The Taking of Territory and the Wrongs of Colonialism.

Everyone now agrees that colonialism was wrong, although there is disagreement on what exactly is the feature or characteristic that makes it wrong. This paper, for example, takes issue with a prominent recent view in the literature that the wrong of colonialism can be wholly explained in terms of the unequal and nonreciprocal relationship that is inherent in colonizing projects. I argue instead that the taking of territory is a central element in its wrongfulness.

It might be thought that this dispute is purely academic: one might think it unnecessary to offer a theory about the wrong of colonialism when we’re all agreed that the system as a whole was systematically unjust and wronged many, many people all over the world. This line of reasoning would be incorrect, however, for two very good reasons. First, there’s an active debate on how colonialism ought to be redressed, and what kind of reparations might be offered for it. Unless we are clear on the nature of the wrong(s), we cannot begin to have a systematic account of reparations, and in particular what ought to be repaired, and how.

Secondly, the very fact that most people think that colonialism is wrong is itself a good reason to examine it. Along with slavery, it is often thought to be the subject of some of our most fixed moral judgments, from which we build theories, rejecting some principles or practices according to their implications, and accepting, refining, honing others, until these various elements cohere in a state of reflective equilibrium. If it does count as one of our fixed judgments, which serves this role in theory, it is particularly important to be clear about what precisely is the wrong. Different accounts of that wrong might have different implications in constructing our overall theory, and different implications for what is included in the theory and what gets rejected.

Colonialism as a system has two distinct aspects: one is political domination, by which I mean the rule of one group of people by another group; the other is settlement by agents of the imperial authority on land that was not previously regarded as theirs. These are distinct elements: it is possible to have rule over a group without any settlement, and settlement without political rule. Historically,
Colonialism took different forms in different places. Some involved political rule without much settlement (though usually some presence was necessary for effective control), as in the case of British rule over India. In other cases, such as the settler colonialisms of the Americas and Australasia, there was settlement and jurisdiction over the territory that was settled as part of the colonizing project. This sometimes involved the forcible inclusion of and rule over indigenous people in these projects, but sometimes the colonizing power made treaties, designed to preserve some element of self-government for indigenous communities on land reserved for them. Most forms of colonialism had both elements in different proportions: they involved both settlement and political domination.

In order to fully appreciate the significance of the argument of this paper, it is necessary to consider how my account of the wrong of colonialism differs from what I call the domination account of that wrong, associated with the work of Lea Ypi and to a lesser extent, Catherine Lu. The central feature of the domination account is its focus on the injustice embedded in political relations between colonizer and colonized. The wrong of colonialism, Ypi claims, “consists in the embodiment of an objectionable form of political relation” and is “situated within a larger family of wrongs, the wrong exhibited by associations that deny their members equality and reciprocity in decision-making”. On this view, if the Europeans had come to the Americas or Australasia and offered the inhabitants fair terms of inclusion, by which she means equal political status in a government that institutionalized reciprocity, colonialism would not have been wrong; indeed, there would have been no colonialism. She argues that the taking of land and settlement on land in itself does not count as an injustice. Her account “is neutral on the status of territorial rights, whether they can be justified, and how, if at all.” In her view, as long as the political order is characterized by norms of equality and reciprocity, it is a rightful and legitimate political order. There is no discussion or analysis of the taking of land or settlement as a wrong. Catherine Lu, in a somewhat similar vein, identifies colonialism with structural injustice, and emphasizes the pervasive relations of domination and subordination. Her central example – the treatment of Korean ‘comfort’ women by the Japanese Imperial Army in the Second World War – locates
the wrong entirely in terms of the relations of domination, and her principal discourse of ‘structural injustice’ focuses on the relationships between the dominated and dominating groups.

In this paper, I simply assume that political domination was wrongful, in order to focus on what is perhaps a more contentious element of the wrong of colonialism: that settlement on territory already occupied by another group is wrongful. To make this argument, I need to explain why a group might be thought to have a special claim to territory. Again, one might think that it is obvious that indigenous people did have a special claim. After all, this is central to their discourse about the wrong that they suffered, which has often focused on the fact that their land was wrongfully taken from them in the course of colonization. It is also consistent with a long-standing tradition within European (colonizing) culture, which distinguishes between imperium and dominium, sovereignty and property, which is central to the writings of both Grotius and Pufendorf, and which suggests that there is an additional justificatory burden to justifying control over property and resources, which is not implied simply in the exercise of sovereignty. It was however often denied by those sympathetic to the colonizing project: they argued that indigenous people in particular were not in the right relationship to the land to have territorial rights proper. It is also denied by recent accounts of the wrong of colonialism that focus on what one might think of as self-evident wrongs: exploitation, domination, and the like.

In order to show that the taking of land was wrongful, it is necessary to justify the rights over territory of indigenous people. In part two of the paper, I offer such an argument, which clearly applies to indigenous people, perhaps even more than other people, from which it follows that settlement on this land was wrongful. This argument proceeds in two parts: an argument from legitimate expectations; and an argument of cultural incompatibility combined with an argument that values collective autonomy.

Then, in part three, I consider the scope of these territorial rights. This is intended to address the claim sometimes made (by colonizers) that the land, or
significant portions of the land, was unoccupied, or thinly occupied; and that settlement can be justified on grounds of fairness.

In part four, I consider treaty-based arguments: this is because in many cases, indigenous people made agreements to alienate their land, or some part thereof, and it is important to consider the validity not only of the agreements that were made, but of such agreements in general. On the face of it, such treaties are consistent with a recognition that the indigenous people had authority over the land; and so constitute a partial recognition of indigenous people’s territorial rights.

Finally, in part five, I consider the implications of this understanding of the wrongs of colonialism for the issue of reparations for colonialism, and compare it to the domination account.

2. What’s Wrong with Unilateral Settlement, or: Why indigenous people had rights to land

Some people take it as obvious that settlement of already-occupied land in the New World was wrong – that the land was stolen or taken, and that therefore a wrong was committed. I agree with this, but I think that this is too quick, because it is important to be clear about the precise relationship between indigenous groups and land and how particular land use patterns can give rise to entitlements in the first place; and what those entitlements consist in. This requires that we consider the taking of land in abstraction from some elements of the actual history of colonialism: the relations of domination and subordination, the violence that often accompanied these events, and so on.10

Suppose, for example, that a group of white settlers from England came to settle on land in the New World and establish a small community there, ploughing the soil, tending crops, and generally living by farming, supplemented by some fishing and hunting. Suppose also that the population density of indigenous inhabitants in the New World was less than the land could support, and less than in Europe, where the migrants originated.11 As with most migrations, let us suppose that it was motivated by a combination of push and pull factors, but I am not claiming that these settlers were driven by necessity. They did not end up there,
blown on the crest of a hurricane, starving and in need. On my story, they came as part of a deliberate policy or aim to settle the land; and they could have survived where they were. Let us suppose, also, that they did not attempt to dominate the indigenous people who also lived on the land. This assumption is necessary in order to isolate the wrong of settlement without domination. As in the spirit of Locke’s account of property appropriation in the New World, we are supposing that the local indigenous people were engaged in a somewhat nomadic pattern of land use, such that they were sometimes in one place and sometimes in another place, and these new settlers occupied a place that they – the indigenous group – had previously wandered about in, hunting and gathering and fishing. However, the indigenous community was still able to wander about on a large enough area that its way of life as a partially nomadic hunter-gatherer society was possible.

