

The Ethical Significance of National Settlement

TAMAR MEISELS
Department of Political Science
Tel-Aviv University
Tel-Aviv 69978
Israel

I Introduction

As an Israeli writing at the turn of the twenty-first century, I have become accustomed to hearing the word 'settlement' used by liberals almost invariably as a derogatory term. The Jewish settlements to the west of the Jordan river, now populated by close to a quarter of a million Jews, are often said to be a central obstacle to peace in the Middle East, as well as being immoral in and of themselves. Consistent liberals realize that this attitude poses a problem for the endorsement of the Zionist effort altogether, since settlement has been a central tenet of this doctrine from the start and the main practical tool for achieving its goals within contested territories. It was also the primary apparatus for achieving Western control over North America, Australia, and New Zealand, wholly at the expense of the aboriginal inhabitants of those places. This, too, is the source of a great deal of contemporary liberal breast-beating.

My primary purpose in this essay is neither to support nor to refute these liberal views. It is principally to remove the issue of settlement from any narrow and controversial context and examine its possible significance to the project of justly determining the allotment of territory, as well as to touch on its moral value as a form of human endeavour.

Clearly, national settlements do not appear in a vacuum. Contemporary territorial conflicts present a multiplicity of arguments commonly raised by national groups in defence of their respective claims. These typically include historical arguments of various kinds, such as alleged

first occupancy claims, often accompanied by compensatory demands couched in terms of corrective justice. Determining the destiny of any particular territory ultimately involves demographic considerations concerning the national affiliation of its current inhabitants and their right to self-determination. From an egalitarian perspective, the allotment of territory also raises issues of distributive justice. It certainly raises questions concerning subsistence rights and basic needs. A proper examination of each of these potential justifications for the allocation of territory could in itself fill an entire volume, and has in fact been the topic of several illuminating essays.¹ It is not, however, the topic of this one. While this essay affirms that grounding any concrete territorial right will often involve more than a single consideration, as well as a vast array of contingent factors, it concentrates, in the interest of analytical clarity, solely on one distinct type of entitlement argument, one which has been largely overlooked in modern political philosophy, at least since John Locke's *Second Treatise of Government*. This essay asks what, from a liberal point of view, is the effect of settlement on entitlement to territory?

More specifically, I will be asking whether settlement on a particular piece of land establishes a claim to it, and what the moral force of such a claim might be. I begin by clarifying the concept of settlement. Later, I will be asking what (if anything) about settlement warrants its defence from a liberal point of view. I will argue that the fact that individual members of a nation are settled on a particular piece of land constitutes a primary factor that should be taken into account in evaluating their nation's claim to control over that territory. Finally, I will say a few words about the complicated issue of settlement in disputed territories.

1 For a discussion of various historical arguments, see Chaim Gans, 'Historical Rights — The Evaluation of Nationalist Claims to Sovereignty,' *Political Theory* (2001) 29 58-79; Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press 2003), ch. 4, 97-123; David Lyons, 'The New Indian Claims and Original Rights to Land,' *Social Theory and Practice* 4.3 (1977), 249; George Sher, *Approximate Justice — Studies in Non-Ideal Theory* (Maryland: Rowman & Littlefield 1997), esp. chs. 1 & 3; John A. Simmons, 'Historical Rights and Fair Shares,' *Law and Philosophy* 14 (1995) 149-84; Jeremy Waldron, 'Superseding Historic Injustice,' *Ethics* 103 (1992) 4-28. On the issue of corrective justice, see also Tamar Meisels, 'Can Corrective Justice Ground Claims to Territory?' *The Journal of Political Philosophy* 11.1 (2003) 65-88. For an egalitarian argument see Hillel Steiner, 'Territorial Justice,' in P.B. Lehning, ed., *Theories of Secession* (London and New York: Routledge 1989), 60-70.

II The Concept of Settlement

In the narrowest sense, the term 'settlement' can be understood to denote nothing more than human residence in a territory. In this sense, then, the settlement of a land simply means 'being there.' I shall refer to this narrow meaning of settlement as 'encampment.'

Now, merely being there is nothing to be sneered at. Basic laws of physics require that we all have to be somewhere (that is, to take up some physical space). The fact that some of us happen to be here, while others are there, and still others are somewhere else, can be morally significant. For example, the fact that your body is physically occupying a certain space poses not only a practical barrier but also a moral one to my occupying that space. The fact that we are over here where there is plenty of food and water, while others are over there where there is nothing, may place certain moral duties on us. More to the point, the fact of a people's mere presence in a territory forms the basis for many of the claims advanced by modern liberal theorists in the name of 'self-determination,' 'self-rule,' or 'self-government.'

However, these principles run into serious problems when relied on to determine territorial questions. This is, *inter alia*, because, unlike individuals, a nation does not form one single physical entity. Some members of a nation can be situated in one place while others are located elsewhere; at times, some of those members will already enjoy self-determination in one of those places, and sometimes they will not; and, of course, members of various nations can inhabit the same territory simultaneously. The problematic territorial questions stemming from these situations, and the fact that they cannot be redressed solely by appealing to the principle of national self-determination, give us a reason to search for a more meaningful understanding of settlement, one that is more sensitive to territorial issues.

