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Episode 25. Anna Stilz on Occupancy Rights

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MATT PETERSON: This is Public Ethics Radio. I'm Matt Peterson.

One of the tragic side-effects of the civil war in Syria is that it has produced a mass migration of refugees and other displaced populations. For some, it isn't even the first time they've had to abandon home: The U.N. recently reported that 71,000 long-term Palestinian refugees have fled Syria for Lebanon.

These repeated movements are going to pose problems in the region for years or even generations to come, as the reshuffling of Palestinians illustrates.

Any attempts to tackle these problems are going to need to address the issue of occupancy rights. That, why do we have the right to live in a particular place, and what are we owed when those rights are violated? If the Palestinians have a right of return, what's the basis of that right? Does it hold the same for second-generation refugees as for first?

Our guest today, Anna Stilz, has a theory of occupancy rights that attempts to settle these questions. She spoke to Christian Barry in Canberra.

CHRISTIAN BARRY: Welcome to Public Ethics Radio. Today we're going to be discussing the issue of occupancy rights with Professor Anna Stilz of Princeton University. Anna, welcome to Public Ethics Radio.

ANNA STILZ: Thanks. It's really great to be here. Thank you for having me.

CHRISTIAN BARRY: So, Anna, one of the things that's characteristic of much of the world is that there are significant populations who have, at some stage, been expelled from territory, been removed either forcibly in various ways. Obviously settler countries have that character, but even countries which aren't settler countries have dispossessed people from land and so on and so forth. That's typically been represented as claims over territory, claims to land. But you think that, in a way, this misses some of the more fundamental issues at hand. Can you explain what you have in mind?

ANNA STILZ: One way I like to describe the kind of right at stake in these cases of removal or dispossession, expulsion is as a right that's in some ways distinct from a property right. So, I like to think of it as what I call an occupancy right.

And I think an occupancy right is a right to reside permanently in a particular area, a particular geographical space, and also to use that space for social and cultural and economic practices, and not to be removed from the place or interfered with in your use of the place in a way that might undermine those practices.

But I think of that right as something that's not at all really much like a private property right. If you think about some different property-like rights that might apply in roughly the same GPS location, you could think about my property right over my house and the lot on which it rests, and that's a kind of familiar right. I can rent my house. I can repaint my house whatever color I want. In that same location, the United States or the state of New Jersey also claims the right to make law, including property law, that regulates my use of my house.

But I also think there's a third kind of right that people, even people who aren't property owners, like homeless people or children, have. And that's this right of permanent residence and use of a place for social, economic and cultural practices. And that's what I call an occupancy right. And that's what I think is often violated in these removal or expulsion cases.

CHRISTIAN BARRY: So, one of the issues seems to be, understanding occupancy rights in this way, is that people who have a claim to occupancy— and perhaps you could explain a little bit about what you think generates this claim to occupy a particular space— those rights get infringed by other groups, who then, themselves, often also claim to have occupancy rights in the same territory.

So how do you actually make way for these different types of understandings of rights to occupy the same space?

ANNA STILZ: So I should probably kind of describe a little bit more my view on what grounds occupancy rights. My basic idea is that we have occupancy rights because people have what I call located life plans. So these are projects and relationships and commitments that are very fundamental to the structure of their lives and that have a kind of geographical situatedness to them.

I sort of came to this view about occupancy rights in just reflecting on cases of removal. You might think of cases in the U.S. context. We removed a number of different Indian groups in the process of the war for the West. The Cherokee removal's a very famous example. And when you kind of reflect on these cases, what's striking to me is the way in which removal destroys the lives that these people had built for themselves.

So I think that the basis of an occupancy right is the establishment of what I call these located life plans in an area. You can kind of think of several different categories, sort of important or salient categories of located life plans. So economic practices are a big one. People often carry out economic practices that have a, a geographical or ecological or infrastructural component to them. So the Sioux Indians hunted wild buffalo; modern Americans work in kind of white collar jobs so they depend on office space and internet access in familiar ways.

You can also think about membership in cultural or religious or other kinds of associations; those usually actually have an infrastructural component to them, so you

need access your church or your meeting house in order to carry out those life plans. People also have personal relationships with friends, family members, colleagues that are important to them and it's important to them to sort of sustain those relations with the particular people that matter to them. And since it's really difficult to kind of draw bounds around a community such that you don't break any cultural personal ties in moving people, often sustaining those relationships means sustaining people's spatial situation to a significant degree.

