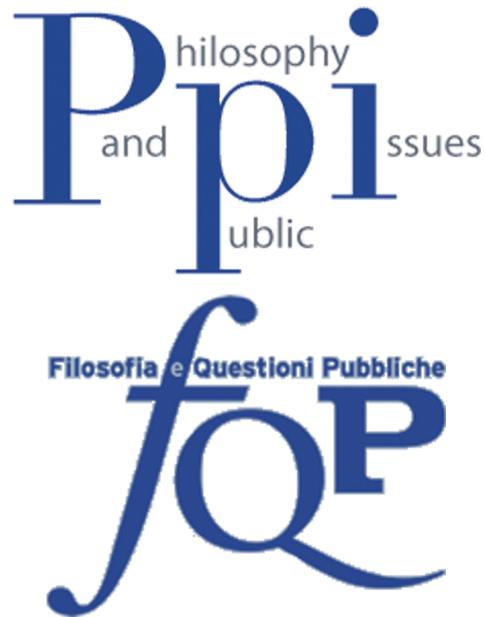


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RETHINKING LAND
AND NATURAL RESOURCES,
AND RIGHTS OVER THEM

BY

ALEJANDRA MANCILLA

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Rethinking Land and Natural Resources, and Rights over Them

Alejandra Mancilla

Margaret Moore's *A Political Theory of Territory* is an engaging attempt to build a normative account of territory, understood as 'the geographical domain of a political entity' (p. 15).¹ Moore steers a third path between statist theories, which justify territorial rights in terms of certain important functions performed by the state, and non-statist theories, which justify territorial rights in terms of their importance to protect certain key values of a group—like, in the case of cultural nationalists, cultural identity. Moore sides with non-statists insofar as she defends a self-determination view, whereby territorial rights are justified in terms of allowing a people to be self-determining. She stands apart from them, however, in that the people are constituted *politically* (rather than culturally or ethnically or linguistically) by a shared commitment to be self-governing, a capacity to establish and sustain political institutions, and a history of political cooperation (pp. 50-53).

¹ Margaret Moore, *A Political Theory of Territory* (Oxford: Oxford University Press, 2015). Subsequent references to Moore's book are by page number only.

There is a lot to be said regarding Moore's exposition and critique of competing theories of territorial rights, her characterization of a *people*, the connection she makes between individual autonomy and collective self-determination, and the conclusions she draws from applying her theory to well-known cases of contested areas, secession and historic injustice. Some of these issues are addressed by other contributors to this volume. My attention in what follows, instead, is focused on what I take to be one of the most thought-provoking parts of Moore's theory, and one in most need of further development; namely, her treatment of rights over occupied and unoccupied natural resources which she understands, respectively, as those lying within and outside already established territorial jurisdictions. First, I expound Moore's account of the role that natural resources should play in a political theory of territory, and compare it to other recent theories of territorial rights in this regard. I then discuss some implications of her view that unoccupied natural resources should be considered as property rather than territory, and put into question her unstated assumption that there is no land left to be claimed as territory. I go on to show how the right to control resources that Moore wishes to leave in the hands of states may be more constrained than she seems to allow for, and conclude by pointing to what seem to me to be the most innovative aspects of Moore's discussion of territorial rights over natural resources, as well as to those that would be worth developing further.

Following Moore, *natural resources* are hereinafter understood as 'anything derived from the environment and not made by humans, that is instrumental to satisfying human wants and needs' (p. 163). Natural resources, in this view, have a relational quality, in that they do not constitute a fixed list, but are contingent on time, space and culture.

I

Disaggregating Rights over Occupied Natural Resources

Recent theories of territorial rights have questioned the canonical triad that is supposed to constitute territorial rights proper. This triad, as presented by David Miller, is composed of the right of jurisdiction over people living within the territory; the right to control the movement of persons and things across borders; and the right to control and use the natural resources within the territory.² When it comes to the latter right, particularly, different theorists have pointed to its limits and have suggested alternative understandings and justifications. Cara Nine, for example, holds that a precondition for holding resource rights is that the land where those resources lie must be a site for the exercise of justice. This means that it must be occupied by people, or it must be shown that holding territorial rights over it is not excessively tangential to the establishment of jurisdictional authority. This leaves claims by states over the deep seabed and underground resources, the Arctic and the Antarctic and other uninhabited spots on earth void. Moreover, it suggests that a new approach is required to deal with them.³ For Avery Kolers, resilience and sustainability are prerequisites that must be fulfilled by any territorial agent, which means in practice that resource rights must always be constrained by these two parameters.⁴ Chris Armstrong suggests that the currently accepted doctrine of Permanent Sovereignty over Natural Resources in international law is ‘an obstacle rather than a boon from the point of view of

² David Miller, “Territorial Rights: Concept and Justification,” *Political Studies* vol. 60, no. 2 (2012): pp. 252–68, p. 253.

³ Cara Nine, *Global Justice and Territory* (Oxford: Oxford University Press 2012), p. 42.

⁴ Avery Kolers, *Land, Conflict and Justice* (Cambridge: Cambridge University Press 2009), p. 3.

justice', and stands in need of major revision.⁵ Along similar lines, I argue elsewhere that, to be consistent, accepting full permanent sovereignty over natural resources would require us to accept full permanent sovereignty also over natural disasters, so that states should compensate all parties affected by them. This unpalatable implication should entice us to rethink the limits of this internationally accepted doctrine.⁶

With cosmopolitans, Moore agrees that disaggregating the resource rights of territorial agents (paradigmatically, states) is necessary for achieving the fulfillment of basic human rights at the global level. At the same time, with statist, she does think that some degree of control over one's natural resources is necessary to realize the value of self-determination of the people politically constituted. She offers three arguments in defense of this claim. First, it would seem that to avoid the well-known tragedy of the commons it is a good idea to leave the administration of resources to states. Second, given that the state must regulate and enforce property laws, it is necessary for it to have a right over its resources. Third (and this is Moore's own argument), 'self-determining political communities need to have jurisdictional authority over resources, mainly because rules around the extraction and use of resources where they live impinge on many different aspects of the collective life of the community' (p. 166). This amounts to the claim that, while the right to control, use and transfer the natural resources within one's territory is required by the collective to achieve meaningful self-determination, the right to fully profit from them is not.