There is a further virtue to adopting a more meaningful interpretation of 'settlement.' Mere presence in a territory, while certainly not morally irrelevant, does not capture the full significance of the interest nations have in the possession of territories settled by their members. The fact that individual English nationals happen to inhabit the European island currently called Britain does not capture the strong interest the British have in holding on to this island.

The interest involved in territorial sovereignty over places of national settlement can be better captured by adopting a wider and more active understanding of the term 'settlement,' which includes a certain interaction with the territory in question. This understanding, although obviously including the first meaning, also involves a fruitful relationship with the land, which consists primarily of building on it and shaping its landscape. This is also the more common understanding of the term

'settlement,' as denoting the existence of an established (though sometimes relatively new) town, village, colony, or city. In short, 'settlement' is taken here as referring not only to the presence of individuals on a piece of land but also to the existence of a permanent physical infrastructure. Such settlements are sometimes constructed in a conscious and premeditated manner, through a collective national endeavour. More often than not, however, they simply evolve over time as individuals, or members of this or that cultural group, settle in a given place and slowly develop the land and build on it in light of their immediate needs. This, at least according to some accounts (e.g. Locke's) may yield individual property rights, but does not on its own automatically generate a joint place of settlement, such as a city or town, let alone any claims of collective ownership over a territory. Still, as history has shown, even where settlement does not start out as a group effort, individuals ultimately join together and, somewhere down the line, make a collective group investment in setting up permanent foundations for their communal habitation. This is the meaning of 'settlement' that I will be addressing here.

Moreover, territorial settlement thus defined may be encountered at various stages. At its inception, or gestation, settlement refers to the process of establishing a new territorial community. Settlement as an ongoing action, may conjure up images of pioneer colonisation and, most problematically, often involves a state-directed policy of settling its co-nationals or co-ethnics on a particular territory precisely in order to gain control over it. Once this problematic process has been carried out to its near completion, however, the resulting 'settlement' refers to an existing state of affairs rather than to a debatable project. At this second stage, I argue, settlement gains not only practical, but also considerable moral force. Consequently, I will suggest that when considering conflicting territorial claims, serious weight ought to be given to the interests of settler nations in retaining the lands they have successfully settled.

In the following two sections, I argue that national settlement (understood both meaningfully and retrospectively) includes two distinct elements which lend it moral significance and contribute to entitlement. The first section concerns the Lockean idea of mixing one's labour with the land.² In the second of these two sections, I discuss a further element of

2 Some readers might question the move from Lockean arguments supplying grounds for private property rights to the justification of nations' sovereignty over territory. While sovereignty and property are admittedly two distinct concepts, they are nevertheless sufficiently related and mutually relevant in order to enlist the one as constructive food for thought, as regards the justification of the other. The two

settlement in its stronger form, which I call the 'expressive' element. This feature concerns the way in which national cultures manifest themselves in the territories settled by their members. The theoretical framework for this second argument is the theory which has come to be known as 'liberal nationalism' and which places strong significance on individuals' interests in their national culture as a constitutive component of their personal identity. Here I shall explore the possibility that the expression of a national culture in a territory, its landscape, architecture, etc., is relevant to the question of entitlement to it. Each of the two arguments is intended to bring out some morally worthy interests held by members of settler nations with regard to lands settled by their co-nationals or forebears. Such interests are often overlooked, particularly where the original act of settlement is tainted with morally damning deeds. I will argue that some normatively valuable interests exist regardless of the injustice by means of which they may have been acquired. However, while I suggest that settlers' interests should be accounted for, they need not necessarily outweigh all competing claims. Moreover, the arguments presented in the next two sections apply to existing places of settlement and leave room for less sympathetic normative judgements regarding settlement projects at earlier stages of development. I shall have something to say about "settlement" at each of these respective time frames, throughout.

III The Ethics of Settlement

1. *The Lockean Element*

Locke's theory of the legitimate appropriation of natural resources assumes initially that, though God gave the world to all men in common, an individual's body and consequently his work, pains, and labour properly belong to him.³ From this he (controversially) infers his 'labour theory of acquisition' whereby:

Whatsoever then he [man] removes out of the state that nature has provided and left it in, he has mixed his labour with, and joined to it something that is his own,

issues are closely connected enough to suggest that arguments originally formulated to protect property rights, such as the Lockean arguments invoked here, can be drawn on in an attempt to shed some light on issues concerning territorial sovereignty. Both are forms, or different aspects, of ownership rights. Note also that a vital aspect of sovereignty rights is the overall control of property within one's jurisdiction.

3 John Locke, *The Second Treatise of Government*, ch. 5, par. 25-7

and thereby makes it his property. It being by him removed from the common state nature has placed it in, it has by this labour something annexed to it that excludes the common right of other men. (ibid., par. 27)

As regards land, Locke tells us that as much 'as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common' (ibid., par. 32). 'He that subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him' (ibid., par. 32). In the case of land, then, legitimate appropriation is made contingent on its use.

