

LATIN AMERICA IN THEORIES OF TERRITORIAL RIGHTS*

América Latina en las teorías de los derechos territoriales

AVERY KOLERS

Philosophy Department, University of Louisville

ABSTRACT

“Who owns it?” is a surprisingly confusing question when applied to territory. Each word opens up puzzles: who can “own” territory? What is “ownership” in this context? How can it be justified in a way that could convince an outsider? These questions are particularly salient in the Latin American context, where multiple distinct kinds of land disputes converge. This paper canvasses two familiar approaches to these questions: the Kantian *autochthony* view, and the Lockean *efficiency* view. Neither view answers the question as to “who owns it” in all its complexity. The paper then defends an alternative approach grounded in recognition of diverse conceptions of land and the ways that distinct groups achieve *plenitude* in particular places.

Key words: territory, rights, land, Nukak, efficiency, autochthony, plenitude

RESUMEN

La pregunta “¿quién es el propietario?” es sorprendentemente confusa cuando se la aplica a la cuestión del territorio. Cada palabra abre una nueva interrogante: ¿quién puede ser “propietario” del territorio?, ¿en qué consiste esta “propiedad”?, ¿qué justificación hay para este tipo de “propiedad” que tenga valor para otros agentes? Estas preguntas son especialmente importantes en el contexto latinoamericano, donde convergen distintas clases de disputas territoriales. El artículo indaga dos conocidas aproximaciones a estas preguntas: la perspectiva kantiana de la autoctonía y la visión lockeana de la eficiencia. Se argumenta que ninguno de estos aspectos responde, en toda su complejidad, la pregunta de la propiedad del territorio. Este trabajo defiende un enfoque alternativo, que se funda en el reconocimiento de otras concepciones de la tierra y las formas en las que grupos diversos alcanzan la plenitud en lugares particulares.

Palabras clave: territorio, derechos, tierra, Nukak, eficiencia, autoctonía, plenitud

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I. "WHO OWNS IT?": THEORIES OF TERRITORIAL RIGHTS IN LATIN AMERICA

Liberal theories of territorial rights developed against the backdrop of European expansion in the Americas. Yet much of the debate in that field nonetheless proceeds as though this undercurrent of colonial expansion—and concomitant assumption that only Christian Europeans were capable of exercising political agency—is not relevant or at least not essential to the theoretical orientations that developed in that context. In recent years, scholars such as James Tully, Carole Pateman, Charles Mills, and many more have worked to re-center the history of imperialism and racial domination in the history and current practice of Anglophone political thought. Yet even this work has tended to foreground the later experience of *North America* and *Oceania* rather than the earlier experience of Spanish contact with what is now Latin America.¹ It would be a mistake to think that there is a single phenomenon—"European Colonialism," "imperialism," etc.—that is the same thing always and everywhere, from 16th-century Peru to 19th-century Oklahoma to 21st-century Queensland. Indeed there are straightforward reasons to think that the Latin American context brings to bear deep challenges to Anglophone political thought, especially regarding territorial rights. In this paper I shall entertain this hypothesis. When we ask, of Latin American territories, "who owns it?" we are forced to rethink theories of territorial rights as they have come down to us from Locke, Kant, and others.

Who Owns What?

When we wonder who owns, say, a car, we typically know the range of potential *owners*, the meaning of "*ownership*," and the nature of the *object*. Only legal persons can own cars; car owners have a fixed range of powers, claims, and permissions with respect to their cars; and (barring "Ship of Theseus"-type transformations) the car itself has a fixed identity. Yet when we ask this question about a *territory*, we know none of these things. Each word opens up further spaces of dispute.

The first dispute arises from the referent of *who*: what class of actors can own territories? This is the *eligibility* problem. The second dispute is in the term *owns*: what does it mean to "own" this particular type of thing? Which of the incidents of property—use, alienation, exclusion, consumption—are in play? Or is property even the right way to think of this ownership? This is the problem of *content*. But third, here we are really using "owns" not in a descriptive or positivist sense but in a *normative* sense: we want to know, not *who has the de facto monopoly of coercion around here*, nor even, *whom does the law recognize de jure as the owner of this place*, but rather, *who has a moral right to it*. This is the problem of *normativity*: how can anyone or anything gain or lose *moral* rights to

¹ Of course the very term "Latin America" is a loaded one. For discussion see Walter Mignolo (2005).

this kind of object? What justification can they give that would carry any weight for outsiders? And finally, the fourth space of dispute is the “it”: what is the nature of the phenomenon being owned or claimed? And what is its purpose? This is the problem of *ontology*.

By exposing these four spaces of dispute we avoid begging important questions about territorial rights. If, by contrast, we started by asking which *state* is *sovereign* in this *jurisdiction*, we would thereby beg all four questions—which I will call the questions of Eligibility, Content, Ontology, and Normativity.

How we approach territory depends in part on which sorts of disputes we take to be the principal data points for the theory. The aforementioned statist approach is useful in domestic and international law for maintaining the legal doctrine of territorial integrity, for mitigating boundary disputes, and for cementing vertical relations between a state and its people. But not all territorial disputes are boundary disputes, nor are all uses of territory simply about jurisdiction. Many disputes involve reshaping the very structure of a place from the bottom up, altering flora and fauna and basic patterns of land-use.