And, finally, a lot of groups, especially indigenous groups, actually have projects that kind of depend on an attachment to a particular locality. So, you might think of the way the Taos Pueblo Indians actually worship at a specific lake called Blue Lake, or the Black Hills have spiritual significance for the Sioux Indians or the highland culture of Switzerland, specifically focused on the Alps. So it's these kinds of life plans that on my view establish what I call this occupancy right and a right to permanently reside somewhere and to conduct social, economic and cultural practices there.

But one of the difficult things with settler societies is that as generations pass, new people come to form these kinds of life plans and connections to a territory and so one of the most difficult kind of problems in adjudicating this issue is thinking about how to weigh the claims of newcomers who often have innocently established located life plans of much the same kind that the expelled victims may have had. How do we balance their claims against the claims of the victims or their descendants who might have been expelled?

CHRISTIAN BARRY: So, one way I can imagine certainly going is to say that, insofar as we look at sort of the modern historical record, some groups might claim that they have an obvious decisive thing in their favor, which is that they were wrongly expelled and that, however innocently the people who now reside there have come to form these located life plans, there's this historical shadow of the removal, the unjust removal, of this other group, which would give them sort of an overriding claim to occupy in cases of conflict.

ANNA STILZ: I think sometimes that's a reasonable argument but not always. I think there are some cases of past expulsion in which there's no historical shadow of the kind that you, that you are referring to.

So, a couple of cases that at least intuitively to me seem to lack this historical shadow element are cases of the grandchildren of American or Israeli Jews whose grandparents were expelled from eastern Europe. Or the children and grandchildren of Germans who were driven out of much the same area at the end of the war, too.

So in those cases, I don't want to suggest that there are no compensatory claims. I think that there may well be claims to compensation for the harm that the expelled people suffered and there may well be claims to compensation for property, say, that was wrongly compensated.

But I doubt that the compensatory claims extend to a right of return on the part of these grandchildren, say, of these groups, to go back to their grandparents' homes in, in Eastern Europe. Why is that? Why do they lack this right of return?

Well, in my view, I think it's because they've established pretty flourishing located life plans in the places where they now live. They have flourishing social, economic and cultural practices either in Israel or America for the grandchildren of the expelled Jews, or in Germany for the grandchildren of expelled Germans. So I think where that is the case, these kinds of claims of return are superseded. And I think that is often the case, though not always.

CHRISTIAN BARRY: And there are many groups who certainly seem to be expelled then who don't flourish, so you treat them as a different category not only with respect to having a right to occupy some territory where they can build a social life together but a particular territory.

ANNA STILZ: I think where rights of return remain a matter of concern over generations is in cases where the expelled descendants don't have flourishing located life plans in the way that we think that they should. You might think of Palestinians who are still living in refugee camps and who lack basic citizenship and other civil rights in many of the countries to which they've been expelled. So in these kinds of cases, I think that we believe they may well retain a claim to return in a way that children of expelled Germans and Jews do not.

Now one of the tricky issues is to explain what is the nature of this claim. Where does it come from and how does it get kind of passed down through generations in this sort of case?

CHRISTIAN BARRY: So if what really makes the difference between the descendants of the European Jews and the Palestinians is that one group is flourishing and one isn't, then perhaps it seems a little bit difficult to see why the Palestinians have a claim to a particular territory rather than a general claim to flourishing, right? One way of looking at the idea of occupancy rights, generally, is that people have a right to flourish in some way or to have the conditions for flourishing and that particular territory is only very contingently to being able to do that.

ANNA STILZ: Yeah. So I think there's a lot of truth in what you're saying there. So I think it's often correct that by the second or third generation, the connection to a particular territory is much weakened than it is for the first generation of expelled victims who actually had lives that unfolded on that territory.

So when we're talking about grandchildren who've never seen their grandparents' villages in Palestine, it's often harder to say that their own located life plans depend on residence in those villages which are often completely transformed from what they would have been when their grandparents lived there.

So I think it's correct that, in the case of third generation Palestinians, what's most pressing about their situation is the lack of a generally good place to live, one where they can form flourishing located life plans.

But I think that we can hold the state of Israel sort of specially responsible for fulfilling this kind of general claim on the part of Palestinians to a sufficiently good place to live. And that's because their expulsion of their grandparents in 1948 contributed to the, the situation that the third generation descendants face today, living in refugee camps without access to a permanent place of residence. There may be

more than one way that Israel could go about discharging this sort of duty to the Palestinians, especially given that the particularity connection is weaker by the time that we're talking about the third generation.