Although it is presented as an integral account, Locke's theory of acquisition does in fact include several distinct components, only one of which, I shall suggest, is applicable to the issue of national settlement. The first of these components concerns primacy, i.e. the stipulation whereby the appropriator needs to be the very first to have enclosed the property in question from the common. In the political context, it is clear that this feature of the Lockean argument can rarely be applied in connection with national claims to territory. Few nations can claim to be the absolute first to have removed the land in question, as it were, from the state of nature. Furthermore, the moral significance of this requirement in the national connection is, to say the least, somewhat questionable.⁴

The second, and central, component of the Lockean theory concerns the notion of an appropriator mixing his self-owned labour with the item in question, thus (according to Locke) legitimately appropriating it as his property. This labour theory has attracted much criticism and is indeed problematic, at least when adopted wholeheartedly and not provisionally.⁵ Additionally, when applied to land, it also involves interpreting 'labour' as the efficient use thereof, or more precisely (and more problematically), it involves a specific culture-dependent understanding of the efficient utilization of land.

4 For a detailed dismissal of nations' 'first occupancy' arguments, see Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press 2003), 105-9; see also Jeremy Waldron, 'Superseding Historic Injustice,' *Ethics* 103 (1992) 4-28, at 28, where the author appears to dismiss 'initial acquisition' arguments voiced by aboriginal nations out of hand, reducing them to simplicities such as 'first come, first served,' and 'we were here first.'

5 See Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press 1988), 184-91; 'Two Worries About Mixing One's Labour,' *The Philosophical Quarterly* 33 (1983) 37-44.

Finally, there is at least one further strand in Locke's theory of entitlement. Part of the rationale behind his labour theory appears to be that in labouring on an object the individual improves it in a way that ultimately renders it completely different, and immeasurably more valuable than it was before. Thus he who toils over a previously unappropriated item does not merely 'mix' his own work with it, but rather, improves it in a way and to an extent that it is changed unrecognizably from the object that originally lay in the state of nature. Thus in effect, the labourer is laying claim to something that did not exist prior to his effort.

This component of Locke's argument, while never distinguished explicitly by Locke from the totality of his entitlement theory, does in fact constitute a distinct aspect of it. It is in part what Jeremy Waldron refers to as Locke's 'Labour Theory of Value,'⁶ but it also includes certain elements of so-called 'creators' rights.' This 'Labour Theory of Value' serves to strengthen Locke's overall argument whereby appropriation by labour is a legitimate way of obtaining exclusive property rights in the appropriated item. If the usefulness of appropriated resources derives mainly from the labour invested in them, says Waldron, 'then anyone complaining about an exclusion by an appropriator can be accused of desiring almost nothing but "the benefit of another's pains"' (ibid., 192). As for 'creators' rights,' it is difficult deny the existence of a creative element in Locke's text. To begin with, Locke attributes very little value indeed to unlaboured-on items as they appear in the state of nature.⁷ Items owe the overwhelming part of their value in usefulness to human industry rather than to nature.⁸

As for the land itself, Locke specifically speaks of the appropriation of any parcel thereof by improving it (ibid., par. 33). He himself seems to acknowledge that this form of justification for property entitlement is considerably stronger in the case of land than it is in the case of gathering the fruits thereof.⁹ After all, many of the provisions left by nature need only be gathered as they are in order to provide significant utility for man. In such cases it may be harder to see how the gatherer has, by simply removing these things from the common stock, altered them to any considerable degree. 'Paradoxically, then, there seems more room

6 Waldron, *The Right to Private Property*, 191

7 Locke, par. 28, 37, 42, 43

8 Ibid., par. 42; later, Locke introduces a similar comparison with regard to land, par. 23.

9 Locke, par. 32-45

for complaint about the exclusive appropriation of acorns than about the exclusive appropriation of land, on the Lockean Labour Theory.¹⁰

In the case of empty land it is plain to see why Locke argues that, were it not for labour, 'it would scarcely be worth anything,' whereas once it has been laboured on it is worth many times more.¹¹ There is, as Locke notes, a striking difference between the usefulness of a piece of cultivated land and the usefulness, as it stands, of a piece of waste ground.¹² In fact, it is worth so much more, and is indeed so different in kind as a result of the industry invested in it in order to render it valuable, that it ought now, according to Locke, to be seen as the sole property of the labourer. Furthermore, the labourer is entitled to the object in question precisely because he, by his efforts, has in fact made it, out of virtually nothing, into what it now is. Thus the logic behind granting entitlement over land to its first cultivator is in part that the improvement, or change, brought about by his labour is a far greater component of the value of the land than the original soil supplied by nature.¹³