With its history of conquest/encounter, slavery, ecological imperialism, and the imposition of a feudal landholding system that, to some degree, survives to this day; and given the world’s hotbed of human and biodiversity, as well as perhaps the most famous and creative movements for land reform and indigenous resurgence; Latin America provides the clearest demonstration of the statist model’s limitations and distortions. In the Latin American context, the most important territorial disputes are different in kind from interstate boundary disputes and incursions, though there has been no shortage of those. Observing this context, we find at least *four types* of (often overlapping) disputes that can be characterized as territorial disputes:

- *Boundary disputes* between sovereign equals, such as Chile and Peru or Argentina and England, where only the Normativity question is at stake, much as it would be if two homeowners were arguing over a tree that straddles the line between their properties;
- *Secession crises*, where a putatively distinct population within a state seeks to carve out a portion of the state’s territory and hence attempts to prove its Eligibility while also challenging the extant state’s Normative claim, but does not question Content or Ontology;
- *Colonial conflicts*, such as those between European-descended settlers and indigenous peoples, where, in addition to other disagreements, we find *ontological diversity*, as the parties disagree about the Content of territorial rights and the nature of territory itself, and part of the conflict involves one side’s power to unilaterally define what land is and what it is for; and
- *Neocolonial or globalization conflicts*, such as those between global capital and peasants or small-scale producers, which—in addition to Content

and Ontology disputes—involve disagreements about Eligibility and Normativity.

Since the fall of the Berlin Wall, Anglophone political philosophers have systematically engaged with global issues and with diversity, sloughing off the earlier focus—characterized by John Rawls’s *Theory of Justice* (1999a) and much of the secondary literature—on individual societies which were imagined to be homogeneous. Yet these two lines of analysis have too often moved in parallel: diversity seems to be encapsulated *within* states, not between them; theorists have assumed that institutions originating in the imperial North Atlantic, such as states, nations, or some descendants of current transnational organizations, would govern global relations.² This has led political philosophers who engage with territory to emphasize the first two classes of territorial disputes: state boundary disputes, and secession crises (see for example Buchanan 1993; Nine 2012; Moore 2015; Simmons 2016). Diversity *within* peoples or nations is mostly assumed away, or—as in the secession debate—is assumed to manifest itself only in antecedent subdivisions such as ethnically distinct provinces seeking to secede. Consequently, colonial and neocolonial/globalization conflicts, which *merge* deep diversity with global justice, have received considerably less attention.

Had they engaged more carefully with Latin America, Anglophone political philosophers could not have ignored colonial and neocolonial disputes, first because ontological diversity remains a prominent aspect of land-related disputes in Latin America, as does the survival of distinct polities and autonomous communities within state jurisdictions (see Martínez de Bringas 2009), and second because Latin America’s position in the “Global South” or the “periphery” of the world system makes it harder to justify thinking of the nation-state or its unitary people as the sole claimant eligible to lodge territorial claims. Major foreign or European-descended landowners, and increasingly, transnational corporations, tend to ally with governments against small-scale producers, imperiling the food sovereignty of the population and recruiting them into a global low-wage workforce, with most of the benefits flowing out of the region. The clash between large, export-driven interests and smaller, community-oriented interests pushes on the ontological question of what land is *for*, and hence, what *people* are *for*.³

If a theory of territorial rights is to be useful in the Latin American context—hence, if it is to be adequate at all—it must grapple directly with the ontological question of what territory is, and what it is for. But to emphasize the ontological question is not to ignore the other problems. Neither indigenous peoples today, nor still less peasants and small landowners, are constituted as *states* or even

² An interesting exception is Rawls himself, in *Law of Peoples* (1999b). But in his model the form of diversity is religious and leaves territory untheorized.

³ See the essays in Wittman et al. (2010). As Wendell Berry (1990) has shown, this is hardly a plight restricted to those in the Global South.

secessionists in the standard senses of these terms. What, then, makes their claims *territorial*? And in what terms can such claims be justified?

Latin America thus provides a demanding test for any theory of territorial rights that pretends to any generality, and particularly to any theory that seeks to join a genuine cross-cultural dialogue (see Dussel 2009). The seemingly simple question “who owns it?” opens out to a rich but rugged philosophical landscape.

II. LIBERALISM: AUTOCHTHONY AND EFFICIENCY

From a liberal perspective, to say that some location is within the territory of some state is to assert the validity of that state’s legal system for persons in that location. Territory is then a legal relationship between a state and a place. Yet how does any state come to bear this relationship to any particular place? The obvious liberal answer is that the people who live there recognize—owe their allegiance to—that state, either through contract-style agreement or based on some other justification of political authority (see Simmons 1993; Stilz 2009). But to say this is to avoid the actual question of territory: in virtue of what do *those particular people* have a right to be the ones whose political allegiances determine the fate of *this land*? Surprisingly, many liberal theorists have no answer to this question, revealing a foundational assumption that people are, for lack of a better word, autochthonous: they are just *there*. Autochthony is the idea that people can be understood to be “naturally” or pre-politically present in a place, such that their right to be there is prior to further political questions. This idea may be more commonly associated with indigeneity, so it may be surprising to hear it ascribed to liberalism. But I will show here that this assumption of pre-political presence can be found in the heart of contemporary liberal thought.

