, as I argued above, if they are stateless they have a claim against the state that displaced their forebears that it assist them in achieving stable legal residence somewhere. Even if, in practice, the displacing state can only do so by granting them full citizenship and residence in the territory from which it expelled their ancestors, the moral claim the

descendants of the displaced have against the displacing state does not preclude the displacers' descendants from acquiring occupancy rights in T.

My aim in the preceding paragraphs has been to demonstrate that the absence of fault for forming a connection to a particular territory does not entail that one enjoys a right to occupy that territory as long as one resides in it and legal residence there is central to one's life plans.²⁶ Together with the earlier argument defending the claim that those at fault for forming a connection to a particular territory (e.g. those who unjustly displaced its original inhabitants) may nonetheless acquire a right to occupy it, this demonstration provides a compelling case for replacing the no-fault condition on the enjoyment of a right of occupancy with a no rights violation condition.

Where does this leave us?

Having clarified and corrected Stilz's proposed occupation principle, we can use it to give an account of what gives a (legitimate) state a right to jurisdiction over a particular territory, as well as an account of the conditions under which such a right persists, or fails to persist, in the face of its violation. But is it a plausible account? I am not yet ready to answer that question. However, I think it likely that the revisions to the occupation principle for which I have argued increase the extent to which the principle's implications conflict with what strike me as fairly

²⁶ David Miller (rightly) objects to Stilz's formulation of the occupation principle on the grounds that "being the legitimate representative of people who, as individuals, have the right to be on that territory" does not suffice to establish a state's right to rule that territory "because there may be an alternative state with a better claim waiting in the wings, so to speak – the state that represents the people who suffered the injustice of expulsion" (Miller, 'Territorial Rights,' 256). The revised version of the occupation principle I defend in the text does not suffer the same shortcoming; rather, it holds that culpable or non-culpable settlers of a territory from which others were unjustly displaced can acquire a right to occupy that territory only if the occupancy rights of those displaced from it have lapsed (i.e. there is no agent with a right to occupy the territory waiting in the wings).

widespread intuitions regarding just claims to territory. I have in mind here the following claims: (1) that those who unjustly displace the rightful occupiers of a territory can come to enjoy a right to occupy that territory themselves; (2) that non-culpable occupiers of a territory may, in the right circumstances, be justly displaced from the territory on which they have built their lives; and (3) that the descendants of those unjustly displaced from a given territory have no right of return to it. Our willingness to accept these conclusions will depend to a considerable extent on whether we believe that the contribution that stable legal, or at least social norm governed, residence makes to the living of an autonomous life is all that grounds a right to occupy a particular territory.²⁷

²⁷ Consider, in this vein and as a starting off point for discussion, the following question: according to Stilz, the fact that the descendants of those unjustly displaced from territory T enjoy stable legal residence in the state in which they currently reside entails that they have no right of return to the territory from which their forebears were expelled. Though these people may lead autonomous lives, the way of life they lead may not be the way of life they would most like to lead, namely the way of life their forebears led. If, plausibly, they would be leading that life in territory T had their forebears not been forcibly displaced from it, then why think it merely unfortunate, but not unjust, that they are unable to lead this way of life? Note that what is at issue here is not a right to the conditions in which one can lead whatever way of life one most aspires to lead, but only a right not to be deprived of those conditions by others' unjust conduct. Perhaps it is not merely forming life plans premised on stable legal residence in a given state's territory that entails the lapsing of a right of return to the territory from which one, or one's ancestors, were unjustly displaced. Rather, it may require that individuals be fully integrated into the political people constituted by the state in which they now reside, so that one comes to identify as a member of that people and to think of the territory ruled by the state as "our territory." This moves us in the direction of Miller's nationalist account of territorial rights.