Apart from the philosophically problematic notions assumed here, such as self-ownership and dominion over one's labour, Locke introduces a justification for entitlement over land and its fruits which appears plausible and readily applicable to national claims.¹⁴ For, according to Locke, entitlement through labour is justified because the object laboured upon has, at least metaphorically speaking, 'been brought into being' largely by the labourer himself. As Nozick suggests, 'Perhaps the idea ... is that labouring on something improves it and makes it more valuable; and anyone is entitled to own a thing whose value he has created.'¹⁵ Thus the labourer is not in effect demanding acknowledgement of an appropriation so much as he is seeking recognition of his right to something he has, in the main, brought into being. '... if natural resources and land are "almost useless materials as in

10 Waldron, *The Right to Private Property*, 193

11 Locke, par. 40, 43

12 Waldron, *The Right to Private Property*, 193

13 Locke, par. 41, 43

14 Waldron, *The Right to Private Property*, 193; Waldron, 'Two Worries About Mixing One's Labour,' 37-38, 44. Discussing Locke's 'Labour Theory of Value,' Waldron points out that this theory 'can be expressed independently of the "mixing one's labour" doctrine,' and therefore 'is not affected by the latter's incoherence, and can stand by itself.'

15 Nozick, *Anarchy, State, and Utopia*, 175

themselves" in their natural state, then it does not seem so unjust that an appropriator should acquire exclusive title to the whole of the object he has taken. For there is only a negligible difference between the worth of his labour and the value of the object he now controls.¹⁶

Far from being straightforward, however, the application of this theory to the case of national settlement quickly encounters several obstacles. Locke speaks only of land acquired directly out of the state of nature as it were, but nations sometimes 'mix their labour' with lands previously settled by members of other national groups rather than merely with previously unappropriated territory. Such acts of settlement would be unjustifiable by Locke's own account.

As for the settlement project which Locke himself supported, he was notoriously culturally biased, as he considered all land which had not been cultivated and 'improved' in a way consistent with the use of land in England of his time to be 'waste' land, free for the taking.¹⁷ It was, for instance, apparent to him that the lands in uncolonized America were virtually without value, as they were not enclosed and cultivated in the way he saw fit. Consequently, those who were to be responsible for the land's enclosure and improvement, and therefore also for the overwhelming increase in its value, would be, by virtue thereof, entitled to it. Locke totally overlooked the fact that 'improvement' is often a point of cultural contention: while Locke valued cultivation and industry, other cultures value harmony with nature, virgin land, and open spaces. One man's improvement of land may be another's destruction thereof.

An additional complication with applying the Lockean reasoning on legitimate appropriation to the national case stems from what has long been interpreted as one of Locke's own constraints on appropriation. According to this supposed constraint, the transfer of property from the common stock to private (or in our case national) ownership is legitimate only if 'enough and as good is left in common for others' to appropriate.¹⁸

16 Waldron, *The Right to Private Property*, 192

17 Locke, par. 42. For a variety of critiques of Locke's cultural bias as regards the appropriate use of land, see James Tully, 'Rediscovering America: The Two Treatises and Aboriginal Rights,' in James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: Cambridge University Press 1993), 137-76; John Douglas Bishop, 'Locke's Theory of Original Appropriation and the Right of Settlement in Iroquois Territory,' *Canadian Journal of Philosophy* 27.3 (1997) 311-37; Margaret Moore, 'The Territorial Dimension of Self-Determination,' in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press 1998), 134-57, esp. 148-9; Margaret Moore, *The Ethics of Nationalism*, 181-4.

18 Locke, par. 27

Though much has been made of this so-called ‘Lockean proviso,’ Locke seems to have been relatively unbothered by it. Waldron suggests convincingly that Locke never intended the stipulation whereby appropriation is legitimate ‘at least where there is enough and as good left in common for others’ as a constraint on acquisition in circumstances of scarcity.¹⁹ This might be because Locke assumed that the legitimate appropriation of land (i.e., the original labouring on a parcel of virgin common land) always improved it to an extreme degree. Thus in Locke’s view any appropriator actually contributed to the common welfare of mankind rather than subtracting from it, whether or not he had left sufficient surplus land for further acts of enclosure and appropriation.²⁰ If one assumes that an appropriated resource was virtually worthless to begin with and, moreover, that an appropriator will have always left the human race better off as a result of his appropriation, why then surely no man’s rights will have been violated by such an act.²¹

Nevertheless, as a result of such problems it is difficult to argue straightforwardly that the laborious act of national settlement justifies the acquisition of territory on Lockean grounds. This is not to deny that there may be cases in which an act of national settlement can be justified along these lines. This is so where settlement is carried out on land which was previously empty and unutilised, and where it can be reasonably argued that its settlement constituted a significant improvement. This, for example, may well have been the case of settlement efforts which took place in the far distant past, ‘in the beginning’ in Locke’s terms, when land was considerably more plentiful. If one accepts this, there may well be more recent cases which could be defended along these lines. I will, however, not argue for any such particular case here. On the whole, the obstacles to doing so pointed out above would render such a defence at best both problematic and controversial.

