Whose Home Is It? Reflections on the Palestinians' Interest in Return

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This paper investigates whether Palestinians have an interest in return rather than a mere interest in settling within the territory of a state that provides them with civil rights and economic opportunities. The paper establishes the following three claims. First, Palestinians have some interests in return to the territory of Palestine-Israel. Second, many of these interests can be satisfied (at least to some extent) by establishing an independent Palestinian state in part of historical Palestine. Third, some of these interests are similar to the interests that may justify an analogous right of return for Jews to the same land.

> *"When I went to the UN in 1974, the Zionists organized a demonstration with banners reading, 'Arafat go home.' I said, 'This is exactly what I want; this is what I came here for.'"*[1]

> *"The Palestinians are amazing. All people of the world live in their respective places except for the Palestinians ... the place lives in them."*[2]

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1 Yasser Arafat, *A Discussion with Yasser Arafat*, 11 J. Palestine Stud. 3, 8 (1982).

2 Danny Rubinstein cited in Salman Abu Sitta, The Right of Return is Sacred and Legal Palestinian Right ... and a Possible One, http://www.palestinereport.org/sect/refs/sitta.html.

INTRODUCTION

Many Palestinians believe that respecting their "right of return" is tantamount to respecting the basic human right to return to one's home. At the same time, many Israelis are convinced that respecting that right of return is tantamount to their being expelled from their homes. Regrettably, it is only when Palestinians or Israelis instinctively associate the right of return with either the right to return home or with the fear of being expelled therefrom, respectively, that they pay any attention to the question of just what the right of return is and what it entails for the lives of Israeli Jews and Palestinians. The thrill of discussing the issue in an academic setting derives precisely from the fact that such a forum releases the discussants from irresistible political and personal passions, in particular from the fervent hopes and colossal fears that characterize the political discourse on this issue (or at least so I hope).

But the politics surrounding the right of return are not only passionate; they are enigmatic. The traditional right-wing support of historical rights and the traditional skepticism concerning these rights on the left both break down in this context.[3] Some left-wing activists who traditionally oppose historical rights become enthusiastic advocates of the Palestinian right of return, while right-wing activists who are typically sympathetic to historical rights oppose it. In this respect, the debate over the Palestinian right

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3 The most notable advocate of historical rights is, of course, Robert Nozick. *See* Robert Nozick, Anarchy, State and Utopia (1974). Many people noticed the relevance of Nozick's defense of property rights to the issue of land rights. Nozick's critics from the left who explore the ramifications of this theory to conflicts over land typically try to demonstrate that historical rights are more flexible than assumed by Nozick. *See, e.g.*, David Lyons, *The New Indian Claims and Original Rights to Land*, 4 Soc. Theory & Prac. 249 (1977); John Simmons, *Historical Rights and Fair Shares*, 14 Law & Phil. 149 (1995); Jeremy Waldron, *Superseding Historic Injustice*, 103 Ethics 4 (1992). As opposed to the mechanical and inflexible rigidity of Nozick, leftist critiques of historical rights insist that these rights "must bend to the needs and interests of human beings," Lyons, *supra*, at 271, or that "historical rights can change, shrink, or expand, and so be sensitive to passing time and changing circumstances," Simmons, *supra*, at 170. In contrast the Palestinian leading organization advocating return, *Al-Awda* (the Palestinian Right to Return Coalition), justifies the right of return partly by emphasizing "the sanctity of private ownership." Statement by the Right of Return Defense Committees, http://www.al-awda.org/old/ror_defense_committees.htm (Feb. 9, 2002).

of return differs dramatically from the similar (although less familiar) debate concerning the rights of Germans expelled from Eastern Europe in the wake of World War II.

Traditionally both the advocates and the foes of the Palestinian right of return believe that one of the primary factors in determining the justifiability of return is the matter of responsibility or culpability for the plight of the Palestinians.[4] This paper takes a different route. The most neglected aspect of the issue of the Palestinian right of return is the question of whether the Palestinians actually have an interest in return. This point is crucial given the prevailing conviction that rights and interests are strongly interrelated and that interests are often relevant to the just resolution of conflicts.[5] The aim of this article is to fill in this gap by investigating whether return is conducive to Palestinian interests. More specifically, the article distinguishes between seven general interests that may be served by return: the interest in annulling a wrong; the financial interest; the interest in restoring the individual's physical environment; the interest in restoring the individual's social environment; the interest in restoring the individual's civic-political status; the interest in a return to "formative territories"; and the interest in Palestinians settling in the most appropriate site.

Before embarking on my investigation, I must first set forth an important

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4 For the Palestinian position, see, for example, Rashid Khalidi, *Observations on the Right of Return*, 21 J. Palestine Stud. 29, 30 (1992). In an interview devoted to the Palestinian right of return, Edward Said also emphasized the asymmetry in the responsibility of Israelis and that of Palestinians. Edward W. Said, The Palestinian Right of Return: An Interview with Ari Shavit, http://www.one-state.org/articles/2000/shavit.htm. The political activist Salman Abu Sitta described it in more dramatic terms:

> There is nothing like it in modern history. A foreign minority attacking the national majority in its own homeland, expelling virtually all of its population, obliterating its physical and cultural landmarks, planning and supporting this unholy enterprise from abroad, and claiming that this hideous crime is a divine intervention and victory for civilization. This is the largest ethnic-cleansing operation in modern history.

Salman Abu Sitta, The Return of the Refugees; the Key to Peace, *at* http://www.arts.mcgill.ca/mepp/prrn/papers/abu-sitta/ (Nov./Dec. 2000). On the other hand, Efraim Karsh devotes much of his arguments against recognizing the right of return to demonstrating that Palestinians, rather than Israelis, are responsible for the 1948 tragedy. *See* Efraim Karsh, *The Palestinians and the "Right of Return,"* Commentary (May 12, 2001), *at* http://www.wzo.org.il/en/resources/view.asp?id=252.

5 On the relation between rights and interests, see Alon Harel, *Theories of Rights*, *in* Blackwell Guide to the Philosophy of Law and Legal Theory (Martin Golding & William Edmundson eds., forthcoming 2005).

proviso: Some believe that the Palestinian right of return is grounded in principles of international law.[6] The international community as a whole has an interest in states fulfilling their international obligations, and this interest may give rise to certain rights. This article does not investigate this question. Rather, it is devoted exclusively to a philosophical inquiry into the Palestinian right of return and the interests that underlie it.

I. THE RIGHT OF RETURN

The term "right of return" is used in different ways and has different meanings. The extensive (and often passionate) use and abuse of this term in political discourse by its advocates as well as by its opponents inevitably lead to ambiguities concerning its precise content. It has often been noted that while the idea of "return" has been central to the Palestinian national narrative, there is no authoritative Palestinian definition of what the scope of this right is. Instead, the right of return has been used in a wide range of senses, from the right of all Palestinians and their descendants to return to their former homes and places of origin in Palestine to the return of some Palestinians to some limited part of Palestine.[7]

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6 For an overview of the international law treatment of the right of return, see Eyal Benvenisti, The Right of Return in International Law: An Israeli Perspective (2003) (paper presented at the Stocktaking Conference on Palestinian Refugee Research, Ottawa, Canada, June 17–20, 2003). *See also* Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 Mich. J. Int'l L. 1091, 1120 (1998); Vic Ullom, *Leonard V. B. Sutton Award Paper: Voluntary Repatriation of Refugees and Customary International Law*, 29 Denv. J. Int'l L. & Pol'y 115 (2001); Ruth Lapidoth, *The Right of Return in International Law, with Special Reference to the Palestinian Refugees*, 16 Isr. Y.B. Hum. Rts. 103 (1986).

7 *See* Khalidi, *supra* note 4, at 29; Menachem Klein, *From a Doctrine-Oriented to a Solution-Oriented Policy: The PLO's Right of Return 1964–2000*, *in* The Palestinian Refugees: Old Problems-New Solutions 46 (Joseph Ginat & Edward J. Perkins eds., 2001). One of the most important limits on the scope of the Palestinian right of return (now accepted by many Palestinians) is that this right can be exercised exclusively or primarily within the territory of the Palestinian state rather than in Israel itself. *See* Khalidi, *supra* note 4, at 36. Of course this is controversial, and some believe that no concessions with respect to the destination of the "returners" should be made. Amnesty International and Human Rights Watch adopted this latter position. A policy statement published by Amnesty International stated, "Amnesty International supports the return of the exiles *to their own homes or the vicinity of their own homes*, where this is feasible." Amnesty International, The Right to Return: The Case of the Palestinians Policy Statement at sec. 8, http://www.badil.org/Law/Human_Rights/AI_Policy.htm (Mar. 30, 2001).