Autochthony

At the dawn of the liberal era, John Locke (1988) argued that the world had been given by God to humanity in common, rather than only to kings or to pre-political groupings. This view retains some plausibility and remains widely held, albeit shorn of theological underpinnings (Arneil 1992; Simmons, 1992; Risse 2012).⁴ On this view, particular individuals’ and groups’ claims to land stand in need of justification. Locke and many of his followers appeal to economic efficiency to justify such claims (Nozick 1974; Lock 1988), whereas others refer to a kind of political efficiency that involves ensuring “self-government” or the

⁴ Thomas Norton-Smith chides Locke for ignoring what—by Locke’s own lights—was prior to *human* ownership, namely, God’s *gift* of the whole world. Norton-Smith (2011: 111) writes drily, “Locke isn’t even particularly gracious in acknowledging the gift on behalf of humanity; the gift from God is [in Locke’s view] largely worthless until human beings labor on it.”

rule of law (Simmons 1992: 291-294; Nine 2012: 166). In each case, the connection between people and place is taken to be *achieved* rather than natural. Yet not all are capable of achieving this relationship; Locke (1988: 298) holds that American Indians are stuck in a state of nature because their failure to enclose property and establish markets in land evinces their non-rationality and failure to obey God's will. In a spectacular turnabout, Locke concludes that American Indians who oppose European incursion are the thieves, and Europeans the rightful property owners.

Francisco de Vitoria provides a striking contrast. Like Locke (but some 150 years earlier), de Vitoria (1991) held that *originally*, the world belonged equally to all. But no one is in the original state any longer; peoples have become attached to places, the Americas belong to the American Indians, and hence European Christians have no right to colonize the Americas. This has the happy result that, for instance, the Treaty of Tordesillas is invalid (since the world is not the Pope's to give). But de Vitoria leaves utterly unexplained the brute natural fact that some people happen to be sovereign in some places, and hence his theory cannot adjudicate disputes over the sovereignty that he presupposes.

A number of later theorists, more fully within the liberal tradition but unwilling to make the right to the very soil dependent on the achievement of a real estate market or the existence of a state, bump up against this same question. Immanuel Kant uses the bare fact of where people happen to be through no fault of their own—"where nature or chance (apart from their will) has placed them"—as the foundation of their right to occupy and of their duty to constitute a state together (cited in Stilz 2011: 584). Similarly, until recently nationalists left unexplained the brute link between people and nation; as Michael Walzer (1983: 44) famously put it, "[n]ations look for countries because in some deep sense they already have countries" (see also Miller 1995).⁵ But although these accounts attractively jettison the Lockean demand for a specific, institutionally-realized achievement, they do not replace it with anything that can be meaningfully grasped or assessed. Provided that no one has (in the current generation) wrongfully expelled others, the link between people and land *just is*.

This account faces a straightforward objection: virtually everyone is descended from migrants, and few if any states are blameless in the origination of their territorial sovereignty. The blamelessness condition applies to virtually no one; so isn't it irrelevant? The answer is that, although most *peoples* came from elsewhere, most *individuals* did not. Individuals who were born within a particular territory, or who were moved there while underage, or who escaped there under duress, or who were non-culpably ignorant of a history of displacement, seem blameless for the conditions that caused their presence in that place. These classes of individuals—the vast majority of all people

⁵ Walzer immediately questions this view and shifts to a "need" criterion for territorial claims. Miller has more recently revised his account, moving in a Lockean direction requiring that groups promote, or at least not detract from, "universal value." I have discussed this at greater length in Kolers (2012).

anywhere in the world—are not accountable for being where they are. Hence their presence requires no justification. This is the autochthony view.

Yet the objector may persist. By shifting to the individual case, the liberal simply dismisses the proposition that peoples can be blameworthy for their presence in a place, without showing that proposition to be false. It changes the subject in much the same way that Robert Nozick (in)famously changed the subject away from distributive justice by imagining distributions to be based on individual voluntary transfers from an innocent state of nature (Nozick 1974). The liberal reply to this objection is, like the Nozickian reply to “end-state” theories of distributive justice, that however well-intentioned, efforts to remedy past injustice must forswear compulsion or forced assimilation of individuals; hence remedies for settler colonialism may entail neither the forcible “return” of contemporary Euro-Americans, nor their forced assimilation into indigenous-governed societies. Given these ground rules, the current Euro-American generation—no matter how culpable their ancestors and their larger societies—has some residual right to stay; and it is this residual right that the autochthony thesis purports to capture.