Instead, my project is more limited. It does not enlist Locke in order to argue in favour of implementing national settlement projects, nor does

19 Waldron, ‘Enough And As Good Left For Others’; Waldron, *The Right to Private Property*, 209-18

20 Locke, par. 37; Waldron, ‘Enough And As Good Left For Others,’ 323

21 In ‘Rediscovering America,’ Tully points out that, in reality, the English colonists of America, and presumably Locke himself, saw their settlement project as leaving ‘as much and as good’ for the natives of that continent. He quotes one of the prominent colonists as ‘enunciating a principle similar to Locke’s proviso’ when he wrote that ‘if we leave them [Native Americans] land sufficient for their use, we may lawfully take the rest, there being more than enough for them and us.’ Tully, ‘Rediscovering America,’ 151 (in reference to *The Winthrop Papers*)

it promote a primarily labour-based theory of territorial acquisition, as Locke himself may have favoured. Rather, it draws on certain elements of his thesis in arguing for the relevance of *existing* national settlements to the issue of justly demarcating borders and determining entitlement to land, specifically in those cases in which it is disputed between two competing groups.

The crucial feature of the Lockean argument for this purpose is the embedded suggestion whereby labouring warrants entitlement because the labourers' industry establishes something virtually novel that came into existence by virtue of their industry. Certainly, according to Locke, such labourers are responsible for the overwhelming proportion of its current worth. Perhaps this is what Locke had in mind when he commented, as regards an object removed from the state of nature by an individual's labour, that no man but he can have a right to it.²²

Locke's problematic assumptions concerning relative value and his arguments regarding efficiency serve to strengthen this claim, but they are not essential to it. Consequently, in the present connection it is not for the most part necessary to get bogged down in questions of relative value.²³ The relevant feature of the Lockean rationale concerns the fact that labouring over land can alter it to such a degree as to, in effect, create a new territorial entity that exists only thanks to that labour. At least its current form and the extent of its value are due solely to those who laboured on it. Whether, in various respects and from different cultural viewpoints, this new creation is better or worse than the resource that existed before is a lesser matter. For instance, whether or not Manhattan is an improvement on the island held by the Native Americans several centuries ago is an arguable point, but it is not of primary significance. It is by all accounts something new and completely different whose value (whatever that may be) is due to the labouring of Western settlers. It is, in other words, the fruit of their labour in which they naturally have a vested interest.

As implied by the above example, the current reading of the Lockean argument is even more compelling when applied to the building of a city than to the cultivation of a parcel of land by an individual. A nation seeking recognition of title to a settlement set up by its members is in a strong sense claiming ownership rights to an object which its members,

22 Locke, par. 27

23 For a discussion of Locke's Efficiency based claims, see Tamar Meisels, "'A Land Without a People': an Evaluations of Nations' Efficiency based Territorial Claims,' *Political Studies* 50.5 (2002) 959-73.

in effect, brought into being. At the very least, its nature and current value are of their making. Having 'mixed their labour' with a portion of the earth's surface, thereby forming it into something new which did not exist (in its current form) prior to their collective endeavour, they now possess a morally significant interest in the products of their labour. Properly speaking, then, far from claiming the right to appropriate territory, they are actually seeking recognition of their interest in something that, for the most part, they themselves established.

Admittedly, the initial liberty right to the original acquisition and subsequent settlement of a territory cannot be justified on these grounds. The original right to 'mix one's labour,' as it were, with a territorial asset must be justified on exterior grounds (e.g., the Lockean notion of vacant territory free for the taking; various historical arguments). The interests considered here concern only the present inhabitants of territories which have already been settled in the past. These interests are significant to determining the destiny of existing settlements. The arbitration of territorial disputes requires us to look at a current time slice and evaluate the contemporary interests involved. One significant type of interest held by current inhabitants (i.e., settlers) is highlighted, and better appreciated, in the Lockean terms described above than in any other. Locke's 'Labour Theory of Value,' when taken on its own, alongside certain elements of 'creators' rights,' can serve *retrospectively* to legitimize national sovereignty over places settled in the past by members of their nation. Current inhabitants possess certain interests in retaining their territorial holdings (with varying degrees of moral force), which stem from the act of settlement itself, regardless of the extent to which their nation's original acquisition was normatively justifiable. Where the original acquisition of land can be justified (on the basis of historical, or other arguments, e.g. self-determination), the act of settlement strengthens the inhabitants interest in the now settled land, and lends their territorial claim additional moral force which did not exist prior to settlement.

It is perhaps not at all surprising that Locke's theory of appropriation, while presented solely as a theory of individual property rights, lends itself easily to the issue of national settlement. Historically speaking, Locke's support for the European settlement of North America is well documented, as is his personal vested interest in it.²⁴ James Tully goes so far as to suggest that Locke's entire theory of property, as presented in his *Second Treatise*, was purposefully designed to justify the European

24 Tully, 'Rediscovering America,' 140-1, 143-4, 147, 159; Bishop, 'Locke's Theory of Original Appropriation,' 311, 329

settlement of North America.²⁶ In reality, Locke's arguments were, in fact, widely employed by the colonists in their continuing struggle to justify English settlement in native America (*ibid.*, 166-71).