One possible response is to claim that the interests of the indigenous inhabitants would be harmed by settlement on land that they previously wandered about in, because, whatever else was true, they were deprived of a liberty that they previously enjoyed. However, if we limit the appropriation of property so as to exclude anything that an agent was previously at liberty to do, it is too strong and too restrictive to be plausible. It suggests that the indigenous group should have full discretionary rights over the area, so that any restriction on their activities by the activities of other groups constitutes an unacceptable harm to them. This would exclude many types of land use patterns, and particularly cases where land is to some extent shared by different groups or used to support different groups. Suppose for example that there wasn’t just one indigenous community roaming around in this area. There were a number of different indigenous groups, occupying or wandering around at different times in different places, so that it could be said not only that each group occupied more than one place (in the course of a year). Each group had a sense of its ‘territory’ and, while some areas might be used by only by one group, some of it was partially overlapping, and was used by more than one group. If we adopt the view above that any restriction on the liberty of a group counts as wrongful harming, then that type of use of land would quickly fall foul of it. However, I think that we may want to preserve the possibility that more than one
group could use the same geographical area without wrongful harming. This means that we cannot count as wrongful harming, cases where the harm consists purely in the fact that the group - group A - doesn’t have full liberty at all times over the land.

This raises a second, related question: What makes the English settlers, who settle in a small parcel of land on which the As resided, different from neighbouring groups of indigenous people (the Bs, the Cs and the Ds), who moved around from place to place, and who might at one time live in a neighbouring area, but then come to sometimes occupy or wander about or draw resources from an area occupied by the As (the first indigenous group)? Why not conceive of the white settlers as analogous to other groups, except possibly with a lighter skin colour and from further away?

I want to resist the conclusion suggested by the almost rhetorical formulation of that question and suggest that part of the wrong of colonialism involved settling on land that had previously been occupied by the other group, and that this wrong is not reducible to the relations of domination and subordination. What kind of wrong is it, then?

There are at least two possible arguments, which I will discuss next: a legitimate expectations argument; and an argument that stresses the cultural incompatibility of the two groups, and the value of collective self-determination.

2.1. Legitimate Expectations.

First, there’s a legitimate expectations argument. This is connected to whether we conceive of the baseline (for measuring harm) as historical, rather than, for example, fairness. We measure whether the position of the indigenous group has worsened (unacceptably worsened) from a temporal position: we examine what people have or expect to have available to them (as part of their set of options) at Time T1 (prior to settlement), and regard changes to these expectations as requiring justification. Using this baseline, the partially nomadic indigenous group could object to the English settlers, but not other rival indigenous groups that also roamed the land, on the grounds that they were used to groups B, C, and D occupying the same land. The English settlers are not just like the other nomadic groups, except whiter and from further away: they are new, and their possession of some land in this area unsettles
the indigenous group A’s expectations of how much and which land will be available to them, and when it will be. The idea here is that expectations, after a while, give rise to claims of justice or entitlements.

This does not resolve the issue, however, but gives rise to two related questions: What are legitimate expectations? and how can they give rise to claims of justice, or entitlements? One of the most famous exponents of this kind of argument, was David Hume, but it was discussed in the context of the taking of land by Jeremy Waldron who wrote:

For better or worse, people build up structures of expectation around the resources that are actually under their control. If a person controls a resource over a long enough period, then she and others may organize their lives and their economic activity around the premise that that resource is “hers”, without much regard to the distant provenance of her entitlement. Upsetting these expectations in the name of restitutive justice is bound to be costly and disruptive.13

Although Waldron’s argument focuses on expectations, it’s clear that not just any expectation that a person might have would give rise to justice claims, but only legitimate expectations, which of course raises the question of what counts as a legitimate expectation.14 There is some ambiguity in this term. We might adopt a moralized sense of the term, where what one can legitimately expect is what is permitted by relevant norms; or a more practically oriented sense, where the term ‘legitimately expect’ means something like ‘what it is reasonable to expect to happen’. Both senses apply in this case: we can assume that members of indigenous group A were occupying the land legitimately by which I mean that their presence on the land was traditional in the sense that it was not achieved by coercion or any other act of injustice. There were also expectations of the second kind: they could reasonably expect that access to this land, and to the set of options related to the their physical presence there, would continue in the future and it would be reasonable to make future-oriented plans with this context in mind.

With regard to the underlying argument for thinking that expectations can serve as a fount of justice, there are at least two different mechanisms that might be
at work. One is project-related, as is implied in the quote by Waldron above: this is
the idea that people live their lives, and make choices and decisions against a
background context; and that this context is assumed as part of the fabric of people’s
lives. When people are deprived of a liberty that they had previously assumed (a
liberty to traverse the area now occupied by the houses and farms of the white
settlers), they experience this as disruptive: they have to change their patterns of
movement; re-orient their expectations, plans and patterns. Of course, many people
experience change of many different kinds, but the point here is that these
expectations and the role that it serves in their lives gives them an entitlement over
the land that the newly-arrived English lack.

There is another aspect of the legitimate expectations argument that is not
emphasized by Waldron, but is consistent with it. Waldron’s account emphasizes
the role of context in people’s lives and the importance of this in people’s projects.
However, it may also be the case that people’s relationship to land is not merely that
of a background context: it may be affective; they may feel an emotional attachment
or connection to the place, which itself has normative significance. This is not
surprising. We can imagine that members of indigenous community A have a lot of
knowledge of the land that they live on: they are familiar with its contours, where to
find fresh water springs; they know good places to fish and hunt, how to grow food,
good trails in the woods or passes through the mountains. With this familiarity
comes an emotionally-charged connection or attachment to place, to favourite rivers
or streams, to places where significant things happened or where one’s family
members are buried. This, too, gives the indigenous people a link with the land that
is not experienced by newly-arrived settlers, and supports the claim that the present
pattern of connections and relationships to land gives rise to entitlements, which
people who are not so connected lack (which I am here terming a broad or
capacious ‘legitimate expectations’ argument). Depriving them of access to these
things that matter to them, that gives meaning to their lives, and is the background
or assumed context in which they live their lives constitutes an objectionable form
of disrespect.15
2.2 Cultural Incompatibility and the Good of Collective Self-determination.

In the original example, I depicted the settlers as a small group of people who posed a relatively minor inconvenience to indigenous people: the indigenous group now had to go around the newly arrived settlers’ area, which involved disrupting a previously-enjoyed liberty. I now want to claim that there is the additional problem of cultural incompatibility, which is relevant in the colonial context, and is partly connected to incompatible land use patterns.

What do I mean by this? Different land use patterns may be partially or completely incompatible with one another: settled farming in enclosed fields is disruptive of nomadic hunting and gathering or slash-and-burn agriculture. Cutting down trees to create cultivated fields reduces the habitat of many of the animals that the indigenous people depend on. In the original example, where there was only one settler group, the effect of that small group was insignificant. But it is a fallacy of composition to infer that something is true of the whole from the fact that that thing is true of some part of the whole, or even every part of the whole. We know this from zero-sum games, like athletic races, where the fact that someone would win if she ran faster does not mean that everyone would win if everyone ran faster. In the case of settlers, it may be true that one small group of settlers will not disrupt the indigenous way of life or culture, but many settlers, with traditions of land use involving individual private property rights, enclosed land, and tilled fields, are threatening to a largely nomadic hunter-gatherer society that assumes not only rights of movement but hunting animals and taking food as they come across them. This makes the presence of the English settler groups dis-analogous with other groups who are indigenous to the land, who, we may suppose, may compete for the same animals and fish and other resources, but whose way of life does not involve altering the very framework in which people live.