The term "return" implies departure, and consequently, the right of return is premised on departure. The departure/expulsion need not be the departure/expulsion of the person who is claiming the right; instead it may be grounded in the departure/expulsion of his or her biological ancestors or even "cultural" ancestors. Having a right to return to the territory of Israel differs, therefore, from having a right to immigrate to Israel and settle there. The Palestinians' right of return is grounded in the fact that they (or someone they are directly descended from) departed or were expelled from Palestine, and thus they can claim a right of *return* as opposed to the mere right to settle in the territory that is now part of the State of Israel. Hence, denying that the Palestinians have a right of return does not imply that many or even all Palestinians do not have a right to settle in Israel. The latter right could be grounded in the Palestinians' right to have their poverty alleviated — a right that has nothing to do with departure/expulsion from the land — or in their right to family reunification. Yet none of these rights should be classified as a right of return because none is grounded in departure/expulsion.

The distinction is, arguably, an overly academic one. What Palestinians seek is to be granted the right of return in order to have the opportunity to live decent lives in a society that provides them with economic opportunities and civil rights.[8] Hence, instead of drawing academic distinctions between the right of return and the right to settle in the territory of the State of Israel, one ought simply to facilitate the return of Palestinians to their homes.

While I have sympathy for the pragmatic motives in raising this objection, there is ample evidence that the Palestinians care deeply about this distinction. What they seek is not simply to be granted the right to settle in their homes, but to be granted this right *for the right reasons*.[9] Ultimately it is the *Palestinians'* political discourse that presupposes the distinction, and respect for Palestinian demands is what requires us to investigate the distinction. This observation implies that, in drawing the distinction, we ought to examine the political discourse of both advocates and opponents of the Palestinian right of return. The criteria for determining what the content of the right of return is ought to be drawn from the writings of

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Human Rights Watch endorsed a similar view but omitted the words "where this is feasible." *Id.*

8 I discuss this objection later in *infra* Part II.C.7.

9 This is not unique to the right of return. Rights are reason-dependent demands, and the proper identification and recognition of the reasons underlying them are important for realizing this right. *See* Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 Law & Phil. 247, 262 (2003).

political activists, the speeches of political leaders, and the convictions of Palestinians and Israelis.

Let me summarize this discussion. First, the Palestinian right of return is characterized by the type of justification underlying the right to settle in Israel. The justification for the Palestinian right of return is based on the departure or expulsion of the Palestinians from the territory of the current State of Israel. Other reasons for recognizing a right *to settle* in the relevant territory that are not directly related to a prior departure/expulsion (for example, the immense poverty of some Palestinians) cannot provide the basis for a right of return, although they may be employed to alert people to the urgency of the demand to return.[10] Second, the right to return to Palestine is a distinctively Palestinian right. It is founded on certain facts of their history, and it is often regarded as a constitutive component of Palestinian identity.[11] These observations help to explain the importance of the territory of Palestine in this context and why other territories cannot be offered as an adequate substitute for Palestine.

II. DO THE PALESTINIANS HAVE AN INTEREST IN RETURN?

A. Introduction

This Part investigates the interests Palestinians have in return. The reader may find the very posing of the question demeaning. Palestinians struggle courageously to be granted such a right. They may be wrong and misguided in this struggle; but how can one question their interest in having it? How can one judge what the actual Palestinian interests are without being justifiably accused of being paternalistic and dismissive? Section B below attempts to

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10 The characterization of the right of return as a right premised on departure is not devoid of difficulties. The justification for the right of return need not be logically or conceptually related to departure. One of the justifications often offered for the Palestinian right of return is grounded in the cultural importance of Palestine to the Palestinian people and its centrality in the Palestinian tradition. For a discussion of the importance of cultural affiliation with a territory and the rights it generates, see Chaim Gans, The Limits of Nationalism 97–123 (2003). Yet, as the Greek obsession with Atlantis demonstrates, people develop a cultural affiliation with a land without their or their ancestors' having ever departed from that land. It seems to me that Palestinian cultural affiliation with the land is often regarded as a justification for a right of return (rather than merely for a right to settle in the territory of Israel), even though cultural affiliation is not necessarily related to departure/expulsion.

11 *See* Khalidi, *supra* note 4, at 31–32.

provide an answer to these disturbing questions. Interests differ from desires, and having a desire for *A* does not imply having a corresponding interest in *A*. Here, I explore the link between rights and interests and demonstrate why an investigation of interests is crucial for normative purposes. I conclude by conceding that it is possible that the Palestinians have a right of return that is not conducive to their interests, but that the investigation of the interests at stake is, nevertheless, of value. Section C then lists seven different interests that may ground a right of return and examines the potential ramifications of these interests for the scope and content of the right. Section D summarizes the discussion and draws some tentative conclusions.

B. Why Substitute Interests for Rights?[12]

Political discourse uses the term the "right of return" rather than a term invoking interests. It is natural for the reader to wonder why one ought to substitute the language of rights with the language of interests. I shall argue that resolving the question of whether there is an interest in return — and, if there is, what it is — can help resolve the dispute surrounding the Palestinian right of return.

Rights and interests are intimately related to one another. Joseph Raz described the relationship as follows: "'X has a right' if and only if ... an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty."[13] Interests, as the term is used here, are not normative-free concepts. Maintaining that *X* has an interest in *A* is an objective statement founded on the conviction that the granting of *A* is conducive to *X*'s well-being. The judgment that *A* is conducive to *X*'s well-being is ultimately founded on certain premises of what the good life consists of. People may desire things that are not in their interest to have, and having a desire does not necessarily mean that the person has an interest in having that desire satisfied. Moreover, people often desire things under the wrong description, i.e., in a way that does not correspond with their interests. Palestinians may desire to return to a certain territory from which they or their parents departed, i.e., Israel; but their true interest may be to settle in a country that provides them with economic opportunities and civil rights. Fulfilling their desire to return may be conducive to their interests

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12 I am grateful to David Enoch for his very important comments on an earlier version of this section.

13 Joseph Raz, The Morality of Freedom 166 (1986).

not because return per se serves those interests, but because it would enable them to enjoy economic opportunities and civil rights.

While rights are grounded in the interests of the rightholders, respecting a right does not always promote the interests of the rightholder. In order for a right *R* to be a right of an individual *X*, it should be the case that *typically* respecting *R* is conducive to the interests of *X* or generally to people in her position. The assertion that people have a right to property is based on the conviction that owning property is conducive to people's interests. Nevertheless, it is possible that some owners would use their property in ways that are detrimental to their interests and that, therefore, owning this property is not in their interests.[14] The right of these owners to property is not conducive to their interests; instead its force is derived from the fact that a right to property is conducive overall to the interests of most property owners.

Therefore, *X* can have a right to *A* in one of two cases. Either *X* has a (core) right to *A* if *X* has an interest in having *A* and that interest is sufficiently weighty to justify the imposition of duties on others. Alternatively, *X* may have a *derivative* right to *A* — a right that is not founded on an interest in having *A*, but on a more general right. The more general right has to be grounded in the rightholders' interests, but not each and every right derived from that general right is *conducive* to the interests of the rightholders. Thus, for instance, while a person does not have an interest in producing bad art or in publishing petty gossip, both activities are protected by rights. The right in the first instance is a derivative of the more fundamental right of artistic expression, while the right in the second case is a derivative of freedom of speech.

This analysis implies that considering whether the Palestinians have an interest in return is perhaps important for determining whether they have a right of return. The existence of interests is highly relevant in establishing whether the Palestinians have a non-derivate right of return. Attempting to establish that they have a derivative right of return requires identifying and establishing a core right from which the former right is derived, and this, I believe, is not an easy task. Finally, the presence or absence of interests is crucial not merely for establishing the existence of a right of return, but also for examining the reasonable scope of a compromise that promotes and respects the interests of both sides. At the same time, this analysis also implies that even if the Palestinians have no interest whatsoever in

14 For a discussion of the relationship between rights and interests, see Raz, *supra* note 13, at 180; Harel, *supra* note 5.

return, they may still have such a right.[15] Therefore, the discussion in this Section has established two crucial points: the relevance and imperativeness of considering the Palestinian interests in return, on the one hand, and the fact that the existence of a right of return does not necessarily entail an interest in return, on the other hand. Section C identifies seven interests that, arguably, may be served by granting Palestinians a right of return.

C. The Interest in Return

1. The Interest in Annulling a Wrong

The right of return is typically understood to be a remedial right. It is founded on the conviction that a primary right of the Palestinians (the right to live peacefully on one's land or, alternatively, the right to return to one's home immediately after departure/expulsion) was either (unjustifiably) violated or at least (justifiably) infringed. Much of the heated debate among Israelis and Palestinians centers on the attribution of guilt and responsibility. Jewish Israelis often attribute responsibility for the plight of the Palestinian refugees to the Palestinian leadership (for encouraging the departure of Palestinians from their homes during the 1948 Israeli War of Independence) or to Arab states (for refusing to integrate the refugees into their societies), whereas many Palestinians believe that the Israelis perpetrated an ethnic cleansing during the 1948 War and that the primary or even exclusive responsibility for the Palestinian disaster is to be attributed to the Israelis.[16]

The importance attributed to the issue of responsibility or culpability raises the possibility that the interest promoted by recognizing a right of return is that of public acknowledgement and institutional recognition that a terrible wrong was committed. Rashid Khalidi describes the conviction that the right of return has an expressive value and that its fulfillment conveys the public recognition that a terrible wrong was committed to the Palestinians as follows:

> Acknowledgement of the right of return is seen as an acceptance in principle of the fact that the Palestinians are a people with national

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15 It is possible, however, that while exercising the right under these circumstances is permissible, it is morally wrong.