To make the demand for individual accountability stick, however, the critic of autochthony can call the liberal bluff, granting that those who faultlessly find themselves in a place have a right to be there. But they can then ask what makes it the case that some people are in some place. I don’t mean causally or historically; I mean, what does it mean to *be* somewhere? When some person is there, *who are they*, and *where* are they? These questions—the “who” and the “it” of our initial question—are ontological: they require an account of how individuals constitute peoples or nations; how land areas become unified and diversified into *places*; and how the people(s) are then linked to the places. This causes trouble for liberals because the autochthony view depends on an innocent individualism. How is a given person to be linked to a parcel of space, P , which is *larger than their own body*, such that they can be said to occupy P ? P ’s being larger implies that the occupation is socially constructed, not a matter of physics or biology. How, in turn, does a number of places, P_i , so occupied constitute some territory T ? And how does some state’s claim to T relate to all the individuals’ claims to the P_i ? The land area that is now, say, Argentina has existed for millions of years. But it only became *Argentina* recently. Its becoming so was somehow linked to its residents’ becoming *Argentines*. And these facts are connected, normatively and conceptually. Argentina is a populated and occupied country even though it is not *crowded*, having fewer than 16 persons per square kilometer (CIA n.d.). There is a great deal of space in Argentina that is not occupied by human bodies or dwellings. Yet we would insist that Argentina, as a whole, is occupied by the Argentine people, even though many residents are not Argentine and many Argentines live abroad. What makes it so? Autochthony is useless here; if it avoids accountability for collective presence, it loses the ability to ascribe places to peoples.

By contrast, Paulina Ochoa Espejo (2012) has outlined a “view from Spanish America” that improves on autochthony. In the newly independent former Spanish colonies in the early 19th century, each state was composed not of a unitary people but of a conglomerate of peoples unified as neighbors. As Ochoa Espejo notes, the term *pueblo* identifies both the people and the place, and it is through normative relations of place-based obligations, rights, legal standing, and contestation that individuals and communities come to be unified at the local level. People find themselves enmeshed in webs of place-specific duties and rights, simply by virtue of being where they are. The “people” is not, however, the locus of *unity*; it is the locus of *controlled struggle*. Through their willingness to obey formalities required by specific courts, first as mere *modus vivendi* but then, through wins and losses over time, as a commitment to a site of struggle, they become unified as neighbors—*vecinos*—in a normative sense (Ochoa Espejo 2016, 2017).⁶ States are then constructed not out of unitary peoples but out of collections of *pueblos*. The genius of this account is that contestation and the assumption of responsibility construct both people and place.

Liberals might worry that Ochoa Espejo’s (2017) proposal rests on brute power: the capacity of imperial courts and their post-independence successors to establish themselves as sites for resolving disputes and enforcing their resolution. That these courts achieve a kind of hegemony is a sign of the people’s resignation to an imposed order, rather than of political legitimacy. It does not establish a moral order. Yet more can be said in its favor than this. Built on a foundation of equal citizenship—originally, universal adult male suffrage including African-descended, indigenous peoples, and “mixed” *criollos* as well as European-descended peoples—and a set of laws, the *derecho indiano*, which did not deliver victory to the white claimant in every dispute, the Spanish-American system established ground rules allowing for genuine nonviolent moral progress within each *pueblo*. No real-world political order can claim a genealogy much better than that.

A deeper problem, however, may be that of recognition. In order to partly constitute the *pueblo*, a claimant—individual or group—needs to have standing in court, and that standing is grounded in the hegemonic agency’s capacity to recognize the claimant as *present*, and their activities as a mode of *use*. And if there is a right answer on whether some claimant is entitled to recognition, or whether someone’s usage ought to be upheld against opposition, then there must be an independent standard that makes this answer correct.

This “problem of the criterion” is not just an academic problem. Indeed, it is particularly salient in precisely the kinds of cases that—as noted at the outset—make land disputes in Latin America distinctive relative to the North Atlantic model that dominates liberal thought. Consider the case of nomadic peoples and

⁶ This model fits well with Jean Hampton’s (1996) proposal that the best game-theoretic model for leaving the state of nature is not the Iterated Prisoner’s Dilemma but the Battle of the Sexes.

“uncontacted” groups such as continue to survive, against the odds, in Latin America. Nomadic peoples spend most of their time *absent* from locations that, from a moral standpoint, seem to be theirs. This seasonal absence is already well known to cause difficulties for state agencies that recognize only permanent presence (Gilbert 2007). But there is more. We might imagine nomads “roaming” from one preexisting resource patch to another in an otherwise forbidding desert or jungle. This “oasis” model depicts resource-patches as natural gathering spots, places where we would expect to find different tribes and industries coming together due to the inherent qualities of the place. For instance, we find major cities like New Orleans and Louisville at the mouths of rivers and at those rivers’ innermost navigable reaches, respectively. The natural attractions of the place presumably bring both temporary and permanent settlers, and, in turn, colonial agencies and courts.