This brings us to an additional, closely connected, problem: this is that the settlement of the English in significant numbers will prevent the indigenous community from being able to exercise collective agency over their lives. If the indigenous people cannot control their physical environment, such as the rivers that they fish in, the water that they drink, the area that they traverse, the place where
they hunt and farm and build homes in, they lack robust or significant control over the conditions of their lives. In that kind of context, where the use of land or space is contested and the cultures are incompatible, it is difficult to conceive of non-harmful compromise. Moreover, it is not clear that compromise between two positions, as if the parties are equal in the negotiations, is appropriate. If the two groups were related to the land in the same way – two groups had both historic attachments and significant relations with the place – compromise would be the right solution. But in the colonial context of settlement, the positions were not equal. The indigenous group had a claim to that particular land, rooted in the legitimate expectations argument above, which I understand broadly to encompass both the importance of projects and affective attachments and value. It would be wrong for the non-indigenous group to settle there without their (informed) consent. Indeed, depriving them of collective agency, disregarding their attachments to the land, and non-consensually unsettling the basic background conditions in which they live, is a form of disrespect.

3. Scope of Territorial Right

The arguments above - from legitimate expectations, cultural incompatibility and the value of collective self-determination – are not knock-down arguments, since we could imagine cases where the English claim could trump the indigenous claim over the land (eg. a claim of necessity). It also implies that small groups of settlers that are not disruptive of the indigenous way of life are permitted. The original colonizers did not make the necessity claim but they might have appealed to a version of a fairness argument, to suggest that the indigenous populations were thinly spread on fertile and resource-rich lands, and that there was something unfair about this.16

In fact, they made two different sorts of claims, which need to be distinguished. One was the claim that the land was empty: this was repeated by many writers about large parts of the New World, and also suggested by the doctrine of terra nullius, and in the early Zionist period in Israel when Lord Shaftesbury's description of Palestine as a country without a people, and the Jews as
a people without a country was widely repeated. Of course, if a country was really empty – devoid of people – there is no problem with settling there. It is hard to object to human migration if the migrants are settling a place that is, literally, devoid of human habitation and of property claims. Surely they have a permissive right to do so, since they are not coercing, displacing or adversely affecting anyone else. But it was rarely the case that the land was in fact empty – Bermuda is a rare example of an unoccupied (but fertile) island.

The case of Bermuda is easy, however, since it is an island. It is unproblematic to view Bermuda as empty if no one lives anywhere on the island. But in most cases there is a question of the scope of territorial right. How much territory can a group legitimately claim? Can a colonizing population rightfully settle in areas adjacent to indigenous communities, but not on indigenous land itself? In that case, the settlements themselves would indeed be on empty land, even if the whole of the Americas were not empty. This would leave open the possibility of legitimate settlements and peaceful coexistence. It would not of course justify the historical practice: it could not justify, for example, the French Crown’s claim in 1627, at a time when there were only 107 French settlers in Canada, in isolated communities in Acadia and along the St Lawrence, according to which they asserted rights to all the land from Florida to the Arctic Circle. It would however leave open the possibility that some settlement could be legitimate.

In the historical colonial context, the claim that the land was ‘empty’ was mainly metaphorical; what was meant was that the people living on the land were using it in ways that the colonizing group did not recognize as use and that therefore large tracts could be used by others. Thus, John Winthrop, the first Governor of the Massachusetts Bay Colony, writing in 1603, and largely anticipating some of Locke’s later arguments, claimed both that the land was relatively empty, so that it was possible to settle there and ‘leave enough for them’ and that the indigenous people not use the land in a way that gave them rights to it. He wrote:

As for the Natives in New England, they inclose noe Land, neither have any settled habitation, nor any tame Cattell to improve the Lande by, and soe have noe other but a Naturall Right to those Countries, soe if we leave them
sufficient for their use, we may lawfully take the rest, there being more than enough for them and us.\textsuperscript{21}

And, again, in Palestine/Israel, there is an explicit recognition that the claim that the land was ‘empty’ was not literally true: indeed, the demographic reality that early Zionists confronted was unavoidable and of great concern to them. What was meant by the ‘empty claim’ was that the indigenous people did not ‘occupy’ it in the relevant sense. Thus, Zangwell, a leading Zionist, argued:

If Lord Shaftesbury was literally inexact in describing Palestine as a country without people, he was essentially correct, for there is no Arab people living in intimate fusion with the country, utilizing its resources and stamping it with characteristic impress: there is at best an Arab encampment.\textsuperscript{22}

It is easy to see that this justification is deeply problematic, because not neutral between different land use conceptions, different ideas of resource use. The reasons why they thought that the land was empty was because they did not ‘count’ indigenous use of that land as use. For the argument to be fair, to generate an argument that we would now accept, we would have to be able to examine in a non-biased way, whether the land was indeed being used by any community; and the ‘use’ in question would have to consider the aims and practices of each community and the way in which these practices involved the land. Assuming that we could do this, and thereby identify land that was indeed empty, then it is hard to see how one could object to settlement on it. I think, however, that the main argument would focus on what counted as relevant ‘use’.

Perhaps however, the argument that colonizing populations made that the land on which they settled was ‘empty’ can be reformulated as a straight-forward appeal to fairness considerations. This would not involve the contentious claim that the land was (literally or metaphorically) empty: it would be a kind of resource egalitarian claim that all people have equal rights in some sense to the earth, and it is deeply unfair if one group possesses great swathes of land (which they then under-use) and other people are more densely packed on other land.

If we are to make sense of this intuition, we need a more precise way to operationalize the requirements of fairness in the context of land. Perhaps a natural
way to interpret the fairness requirement is in resource-egalitarian or land-egalitarian terms.

There are, however, serious difficulties conceptualizing an egalitarian baseline for land. Every parcel of land is unique, in its access to fresh water, potential fertility, mineral resources, and proximity to other things of value. One obvious metric of equality – geographic space – is obviously unfair, since land is of uneven value: six kilometres of scrubby forest in northern Ontario is not the same as six kilometres in downtown Toronto or six kilometres of fertile land in the Great Lakes Lowlands.

Perhaps though we could interpret the egalitarian baseline as requiring that each parcel of land is of roughly equal value. This is more promising, but runs up against the difficulty that some of the variation in value may be due to people improving the land or altering it in ways that increase its value. It would be reasonable then for them to be entitled to the additional value of that improvement.

In response to this concern, we might try to ascertain the value of the unimproved component of the land. This is the strategy adopted by Hillel Steiner, who argues that people are vested with two fundamental rights: the first is the familiar, libertarian self-ownership right; the second is a right to an equal share of the value of global natural resources. Egalitarian redistribution, he argues, ought to apply only to unimproved land, and people should be permitted to keep the additional value that they contribute. In this way, Steiner departs from the exclusive focus on present value and abstracts from the historical contributions that have affected the value of land.