So it may well be that one way for Israel to fulfill this claim would be to allow the third generation descendants a right of return to Israel. But another way might be to resettle them in the West Bank and Gaza with special compensation for the harm of displacement and help in rebuilding a new life. Or even to find a territory in some other place that would extend them this right to engage in social, cultural and economic practices and allow them a degree of political autonomy.

CHRISTIAN BARRY: So one reason why I can imagine that people were really attracted to the property right model of thinking about territorial rights is that when you think about a right to occupy a territory as something that could be passed on, something that endures, and thereby also presumably something that can be claimed indefinitely in the future if it's infringed. This creates formally, at least, very strong incentives against disoccupying, right, off

ANNA STILZ: Right.

CHRISTIAN BARRY: So I could imagine a worry that if occupancy rights are the sort of things that are fragile, such that if you displace people if you're lucky, they'll do well, and then they won't have an occupancy right at all. There might be some concern that this is a process of sort of evergreening

ANNA STILZ: Right.

CHRISTIAN BARRY: It's injustice. And you could imagine even that it's not so, so far from the psychology of settlers that at the very least they know they're giving their grandchildren a better life.

ANNA STILZ: Right.

CHRISTIAN BARRY: So it

ANNA STILZ: Creating facts on the ground.

CHRISTIAN BARRY: Yeah.

ANNA STILZ: Right. There is a kind of perverse incentive worry, I think. So I'm going to say a few things kind of in response. So, one is that on my view the first generation, I think, almost always has a right of return and first generation settlers are almost always under a duty of repatriation. It's

CHRISTIAN BARRY: Even if those settlers themselves were somehow really innocent of wrongdoing? If they were under duress or entering the territory?

ANNA STILZ: There are some settlers that are really wrongdoers in the sense that they're voluntarily participating in a process that they know or reasonably ought to have known entails infringing on other people's rights. But there are other kinds of settlers that have classes of excuses or justifications for what they've done.

A common kind of excuse we might think of is duress or ignorance. So we might think of the convicts who were transported to Australia, to settle Australia by Britain. So they settled only under duress or in cases of ignorance. We might think of kind of indentured servants who signed up to go to America. They were often illiterate, they had no idea. And then in even stronger cases, the cases of possible justification, cases like Jewish refugees who were on ships and were, you know, denied entry into, to many countries after World War II and who really had nowhere else to go.

I think wrongdoers are clearly under a duty to repatriate and to restore the territory to the victims that they expelled. Often I think excused settlers are under that duty, too, where it's reasonably possible for them to repatriate once they become aware of, of the wrongful nature of the process in which they're involved.

And even in cases of justified settlers, who may be refugees that have nowhere else to go, they may not be under a duty of repatriation, but I think that they're still under a duty not to expel the current occupants, and if they have, to restore occupancy of the land to the ones that can come back.

So even in the case of Jewish refugees, I don't think there was a justification for expelling the Palestinians. I think, instead, the refugees ought to expect to share the territory where they have a pressing claim of necessity. And if they did expel victims then I think that they have a special responsibility to compensate and to allow them to return and to recreate their lives.

CHRISTIAN BARRY: So you mention the idea of sharing territory. And one of the things that seems very appealing about the idea of an occupancy right is that it doesn't have the type of exclusivity that is typically built into property rights. But, of course, one of the reasons why people find occupying a certain territory valuable is partly related to having more particular rights and particular things

ANNA STILZ: Right.

CHRISTIAN BARRY: and even in cultural spaces. And you can even see various kinds of conflict over Jerusalem right now which seems to be

ANNA STILZ: Yeah.

CHRISTIAN BARRY: could be read as an instance of two groups who have occupancy rights but there's a sense in which they're vying over certain type of rights over territory, not a particular property right but a kind of right. So that even with respect to occupancy rights which allow for a kind of sharing, there seems to be a lot of potential for conflict.

ANNA STILZ: These cases become really pressing where you have two groups of people, more or less, who have ways of life that entail resource use of a territory that's often incompatible. And in that kind of case, I think that the groups are under a duty to share in a sense which involves actually making concessions about their ways of life in order to allow the other group to enjoy at least core elements of their cultural practices.

That may mean that we can't, if we have to share the territory with a distinctive kind of group that has ways that are very different from ours, our cultural practices may not go unscathed. But both groups may be under a duty to accept a kind of resource use framework that means that both need to make certain concessions in order to allow some of each group's practices to be fulfilled.