16 The dispute over the responsibility for the plight of Palestinian refugees is both a factual and a normative one. For an attempt to present both the Israeli and the Palestinian points of view and to provide an outline of an acceptable solution, see *Concept Paper: The Palestinian Refugee Problem and the Rights of Return*, 6 Middle East Pol'y 167 (1999).

> rights ... and that a wrong was done to them as a people in preventing them from doing so. On the other hand, rejection of the right of return is seen as a denial of the Palestinian's peoplehood and rooted-ness in their homeland, and thus of the injustice they have suffered.[17]

There are at least two serious difficulties with this view. First, it seems that the remedies provided for the violation of rights typically promote the interests of the victim independent of the remedies' expressive value. A remedy's expressive value may be of great societal importance; but the importance of the remedy's expressive value in fact depends upon the prior judgment that the remedy is beneficial to the victims' interests. It could not, therefore, be the case that the justification for a remedy relies exclusively on its expressive value; it must rely on some independent interest of the victim. Second, there is nothing to suggest that acknowledging the right of return is the only or most appropriate way of expressing regret or conveying recognition that a wrong was, indeed, committed towards the Palestinians. If one has committed a wrong, one ought to publicly express regret and, sometimes, even be willing to be punished or voluntarily take on costs in order to convey publicly the seriousness of one's remorse and the sincerity of one's conviction that a wrong was committed. Both the expression of regret and one's willingness to bear self-imposed costs may be of great value both to society and to the victim. Yet recognizing a Palestinian right of return is not tantamount to an apology or public confession or even punishment of the perpetrators of the wrong. It is perceived by Palestinians to be a *remedy* for violating a primary right — the right of Palestinians to live peacefully on their land or their right to be permitted to return to that land immediately after departure/expulsion.

Remedies for a wrong promote the interests of victims in two ways. First, a remedy typically grants the victim financial or other tangible benefits. Second, by describing the benefit as a remedy or compensation, society furthers the victim's interest in public recognition of the fact that a wrong was committed against him or her, i.e., the victim's benefit is thereby linked to the prior commission of a wrong. The value of a remedy is not, therefore, exclusively of an expressive nature. Rather, its expressive value is the byproduct of the conferral of a benefit of independent value to the victim.

Take the following example. If I negligently harm a person, I am required to pay compensation to that person. Compensation consists of money, which promotes the financial interests of the victim independent of its significance

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17 Khalidi, *supra* note 4, at 31–32.

in providing public affirmation of the fact that a wrong was committed. By labeling this money compensation, society acknowledges that the money is linked to the prior commission of a wrong. This acknowledgment furthers a second interest of the victim, namely, the interest in public recognition of the fact that her right was violated and a wrong committed. But compensation can promote this second (expressive) interest only if the provision of a remedy also promotes the first type of interest, namely, an interest independent of the interest in public recognition of the commission of the wrong. Giving money to charity or to a person other than the victim of the wrong but who is equally needy will not, in the typical case, constitute a remedy. In the Palestinian context, therefore, it seems that the remedy of recognizing a right of return can promote the Palestinians' interest in public recognition that a wrong was committed to them only if the victims of the wrong (the Palestinians) have an autonomous interest in having a right of return.

Some advocates of the Palestinian right of return believe that only affirmation of a Palestinian right of return (or even acknowledgement that Palestinians ought to be permitted to return on the basis of this right, that is, that this right is not overridden by interests conflicting with return) will amount to recognition that a wrong was committed against the Palestinians.[18] This assertion has its roots in a serious misunderstanding since, "[a]s all lawyers know, not all wrongs can be remedied by reinstating the status quo ante. Third party expectations and other considerations merit respect."[19] Israelis who advocate the provision of compensation to the Palestinians typically ground their position in their conviction that wrongs were, indeed, committed, but that compensation is the appropriate remedy for these wrongs. They may be wrong in believing that compensation, rather than restitution of land, is the most appropriate remedy, but in opposing the latter, they are not denying the existence or seriousness of the wrong committed. Indeed, denying that a person whose hand I intentionally broke is entitled to having my hand chopped off and transplanted onto his body does not imply that I committed no wrong in breaking that person's hand.

2. The Financial Interest

Many Palestinians lost much or all of their property with the departure/expulsion from their lands during and in the aftermath of the 1948 Israel War of Independence. Moreover, the departure/expulsion was sometimes

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18 *See id.*

19 Benvenisti, *supra* note 6, at 8.

accompanied by additional costs and losses, for instance, the loss of potential income.

Calculating the monetary value of these losses is a complicated enterprise for both normative as well as econometric reasons.[20] Yet there is no need to embark here on such calculations, since the interest Palestinians have in the monetary value of their lost property and other damages they incurred due to departure/expulsion can be satisfied without facilitating return either by compensating Palestinians or even by granting them ownership of the lost property without facilitating return.[21]

3. The Interest in Restoring One's Physical Environment

Home, as some advocates of the Palestinian right of return are quick to point out, is not merely of monetary value.[22] One of the primary losses incurred by the Palestinians in the 1948 Israeli War of Independence was the loss of their proximate physical environment: homes, fields, trees, wells, and familiar landscape. In the moving descriptions penned by Palestinians, one often finds expression of the intense sense of loss stemming from their forced departure from their physical environment. In his poem *Diaries of a Palestinian Wound*, Mahmoud Darwish writes:

> We shall remain wakeful, we remember!
> Al-Carmel lives in us, like a wonder:
> On our eyelids lives Galilee grass,
> And the waters of our river do pass
> Through the texture of our native soil;
> We write no poetry, but we do toil:
> Twenty years before the June disaster,
> We lived in fetters, dear beloved sister!
> Those sad shadows that are darkling

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20 Some Palestinian researchers have made attempts to calculate these losses. For a useful discussion and references, see Terry Rempel, *The Ottawa Process: Workshop on Compensation and Palestinian Refugees*, 29(1) J. Palestine Stud. 36 (Autumn 1999).

21 For a comprehensive investigation of the private property claims in the Israeli-Palestinian context, see Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 Am. J. Int'l L. 295 (1995).

22 In taking the "Oath of Return," published in 9 Al Majdal 6 (Mar. 2001), *available at* http://www.badil.org/Majdal/2001/majdal9.pdf, thousands of Palestinians have vowed never to accept compensation as a substitute for the right of return. Exchanging what is perceived to be stolen land for money is considered by many Palestinians to be *bakshish*: a dishonorable bribe.

> Upon your eyes, to eliminate sparkling
> Happiness, are but our long, dark night
> Against which we continued to fight.
> When you sang, dear skylark,
> Palestine's dawn shone from the dark.[23]

The sense of a lost physical environment is equally intense in stories describing Palestinians visiting their lost homes. In his story *The Return to Haifa*, Rasan Kanafani describes a meeting between the Palestinian refugees Said and Safia who visit their home after a twenty-year absence and meet an old Jewish woman who now lives there. The old woman looked at them

> and then said slowly, "You are the owners of this home, and I know it." "How do you know?" asked Said and Safia together. The old woman continued to smile and said, "From everything. From the pictures, from the way you stood in front of the gate. The truth is that ... many people have come and started looking at their homes and entering, and every day I say that you probably will come."[24]

Kanafani describes how the Palestinian couple scrutinizes the living room and detects objects they remember from their past: At a certain point, Kanafani describes the emotional turmoil of Said who, after twenty years of absence, suddenly gazes at

> five peacock feathers that are standing in a wooden vase in the middle of the room, and he saw them moving in their unbelievably rare wonderful colors in the wind blowing from the open window. Suddenly, he asked rudely, pointing at the vase, "There were seven feathers. What happened to the two missing ones?"[25]

It is difficult to imagine anyone remaining indifferent to such descriptions. Indeed, works conveying such sentiments have been translated into Hebrew and have gained wide popularity amongst Israelis, due in part to the identification felt by European Jews who have visited their shattered former homes in Europe.

The strong interest people have in their contact with physical objects is recognized by legal systems and serves as the basis for much legal doctrine. A less dramatic case than the one discussed here is that of a contractual

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23 *See* http://students.bugs.bham.ac.uk/palestinian/ART-poetry.htm.

24 Rasan Kanafani, The Return to Haifa in the Other Rooms: Three Palestinian Novellas 93, 107 (Ami Elad-Bouskila ed., 2001) (Hebrew) (translation by author).