This seems philosophically neat, but difficult to realise in practice. As Miller has complained in response to Steiner, it is very difficult to disentangle the original natural value from the value that is connected to human creation. This is especially true when we are dealing with the value of urban land, which is rarely connected to direct improvements of the land (in terms of enhanced fertility for example) but more likely connected to proximity to other things of value (cafes, restaurants, schools), which may increase value of the said piece of property, depending on the supply and demand curves of the population in question.
Perhaps a more promising route is to adopt something like Dworkin’s hypothetical auction, which is employed precisely to approximate equality while acknowledging that different people have very different beliefs about what gives value to life, and therefore would value quite different resources to realize their chosen way of life. To model equality in that context, Dworkin appealed to a hypothetical auction, whereby all the resources of a society were placed for sale in an auction, and everyone was a participant in the auction, with equal purchasing power. Different people would bid for different goods, but, Dworkin claimed that the different bundles count as equal to each other if they satisfy the ‘envy test’, that is, if every person in the auction is happy with the result in the sense that they do not prefer anyone else’s bundle to their own.  

However, the Dworkinian auction is not free of the problem of cultural bias, and this is relevant to its suitability for approximating egalitarianism with respect to land. Kolers offers the example of two groups that bid for a patch of land in the Arabian desert: one group are the Bedouin, who are nomadic over large stretches of the desert, where they herd camels, travelling from water-hole to water-hole; and another group views the same patch of desert as a source of oil. Even if the Bedouin desired that desert as much as the oil-producers, and had the same initial currency in the market, they could not afford to pay the same price for it, because herding camels produces less revenue than the sale of oil. They would be out-bid; or, if they were not, they could only secure it at the price which would require them to extract the underground oil, which, Kolers points out, might be incompatible with their way of life. Again, in the hypothetical Dworkinian auction, the assumption that money can stand in for strength of preference is deeply problematic (even though Dworkin tried to neutralize the effect of differential money by giving each auction participant an equal amount). This argument, however, suggests that the auction is not in fact neutral between different conceptions of what land is for, and why we value it.

The same problem also arises in a departure from resource-egalitarianism or land-egalitarianism, according to which those who have a special claim or special attachments (conceived by Dworkin as an ‘expensive taste’) could compensate the
people who are excluded. Compensation would also run into the problem of oil producers and the Bedouin being able to pay different prices for the same piece of land.

At this point, I think we are in a position to reject the view that fairness should be interpreted as requiring resource-egalitarianism or land-egalitarianism, or egalitarianism-plus-compensation. We should reject these forms of land-egalitarianism not simply because of the problems, canvassed above, with identifying the baseline: there is an even more fundamental reasons why the baseline for examining claims ought to be an historical one (which is of course implicit in the legitimate expectations form of argument) rather than subjunctive baseline, as with an equal rights to land baseline. The reason is that the subjunctive baseline – that is, land egalitarianism -- is unfair: it views people as possessing equal initial rights with respect to a particular piece of land when in fact they are already very differently situated with respect to it; and these different situations have given rise to moral claims. In other words, egalitarianism with respect to land – viewed as a resource that all ought to share in equally -- would in fact be unfair, because not recognizing that place is a morally significant background condition for people’s relationships, plans and ways of living, and are the object of people’s attachments. In our world, unlike Dworkin’s hypothetical one, where people are ship-wrecked on an island and divide up all its resources in an auction, people have morally significant attachments to place and projects and relationships which presuppose that they live in a particular place. This is the appropriate (historical) baseline from which we should analyse people’s entitles. This, of course, follows from the legitimate expectations argument, which requires that we proceed in our analysis of people’s entitlements from where they are now, subject to fairness considerations, rather than assume an egalitarian entitlement to land.

What would fairness require? Fairness requires some kind of sufficiency constraint: people are entitled to the land that forms the background context of their projects, plans and attachments, on which they live their lives, but this is limited by claims of necessity, perhaps defined in terms of the conditions for a minimally decent life. And in a situation of cultural conflict – where the very land
practices are to a significant extent incompatible – the practices of the indigenous groups, whose expectations and way of life will be disrupted, are the ones that count from the point of view of determining the scope or extent of their territorial entitlement.

4. Indigenous land and treaty rights

Let us return to our hypothetical case of a number of indigenous groups – the As and Bs and Cs – roaming about on land that each one identifies as theirs, but these claims are partially over-lapping, such that one piece of land can be used by more than one group. Suppose now that the Es (the English) come to this area and offer something in exchange for the land, so that the English can settle on it. What should we think about settlement when it is the product of agreements between indigenous and non-indigenous people? Is there anything wrong with settlement of land that is negotiated between such groups, conceived of as collective parties?

This is challenging for my account, since it is certainly possible to imagine the legitimate transfer of land by contract or by treaty. I argued in section two that indigenous people typically had an interest in living in a certain way, and had a particular relationship with the land. They also typically seek to be self-determining and to create the rules and shape the process by which they live their collective lives. Would there be a problem with a treaty arrived at by two equally situated groups? And if there’s no problem with a contract in this case, doesn’t that show that the real problem is the unequal and nonreciprocal political relations between the two groups? Wouldn’t that vindicate the domination account?

To address this question, let’s imagine two different contexts in which such agreements might arise.

First, let’s consider a case where the representatives of the relevant groups -- representatives of an indigenous group and a prospective settler group – reach an agreement, arrived at from a position of full political equality and full knowledge, which involved the exchange of land for something else. Imagine for example that an indigenous group in the Americas traded land, or some of their land, for guns. Imagine that they understood what they were doing, and that the representatives of
this group roughly reflected the considered views of the members on whose behalf they were negotiating. Is there a problem with an agreement of this kind?

On the one hand, it seems that, in this case, idealized to assume full information about the land tenure practices (exclusive use, permanent alienation) and equal negotiating position of both parties, we should accept the agreement as legitimate. It is structurally similar to other agreements that we accept as legitimate. Moreover, people agree to things all the time without realizing the full implications of what they are doing, especially over time. We can imagine that such an agreement would have been unsettling for the indigenous community, perhaps unsettling in ways that they did not fully recognize at the time that they reached the agreement, but this is true of many autonomously-arrived at decisions, such as the decision to have a child. It would be an objectionable form of paternalism to deny agency to such a group, if, counter-factually, they had full knowledge of the terms of the agreement, and were negotiating from a position of equality.

In exploring this line of argument, I am not ignorant of the fact that the actual historical practice was much different from the idealized contract above. While agreements were made exchanging land for guns or other useful items, they frequently did not meet these conditions. Sometimes, agreements were made, but they were also often broken. They were also made without a full understanding of the land tenure practices of the settling population, and especially the knowledge that it involved permanent alienation to a group that had a land tenure practice that involved exclusive use. It is doubtful that indigenous people would have alienated land under such conditions. While theoretically, we can imagine cases where a group would freely exchange land for something else, we should be wary of interpreting as a free full-knowledge exchange one which is deeply unequal, would permanently dispossess them of land, which was not only a resource for them, and integral to their way of life, but over which indigenous people felt that they were in a trusteeship relationship over the land, where they were its guardian and protector. It is even more astonishing that they would have traded it for items that would leave them in a position of reliance on the suppliers of these items, rather than able to make the items themselves. It is doubtful that a group, from a position of equality
and full knowledge, would enter an agreement that would leave them much worse off. Most agreements, even unfair ones (in the sense that the division of the fruits of cooperation are unequal) are at least mutually advantageous (else: why would the parties agree?)