Yet, at least sometimes, the opposite is the case: the oasis is an artifact. Discussing the Nukak, an Amazonian indigenous people in what is now Colombia, Gustavo Politis (1996: 507) writes, “residential camps are not established at resource patches; the patches are ‘created’ by the establishment and subsequent abandonment of residential camps.” This occurs because the Nukak dispose of their entirely biodegradable waste in such a way that it composts into “future resource patch[es].” Consequently, sites of past residence become “wild orchards” of edible plants (Politis 1996: 505). Contrary to the oasis model, the intrinsic quality of places is not a natural fact but a consequence of those places’ having been made by the people. Their intrinsic “natural” quality is a product of human activity. The very soil is an artifact (see Glaser and Birk 2012).⁷

All of this matters because colonial courts could adjudicate a dispute among several claimants, each of whom wants a patch of land for its “natural” quality, when in reality that quality is an artifact of the multigenerational activities of an uncontacted nomadic group that is not party to the dispute before the court. To speak to these concerns, Ochoa Espejo’s account would have to go deeper than the practice of the colonial court to identify what it is that grounds a right to standing. This point is most forceful when we recall the reason we want to know “who owns it”: to resolve territorial disputes. If I demand my day in court, and assert that I have been doing some activity *A* in some location *L*, and yet the court denies that *A* is even an activity or denies that I am present in *L*, on what grounds can we determine whether I am right or the court is right?

To solve disputes, we need to understand how groups become eligible to lodge territorial claims; how groups are intertwined with the ontology of places; and how groups’ plans or intentions can generate a normative link to particular places.

⁷ I am grateful to Anna Browne Ribeiro for discussion.

Efficiency

The autochthony thesis was an attempt to determine who has a right to live in any particular place. Because it assumed the oasis model of places and the natural faultlessness of presence, autochthony was untenable. Ochoa Espejo's alternative, grounded in the *derecho indiano*, is more promising, but it still requires independent criteria of standing and use. Lacking a conclusive account from that direction, we might be tempted to revisit the Lockean efficiency thesis. The efficiency thesis requires not that the claimant be there, but that they have interacted with the land in a way that enhanced its value.

Recall that the underlying justification of the efficiency requirement is twofold. First, the world is antecedently unowned, and so no one is born with any special claim on any particular place. Everyone has an equal claim on the entire world. So anyone's claim to exclusive use of anything requires some justification. And second, the world is finite, characterized by moderate scarcity. Thus the only plausible justification for exclusive use of one part of the Earth is that the claimant uses it wisely, without worsening anyone else's condition. These twin commitments are embodied in Locke's theory of property, where labor grounds property claims, provided nothing is wasted and no one is harmed (Locke 1988: chap. 5).

So stated, the efficiency thesis is quite plausible. Yet it faces two fatal problems. First, it requires an account of "waste"—that is, it has to be able to distinguish between use and nonuse. Locke infamously requires enclosure and cultivation, but this is widely and rightly regarded as Eurocentric. A. John Simmons (2016) updates this to demand the incorporation of the place into one's morally permissible projects. Recently, liberal nationalists have adopted softer versions of this approach; David Miller (2012: 258) proposes that claimants must enhance the territory's material value, and Tamar Meisels (2005: 79) proposes a built-infrastructure requirement. In each of these cases, the strategy is to try to "lower the bar" for what counts as efficient use so as not to exclude indigenous and nomadic peoples, who seem to have a moral claim on certain lands despite low population density and little economic production in monetary terms. This strategy, however, runs into a dilemma. If nomadic peoples' uses of land constitute waste, then they can be dispossessed even though this would mean the end of their livelihoods and, in many cases, their lives. Yet if their uses do not constitute waste, then there is basically no lower bound on what counts as use, and the efficiency criterion becomes toothless. In short: if attachment is grounded in some achievement, such as efficiency, then it must be possible to fail, and failure must have consequences. Otherwise, the efficiency criterion collapses into autochthony.⁸

⁸ For extended discussion see Kolers (2012).

The bar-lowering approach not only collapses into autochthony, but also creates a new problem in that it ignores *misuse*. We might reject Lockean claims that indigenous uses amount to waste, but we should not therefore deny that waste is possible. In particular, wanton environmental destruction seems to qualify as misuse of a sort that undermines assertions of attachment. If a people contaminates soil with uranium tailings, or blows the tops off mountains to access and burn the coal that lies within, this is hard to reconcile with any moral claim of special attachment to the place. But this is in stark contrast to what we see in the case of the Nukak, whose activities, though not commodified, enhance the value of places.

Ironically, then, although theorists propose lowering the bar as a means of alleviating the Eurocentric requirement of sedentary cultivation, the real impact of lowering the bar is to give a free pass to destructive European and Euro-American practices, while failing to recognize the genuinely productive uses of non-European peoples and non-industrial uses.

This irony reveals the second, deeper problem with the efficiency thesis, namely, the doctrine of antecedent common ownership. It is this doctrine that, in turn, seems to make an efficiency criterion inevitable—for how else can I exclude everyone else from something to which they have as much prior right, except by showing that they are no worse off for being excluded? And how can I show that they are no worse off unless we have a single shared currency such as economic efficiency? Part of what is at issue between Europeans and indigenous peoples in classical colonialism, and between transnational corporations and peasants in neo-colonialism, is whether the greater (short-term) economic productivity of land is a relevant or still less a decisive currency across modes of valuing land. And another part of what is at issue is whether the colonialists and industrialists—however efficient they might be—are entitled to take possession of places and exclude others from them at all. If either of these questions is not settled, that is because the question of *whose land* is not decided by that of *how best to use it*. Quite the contrary: at least within limits, the best use is determined by who has a right to it—all the more so if there is not only one measure of improvement.