CHRISTIAN BARRY: We're discussing settlement, expulsion and corrective justice with Anna Stilz and we're going to take a brief break and be right back.

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CHRISTIAN BARRY: Anna, one of the differences between occupancy rights and territory rights is the sort of non-transmissibility, inheritability of occupancy rights. Now, I wonder, though, how you think we should deal with the claims that people who not only conceive of themselves as having been wrongfully removed from the territory but also wrongfully removed from things to which they actually had rights or territorial claims.

ANNA STILZ: So maybe I should say something a little bit about the question of heritability. We can think of an occupancy right as something like a very limited kind of property in the Earth's surface. The fact that I reside here and use this area for my social, cultural and economic practices gives me some claim to this thing.

But the way I tend to think of an occupancy right is as an entitlement that's kind of much more limited than a private property right that we're familiar with in most existing legal systems. So it wouldn't convey all the kind of incidents of control that property generally conveys. It wouldn't necessarily convey rights to income from the land, rights over the natural resources. It wouldn't necessarily convey a discretionary right to exclude under all circumstances. And I also don't conceive of an occupancy right as necessarily being heritable.

It could be contingently heritable if the next generation kind of forms located life plans in the same place that their parents did. But it's not like a private property right where, you know, it's a matter of sort of making a will and kind of bequeathing it to the person of your, of your choice.

Now, I don't know if I have a knockdown argument for why occupancy rights shouldn't be heritable. There's a kind of familiar historical entitlement mode of thinking that might be inclined to see them as heritable. But I guess I could say sort of two remarks about why I don't have the intuition that it should be heritable.

One is it just doesn't seem to me that it's part of the concept of a property right that it necessarily be something that we can pass on indefinitely to future generations in this way. So, a lot of theorists, I think, see inheritance as something that really ought to be regulated within a distributively just framework of law and if inheritance is going to create, you know, kind of tremendous class inequalities or disparities between people, it seems like we ought to regulate inheritance rather than kind of biting the bullet and accepting that.

And the second reason I don't necessarily sort of see occupancy rights as inherited is that if you think of a case like the case of the Huguenots who were driven out of France under Louis XIV. They were French Protestants and many of them fled to the United States, so let's say that I'm a descendant of a Huguenot who has grown up in America. Now, if this occupancy right is heritable, then according to this theory I preserve the right to return to the land of my Huguenot great-great-great grand ancestors. So I preserve a right to return to residency in France.

But it's hard for me to see how I would have any interest in such a right. So, I've no connection to France. None of my activities or plans or commitments or anything in the structure of my life depends on living in France.

So if we accepted that kind of view of occupancy, we would be, I think, committed to some really counter-intuitive consequences about, you know, allocating these rights of residence. And it's just hard to see why we would have interest in doing that.

CHRISTIAN BARRY: One of the features of the way in which you understand occupancy rights is that the strength of a person's claim, or even the existence of any particular person's claim, to occupancy rights in a particular place may depend very much on facts about him or her or the group to which he belongs.

And you mentioned indigenous peoples and how it may be the case that because of their beliefs, because of their practices, there may be a type of claim or tie to a particular territory which is different in kind from what other groups do.

I can imagine other groups sort of seeing this as, in a sense, unfair. So just this very contingent fact about them that they, I don't mean to be dismissive, but that they think that, you know, they built a monument to their god here

ANNA STILZ: Right.

CHRISTIAN BARRY: It gives them a claim to perhaps not exclusive use but this territorial that, somehow, that that claim is taken to be on a higher footing than the claims of other groups whose occupancy rights are also infringed, although they can't plausibly claim that they have a right to any particular piece of territory.

I have in mind sort of, in Latin America, there's a big sort of split, in a way, between the groups who are the people without the landless movements who don't typically make a claim to a particular territory, although they do make a claim to a kind of territory that they can use in particular ways to sustain of life, and indigenous groups which are really making particular claims to particular territories.

And although there's been a conflict of various sorts with all these groups, people seem to be, in a way, more receptive to the indigenous claims in a way that they are to the landless claims which is, I can imagine, being seen as being problematic.

ANNA STILZ: Yeah. Well, I certainly think that landless people have a claim that is in many ways just as urgent and sometimes even more urgent than the claims that some indigenous peoples may have. The peculiar feature in question, though, is whether their claim has the particularity that indigenous peoples have.