This leads us to the second possibility, which would explain such an agreement. It is probably true that indigenous people would not have irrevocably alienated their land, if they had full knowledge of what that trade involved, but it is much more likely that some indigenous people would have alienated a part of their land, even in conditions of full knowledge, if they were reasoning from a context of a collective action problem.29 Suppose, for example, group A alienates a portion of its land, but just a portion, in exchange for some good, knowing full well that that portion is well and truly alienated from them. They have calculated however that they can afford to live without that land, since the goods that they have received in exchange will allow them to be more productive. That is to say, the calculation that they make is stable for them, and consistent with the maintenance of their way of life. Suppose however, that indigenous groups B, C and D make similar calculations and also alienate a portion of their land, perhaps even for guns, so that they can fight each other (let us imagine that they are historic enemies). The net effect of these transfers is to leave a significant portion of land in the hands of non-indigenous people, who, let us suppose, want it for their own (exclusive, private property) use, which – as I argued in section 2.2 – is incompatible with indigenous land use. Now the indigenous people find that their effect of their agreements is to make it impossible to pursue the semi-nomadic way of life that they had originally pursued, because the animals that they hunt are not available in adequate numbers. The net effect of many individual groups acting in this way is that indigenous people as a whole (collectively) are dispossessed of their land.

In the scenario above, we are imagining that there is no deliberate intent to dispossess indigenous people as a group: it is just the effect of many prospective settlers or strong settler desire, combined with the failure of different indigenous communities to solve their own collective action problem. I do not for a moment believe that this was what generally happened in the colonizing period, rather than
something more directed, but if it had happened like that, or some settlement happened like that, there are two things to be said.

First, one might say that there is no requirement that the negotiating group solve the collective action problem of the group that they are negotiating with. And it is not inevitable that a collective action problem will be solved. Sometimes people will just fail to solve collective action problems that they face.

Second, and somewhat in tension with the above, the fact is that, while each individual agreement may have been fair on its terms, the process as a whole did not serve indigenous people’s interests, and resulted in the transfer of resources which was radically unfair. This should lead us to raises questions about the fairness of the process itself and whether the colonial power, in their negotiations with each individual group, were exploiting a weakness on the other side. I do not mean that the failure to address a collective action problem is the same as exploitation, but I am arguing that a group (let’s say, the colonial power) may be exploiting the other sides’ failure to address a collective action problem. If this is true, then, there is something problematic about the transfer of land, when it occurs between collective agent E and collective agents A, B, C, and D, each of whom is in a collective action problem with one other. This would not be true of a case where the prospective settlers were multiple groups and the prospective sellers were multiple groups, and the outcome of all these negotiations ended up benefiting some of these groups more than others. It is, however, be the case when one collective agent negotiates with multiple collective agents from a situation where the single agent is able, and does, exploit the individual weaknesses of the multiple agents. The resulting agreement is not just harmful to them in the sense that it is not in their interests. It is an instance of wrongful harm, because the colonizing party is exploiting a collective action problem, rather than seeking to reach a fully reciprocal and mutually advantageous agreement.

Let me turn now to the general question of the moral permissibility of the settlement of the English as the result of negotiations regarding the transfer of land. In section 2, I described indigenous people as having a legitimate interest in their collective self-determination and as having a particular relationship to land. It is
consistent with a group’s self-determination that they may want the power to re-shape the rules, alter the background context, and make changes to their institutions and practices that would ultimately change their culture. This suggests that a contract between two equal parties, negotiating in full knowledge of the preferences and activities of the others, would be legitimate. However, in the discussion of the scenarios above, I suggested that we should be skeptical of formal equality as conferring legitimacy on various treaties, and may want to introduce more substantive conditions. To wit: if these contracts are justified in terms of collective self-determination, the substantive content of the agreement must also be consistent with each group’s self-determination. This would mean that the agreement must be such that indigenous people retain sufficient control over the collective conditions of their existence, including the fundamental resources that they need to live. It is reasonable to expect that there would be some transfer of land, some settlement of land, consistent with the continuation of the way of life of indigenous and non-indigenous people. But this must be limited in scope – its limits defined by the relationship that indigenous people have to the land, and their desire to continue in a semi-nomadic way of life, at least for as long as this is their preferred way of life.

5. Domination, Jurisdiction and Communities

In the section above, I argued that there is a distinctive territorial wrong implicit in certain kinds of colonial projects: settlement on land previously occupied (in a capacious, not culturally biased sense of that term) is wrong. This is denied by Ypi, who claims that she is “neutral” on that question; and argues that the wrong of colonialism can be explained without recourse to assumptions about rights over land.

In her article, Ypi identifies the basic wrong of colonialism as belonging “within a larger family of wrongs, the wrong exhibited by associations that deny their members equality and reciprocity in decision making.”

Drawing on Kant, she emphasizes the need for fully inclusive rules, for equal and reciprocal justice, and an equal basis of interaction in establishing the rules governing everyone.
This addresses one of the main problems with colonialism: that it embedded objectionable political relations of domination and subordination. But it also fails to pick out anything specific to colonialism as a wrong: colonialism shares this wrongful element with many other political systems. Political domination is experienced also by people who live in an authoritarian society, who are excluded from representation in government. This argument fails to distinguish between the wrong experienced by Indians living under the Raj and that experienced by the British working class, in the same period (circa 1850s), who were also denied political voice. Yet we might think that there is something fundamentally different about the injustice of colonialism and the injustice of political domination within a country.

The view of reciprocal justice trumpeted by Ypi implicitly relies on a sharp division between jurisdiction and settlement, with the former being theorized as requiring full inclusion. In section 2, I offered reasons to suggest that unilateral settlement was morally wrong, but now I want to question the adequacy of the solution she does offer, the solution of full inclusion and full equality, as a way to address political domination. Whether this is adequate depends crucially on whether it applies to groups or to individuals, and the terms of control (over land) that is vested in them.

To see why the first matters, let us return to the example of English settlement in the New World, occurring among indigenous groups that were heavily reliant on nomadic hunting or on slash-and-burn agriculture. Suppose, as Ypi suggests, the English land there to establish a settlement but at the same time they offer to establish a political authority that is fully inclusive of all individuals, indigenous and non-indigenous alike. Suppose also that the people have, in addition to individual identities, some collective identities and attachments: members of indigenous groups identify with their particular group and the settlers identify with their origin group and each group is accustomed to exercise some form of collective self-determination over their lives. As in the example earlier in the paper, let us suppose that some of the cultural practices, especially as regards land tenure and use of land as a resource, of the settler and indigenous groups are mutually
incompatible. Ypi’s view gives no normative weight to these identities and attachments, to the collective self-determination of indigenous people, or their rights over the land. Her focus is solely on the character of the political order that includes both indigenous people and visitors: it should be based on “equal and reciprocal terms of interaction, … [which] ensure that members retain equal authorship of associative rules and that such rules are established on the basis of reasons accessible to them all, and make certain that reciprocity in communication continues to hold”\textsuperscript{32}.