25 *Id.*

obligation to sell rare or unique objects. The standard remedy for a breach of contract is, of course, monetary damages. Specific performance in contract law is considered an exceptional remedy. In the terminology favored by the law-and-economics movement, this difference can be phrased by asserting that the Anglo-American law of contracts protects most contractual rights with a "liability rule," i.e., by compensating the victim of the breach, rather than by a "property rule," i.e., by enforcing the contractual obligation. Yet there is an important exceptional class of cases in which the preferred remedy for breach of contract is specific performance. Kronmann describes this exception as follows:

> If the "subject matter of [a] contract is unique in character and cannot be duplicated" or if obtaining "a substantial equivalent involves difficulty, delay, and inconvenience," a court will be more apt to compel specific performance. "The fact that such a duplicate or equivalent cannot be so obtained does not necessarily show that money damages are not an adequate remedy, but is a fact that tends strongly in that direction." Conversely, if the subject matter of a contract is such that "its substantial equivalent for all practical purposes is readily obtainable from others than the defendant in exchange for a money payment, this fact will usually in the absence of other factors be sufficient to show that money damages are an adequate remedy for breach."[26]

The intuition underlying this exception is straightforward. Contract law is designed to compensate the victim of a breach of contract for her loss. In cases in which the subject-matter of the contract is unique, this cannot be accomplished simply by monetary compensation. It is the object that was contracted for that the contractors care about, not its monetary value. The monetary loss in losing one's home is typically a much greater monetary loss than the loss of unique objects, but it is not the monetary value of the loss that counts. It is, rather, the uniqueness of the object lost — a loss for which monetary compensation is simply inappropriate. It is inappropriate not because of the difficulty entailed in evaluating the monetary value of the loss but because of the incommensurability of the loss to money and the inappropriateness of substituting return of the object with monetary remedies.

The argument for return based on the interest in restoring one's

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26 Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 357–58 (1978) (citations omitted).

physical environment suffers from two difficulties. First, memories of one's immediate physical environment (and, arguably, one's interest in restoring it when it is lost or taken) fade with the passage of time. Second, the physical environment itself transforms with the passage of time. Thus, memories of one's physical environment, on the one hand, and the actual physical environment, on the other hand, drift apart. Hence, it is not clear that the interest underlying the right of return under this argument can, in fact, be satisfied by return.[27] Let us investigate each one of these considerations.

Memories of one's physical environment become less and less concrete as time goes by. This is particularly true for the descendants of refugees whose "memories" of their "homes" are based on stories and legends told by their parents or other relatives. Note that the willingness to "return" to a physical environment one fantasizes about can be as intense as the willingness to return to one's actual environment. The longing to restore imaginary realities based on stories and myths can be as intense as the longing to restore actual realities grounded in one's life experience. The question is ultimately a normative one of whether "memories" based on myths and stories are normatively compelling. Does the intense longing to return to a place one has never been or of which one has only a dim memory constitute a basis for return similar in nature (even if weaker in strength) to the wish to return to a place that raises fresh and concrete memories of longing for the physical environment one has recently departed?

Jeremy Waldron supports the view that memories of one's recent past are a better justification for return than the faded memories of one's childhood:

> If something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the exercise of my autonomy is much less credible. For I must have developed some structure of subsistence. And that will be where my efforts have gone and where my planning and my practical thinking have been focused. I may of course yearn for the lost resource and spend a lot of time around the campaign for its restoration. But that is not the same thing as the basis of the original claim. The original entitlement is based on the idea that I have organized my life around the use of this object, not that I have organized my life around the specific project of hanging on to it or getting it back.[28]

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27 For a discussion of whether the interests in restitution of land can be sustained after a long departure from the land, see Tamar Meisels, *Can Corrective Justice Ground Claims to Territory*, 11 J. Pol. Phil. 65, 80–81 (2003).

28 Waldron, *supra* note 3, at 18–19. Waldron repeats and elaborates this argument

But Andrei Marmor is not persuaded:

> So I think that Waldron is right to maintain that merely yearning for a lost property, by itself, does not necessarily warrant the endurance of the entitlement to possess it. The conclusion is quite different, however, if the yearning is not just a sentimental matter, but something which is closely related to the person's individual or communal sense of identity. Now consider the Palestinian refugees, living in miserable refugee camps, being reduced to this degraded status by the very loss of their homes in Palestine. Could we think of any clearer case where the yearning for the lost property is important for the sense of identity of the dispossessed?[29]

Marmor's argument holds a fallacy that strengthens rather than weakens the case for the right of return. It is misguided to differentiate as Marmor does between the privileged yearning of an eminent Palestinian intellectual such as Edward Said to return to the palm tree of his childhood in the lucrative neighborhood of Talbieh[30] and the yearning of an impoverished refugee living in a camp to return to his village. Although addressing the economic needs of the impoverished latter is of greater urgency than restoring the privileged former to his property, it seems that the sense of identity of both has been equally shattered.[31]

The real question is whether Marmor-type considerations — namely, the

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in *Settlement, Return, and the Supersession Thesis* in this volume.

29 Andrei Marmor, Entitlement to Land and the Right of Return: An Embarrassing Challenge for Liberal Zionism 19 (unpublished manuscript, available on SSRN).

30 *See* Said, *supra* note 4, at 34.

31 The rest of Marmor's analysis suffers from a similar weakness. Although Marmor relies on an autonomy-based argument, he conflates it with economic and humanitarian considerations. Thus, for instance, in the context of developing his autonomy-based argument, Marmor says, "If I am expelled from my home, and reduced to a status of refugee, with very limited opportunities to escape such a predicament, the case for the endurance of my entitlement becomes much stronger." Marmor, *supra* note 28, at 19. This claim is misleading in an important way. If one is reduced to refugee status, there is a strong case for facilitating one's integration into civil society, but this ought not be equated with the case for the return of one's lost property. While the autonomy-based argument purports at least to justify return, the humanitarian considerations raised by Marmor suggest only that Palestinian refugees need to be provided with economic and civic opportunities but do not indicate where or how these opportunities ought to be realized. Tamar Meisels offers a possible explanation for the differential treatment of impoverished refugees relative to those of prosperous ones. She argues that

> [i]n many cases, while a group loses control over a territory, its members continue

interest in return generated by the yearning of (both privileged as well as impoverished) Palestinians for property that they have been dispossessed of for a very long time (and, in most cases, property possessed only by their parents)[32] — can ground a right of return similar in nature to that of Waldron-type considerations — namely, the interest of a person currently possessing the property or who has up until recently possessed it in being able "to alter it, use it and make it in effect part of [her] life."[33]

Waldron's analysis seems to vacillate between two possible options. Under the first option, it is the proximity in time to when the given object was part of the person's life that ultimately determines whether the object is

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> to reside within it or near it. They are unable to rebuild their lives around a different territorial asset, since they have nowhere else to go, and thus the lost asset, with which they are still in physical contact, continues to play a pivotal role in their lives. This is the group members who live in refugee camps ... .

Meisels, *supra* note 27, at 84. Under this view, poverty can, at most, serve as a proxy for the importance of the lost territory to one's identity.

The typical solution practiced in Europe in cases of ethnic cleansing is resettlement of the refugees in new states rather than facilitating return to the land of origin. *See* Benvenisti, *supra* note 6, at 6–7; Yoav Gelber, *The Historical Background and the Right of Return*, *in* The Palestinian Refugees: Old Problems — New Solutions 17, 30–32 (Joseph Ginat & Edward J. Perkins eds., 2001).

32 Marmor limits his analysis explicitly to first- and second-generation refugees. *See* Marmor, *supra* note 29, at 14. This is a qualification that most advocates of the Palestinian right of return would reject. I ignore it here because my argument addresses both the circumstances of first-generation refugees and similar circumstances that apply to their descendants.

33 *See* Waldron, *supra* note 3, at 18. In a private conversation, Marmor defended the position that the two types of interests ought to be protected in a similar manner. In his view, the fact that squatters have forced me out of my apartment and, as a result of being kept out my apartment for a long time, I have forgotten the color of the walls or the texture of the carpets does not imply that my right to my apartment has been weakened, nor that the squatters have a right to possess it. Similarly, my senility is no reason to deprive me of my property rights precisely as my neighbor's sharp memory is no reason to grant extra protection to his property rights. This objection only demonstrates that rights operate on the basis of broad generalizations. A person does not acquire or lose a right on the basis of her weaker or sharper memory, but when rights are designed, concerns founded on the temporal proximity of memories with regard to the object of the given right may be relevant. A person who maintains that the more remote a given yearning is from real-life experiences, the less it forms part of one's life, and, consequently, the less it warrants consideration should not rely on the particularities of the individual and the vividness of her memory of a specific lost object. She should, instead, justify the differential treatment of Waldron-type interests and Marmor-type interests on the different reasonableness of the emotional attachment to the object of yearning.

necessary for maintaining that person's sense of identity. Under the second option, it is the actual success or failure in leading an alternative life or in having an alternative "structure of subsistence" — one that does not depend upon the lost object — that is indicative of whether the lost object is, indeed, essential to the person's sense of identity. Marmor seems to accept the fundamental observation made by Waldron that one ought to distinguish between the mere yearning for a lost object and a yearning that "is closely related to the person's individual or communal sense of identity," but he regards poverty and the lack of an alternative life as a better indication of the importance of the lost object to the person's sense of identity.