So, a landless person may have a very urgent claim to some decent place to live and a place where they and their communities can enjoy flourishing life plans. But it may not matter as much to them that that be the place that their ancestors came from as it might to an indigenous people, especially if they have religious or cultural practices that are very much tied to that locality.

And I think I am going to say about indigenous peoples that whether or not they have persisting claims depends not on their indigeneity but on the nature of their particular kinds of practices. So if it really is fundamental to their religion that they worship at Blue Lake, that may ground a kind of ongoing claim on the part of the Taos Pueblo.

In some other cases, for example, in the Cherokee Indians who were displaced from Georgia to Oklahoma, they, I think, are very much like the American and Israeli Jews and descendants of the Germans in that they have a very flourishing life now in Oklahoma and the mere fact that they were once native to a different region of the United States and that they might have made a plausible or facially arguable claim to have been the indigenous inhabitants of that region, I don't think that adds any strength to their claim to return because they don't really have ongoing religious or cultural practices that are essentially tied to that locality.

So, I use the example of indigenous people just as a kind of familiar case where these locality kinds of claims often occur but it's possible that nonindigenous peoples could sometimes have locality based projects of, of the right, of the right kind.

I will say one thing that troubles me in this area, which is that I really do want to distinguish fundamental religious or cultural projects that really play a kind of key organizing role in people's lives from kind of just a mere desire to return to the territory of one's ancestors.

So, another example in this area is that of the Serbs who are deeply identified with the territory of Kosovo because a famous battle in their national history was fought there in 1389. And for many Serbs that grounds a claim for the Serbian people to reoccupy that territory because of this identification. But Serbian national projects and the kind of located life plans of most Serbs are not really located in the territory of Kosovo, they're located in the territory of Serbia.

I am not very sympathetic to the claim that this desire or even this identification grounded in national narrative is sufficient to give a person or a group of people the claim to reoccupy an area of land. I think there is a difference between kind of desires or identifications and quite comprehensive religious or cultural projects that play a central feature in people's lives and may be tied to a locality in a certain way.

CHRISTIAN BARRY: Good. So, so far we've been discussing things, in a way, from the point of view of what the people ought to do who find themselves in a position that they are a member of a settler society. I wonder if you could say a little bit about what groups whose rights are flouted are permitted to do.

Quite aside from not thinking that they ought to take on more cost in order to address the needs of people they've expelled, often it's quite the opposite. So the idea that the settler societies would owe anything to the societies that they've displaced is very far from their minds.

So this raises the question of what groups who lack occupancy rights which, in your view, I take to be a very stringent, fundamental right, what they then have a right to do. What ought a group whose claims are simply being consistently flouted, what can they permissibly do?

ANNA STILZ: So, this is a really good question and it's a difficult question, I think. When you read, say, in the just war literature, for example, that many people believe that it's a just cause. It's maybe one of the more just causes we can think of, that people who do currently occupy a territory could fight to defend themselves against dispossession of the kind that we've just been describing, right?

If it's permissible for people to defend their current occupancy, perhaps by use of lethal force, against prospective settlers or attackers who seek their displacement, then we have to think about whether people who have been displaced are permitted to reclaim the territory, also perhaps by use of lethal force.

I think particularly in cases where the expelled victims are not just suffering for lack of their particular land but are suffering in an absolute sense — they're refugees, they lack a decent place to live at all — there I do think they may well have the right to reclaim their territory by force if it involves displacing wrongful settlers.

Things become more difficult once we start thinking about second and third generation descendants of settlers who are themselves innocent. So, the wrongful settlers may have forfeited their right of occupancy by engaging in certain kinds of activities, but the innocent descendants of these people often won't have.

And I think that in these kinds of cases it may make it less permissible to reclaim territory, especially particular territory one just has a special kind of attachment to, by lethal force. There may be, though, cases as you say of necessity where it's permissible to take territory from people who are otherwise innocent because one is oneself in urgent need. I think that may well be the right answer much as, if I'm in urgent need it may be permissible for me to take your property in some kinds of circumstances.

CHRISTIAN BARRY: Anna Stilz, thank you for joining us on Public Ethics Radio.

ANNA STILZ: Thanks so much for having me.

MATT PETERSON: Public Ethics Radio is produced by me, Matt Peterson. And Christian Barry is our host. The show is supported by the Centre for Moral, Social and Political Theory at the Australian National University, and the Carnegie Council for Ethics in International Affairs.

Thanks for listening.