Be that as it may, it has been argued, by Tully and other critics of Locke, that any attempted justification of Western settlement on the lands of North American natives based on Locke's theory of original appropriation is unsuccessful and ultimately self-defeating.²⁷ This is not to say that any Western settlement in North America would have been unjustifiable in Lockean terms, but only that the wholesale theft of Indian lands cannot be said to have been justified. The same is true of other incidents of national settlement where this effort is not carried out on empty land. My argument here is, however, as I have said, considerably less ambitious than Locke's was, and consequently this observation does not pose any serious threat to it. Rather than arguing that Locke's thesis justifies a right of settlement in any particular case, I suggest only that *once* a territory has been settled, certain aspects of the Lockean argument give rise to good moral reasons for granting continued possession of that territory to those who have already settled it.

Admittedly, settlement projects too often involve destroying previous arrangements that were of great value to others. In such cases, a new settlement cannot acquire automatic priority over its predecessor. Where construction of the new involves the destruction of the old, the latter carries with it a negative value judgement that must be accounted for in any over all evaluation of competing claims. Nevertheless, it does not preclude the consideration of newly evolved interests on the part of settlers and these, I have suggested here, are better appreciated in Lockean terms than in any other.

2. *The Expressive Element*

Thus far, I have pointed to the change or alteration of territory that occurs in the process of national settlement. I have as yet said little concerning the nature of this change. The following argument embraces that strain of liberal political thought which, in recent years, has come to the defence

26 Tully, *ibid.*, 'Rediscovering America,' mainly on 139-66. Note that, in this historical connection, the property arguments advanced by Locke attached themselves to collectives as well as to individuals, as Locke notoriously defended not only individual colonists' property claims but also the alleged rights of the British crown over the colonies established by its nationals in North America (Tully, 165).

27 Tully, *ibid.*, 'Rediscovering America,' throughout, esp. on 175-6; Bihop, 'Locke's Theory of Original Appropriation,' throughout, esp. on 312

of nationalism, and attempts to apply it to the very concrete issue of national territorial rights. It focuses on the significance that theories of 'liberal nationalism' place on individuals' national-cultural affiliation and on the important identity-related role attributed by those theories to national cultures.²⁸

When national members settle a territory (i.e., when they form a colony, build a town or city), they not only change the terrain in question, but rather, they reform it and shape it in the light of their national culture. National settlement involves shaping a territory so as to coincide with a particular way of life. Nations or individual nationals settling territories must, at some point, reach certain collective decisions concerning the form their settlement is to take. They must, for instance, choose between various modes of architecture and forms of agriculture, which will ultimately shape the territory's landscape; they must decide whether to build huts or high-rises, and what style to build in; they need to determine whether to enclose and cultivate, or to allow for open spaces, and whether to construct urban or rural settlements. Should they aspire to construct a few concentrated and densely populated potential cities, or to spread out within a given terrain into many sparsely inhabited small villages or towns? They have to decide whether to industrialize and, if so, to what extent and in what fields; and so on and so forth. In some cases these decisions will be made explicitly in a well thought-out manner by a central power, as when a government plans the construction of a city or encourages (through financial or other incentives) internal immigration to outposts which are as yet unsettled by their nationals. Other decisions will often be made ad hoc and haphazardly, sometimes on the spot by settlers themselves, or will simply develop gradually in a certain way. Still others will be influenced by circumstances and unfolding events. Settlement is not always the product of a preconceived and organized decision, though such premeditated projects did characterize the settlement of much of the New World. Often places of settlement simply develop over time as a result of prolonged occupancy in a given territory, as was the case throughout Europe. But the point is that most of the decisions involved in settling a territory — whether taken in advance of settlement or in the process thereof — are culture-dependent, just as the decision whether to build churches or synagogues or mosques in the settlement is.

Furthermore, the mode in which these plans and decisions are ultimately carried out, the manner in which the settlement is constructed

28 See *supra* n. 1.

and managed in practice is also culturally influenced. As time goes by, the expression of the national culture in the territory will necessarily become more and more apparent. Beyond the bare essentials of life, places of permanent residence will usually acquire ornaments of cultural significance, which manifest themselves in the public sphere. This is easy to see when one considers well-established places of settlement such as old cities. Landmarks such as the Tower of London, the Arc de Triomphe and the Eiffel Tower in Paris; the Arch of Titus in Rome, Wenceslas Square in Prague, and Heroes' Square in Budapest are all cases in point. Such monuments are all entwined with the culture of the settled society, either with its collective history or with the personal achievements of certain prominent nationals, and subsequently with the cultural identity of its members.

National cultures are imprinted on the territories settled by their members. As David Miller points out when referring to the establishment of national claims to authority over a territory:

The people who inhabit a certain territory form a political community. Through custom and practice as well as by explicit political decision they create laws, establish individual or collective rights, engage in public works, *shape the physical appearance of the territory*. Over time, this takes on symbolic significance as they bury their dead in certain places, establish shrines or secular monuments and so forth. This in turn justifies their claim to exercise continuing political authority over that territory. It trumps the purely historical claim of a rival group who argues that their ancestors once ruled the land in question.²⁹

Why should this be so? Why should the unarguable fact that the process of settlement involves the imprint of national cultures on the territories settled by their members be considered relevant from a liberal viewpoint to the question of entitlement to it, even where a territory is claimed by another group which may have inhabited it previously? The answer to this question lies in the trilateral relationship between personal identity, national cultural identity, and national territory.