Without taking any definite stance on these different positions, I wish to make three unrelated observations with respect to the Waldron-type and Marmor-type interests respectively. First, the very choice between classifying a person's yearning to regain her lost property as a whim or "sentimental matter" and labeling it a valuable commitment constitutive of her identity depends partly on one's sense of whether granting possession, under the circumstances, is just or not. For example, there are those who believe that in a prior life they lived in a different country or belonged to a different nation. Often, these people yearn to return to their homes or join the nation to which they believe they belong. Let us assume that I yearn to live in India because I believe that in a prior life I was Indian and I believe firmly that my having being Indian in that past life defines my identity. My yearning to immigrate to India is more likely to be classified by Marmor as merely "a sentimental matter" or, perhaps, might be classified as a psychiatric aberration, whereas Edward Said's yearning to return to his home in the neighborhood of Talbieh is more likely to be described as a yearning that is "closely related to [Said's] individual or communal sense of identity." My yearning to live in New Delhi may warrant sympathy, but it does not justify imposing a duty upon the Indian government to grant me a legal right to immigrate to India. Similarly, the sincere and deeply held conviction of the Black Hebrews that they are the true Israelites and, therefore, ought to be allowed to settle in Israel would most likely be rejected on the ground that their belief is merely "a sentimental matter." But such classification of their yearning seems to rest, in fact, upon the moral judgment that they do not have a right to settle in Israel. More generally, it seems to me that our tests for determining what constitutes a person's sense of identity are too dependent on our moral judgments concerning the justifiability of the demands made by that person. This conclusion implies that Marmor's argument is circular. First, one must establish that a person's yearning warrants a certain degree of normative force, and only afterwards, partly on the basis of this judgment, can one infer that the yearning is constitutive of

that person's sense of identity. Second, in contrast to Waldron-type interests, Marmor-type interests are (at least in the context of the Israeli-Palestinian conflict) a double-edged sword. Palestinians may find it particularly difficult to concede the force of these interests because they are the same ones that have been used to justify the return of Jews to that very same piece of land. The more the yearning for the lost property is detached from actual experiences of life in Palestine, the more it resembles the Jewish yearning to return to Zion, and the easier it is to justify the Jewish right of return to Israel. There may be differences in the circumstances that could justify the claim that the Jewish interests in return are less weighty or significant than those of the Palestinians, but many Palestinians want to differentiate sharply between the Palestinian interests in return to Palestine and the Jewish claim to such an interest. Marmor-type arguments blur this distinction in a way that would lead to a major concession on the part of Palestinians — one that most Palestinians would be reluctant to make.[34]

Third and most important, a fundamental aspect of the Waldron-type interests distinguishes them from the Marmor-type. Waldron-type interests in property are rigid interests. My interest in possessing an item that has constituted part of my life is an interest that typically can be satisfied only by possessing that particular item or an item that is almost identical to it. However, my interest in bringing to fruition my yearning to return to property I have never possessed (but, for instance, was possessed by my grandparents) is typically an interest that can be satisfied by possessing property that is similar but not identical to the one possessed by them.[35]

The reason for this difference seems to lie in human nature. When a

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34 Marmor could address this claim in three ways. First, he could bite the bullet (or perhaps deny it is a bullet) and concede that both Jews and Palestinians have an interest in return and turn to investigating whether the interests of the two can be reconciled or whether one overrides the other. Second, he could classify the Jewish yearning as a "whim" or an "obsession," while classifying the Palestinian yearning as one that is "closely related to the Palestinian sense of identity." Third, he could argue that it is only the conjunction of the injustice done to the Palestinians with the interest they have in regaining their sense of identity that gives rise to their right of return. Each one of these arguments deserves careful treatment and is bound to require a thorough investigation of the particularities of the Jewish and Palestinian histories.

35 For a similar claim in a different context, see Lyons, *supra* note 3, at 262–66. Lyons speaks not of remedies for violation of a right, but of property rights in general, and he demonstrates their instability and reliance on changing circumstances. Even Simmons, who is sympathetic to historical rights, asserts that, often, historical rights are not linked to the particular object lost. Historical rights can be to "particularized shares." Simmons, *supra* note 3, at 165–66.

physical object forms part of one's daily life, one typically develops greater sensitivity to that object and its specific qualities; it is, therefore, that object and that object alone that can serve the needs of that person. In contrast, when an object is removed from a person's actual sphere of experiences and it is only the remote memory of the object or merely stories concerning the object that provide the basis for the interest in acquiring it, it is typically easier to satisfy the interest in possessing it by means of a substitute. The proximity of Waldron-type interests to actual experience mandates a greater degree of rigidity in the remedies for the violation of property rights. At the same time, the detachment from the tangible concreteness of physical objects yearned for in the context of Marmor-type interests typically facilitates a degree of flexibility with respect to the remedies. Recent Zionist history is illustrative of this claim. Much of the Zionist settlement in Israel took place in areas that had never been controlled by Jews. Yet, for most Jewish Israelis, "return" to Ashkelon, a city not controlled by the ancestors of the Jews in ancient times, is an adequate substitute for return to ancient Jewish lands, partly because of its relative proximity to the ancient Kingdom of Judea.

Arguably, Marmor could raise the following objection. Although Marmor-type interests generally are flexible, this is not always the case. Some evidence suggests that the Palestinian desire to return is rigid. Edward Said expressed his yearning to return to *his* home in *Talbieh* and not to some equally lucrative neighborhood in Ramallah,[36] and the refugees born in the camps often express a desire to return to a specific village — the village from where their parents departed or were expelled. This, however, is inconclusive evidence of the rigidity of the Palestinian interest, for two reasons. First, it seems that even if there is, indeed, a yearning to return to the same house or village, this yearning is simply impossible to realize without committing grave injustices. Hence, even under the more demanding variations of the right of return, the right is subject to the concern that third parties not be deprived of their rights.[37] If the interest in return is rigid and

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36 *See* Said, *supra* note 4, at 34.

37 This principle was accepted by some Palestinian leaders as well as by Palestinian intellectuals. *See, e.g.*, Yasir Arafat, *The Palestinian Vision of Peace*, N.Y. Times, Feb. 3, 2001, at D15; Said, *supra* note 2, at 47–48. Human rights organizations that support the Palestinian right of return also stress this principle. Section 8 of the Amnesty International policy statement, *supra* note 7, asserts, "The rights of innocent third parties who may be living in the homes on the lands of the exiles, should also be taken into account." Section 18 reiterates this principle more clearly, stating,

> Where possible, Palestinians should be able to return to their original home or

cannot be reasonably satisfied other than by return to the same village or piece of land, the interest perhaps cannot be satisfied in any way whatsoever (other than by committing grave injustices), and we therefore are forced to resort to a second-best solution, namely, compensation. Second, as indicated earlier, not just any desire establishes an interest that this desire be satisfied. It is plausible that the Palestinians have a desire to return to the same sites from which they or their ancestors departed or were expelled but that their interests can be satisfied by facilitating return to places other than those sites. The temporal remoteness of their memories from the yearned-for land serves, in my view, to bolster the assertion that their interests are flexible and can be satisfied in a variety of ways.

Thus far, this section has examined the gap between the 1948 environment (the period in which most Palestinians departed or were expelled from Palestine) and the actual life experiences of Palestinians residing outside the 1948 boundaries and the difficulties this gap generates for the claim that return is conducive to the Palestinians' interest in restoring their physical environment. The case for return on the grounds that it is conducive to the restoration of the individual's physical environment is even weaker if we take into account the fact that the environment to which the Palestinians would return is radically different from the one they departed/were expelled from in 1948. The five feathers that Said left behind in 1948 and that he found twenty years later in the Kanafani novel are the rare exception rather than the rule. Return to the physical environment one regards as home is not a return to a specific geographical coordinate; rather, it is a return to the sights, smells, and colors of home. Ironically, the failure to acknowledge the enormity of the transformation of the yearned-for physical environment can be understood as the failure to comprehend the enormity of the wrong that Israel committed by erasing the Palestinians' history in a way that precludes not only the possibility of restoring the physical environment but also the possibility of documenting it.[38]

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lands. If this is not possible — because they no longer exist, have been converted to other uses or because of a valid competing claim — they should be allowed to return to the vicinity of their original home.

For a good discussion of the constraints imposed by the interests of third parties, see Chaim Gans' article in this volume.

38 Some may argue that recognizing that the passage of time erodes one's rights provides incentives for invaders either to commit ethnic cleansing or to prevent the return of victims of ethnic cleansing to their lands of origin. This article is devoted exclusively to the examination of which interests of victims of a past ethnic cleansing are served by return. It is possible that incentives that may affect the fate of future potential victims should be taken into account in designing legal institutions.