Ypi claims that the indigenous people have an \textit{obligation} to enter into a political community on equal terms with the visiting group, the English.\textsuperscript{33} But what grounds that obligation? Why isn’t it legitimate for indigenous people simply to ask to be left alone, to claim that they want to be self-governing over their own lives, in their own community, on their own territory, just as they were before? Why does the mere arrival, uninvited, of some other group, put them under a moral obligation to enter into a political association with them?

If an inclusive political community is the remedy for the injustice suffered by indigenous people, it is noteworthy that indigenous people have rejected it whenever they have had an opportunity to do so. Indigenous communities in North America have protested not only their exclusion and marginalization from economic and political power in the political institutions that have been created, but also their inclusion in it. In Canada, the most successful mobilization of all indigenous groups occurred against the Canadian Government ‘White Paper’ which promised to Canadian indigenous people equal political status and equal rights, thus denying the legitimacy and authority of the political structures that mattered to them.\textsuperscript{34}

Ypi is aware that this is unacceptable to almost all indigenous people, and backs away from pressing the full implications of her position in two ways. First she is ambiguous on whether the equality and reciprocity that is fundamental to overcoming colonialism is group-based or individualist. On the one hand, in line with an individualist interpretation, she argues that the need for political institutions applies whenever the two groups are in contact, without any suggestion that the patterns of life of the indigenous people on their land should get any kind of
primacy. She writes: "whether it be rules of trade or rules regulating the movement of people (including their right to settle) an equal and reciprocal basis of interaction is one that ensures everybody will have a say that the claims granted to one group are proportionally equal to those recognized by another." The terms ‘everybody’ and ‘proportionally equal’ both suggest that she is applying an individualist (population) principle: this is clear in the term ‘everybody’ but proportionality too suggests individualism, because it implies that decision-making should be proportionate to group size. However, elsewhere she describes the deliberation as occurring among groups. She refers to "territorially distinctive collective agents" as engaged in deliberation: when such agents “first make contact with each other, they have a duty (a) not to treat each other with hostility, (b) to communicate respecting criteria of equality and reciprocity, and (c) to set up a political association that reflect such criteria in the rules it generates”. This is still somewhat ambiguous, since it seems that in some cases, it was not communities making contact with each other, but one community making contact with the other, which may have been unwanted; in which case the political association that automatically emerges is one that is non-consensual in its origin.

The second place where she steps back from the full implications of her argument is in terms of the associative obligation that she says indigenous people have. Although she claims that all are under a moral obligation to enter into equal and reciprocal relations in an inclusive political authority, she also says that this obligation cannot be coercively enforced. Everyone, she says, has “a duty to join a political association guaranteeing equal and reciprocal terms of interaction to its members” and this means that indigenous people, too, are morally required to enter into this association. But she does not think that their consent should be forced: associative offers cannot be coercively enforced, even if the refusal to associate is itself a moral wrong.

This is puzzling: we often think that people can be required to perform X if they are morally obligated to perform X; it is unusual to also require their agreement. Showing that something is morally required may be thought sufficient to
explain that it can be legitimately compelled. What is the additional role that consent is playing here?

Perhaps, though, Ypi thinks that there is something particular about political authority that requires consent. “[F]or an associative offer to be considered effectively equal and reciprocal,” Ypi writes, “the consent of those on the receiving end is required”. 40 This position is obviously more congenial to indigenous people than forcible association, since it seems that they can veto an inclusive political association. Ypi, however, thinks they are wrong to do so: “to say that consent is required does not mean that there would be no wrong involved in withholding it. Residents might be committing a moral wrong in refusing fair and reciprocal offers to associate”.41 Although coercion is not permitted, indigenous people are committing a moral wrong in wishing to be left alone, though the precise nature of that wrong is not clearly explained.

At this point, it is noteworthy that Ypi, who, until now, has avoided discussing territorial rights, on the grounds that her theory is ‘neutral’ on whether they are justified, at this point argues that rights over territory cannot be conclusively justified until they are agreed in a reciprocal and inclusive political association. The “residents’”(indigenous people’s) enjoyment of the benefits of the resources and land that they live in is now described as “provisional” and “unilateral”; rights over land will only be “conclusive” when they are recognized in a legitimate, fully inclusive and reciprocal (larger) political association.

This introduces an additional complicating factor in her theory. In her account, indigenous people do not have any primacy over their territory, and their rights to land (including whether they have them at all, and what they consist in) can be conclusively justified only once they enter into political relations with the visiting group. This means that the indigenous group, who Ypi calls ‘residents’, cannot rightfully object to the influx of settlers on their land. Yet, we saw early that this is deeply problematic: if the settler group is demographically large enough, or if its numbers are continually supported by successive waves of migrants who are from the same culture, then, in the context of incompatible practices especially in relation to land, the indigenous group’s way of life, and manner of interacting with
the land will be severely undermined. The flow of settlers in any numbers is inconsistent with the indigenous group’s self-determination, with their ability to control the vital background conditions in which they live. Perhaps this explains the indigenous group’s motive in entering in a political community with the incoming English: unless they do, they cannot be secure in their control over the land, which is a vital background condition to their way of life. Perhaps this will force the indigenous people into associating with the new arrivals. But the control that they would have in the ‘inclusive’ political association favoured by Ypi is certainly sub-optimal from their viewpoint: they have deeply divergent interests, decisions presumably would have to be made by majority vote, since unanimity is not a practical decision-making rule, which means that indigenous people may find themselves outnumbered and outvoted in this fully inclusive, reciprocal political association (with people they’d prefer not to be in association with at all).

What all this means is that Ypi’s account is not after all ‘neutral’ on territorial rights. She is assuming that indigenous people have no prior authority over the land and are forced to negotiate on equal terms with the new arrivals with respect to land, despite the fact that they are very unequally situated with respect to it. And if this is so, she needs to make a stronger claim about territorial rights, viz., that they are indefensible. She needs to show that arguments of the kind I outlined in part 2 do not work, because, otherwise, she cannot explain the terms of the political association or even why the indigenous group would agree to an association that denies them self-determination.

My view, by contrast, is based on both non-domination and self-determination, by which I mean self-determination on land over which indigenous people have special claims of the kind outlined above; and any inclusive political order that both sides agree to would instantiate equality and reciprocity along group-based lines. It would ensure that the indigenous group (or their legitimate representatives) has real decision-making power, including on the question of where and how settlement takes place. It would respect from the outset the central claim that indigenous people have entitlement over their land, their territory, because the agreement or consent of indigenous people, who have authority over
their territory, would be required. It is crucial that the political institutions are not simply inclusive in form, but that they are created because both parties see the need for it. It is not impossible to envisage cases where this would happen. Suppose for example that indigenous and non-indigenous people engaged in mutually beneficial trade, which, over time, develops in ways where both parties see the need for the creation of some kind of over-arching or new political authority to regulate that interaction. In that case, we might say that the migrants haven’t just arrived and set in motion this train of events whereby they altered the indigenous community’s way of life, as on Ypi’s account: on my account, the incoming group would have to be invited.