We need to explain who can gain rights to places, what links them to those places, what gives a place its identity, and how these links can be normatively justified. Liberal approaches to these problems presuppose what they need to explain. Yet their flaws reveal a way forward. We need to account for the role of group activity in the ontology of the place itself.

III. ETHNOGEOGRAPHY

Land is not just one thing. Places are artifacts, not merely in the sense that the built environment and the web of normative relations is constructed through contestation and cooperation, nor even merely in the deeper sense that the very land is formed through interaction with people and other animals; but different people and communities have different conceptions of what land is, and they make places by realizing those conceptions of land. To work with this diversity I use the term “ethnogeography.”⁹ An ethnogeography is a culturally-specific ontology of land—a set of beliefs about what land is and how people relate to it. Liberals, by and large, fail to recognize that their own conceptions are culturally specific; they embrace an Anglo-American ethnogeography where land is understood as either resources or waste. This Anglo-American ethnogeography might be perfectly sensible, so far as it goes, but what is essential to realize here is that it is culturally specific.

When an ethnogeography is hegemonic within a particular population—an *ethnogeographic community*—then within that population a particular view of land will seem, to most people, completely natural. And when that ethnogeography holds sway in a region, then its tenets will determine what people do with land, what they even think it is possible to do with land. For the most part, it will not seem *to them* to be culturally specific because they will typically not conceive of land any other way, nor perceive the contingency of their own conception.

In an ethnogeographic community, the ontology of land is only “as-if” shared. Individuals need not *endorse* the locally hegemonic conception of land; it is just that material, political, and legal interactions are structured such that individuals *live* that ethnogeography, whether or not they endorse it. Nor is this “community” necessarily a “culture” or a “nation.” It is merely a population unified by a hegemonic ethnogeography. They are, in Ochoa Espejo’s terms, *vecinos*. What my account adds is not an *ethnos* or nation, but the reminder that even to say that certain groups share the same place is to make ontological claims, not merely legal ones.

The doctrine of antecedent common ownership of the world implies that enclosures and exclusions stand in need of justification. Ethnogeographic diversity, however, suggests that there is no fixed identity to this thing, “the world,” prior to social constructions of it. Nonetheless, the common ownership thesis can be preserved, not as the first-order principle that everyone has an equal claim on the world, but as the second-order thesis that everyone has an equal claim on *ontologies* of land, including not just how to use land within a pre-given place, but also which places exist, and what they are like—their character, boundaries, and composition. To engage in a productive territorial dispute is for each ethnogeographic community to make its case for the implementation of its

⁹ I borrow this from a slightly different use by J.M. Blaut (1979). For fuller explanation see Kolers (2009).

ontology in a particular place, without supposing that competing claimants—even if their claims overlap geographically—are demanding the same sort of relationship with the same place. In order to assert such claims, these communities must appeal to a shared criterion for answering the normativity problem.

What could serve as this shared criterion? I argue that *plenitude* succeeds where autochthony and efficiency fail. Plenitude is fullness or abundance. For a place to be full is for it to be distinct from other places and internally diverse. One achieves distinctness and diversity not by filling a place up with stuff—the brute physical acts of putting a fence around it and dropping stuff in—but rather by intimately *knowing* the place, organizing it to serve particular intentions, and reshaping it from the inside. This might involve adding stuff, but it might equally involve removing stuff. Most commonly it involves classification and organization.

Consider again the Nukak. Their section of rainforest is full, to them. The place is as it is in part because they have been there; their settlement patterns alter the vegetation and construct resource troves where none existed before. Their practices have shaped the place just as much as it has shaped them. This fact is about knowledge as well as practices. The Nukak intimately know their rainforest home in a way that outsiders do not. They know what to eat and how to construct a shelter, and how to leave it behind. They know routes through the rainforest and where the boundaries of their lands are. The place has an identity, shape, character, and life cycle that are opaque to outsiders. To a Lockean, the lack of market penetration of the rainforest is a sign of emptiness or waste. But this reveals more about the Lockean worldview than about the place; to the Nukak, the place is well-defined and full. By contrast, whereas the Lockean industrial city is full, Nukak visitors would find nothing to eat, no place to sleep, and have no means of clothing themselves. It would be a concrete wasteland (see Kolers 2012: 112-114).

Plenitude is thus responsive to culturally distinct conceptions. We can respect the Nukak's claim not by "lowering the bar" of population density or built infrastructure, as the revised versions of efficiency attempt, but by taking the Nukak criterion on its own terms. A valid territorial claim answers the normativity problem by allowing each claimant to propose a culturally-specific criterion of plenitude and to show that the place claimed is in fact full by that criterion. What makes this a cross-culturally normative criterion is that even if outsiders do not share or understand the ethnogeography of the claimants, outsiders can still discern whether the claimants are implementing a sustainable plan for the place. This is what *derecho indiano* court should be able to see, and to

fairly evaluate; it is by this criterion that we can assess the justice of the resulting dispute resolution mechanism.¹⁰

It is, of course, possible that more than one group will be able to make this claim at the same time in the same area. There is no theoretic way to avoid the possibility of genuine territorial disputes; to the contrary, that is just why we need theories of territory. Unlike the autochthony thesis, plenitude gives us the tools to assess competing claims and determine whether and to what degree each one is worthy of support; and unlike efficiency, plenitude demands of each claimant a specific achievement, but without imposing one culture's criterion of use or success. It does this by demanding that each ethnogeographic community define plenitude by its own lights, and then demonstrate a capacity to meet that self-imposed criterion in perpetuity.