A central tenet of the doctrine of 'liberal nationalism,' which is presupposed in this section, is that certain forms of collective cultural affiliations, specifically national cultures, form an essential component of individual identity. Since the welfare of individuals is at the heart of liberalism, and national cultures, it is argued, are important to individual identity, then nationalism, at least in certain benign and restricted forms, is of value to liberalism. This is, of course, a gross simplification of a wide

29 Miller, *Citizenship and National Identity* (Cambridge, MA: Polity Press 2000), 116-17. Emphases added.

variety of complex arguments residing under the collective roof of 'liberal nationalism.'³⁰ Still, I think it captures the essence of a significant strand of this doctrine.

The next step in the territorial argument is predictable and practically inevitable. If national cultures form an essential component of their individual members' identities (or at least of the identities of very many contemporary nationals), and if these same national cultures manifest themselves in certain territories, then those territories are of inarguable significance to the personal identity of the individuals composing that nation. And if the well-being of individuals and the protection of their identities is what is at stake when nations lay claim to territory settled by their nationals, then there are good liberal reasons for granting the desired control over that territory to the nation comprising those individuals whose identity is so closely intertwined with it.

This argument need not disturb contemporary opponents of ongoing settlement projects too much. In fact, accepting it supplies them with good cause to resist unjust acts of appropriation and land transformation, even more fervently than they would otherwise. If unjust settlement projects are allowed to succeed, they will ultimately acquire the type of moral respectability outlined in this section. Territories are not merely improved, or at least altered, by settlement, as was argued in the previous section: they are not only 'created,' or recreated, by their settlers. They are, as it were, 'created in their image,' that is, in the image of their national culture. As they take root, national settlements begin to form a new component of the cultural identity of the individual members of the settling nation *wherever they may live*. Since individuals and their identities are important from a liberal perspective, liberals will increasingly acquire good reason to favour the prolonged holding of national settlements by the nation state whose members established and inhabit them.

These reasons are admittedly non-conclusive, and in many concrete territorial cases they will have to contend with the identity-related historical interests of contesting nations. The present argument relies on the fact that certain brands of contemporary liberalism place consider-

30 I refer here to an entire family of theories grouped together under this collective name. Prominent examples thereof are Neil MacCormick, 'Liberal Nationalism and Self-Determination' in Desmond M. Clarke and Charles Jones, eds., *The Rights of Nations — Nations and Nationalism in a Changing World* (Cork: Cork University Press 1999) 65-87; Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press 1993); David Miller, *On Nationality* (Oxford: Clarendon Press 1995); Margaret Moore, *The Ethics of Nationalism* (Oxford and NY: Oxford University Press 2001); Chaim Gans, *The Limits of Nationalism* (Cambridge: Cambridge University Press 2003).

able value on the protection of cultural components of individual identity. By this very logic, any wholly conclusive judgment regarding the destiny of a specific territory will also have to account for the identity-related interests of prior inhabitants and their descendants. The likelihood of conflict does not weaken the present argument, which willingly acknowledges that resolving territorial disputes requires a delicate balance of multiple considerations. Success in these matters, however, requires a clear view of its respective components and a consideration of their varying strengths. The expressive element, while admittedly neither exclusive nor conclusive, addresses one such aspect, which is both politically urgent and philosophically unattended to.

Moreover, while the delicate interplay between various identity-related arguments may often be the source of conflict, their conjunction enables them to mutually reinforce each other. The expressive interest argument presented here not only supplies its own justification for territorial entitlement but also reinforces our sense of the importance of historical connections as a criterion in evaluating claims to territory.³¹ If a national group has a historical-cultural connection with a given territory, then it has a particularly strong interest in being on that territory now because that same territory is likely to be uniquely suited to the expression of its inherited culture. Furthermore, in many cases the act of settlement itself will serve to create a historical-cultural tie with the territory as it moulds the history and culture of the settling nation around that territory. This is the complicated fact of the matter, despite the recognition that even such dual interests may still have to compete with the historical claims of other nations (e.g. prior occupants) to the same territory.

IV Settlement in Disputed Territories

The upshot of the two arguments advanced above is that there are good *moral* reasons for granting political control over places of settlement to the nation whose members established them and whose culture is imprinted on them.

How does this conclusion relate to contemporary 'hard cases' in which settlements are established in territories claimed by more than one nation? As already stated, unlike what Locke may have intended, the two arguments advanced here were not designed to address the original

31 For the most sophisticated account of historical interests in territory see Chaim Gans' 'right to formative territories' argument, *supra* note 1.

act of settlement directly, though I reserve the right to say a few words on this matter towards the end of this section. Rather, the arguments put forward in the last two sections advocate the incorporation of current facts about existing settlements into any liberal attempt at arbitrating territorial disputes.