Finally, I should qualify my skepticism and specify the rare circumstances in which return could, indeed, be conducive to the interest Palestinians have in restoring their physical environment. First, it is not inconceivable that there are cases of elderly Palestinians who have real memories of a physical environment that is still in existence. Second, although the interest in restoring one's physical environment typically does not give rise to a right of return for Palestinians, it may give rise to other rights. Palestinians' memories and yearnings may give rise to a right to have their past documented, e.g., a right that the names of their villages be reused and that their history be respected.[39] Hopefully, readers of this article ten years from now will be surprised to learn that at the time of its writing, in 2004, no single museum devoted exclusively to documenting Palestinian history exists in Israel.

4. The Interest in Restoring One's Social Environment

The Palestinian exile has not only forced Palestinians out of their physical environment, it has uprooted them from their community and shattered their fundamental social structures. Perhaps, it could be argued, the right of return rests on the interest in restoring one's social environment: the network of friends and relatives who provide one with a sense of social identity.

I believe that the arguments raised in the previous section with respect to one's physical environment are also applicable in this context. Memories of social structures become distorted and often represent an idealization of the past. Even when the memories are rooted in a past reality, it is difficult to see how return can restore the lost social structures. Of all the categories of interests that may give rise to a right of return, this seems to be the least plausible, for at least two reasons. First, restoring the Palestinians' social environment is not contingent on their return. It is more likely to be realized successfully in an independent Palestinian state. Second, and no

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Yet predicting the effects of incentives is a very difficult and speculative enterprise. Arguably, if the passage of time does not affect rights, it in fact provides greater incentive to invaders to commit genocide rather than ethnic cleansing because only genocide can guarantee the rights of the descendants of invaders. More importantly, however, since the determination concerning the interest in return has important normative ramifications for the rights of others, the mere fear of the potential harmful consequences such as the fear of providing incentives for genocide cannot justify the violation of these rights. For a discussion of the irrelevance of deterrence-based arguments, see Waldron, *supra* note 3, at 16–24.

39 On the importance of the memory of injustice, see Waldron, *supra* note 3, at 5–7.

less important, the lost social structures seem to be lost forever. No return can restore them.

5. The Interest in Restoring One's Civic and Political Identity

The Palestinians expelled from their homeland lost not merely their property, their immediate physical environment, and their social environment, but also their status as civic/political agents.

The claim that Palestinians had a civic/political presence in British Mandate Palestine (or "Mandatory Palestine") is a controversial one.[40] The controversy is not over fact, but, rather, interpretation. The discussion in this Section is grounded in the following understanding of the civic and political status of Palestinians. In Mandatory Palestine, Palestinians were central political agents: their culture and religion had a strong presence in the public sphere, and they had some representation in the decision-making process. Moreover, the presence of Palestinians in Mandatory Palestine was so significant that they reasonably expected to have the opportunity to establish an even greater civic/political presence in the future. At the same time, however, the Palestinians did not enjoy full-fledged independence in Mandatory Palestine, with British officials ultimately in charge of the political decision-making process. Yet it is my assertion that despite this British control over the political spheres in Palestine, the Palestinians nonetheless were a significant civic/political force in Mandatory Palestine.

The Palestinians' departure/expulsion from Palestine obviously led to a radical change in their status. Khalidi aptly describes the fate of the Palestinians in 1948 as "politicide."[41] With the exception of those residing in Jordan, the Palestinians never regained their power as political agents anywhere. Palestinians who reside in Lebanon, Syria, and Egypt have not been granted citizenship in those countries. The political clout of Palestinians who reside in Western countries is minimal and insignificant. Ironically, in Israel,

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40 Mandatory Palestine was the political entity governed by Britain from 1920 until 1947. The mandate system was established by Article 22 of the Covenant of the League of Nations as formulated at the Paris Peace Conference (January-June 1919). This Article stated that the territories inhabited by peoples unable to stand by themselves would be entrusted to advanced nations until such time as the local population could handle its own affairs. This concept was incorporated into the Treaty of Versailles on June 28, 1919. For the full text of the terms of the British Mandate in Palestine, see http://www.mtholyoke.edu/acad/intrel/britman.htm.

I am grateful for Tamar Meisels' forceful criticism, suggesting that Palestinians never had a significant civic/political presence in Mandatory Palestine.

41 Khalidi, *supra* note 4, at 30.

Palestinians enjoy some political rights and have significant representation in the political sphere. Yet their status as full-fledged citizens is compromised by the self-characterization of Israel as a Jewish state and by persistent official and unofficial discrimination. Some political theorists describe the peculiar status of Israeli Palestinians by differentiating between two forms of citizenship in Israel: republican for Jews and liberal for Arabs. Arabs enjoy civil and political rights but are barred from "attending to the common good."[42]

The interest in restoring Palestinian civic and political identity ought to be distinguished from two other interests. First, it should be distinguished from the interest Palestinians have in becoming equal, full-fledged citizens in the countries in which they reside. Palestinians who have acquired citizenship in Western Europe, Australia, and North America presumably enjoy full-fledged citizenship in these countries. Palestinians residing in Lebanon, Syria, and Egypt ought to be granted the right to become citizens of these countries if they so wish, and Israeli Palestinians ought to be given the opportunity to participate as full-fledged Israeli citizens. But the interest I am speaking of is a more demanding one. It is not merely the interest Palestinians have in being citizens in a well-ordered society and bearing equal rights and duties, but, rather, the interest in shaping the public and political sphere in ways that are expressive of Palestinian culture and tradition. This interest is not satisfied in countries in which Palestinians form only a marginal minority (such as Western countries) or in states that are officially nation-states when the relevant nation is not Palestinian (such as Israel). Thus the interest in restoring civic/political status is a more demanding one than the interest in being a citizen with equal rights and duties. It is, however, less demanding than the interest in national self-determination. The interest Palestinians have in self-determination may give rise to a right to establish their own nation-state. But restoring their civic/political status in the states in which they reside does not mandate the establishment of a Palestinian nation-state. Rather, it can be satisfied within the framework of a binational state — a state in which Jews and Palestinians are equal partners.

The interest in restoring civic/political identity can be described as an interest that is an amalgam of the interest in being equal citizens in non-Palestinian states and the interest Palestinians may have in national self-determination. It is the interest that they have in being able to shape the political sphere of where they live in a way that is expressive of their

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42 Yoav Peled, *Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 Am. Pol. Sci. Rev. 432, 432 (1992).

culture and not merely to participate in politics as equal citizens. Since this interest can be satisfied in the framework of a binational state just as well as in a Palestinian state, return for Palestinians is conducive to such an interest. If Palestinians return to Israeli territory, they can become a meaningful minority or perhaps even a majority in a new binational state and thereby restore their former civic/political status. Their citizenship in such a state would be significant and valuable in a way different from their citizenship in European countries. However, its conduciveness to this interest notwithstanding, return is not the only or even the most effective means of satisfying this interest. Establishing a Palestinian state (in which Palestinians will be the overwhelming majority) is equally if not more conducive to the realization of this interest.

6. Palestine as a Formative Territory

In his discussion of historical rights, Chaim Gans describes the importance of formative territories as follows:

> For peoples and nationally conscious individuals, the interest in not being severed from their formative territories touches on emotions that are inextricably intertwined with their conception of their identities .... These are interests tied to some of the deepest layers of identity, both in their origin (the perception of selfhood) and in the consequences which result from the deprivation of these needs (feelings of alienation and longing).[43]

Gans puts forth a useful analogy between the relation to formative territories and the relations among members of a family: "The interest in formative territories which the parental ties analogy represents is the desire to be in close physical proximity to one's loved ones, that is, not to be separated from them or to spend one's life in a state of pining." The existence of such an interest is, therefore, "clear and self-evident requiring no proof."[44]

Gans does not regard the existence of formative territories as sufficient for establishing a right to political sovereignty over a particular territory. Instead, he believes that identifying a territory as formative for a group that has a right to political sovereignty plays an important role only in determining the location of the group's territorial sovereignty. The group first has to

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43 Gans, *supra* note 10, at 116. Gans' analysis is one recent example of a more general argument made by nationalism theorists. For a short discussion and references, see Meisels, *supra* note 27, at 83.

44 Gans, *supra* note 10, at 110.

establish that it has a right to territorial sovereignty. Once this right has been established, the particular location of sovereignty should sometimes be determined by the group's cultural ties to a particular territory.[45] Moreover, Gans believes that the group's interest in a formative territory justifies not merely perpetuating an existing state of affairs — namely, facilitating the future presence of those currently residing in their formative territory — but also restoring the *status quo ante*, namely, facilitating, under certain conditions, the return of people who reside outside the boundaries of their formative territory.[46] Using Gans' framework to justify the Palestinian right of return requires first establishing that the Palestinians have a right to territorial sovereignty, then determining whether Palestine is a formative territory for them, and, lastly (if the answer is in the affirmative), examining the normative implications of this determination. For the purposes of our discussion, I shall assume that Palestinians have a right to political sovereignty, and I focus, therefore, on the two latter questions.