6. Implications: Reparations
Different remedies are suggested by the different analyses of the wrong of colonialism. On the domination account of the wrong of colonialism, the appropriate remedy for colonialism is the end of forms of domination. This is because domination is experiential: it is addressed once it is ended. To address the wrong of colonialism, on Ypi’s and Lu’s domination/structural injustice account, it is necessary to remove the institutions and practices of unequal, unjust and nonreciprocal political institutions. To some extent, this was what happened in the de-colonization period of the 1950s and the 1960s especially, which was characterized by the rapid demise of the European empires, the dismantling of the colonizer’s forms of political authority and conferral on the population the liberty to create forms of political authority for themselves. It is true that many of the political institutions that were thereby created have not been fully equal and reciprocal, and problems of domination persist in different forms; but these are different species of the general problem that many relations – political, economic and social – are unequal and nonreciprocal, rather than a problem of colonialism per se. This of course does not preclude compensation for their earlier political suppression. However, the central remedy for the wrong of settler colonialism according to the domination analysis preferred by Ypi is the creation of equal, inclusive and non-dominating forms of political authority inclusive of indigenous
and non-indigenous peoples alike. That would meet her Kantian “ideal of [a]
political association that respect[s]. the claims of all those involved. ”43 I have
already raised the objection that in many cases this is not the preferred solution of
indigenous people, who resist forcible inclusion, even on equal terms.

The most obvious remedy for the wrong of taking land is restitution: to
restore the land to its original inhabitants. In colonies where the agents of imperial
authority –members of the governmental and bureaucratic apparatus of the
imperial state – were present in limited numbers, sufficient to effect control,
restitution could be realized simply through de-colonization. Once control was
relinquished, the members of the imperial centre could go, and often wanted to go,
home. In cases where colonialism is relatively recent, and the perpetrators are still
living on the land, the land should be returned. The colonizers were not at liberty to
settle there in the first place, and they should return the land to the original
occupants.

In many cases, however, colonialism persisted over many generations, and
the descendants of the original colonizers have grown up on the land, have
developed relationships in that place, and are attached to the place, and it forms the
background context of their lives. Restitution of the territory is not possible, at least
not without committing further injustice. This follows from the idea of legitimate
expectations, which is not a first occupancy principle, but focuses on the
development of morally significant relationships and commitments over time.
These may eventually apply to the children of the perpetrators of serious injustice.

This does not mean that injustice has been superseded, in Waldron’s
unfortunate turn of phrase.44 If a wrong occurred, it should be righted. The problem
is simply that in cases of multi-generational land settlement, there is no clearly just
remedy for that wrong. In the corrective justice literature, the typical mechanisms
for addressing wrong when restitution is impossible or undesirable are:
compensation, giving something of an appropriate value but not the thing itself, and
apology; both of which should of course be pursued.45 It may also be possible to
offer some limited forms of restitution of indigenous rights on public lands, and/or
in conjunction with the recognition of the use-rights of other claimants in cases of
indigenous fishing rights and/or hunting rights. However, tragically, none of these are adequate to the wrongful harm that was done.

My account of the wrong of colonialism, especially settler colonialism, has, then, different implications from the account offered by Ypi and other domination theorists. I do not dispute that at the heart of both forms of colonialism were deeply unequal and nonreciprocal relations between colonizers and colonized. It was, however, not confined to this. The taking of territory was a further wrong, which, in a multi-generational context, can only be partially remedied. Whatever we might think about the relative weight of these two wrongs, it seems that the second – the taking of land and settlement on it – is not easy to remedy properly or fully, and so this wrong is likely to have irreversible effects.

**Conclusion**

In this paper I have presented reasons for thinking that the settlement of people on land that was part of the colonial project was itself a wrong, because it failed to recognize the significant relationship between people and land that was in place. I have argued that already settled people are related to each other and to land in morally significant ways, and that they require control over the land if they are to enjoy robust forms of self-determination.

At the heart of this paper, then, is a distinction between two uses of the term ‘settled’ or ‘being settled’ on the land, which have very different moral implications. The term is often used to describe people who are (1) settled on land, typically for many generations (even if the said ‘settlement’ takes the form of a semi-nomadic existence); and (2) members of a settler society, in which groups settle as groups on land or territory, with a view to reproducing their culture on the land. It does not apply to individual migrants who move to a place as individuals and seek to join the society there.

Implicit in my argument is that the first type of people enjoy some entitlements to the land, especially control over it, because they are connected in morally relevant ways to the place in question. It is a background context of their projects and plans, they are often affectively attached to it, and it’s integral to their
collective self-determination. This is not the case with settlers of the second kind. On my argument, part of the wrong of colonialism was to forcibly settle the land, and to thereby disable the previous group from being able to exercise their entitlements. This should be no surprise: that this needed a separate kind of justification from that deployed to justify political sovereignty was recognized by the original colonizers who tried to advance distinct arguments to justify this aspect of the colonial (imperial) project. If we theorize domination as its central, wrongful element, we will fail to understand fully the extent of the wrong of colonialism, its unique feature, and the difficulties in remedying it. The domination account, in short, fails to fully appreciate how wrong colonialism was.


An alternative account is provided by Kok-Chor Tan and Daniel Butt, both of whom separately list (a) the denial of political sovereignty (b) exploitation and (c) cultural imposition as definitive of colonialism and as their wrongful components. Kok-Chor Tan, Colonialism, Reparations and Global Justice” in Jon Miller and Rahul Kumar, eds., Reparations: Interdisciplinary Inquiries Oxford: Oxford University Press, 2007, 280-306.; Daniel Butt, “Repairing Historical Wrongs and the End of Empire”, Social and Legal Studies, vol. 21, no. 2, 2012, 227-42; Daniel Butt, “Colonialism and Postcolonialism”, The International Encyclopedia of Ethics, Edited by Hugh LaFollette, Oxford: Blackwell Publishing, 2013, 892-898. My argument could also be directed at theirs since neither considers as a direct wrong or injustice the taking of territory.

2 John Rawls, A Theory of Justice (Cambridge, Mass.: Harvard University Press, 1971), pp. 48-55. For an example of how colonialism serves this role, see Christopher Wellman, in his discussion of secession, where he rejects some accounts and accepts others, based on an analogy with colonialism, which he assumes we all recognize as unjust. See Christopher H. Wellman, A Theory of Secession. The Case for Political Self-determination (Cambridge: Cambridge University Press, 2005), 55.

3 Ypi, “What’s Wrong with Colonialism”, p. 162.

4 Ypi, “What’s Wrong with Colonialism”, p. 172.

5 It is not clear whether what counts as an injustice is grounded in a more fundamental appeal to relations of domination and subordination, or whether it presupposes (but does not explain)
what counts as an injustice. In a list of injustices associated with the historical practice of colonialism, she lists: “military conquest and political subjugation, enslavement and exploitation of subjugated populations, the annexation of territories, expropriation of property, and resource extraction. Catherine Lu, “Colonialism as Structural Injustice: historical responsibility and contemporary redress”, *Journal of Political Philosophy* vol. 19, no. 3 (2011), 261-281 at p. 262. This leaves a little unclear whether the taking of land and resources in a context free of relations of domination and subordination counts as an injustice, or whether it did so only in the historical context, where it was framed in a discourse of superiority/inferiority and occurred in the context of pervasive relations of domination and subordination.

6 This could be regarded as a friendly amendment to one of the central claims of Lea Ypi’s account, for I accept that the colonialism was intrinsically unjust and that political domination was wrongful. For the opposite view – the claim that colonialism was only contingently unjust – see Laura Valentini, “On the distinctive procedural wrong of colonialism”, *Philosophy & Public Affairs*, vol. 43, no. 4 (2015), 312-331.