I have in mind places such as the United States, Australia, New Zealand and, with the progress of time, many parts of Israel as well in which settlement has already, rightly or wrongly, occurred in the past and is now a well established fact. *Once* this has happened, I claimed, both of the arguments advanced above give rise to reasons for favouring settlers' claims over those of others. Arguably, the value of labour and of cultural identity may acquire additional moral value when political, legal institutions have evolved in such ways that the settlers descendants are able to recognise their fault and to offer some kind of compensation to the native national group.

Time is, of course, of the essence, and it may often be difficult to determine how much time is enough to constitute a well-established settlement whose existence trumps the claims of others. Are one or two centuries sufficient, as in the case of North America? Is only a single century, more or less, enough, as in the Australian case? Can fifty or, say, seventy-five years suffice, or even twenty or thirty, as is the case with various places of settlement in Israel? Perhaps, in cases where the act of settlement itself is judged to be wrong, any claim based on such morally negative actions should be considered only when the present claimants do not belong to the generation of settlers who were responsible for the original wrongful acts.

More crucial, however, and more easily determinable than any temporal test, is the factor of change. Settlement creates objective 'facts on the ground' and these are not merely physical, but also moral. Settlement reshapes the normative, alongside the tangible, landscape. While the time element may be difficult to pinpoint, the very nature of the arguments presented here supplies a more applicable, and a more justifiable, pair of criteria. First, we must ask whether the settling nation has improved, or at least altered, the territory significantly. Has it in effect 'created' something new that did not exist prior to its settlement effort? And second, has the nation claiming a given territory constructed a settlement that now reflects its members' culture of identity?

Where the answers to these questions are affirmative, both arguments point towards favouring the territorial claim. This is so regardless of the merits (or demerits) of the original act of settlement. As David Miller has argued:

If one group occupies the territory previously held by another, then, *ceteris paribus*, the strength of its claim to exercise authority will increase over time. At a certain

point - impossible to specify exactly — it will have a stronger title than the original inhabitants will. This might sound uncomfortably like a version of “might makes right,” but I cannot see any reasonable alternative to the view that *it is the occupation and transformation of territory which gives a people its title to that territory*, from which it follows that the competing claims of the present and original inhabitants increase and diminish respectively with the passage of time.³²

Similarly, I have emphasized throughout that the argument advanced here applies only to settlement as a *fait accompli* rather than to the justification of any settlement project. This last point might prove controversial as it suggests that the morally appropriate attitude towards settlement may, in some cases, be different when settlement is being contemplated or carried out from what it might be in retrospect, that is, once a territory has been successfully settled. It suggests that at times there may be reasons for acknowledging title to territory whose history is tainted with morally questionable deeds. This admittedly is a morally problematic view, as it may encourage national groups to commit morally unjustifiable acts of settlement in the hope that their acquisition of a territory will be retrospectively recognized as legitimate. This is, of course, the morally problematic reality of the matter as well. It is also an unavoidable moral hazard for liberalism.³³ From a national point of view, it renders settlement a primary national objective.

As for the appropriate attitude towards ongoing settlement efforts, though this was not the focus of the argument here, it does have some bearing on this issue. The Lockean element of my argument implies that, from a liberal perspective, settlement is justified only where it is carried out on as yet unsettled ground. It is unjustified when it involves the infiltration of pre-existing well-established places of settlement, such as cities or towns. If we take this restriction into account, however, the appeal to Locke in connection with settlement does imply that, in principle, such human endeavour is of moral value.

32 Miller, *Citizenship and National Identity*, 196, Miller's n. 14, emphasis added. As I understand it, Miller presents occupation and transformation as cumulative requirements, both necessary conditions for control.

33 Both David Miller and Jeremy Waldron acknowledge and resign themselves to similarly morally hazardous conclusions on related issues. See Miller, *Citizenship and National Identity*, 196, *ibid.*; and (though to a lesser degree of acceptance) Jeremy Waldron, 'Superseding Historical Injustice,' *Ethics* 103 (1992), 4-28, at 25.

V Concluding Remarks

I have argued that where members of a nation have succeeded in settling a parcel of land and in shaping it into a well-established, built-up, permanent place of residence which reflects their culture, there are strong moral reasons to grant that nation a right to that land. I tried to show that the issue of settlement supplies us with a perspective on territorial questions that has both liberal foundations (i.e. in Locke) and liberal-national appeal.

The two arguments advanced here attempted to identify some of the interests held by members of 'settler societies' that are worthy of our moral consideration. These were said to be the interest in harvesting 'the fruits of one's labour' (so to speak) and the interest in components of identity.

All that was said does not, however, necessarily establish that these interests always constitute sufficient reason for imposing on others the relevant duties involved in granting the settler nation sovereignty over the land it has settled. Thus, the argument falls short of claiming that nations always, and under all conditions, have an overriding right to all places settled by their nationals. The arguments offered above present the interests of settler nations in a new and favourable light, but they do not work in a vacuum. They will not necessarily trump all other interests in every case, nor do they negate the importance of conflicting considerations.