One can provide ample evidence in support of the claim that Palestine is a formative territory for Palestinians: literary, historical, and cultural. Admittedly, the interest Palestinians have in residing in a formative territory cannot always be sharply distinguished from the interest they have in restoring their physical environment or their social environment. The longing to restore one's physical and social environment can often be expressed in terms that are similar to expressions of the longing to return to one's formative territory. Thus, the literary, historical, and cultural expressions of longings do not always indicate unambiguously whether the interest at stake is restoring one's physical environment or returning to one's formative territories. However, the risk of misinterpreting the nature of the Palestinian longing to return notwithstanding, there is sufficient evidence to substantiate the claim that Palestine is, indeed, a formative territory for Palestinians. In his poem *We Shall Return*, Issa Lubani writes:

> My beloved, I am hungry for thine eyes:
> My tongue is tied; stifled are the cries
> On my lips. Yet deep is my yearning,
> And, through bitter experience, I am learning
> That he who departs must one day return.
> Longing eats into my ribs, and doth burn:
> It transcends boundaries. In its grip
> We are caught, you and I, in a long trip.

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45 *Id.* at 103.

46 *Id.* at 118.

The leaves, the fruits, the trees and letters
Shall prosper and glow, despite the fetters.
Our pain, our wounds, our misery, our agony
Teach us to defy humiliation, ignominy.
Despite the odds of fate, we ever stand
Steadfast, and shall regain our homeland.[47]

It seems evident that the longing for Palestine plays a central role in Palestinian culture, and the very existence of a distinctive Palestinian identity, as opposed to other Arab identities, is founded on the distinctive role Palestine has as a formative territory for Palestinians. It is ultimately the territory of Palestine and the longing for it that differentiate Palestinians from Egyptians, Syrians, Lebanese, and other Arab nations.

Once we have established that Palestine is a formative territory for Palestinians, we must inquire into the ramifications of this recognition. First, it would be difficult to deny that the territory of Israel/Palestine is a formative territory not only for Palestinians but also for Jews. By founding their right of return to Palestine on the interest to reside in their formative territory, the Palestinians place themselves on a par with Jews. This does not necessarily commit Palestinians to the view that Jews also have a right of return. It is possible that the circumstances giving rise to this right are not present in the Jewish case or that the Palestinian right of return overrides the Jewish right. Moreover, as Gans indicates, even if one concedes the Jewish right of return, one is not committed to justifying the establishment of a Jewish state or Jewish sovereignty.[48] But this recognition of being on a par with Jews forces Palestinians who oppose Zionism to concede that Palestinians and Jews have similar types of interests in return and that, if the Palestinian case is stronger than the Jewish one, this must be due to nuanced and contested differences between the two cases. Israel/Palestine is, alas, a formative territory for both Jews and Palestinians alike.

More importantly, however, unlike the interest in restoring one's physical

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47 *See* http://en.falastiny.net/ideas_poems/poem/return.htm. I rarely dare engage in literary interpretation, but it seems to be called for here. The poem by Lubani differs in an important way from the Darwish poem *The Diaries of a Palestinian Wound.* Unlike Darwish's poem, the longing expressed in Lubani's poem is not to concrete or specific sites of childhood; instead, there is a longing for places one aspires to return to for the first time rather than for places one departed. The images are abstract and are focused more on the longing and the pain caused by those images than on describing the specific places to which one longs to return. This style is indicative of the fact that Palestine constitutes a formative territory for the Palestinians.

48 *See* Gans, *supra* note 10, at 119–20.

environment, the interest in residing in one's formative territory does not necessarily or even typically entitle one to return to any particular site in that territory. Gans points out that the "site of self-determination, even under its statist conception ... does not necessarily imply that sovereignty applies to all of the historical territories,"[49] for the interest in residing in one's formative territory is typically a flexible interest that can be satisfied by living in various locations that are sufficiently associated with the formative territory. Naturally, Jews' interest in residing in the formative territory of *Eretz Yisrael* ("the Land of Israel") could not have been realized in Uganda. But it seems that this interest could have been realized to a sufficient degree within Israel's pre-1967 borders, when the holy sites of the Old City of Jerusalem and other sites of great formative importance were under Jordanian rule. In fact, much of the area which forms pre-1967 Israel is not territory that was occupied by the ancestors of the Jews; yet it is sufficiently proximate and related geographically and spiritually to constitute formative territory for the Jews.

It cannot be denied, of course, that the interest in residing in one's formative territory can be realized to a greater or lesser degree, and it is possible that an opportunity to reside in any site in Palestine is more conducive to the Palestinian interest than an opportunity to reside in part of that territory. Thus, it is possible that this interest could be better satisfied in a binational state or in a "secular and democratic state" replacing Israel, rather than in a Palestinian state located in the West Bank and Gaza Strip. Acknowledging that the Palestinians' interest in residing in their formative territory can be realized in the two-nation framework weakens this interest as a basis for justifying an unqualified Palestinian right of return to any part of Palestine.

7. The Interest in Settling in the Most Appropriate Site

The discussion thus far has been founded on the distinction between the interest in return and the interest in merely settling in Palestine. Palestinians, it was argued, do not merely wish to return; they wish to return for certain reasons, and they want these reasons to be understood and acknowledged by Israel as well as by the international community. But perhaps my assumptions have been wrong. Perhaps Palestinian refugees wish merely to end their ongoing misery in the refugee camps, and Israel is simply the most appropriate place to do this or the most appropriate agent to bear the costs of this. The interest underlying the desire to settle in the territory of Israel is simply an interest in living in a state that provides them with economic

49 *Id.* at 115–16.

opportunities and civil liberties. For two reasons and given that this interest is costly, it is most appropriate that Israel bear the cost and responsibility of satisfying it. First, many would agree, Israel is responsible and most likely culpable for the Palestinian plight since it either expelled the Palestinians or else (at best) unjustifiably prevented their return following the 1948 War of Independence. Second, Israel is the territory from which the Palestinians departed/were expelled. Admittedly, even under this view, the Palestinian interest in settling in a state that offers them economic opportunities and civil liberties could be equally satisfied by settling in Greece or even in a Palestinian state with a stable economy and liberal constitution. But is Israel not simply the most appropriate site for Palestinian settlement?[50]

The claim that Israel is the most appropriate site seems compelling, but suffers from three major difficulties. First, as argued earlier, this line of argument does not represent correctly the Palestinian position. Palestinians care deeply about the identity of the place where they settle. They seek recognition for their right *of return* rather than simply their right *to settle* in Israel because it happens to be a country with a relatively prosperous economy in the vicinity. The historical resistance of Palestinians to any attempt to facilitate permanent settlement in Arab states is strong evidence of the Palestinian desire to realize a right of return rather than merely settle in a country that could offer economic opportunities and guarantee civil liberties.[51] Second, this line of argument is founded on the conviction that there are no compelling legitimate interests to prevent the return of Palestinians to Israel. Jewish Israelis often point out that Palestinian return would erode the Jewish character of the state as well as its economic and social fabric. But

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50 Surprisingly, this interest is rarely mentioned in the literature. For an exception, see Meisels, *supra* note 22, at 84.

51 In his article, Khalidi describes the opposition of the Palestinian leadership to any attempt to resettle the refugees. Khalidi, *supra* note 4, at 30–31. Even the most sympathetic advocates of a Palestinian right of return ought to have reservations about the resistance of the Palestinian leadership to considering this possibility, at least with regard to the impoverished refugees in Arab states. So intense was this resistance that Palestinians at first objected even to UN Resolution 194, partly because it offers the refugees a choice between the options of return and receiving compensation — compensation that was regarded as a sell-out. *See id.* at 36. This is analogous to the accusation made against Zionist leaders who, in the view of some historians, were oblivious to the humanitarian disasters in the lives of Jews in Europe. The debate between Herzel and the Eastern European delegates over the possibility of the immigration of Jewish refugees to Uganda following the brutal *pogroms* in Russia in 1903 is one example of the inattentiveness of Zionist leaders to the endless humanitarian disasters of Jewish life in Eastern Europe.

Palestinians who dispute the legitimacy of the Jewish state have argued that precisely as South Africa could not use the White character of the state to justify Apartheid, so Israeli Jews cannot invoke Israel's Jewish character to justify depriving Palestinians of their right of return.[52] Even those who concede that the Zionist aspirations may be legitimate argue that, given the urgency of the Palestinian humanitarian concerns, the desire for a Jewish state should be set aside.[53] It has also been argued by Palestinians that Israel can sustain mass Palestinian immigration and that such immigration would not undermine the economic and social infrastructure.[54] This claim is bolstered by the fact that Israel has absorbed huge numbers of immigrants from varying cultures and, although the success of this enterprise is controversial, the process has not led to economic or social disaster.[55]

This paper is not the appropriate forum for discussing the justifiability of Zionist aspirations for a Jewish state or the economic and social feasibility of Palestinian return.[56] It should be noted, however, that the

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52 *See, e.g.*, W. Thomas Mallison & Sally V. Mallison, *The Right of Return*, 9 J. Palestine Stud. 125, 134 (1980). The same point is made in the Statement by the Right of Return Defense Committees, which asserts, "We also confirm that the Right of Return is not conditional upon the demography of Israel nor subordinate to Israel's racist policies including Apartheid, as this would mean the legitimation of the ethnic cleansing against the Palestinians ... ." Right of Return Defense Committees, *supra* note 3.