8 Hugo Grotius, *The Rights of War and Peace*, eds., Jean Barbeyrac and Richard Tuck Indianapolis: Liberty Fund, 2005 [1625]. In the context of jurisdiction over the sea, Grotius distinguished territory from property, arguing that both rights were associated with possession, but that territorial rights involved the effective exercise of political power. See Book 2, ch. 3, s. 13, para 2 for the use of that distinction in relation to law of the sea.

9 In his chapter on the ‘Legacy of Rome’, Anthony Pagden distinguishes three different meanings of the term ‘imperium’, all stretching back to Roman times and connected to the meaning of the term in the context of the Roman Empire. He notes that the root sense of the word is to order or command, but it was also used to convey the following meanings: 1. A limited and independent or ‘perfect’ rule, 2, a territory embracing more than one political community, and (3) the absolute sovereignty of a single individual. Anthony Pagden, *Lords of All the world, Ideologies of Empire in Spain, Britain and France, c. 1500-c.1800* (New Haven & London: Yale University Press, 1995), pp. 14-17.

10 It also requires that we examine entitlement to land and settlement in abstraction from political authority relations. We normally distinguish between property and territory. On the usual (redistributive liberal) formulation of that distinction, where territory is the geographical domain of jurisdictional authority, and property is the rules that a legitimate political authority establishes, most disputes over land are internal to the political community and negotiated at the political level. Here, I am concerned with a prior issue whether settlement itself, in a way that is not authorized by the initial collective agent (the indigenous group), is wrongful, and for that, we need to establish that the indigenous group has entitlement over the land. For good discussions of the distinction between property and territory, see Tamar Meisels, “Liberal Nationalism and Territorial Rights”, *The Journal of Applied Philosophy*, vol. 20, no. 1 (2003), 31-43; Tamar Meisels, *Territorial Rights, 2nd edition* (Dordrecht: Springer, 2009); David Miller, “Territorial rights: concept and justification”, *Political Studies*, vol. 60, no. 2, 252-268; Margaret

11 I am assuming this for the sake of the argument. The actual population of the New World was deeply contested, with native peoples making higher estimates, and the settler populations, lower estimates. Whatever the truth, it’s clear that these places weren’t literally empty or unpopulated.


14 Many expectations don’t give rise to claims of justice: there are many choices that are made against a background of relatively stable rules and hence expectations, but when these change, we don’t necessarily think that people have a claim of justice to the *status quo ante*, or to compensation. This is true for example of people investing in skills in the labour market.

15 Lea Ypi has challenged this line of argument in her (unpublished) paper, “Structural Injustice and the irrelevance of attachment”. She asks an important question: why do we think the Sa’ami should have special rights over reindeer (herding and associated lands) and not the English aristocrats who claimed, on the very same ground (of attachment to a way of life), that they should be permitted to hunt foxes over farmers’ fields? The answer (that she doesn’t consider fully enough) is that the Sami could not continue their lives in anything like its recognizable form if there were no reindeer, or if they were prohibited from herding them, but the class-based lifestyle enjoyed by the English fox-hunting upper class could continue without the ability to hunt foxes. It is not integral to that way of life. One might also develop an argument that that class-based culture is arrogant and objectionable, but I do not rely on that assessment to argue that they are dis-analogous.


17 This phrase was used by Anthony Ashley Cooper, 7th Earl of Shaftesbury in a lecture in July 1853, and was often repeated in the early Zionist period. However, it is not clear that it meant that the land was empty of people – since the phrase ‘a country without A people’ suggests, not that there are no people living there, but that the people lack the unifying features for collective agency, or collective self-determination.

18 Of course, a perspective that gives more prominence to the interests of animals, and their place-related interests, could offer grounds for objection to human migration even in these conditions. I am grateful to Sue Donaldson for pressing me on this point.

20 The issue of scope of territorial rights is extremely complex. I have discussed them elsewhere, in REDACTED.


26 First, there is the question of what counts as a resource in the first place, which is not ontologically given: a resource suggests an instrumental relationship with a thing; and so is culturally laden (different things are resources for different people). Dworkin is aware of this as a problem, and attempts to overcome this problem of identifying what is a resource by arguing that any good that is conceived by anyone as a resource should be placed in the market. This tends to get many things in the market, although it’s not at all clear that we have a culturally neutral method to individuate resources: in Kolers’ example, in cases where one group wants the wood, another the whole (living) tree, and another the bark, how do we individuate resources in a fair and culturally neutral way? Avery Kolers, “Justice, Territory and Natural Resources”, *Political Studies*, 2012, (vol. 60, no. 2), pp. 269-286. I’ve argued for this point also elsewhere REDACTED.


28 Of course, the claims that people make to land have to be subject to empirical examination: we would need to be confident that people are indeed interacting in normatively significant ways with land, and have developed legitimate expectations with respect to them. We should not rely on a simple assertion that people care about land x, y, z, without some empirical examination of the centrality of that place to their lives. I have argued at more length elsewhere.
that a group occupancy principle can yield heartlands but not precise boundaries. See REDACTED.

29 Some version of a collective action problem is typically involved in cases where the exercise of individual rights undermines collective rights. Indeed, in some cases, groups or governments have employed this as a method to dispossess indigenous people of their land. This was the strategy adopted by the Pinochet regime in Chile between 1973-1990, which privatized the Mapuchean people’s land, thus leaving it open for individual Mapucheans to sell their holdings to non-indigenous people and multi-national corporations. The net effect of the exercise of individual rights was to undermine the collective good: presumably even those Mapucheans that sold their land did so because they wanted the money, not because they wanted to convert the land into non-indigenous hands. It is easy to see what is wrong with that example of a collective action problem: it was engineered by the government, and the indigenous people were disabled in important ways from solving the problem.

30 Lea Ypi, “What’s wrong with colonialism”, p. 163.

31 For an excellent discussion of Kant on this matter, which emphasizes the relationship between provisional right and duties to establish rightful authorities, see Anna Stilz, “Provisional Right and Non-State Peoples”, in Katrin Flikschuh and Lea Ypi, eds., Kant and Colonialism (Oxford: Oxford University Press, 2014), 197-220.

32 Ypi, “what’s wrong with colonialism”, p. 177.


35 Ypi, “What’s wrong with colonialism”, p. 175.

36 The ambiguity between an individualist and collective versions of the relevant agent in Ypi’s work is discussed in Valentini, “On the distinctive procedural wrong of colonialism”.

37 Ypi, “What’s wrong with colonialism”, p. 175.

38 Ypi, “What’s wrong with colonialism”, p. 179.

39 This is explored through an example of individual associations. “Suppose Susan has a duty to form an association with Lina. And suppose that for them to work out what the right terms of association would be, they should deliberate with each other. Suppose Lina refuses to engage in deliberation. It would be wrong for Susan to assault Lina in order to make Lina talk to her. This would corrupt the reciprocity of deliberation, and compromise Lina’s equal authorship of the terms of political association. This is not to say Linda is not committing a moral wrong in refusing to associate with Susan.” Ypi, “What’s wrong with colonialism”, p. 179.


42 Of course, other wrongs associated with colonialism – like violence, and human rights violations that accompanied it - might require different and separate remedies.

43 Ypi, “What’s wrong with colonialism”, p. 175.


45 I have discussed all three in the context of expulsions in REDACTED.