IV. WHO OWNS IT?

When *campesinos* struggle for food sovereignty against transnational corporations, we cannot solve this dispute by appealing to the territorial sovereignty of states, since neither party claims to be a sovereign state. Yet neither is the dispute simply a legal one over whose property it is, or a moral one over whose property it ought to be. If it were a legal dispute, it could be solved by researching land titles; if it were a moral property dispute, it could be solved by a general theory of distributive justice. Rather, such disputes are contests over whether the *campesinos'* ethnogeography—specifically, the fact that they have achieved plenitude, by their own lights—is to carry weight against that of the transnational corporation; and whether the corporation is capable of maintaining the plenitude of the place in perpetuity.¹¹

A similar dynamic occurs in classical colonialism between indigenous peoples and Euro-Americans. Again, appealing to state sovereignty is useless, since the states system, as it existed during the era of colonial expansion, did not recognize non-European polities such as the Aztec or the Inca as having the rights of states. But even if it had, this would have left open the question of whether the states of the Americas were entitled to all this land, when Europeans could make such profitable use of it. To this day, the struggles of indigenous peoples against colonial governments, corporations, and Euro-American citizens are best understood as territorial disputes. The plenitude criterion can demand that each party make its case for the extant plenitude of the place, without thereby imposing a culturally-specific ontology of land on either side.

In the context of colonialism and enduring injustice, it is worth noting that the plenitude criterion makes no essential reference to the past. It is true, as a general

¹⁰ Recognizing, of course, the bounded sense in which any dispute resolution mechanism implemented by imperial courts can count as "just."

¹¹ For a valuable case study, see Palau et al. (2007).

rule, that those who have achieved plenitude in a place and have a viable plan to maintain it in perpetuity are likely to be those who have been there at some point or are there currently. Thus, the past is relevant as motivation and source of knowledge. Moreover, if an oppressed group currently has a plenitude claim for a place, and their competitor is the colonial power that previously evicted them, this can support prioritizing the oppressed group's claim; for just as "filling" a place supports territorial claims, *emptying* it undermines them. Hence, the claims of colonial powers typically lack force against those of their victims. It remains the case, however, that on the plenitude criterion the bare fact of having been somewhere previously carries no normative weight against extant and forward-looking plenitude claims. This may seem to bias the plenitude criterion against indigenous claims and claims of groups that have been expelled or persecuted.

My reply is that, while past and enduring injustices could and often should be compensated and repaired, it is inappropriate to compensate *purely* past injustices with territorial awards. In the first place, inasmuch as the beneficiaries (by hypothesis) currently lack a plenitude claim to the place in question, they have no special link to the place, nor any plans to fill it in perpetuity. Their ethnogeography is likely to have evolved in the intervening years, making them less willing or able to recreate what their ancestors once had. Thus "returning" them to that land, absent knowledge of and plans for it, would not obviously even benefit them. Second, precisely because places are not preexisting but are made by people, it is incorrect to say that the group would be returning to the place from which they or their ancestors had been evicted. Consider populations evicted from rainforests that have now been logged, burned, ploughed, and depleted by overgrazing. Not only is it doubtful whether the previously evicted population benefit from being returned to this utterly transformed environment, it is no longer the same place. What they are entitled to is not *these geographic coordinates*, but rather, a place where they can live their lives according to their ethnogeography as it is now; a place where they can, and want to, take responsibility for plenitude in perpetuity. Thus, the bare historical link to a bare geographic location carries no justificatory weight going forward.¹²

I believe the plenitude criterion successfully resolves the problems of eligibility, content, normativity, and ontology. In doing so, it prioritizes not the jurisdiction claims of states, but the knowledge claims of distinct populations. It thus tends to support indigenous rights against Euro-American encroachment, and the food sovereignty of peasant communities against transnational agribusiness enterprises. For these reasons it enables us to determine "who owns it" in the rich and diverse contexts of Latin America.

¹² This is not to deny that reparations for previous theft and dispossession would be appropriate. However, merely "returning" people to an utterly transformed environment is not sufficient, and not necessary, for moral repair.