53 Marmor, *supra* note 29, at 26.

54 Among those who believe that return is feasible is the influential activist and researcher Dr. Salman Abu-Sitta. *See* Salman Abu-Sitta, The End of the Israeli-Palestinian Conflict: From Refugees to Citizens at Home (2001). Abu-Sitta envisages a seven-stage process in which most Palestinians would return to Palestine. For a brief, accessible description of his proposal, see his debate with Michael Lerner at http://www.vancouver.indymedia.org/news/2003/04/43021.php (Apr. 17, 2003). Regrettably, Abu-Sitta is reputed to be unreliable. A revealing and amusing example demonstrating his lack of familiarity with the facts is his recent assertion that the majority of Israeli Jews hold foreign passports. Susannah Tarbush, Implementing the Palestinian Right of Return, *at* http://www.caabu.org/press/articles/tarbush-abu-sitta.html (Sept. 28, 2001).

55 *See* Uri Avnery, *The Right of Return II*, Tikkun, Mar./Apr. 2001, *available at* http://www.tikkun.org/magazine/index.cfm/action/tikkun/issue/tik0103/article/010313c.html.

56 The former concern is a point of fierce ideological dispute. Many believe that the very notion of a Jewish state is racist and unacceptable. Yet some Palestinian leaders have accepted its legitimacy. *See* Arafat, *supra* note 36. The issue is, of course, part of the broader issue of nation-states with ethnic minorities or nation-states with a special affiliation to minorities living outside their borders. For a thorough discussion of these issues, see Amnon Rubinstein & Alex Yakobson, Israel and the Family of Nations: Jewish Nation-State and Human Rights (2003) (Hebrew). It

trivialization of Israelis' interests in preventing the settlement of Palestinians within the territory of Israel is unjustified even if one rejects the legitimacy of the aspirations for a Jewish state and establishes the economic and social feasibility of Palestinian return. Massive Palestinian immigration to Israel would change radically the social conventions, the political culture, and the traditions sustaining Israeli society. The new society emerging after such a transformation would, perhaps, be a better society, as Edward Said asserts.[57] But such a demographic experiment would no doubt have immense social and cultural effects on those who currently reside in Israel. In the absence of very compelling reasons, one could maintain that the ultimate decision to embark on such a demographic experiment ought to be made by those who currently reside in that territory.

Let us assume that both of my claims are false: Suppose that the Palestinians do not wish to return to Palestine, but merely to settle in a country that provides them with economic opportunities and civil liberties and there are no compelling reasons against facilitating mass immigration to Israel. Because Israel is responsible for the plight of the Palestinians, it should justifiably bear the costs of their resettlement. But these observations would be insufficient to establish a right of return for the Palestinians. The costs of resettling Palestinians can be borne in a variety of ways, including, for instance, compensating Palestinians for their losses or persuading other states to allow Palestinian immigration to their territories. Under these assumptions, it seems wrong to insist that the Palestinians be allowed to return to Israel, since return does not promote their interests. Thus, unless it can be shown that the Palestinian interest in being provided with economic opportunities and civil liberties cannot be satisfied in any way

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should be noted, however, that the legitimacy of a Jewish state and the legitimacy of the "demographic concerns" have only indirect relevance to the question of the Palestinian right of return. If these concerns are not legitimate, all that this implies is that Israel cannot use them or, more generally, its identity as a Jewish state to justify rejecting *an otherwise justified demand* by the Palestinians to a right of return. Hence, establishing that a Jewish state is illegitimate is not sufficient to justify a right of return.

57 In an interview Said said,

> Why do you think I'm so interested in the bi-national state? Because I want a rich fabric of some sort, which no one can fully comprehend, and no one can fully own. I never understood the idea of this is my place, and you are out. I do not appreciate going back to the origin, to the pure ... . I do not believe in all that. I would not want it for myself.

Said, *supra* note 4, at 52. This sentiment, Said argued, makes him "the last Jewish intellectual."

other than granting them a right of return, this interest cannot establish a right of return. And the question of whether only return can facilitate the provision of economic opportunities and civil liberties is an issue I leave for economists, sociologists, and political scientists to delve into.

D. The Interest in Return: A Summary

The force of the Palestinian interest in return can be best evaluated by means of a thought experiment. Let us assume that the Palestinians have established a prosperous society and regained their independence outside of Israel. Would return to their historical homes still promote their interests? The discussion has established that, even under this scenario, Palestinians might still have two legitimate interests in return. First, some Palestinians — first-generation refugees — would have an interest in residing in the physical environment of their childhood. Second, some Palestinians would have an interest in residing in territory that is formative of their identities. This latter interest could, to some extent, be satisfied if a Palestinian state were established in the West Bank and Gaza Strip. But it could be satisfied to a larger extent in a binational state because, in such a state, Palestinians could reside in any place they wish. Ironically, however, this interest in residing in one's formative territory is one that is shared by Jews and Palestinians and may even ground an equivalent Jewish right of return to the territory occupied by Israel.[58]

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58 There is some (admittedly inconclusive) evidence suggesting that the advocates of the right of return are also skeptical with respect to the interests served by the right. What is puzzling with respect to the Palestinian right of return is that its advocates often argue that the rightholders (Palestinians) are unlikely to exercise it. The claim that Palestinians are unlikely to exercise their right of return once they have it is supported by the recent controversial report by Dr. Khalil Shikaki, Results of PSR Refugees' in the West Bank/Gaza Strip, Jordan and Lebanon on Refugees' Preferences and Behavior in a Palestinian-Israeli Permanent Refugee Agreement (Jan.-June 2003). The report suggests that while Palestinians wish to be granted a right of return, only a minority would exercise it given the opportunity to do so. At the same time, one has to acknowledge that there are immense difficulties in predicting the future decisions of Palestinians on the basis of surveys of this type. For an interesting discussion, see Sari Hanafi, *Return: Sacred Cow or Dialogue?*, 8 Palestine Rep. (2001), *at* http://www.jmcc.org/media/report/01/Nov/3.htm#feature. Hanafi describes his visit to his family and the refusal of his father to see photos from Haifa because

> in his words, it was not "his Haifa." Haifa was now an Israeli city, he declared, and was adamant that he could not return as long as it remained under Israeli sovereignty. The very next day, however, a Swiss journalist ... asked him if

I began this article by stating that liberating oneself from the passions of politics by engaging in academic discourse is a thrilling enterprise. But it has its costs. One is not guaranteed that the responses one seeks will ensue from this discourse. And, indeed, the conclusions of the investigation undertaken in this paper could be disappointing for both sides, for there are interests that may give rise to a Palestinian right of return, but at least some of those interests may give rise to a parallel Jewish right of return. Hence, any support for a Palestinian right of return bolsters the case for the Jewish right of return as well. Moreover, I have demonstrated that the majority of the interests served by Palestinian return could also be served — at least partially — by establishing a Palestinian state. The question of whether there are compelling conflicting considerations was also raised, but no definitive answer can be offered. Opponents of recognition of a Palestinian right of return or, at least, those who maintain that an acceptable solution entails major concessions with respect to this right will find the next, final section of interest.

III. CODA: SHOULD PALESTINIANS RELINQUISH THEIR DREAM OF RETURN OR SHOULD THEY PRETEND TO HAVE RETURNED?

In a recent conversation with a group of academics from the Hebrew University, Dr. Sari Nusseibeh, President of Al-Quds University, was asked about his new joint initiative with Ami Ayalon (the former head of the Israeli Security Services). Under this initiative, Palestinians would waive their right of return to Israel in exchange for the establishment of a Palestinian state.[59] Nusseibeh was asked whether, instead of calling for the total abandonment of the dream to realize the right of return, the initiative could not have insisted on certain symbolic gestures (such as limited family reunification) towards the Palestinians that would enable them to pretend that they have, in fact, returned. Why bring such a cruel and abrupt end to the dream to return? Why not ease the agony by reinterpreting the right?

Dr. Nusseibeh responded that he believes in the virtues of shock therapy in politics. Awakening from the long sweet dream of return is painful, but

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he would return to Haifa if it becomes possible. His discourse became quite suddenly ideological and elegant as he announced that, "as a Palestinian, like any other, I long to return no matter the conditions."

59 For the text of the joint "statement of principles," see http://www.mifkad.org.il/eng/PrinciplesAgreement.asp (July 27, 2002).

abrupt pain is preferable, in his view, to political fraud. This article examined whether awakening from the dream is not merely a pragmatic concession to the military might of Israel but perhaps also grounded in Palestinian interests.