REFERENCES

- Arneil, Barbara. 1992. "John Locke, Natural Law, and Colonialism." *History of Political Thought* 13 (4): 587-603.
- Berry, Wendell. 1990. *What Are People For?* San Francisco: North Point Press.
- Blaut, James M. 1979. "Some Principles of Ethnogeography." In *Philosophy in Geography*, edited by Stephen Gale and Gunnar Olsson. Boston: D. Reidel, 1-8.
- Buchanan, Allen. 1993. *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*. Boulder, CO.: Westview Press.
- CIA. n.d. Argentina. *World Fact Book*. Retrieved on July 14, 2017 from <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html>
- Dussel, Enrique. 2009. "Una nueva edad en la Historia de la Filosofía: el diálogo mundial entre tradiciones filosóficas." *Utopía y Praxis Latinoamericana* 14 (45): 31-44.
- Gilbert, Jérémie. 2007. "Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights." *Human Rights Law Review* 7: 681-716.
- Glaser, Bruno and Jago Jonathan Birk. 2012. "State of the Scientific Knowledge on Properties and Genesis of Anthropogenic Dark Earths in Central Amazonia (*terra preta de Índio*)." *Geochimica et Cosmochimica Acta* 82: 39-51.
- Jean Hampton. 1996. *Political Philosophy*. Boulder: Westview Press.
- Kant, Immanuel. 1996. *The Metaphysics of Morals*, ed. Mary Gregor. Cambridge: Cambridge University Press.
- Kolers, Avery. 2009. *Land, Conflict, and Justice: A Political Theory of Territory*. Cambridge: Cambridge University Press.
- Kolers, Avery. 2012. "Attachment to Territory: Status or Achievement?" *Canadian Journal of Philosophy* 42 (2): 101-24.
- Locke, John. 1988. *Two Treatises of Government*, edited by Peter Laslett. Cambridge: Cambridge University Press.
- Martínez de Bringas, Asier. 2009. "La deconstrucción del concepto de propiedad: una aproximación intercultural a los derechos territoriales indígenas." *Utopía y Praxis Latinoamericana* 14 (45): 11-29.
- Meisels, Tamar. 2005. *Territorial Rights*. Dordrecht: Springer.
- Mignolo, Walter. 2005. *The Idea of Latin America*. Oxford: Blackwell.
- Miller, David. 1995. *On Nationality*. Oxford: Oxford University Press.
- Miller, David. 2012. "Territorial Rights: Concept and Justification." *Political Studies* 60: 252-68.
- Moore, Margaret. 2015. *A Political Theory of Territory*. Oxford: Oxford University Press.
- Nine, Cara. 2012. *Global Justice & Territory*. Oxford: Oxford University Press.
- Norton-Smith, Thomas. 2011. *The Dance of Person and Place*. Binghamton: SUNY Press.
- Nozick, Robert. 1974. *Anarchy, State, and Utopia*. New York: Basic Books.
- Ochoa Espejo, Paulina. 2012. "Paradoxes of Popular Sovereignty: A View from Spanish America." *Journal of Politics* 74 (4): 1053-1065.
- Ochoa Espejo, Paulina. 2016. "Taking Place Seriously: Territorial Presence and the Rights of Immigrants." *Journal of Political Philosophy* 24 (1): 67-87.
- Ochoa Espejo, Paulina. 2017. "A Place-Specific Model of Territorial Rights: Territory, Property, and Jurisdiction in Juan de Solórzano's *Política Indiana*." Paper presented at the Workshop on Territorial Rights, Montreal, 21 April.
- Palau, Tomás, Daniel Cabello, An Maeyens, Javiera Rulli and Diego Segovia. 2007. "The Refugees of the Agroexport Model-the Impacts of Soy Monoculture in Paraguayan Campesino Communities: Summary." Retrieved on 13 December 2017 from <http://www.bases.org.py/base/adjuntos/refugiados-modelo-agroexportador.pdf>.
- Pateman, Carole and Charles W. Mills. 2007. *Contract and Domination*. Cambridge: Polity.
- Politis, Gustavo. 1996. "Moving to Produce: Nukak Mobility and Settlement Patterns in Amazonia." *World Archeology* 27 (3): 492-511.
- Rawls, John. 1999a. *A Theory of Justice*. Revised ed. Cambridge: Harvard University Press.
- Rawls, John. 1999b. *Law of Peoples*. Cambridge: Harvard University Press.

- Risse, Mathias. 2012. *On Global Justice*. Princeton: Princeton University Press.
- Simmons, A. John. 1992. *The Lockean Theory of Rights*. Princeton: Princeton University Press.
- Simmons, A. John. 1993. *On the Edge of Anarchy: Locke, Consent, and the Limits of Society*. Princeton: Princeton University Press.
- Simmons, A. John. 2016. *Boundaries of Authority*. Oxford: Oxford University Press.
- Stilz, Anna. 2009. *Liberal Loyalty*. Princeton: Princeton University Press.
- Stilz, Anna. 2011. "Nations, States, and Territory." *Ethics* 121 (3): 572-601.
- de Vitoria, Francisco. 1991. *Political Writings*. Cambridge: Cambridge University Press.
- Walzer, Michael. 1983. *Spheres of Justice*. New York: Basic Books.
- Wittman, Hannah, Annette Aurélie Desmarais and Nettie Wiebe, eds. 2010. *Food Sovereignty: Reconnecting Food, Nature and Community*. Oakland, CA: Food First Books.

Avery Kolers is Professor of Philosophy at the University of Louisville. His book *Land, Conflict, and Justice: A Political Theory of Territory* (Cambridge, 2009) won the Canadian Philosophical Association's biennial book prize in 2011. His most recent book is *A Moral Theory of Solidarity* (Oxford, 2016). Email: akolers@louisville.edu