⁵ Chris Armstrong, "Against Permanent Sovereignty over Natural Resources," *Politics, Philosophy & Economics* Vol. 14, no. 2 (2015): pp. 129–51, p. 146.

⁶ Alejandra Mancilla, "The Volcanic Asymmetry or the Question of Permanent Sovereignty over Natural Disasters," *Journal of Political Philosophy* Vol. 23, no. 2 (2015): pp. 192–212.

Furthermore, even the former right is defeasible when what is at stake are the basic rights of others; for example, their right to subsistence. I examine these claims in more detail in section III.

While states are the relevant controlling agent when it comes to *occupied* natural resources, Moore thinks that a different jurisdictional authority should be put in place when it comes to natural resources over *unoccupied* areas of the earth. According to her list, these include the High Seas, the deep seabed, small uninhabited islands, the earth's underneath resources, the Arctic and Antarctic, the airspace and the atmosphere. Why is this so?

From the outset, Moore rejects what she calls 'the property account of territory' as a general normative approach to territory, whereby states stand to land in the same relationship as individual owners to their property (p. 16). However, she endorses this approach when it comes to specific conflicts over unoccupied areas of the earth. When countries dispute among themselves the use and exploitation of areas such as the deep seabed, for example, Moore's point is that they should not be seen as arguing about jurisdiction, but about property rights, where the resources in question are valued as possessions, and as having purely instrumental value (p. 17). This property-approach to territory is in fact still present in international law and politics and, although Moore does not wish to build a theory to match the current state of affairs, she admits that here the latter may offer normative guidance.

II Unoccupied Natural Resources as Property

An implication of viewing unoccupied natural resources as being subject to property claims rather than territorial claims is that a new, currently nonexistent authority (or more than one)

ought to be put in place to adjudicate disputes over them. Moore suggests that this authority should take the form of a multi-lateral agency, with the right to establish and regulate property rules for the common good of all, as well as with coercive powers to tax the use and exploitation of resources.⁷ This should be the preferred solution, Moore claims, to administer commercial fisheries and the deep seabed, small uninhabited islands claimed either for strategic reasons or for their natural wealth, the subterranean depths of the earth, and the atmosphere over the territorial airspace.⁸

Moore is aware that by proposing this she is taking a step toward—if not ideal—immediately unfeasible political theory. In one sense, feasibility has to do with logical consistency, but in

⁷ For a similar view, see Cara Nine, *Global Justice and Territory*, p. 43.

⁸ Moore does not mention outer space resources, but given her broad definition of natural resources, they could easily fit in the category of unoccupied ones. A further question is whether they should also be treated like property and administered by a multi-lateral body for the common good of all. To answer this it seems necessary to distinguish two types of resources: on the one hand, those the overuse of which could lead to a tragedy of the commons; on the other, those the use and/or extraction of which do not seem to generate this problem, at least not in the foreseeable future. An example of the first group is the geostationary orbit 35,000 kilometers above the earth: it is not fortuitous that there is already an international body in place to grant and administer access to the limited slots available on it for telecommunications, broadcasting and weather satellites. See the International Telecommunications Union (ITU), <http://www.itu.int/en/about/Pages/default.aspx>, accessed March 30, 2016. An example of the second group are rare minerals on near-earth asteroids and on the moon. Private companies are already planning path-finding missions to prospect available resources in them, while NASA scientists promote this ‘sustainable’ new industry. See Siceloff, Steven. ‘Study: Asteroids Provide Sustainable Resource,’ NASA News, June 13, 2013. https://www.nasa.gov/mission_pages/asteroids/news/asteroidmining.html#VwJsMXqpfqQ, accessed April 4, 2016.

another sense it refers to a measure of probability, i.e. to how likely it is for something to happen, or to be agreed upon, or to be implemented. Accordingly, the establishment of a multi-lateral agency or agencies with jurisdictional powers over these unoccupied resources is feasible in the first sense, but not straightforwardly so in the second. This is not surprising, since it would require that all agents agree upon the right use and distribution of profits from them; something that will be typically contentious, as Moore herself recognizes when she says that ‘we should expect different societies, with different cultures or different values or different projects, to favor different property regimes and to have different approaches to the treatment of land and potential resources’ (p. 166).⁹ This is why, as a second-best solution, Moore suggests that states should at least try to agree on some common principles to distribute the right to control unoccupied resources among them.

Two questions that remain to be answered are, first, who the relevant *demos* should be if a multi-lateral agency were put in place—or, to use Moore’s own terminology, who should count as *the people* to be represented by these multi-lateral agencies. It seems that, for Moore, states would be the obvious candidates. But is it obvious? After all, if unoccupied resources are to be treated as property, then at least in principle it seems plausible that individuals and other types of organized collectives (like companies, foundations and associations) may lay claims to them. This may be the case especially insofar as their interests are affected by the way in which the resource is administered. Just to

⁹ A tangible proof of how contentious it can be to reach agreement on the use of the commons were the two United Nations Conferences on the Law of the Sea (UNCLOS 1958 and 1960), where the proposal to create an international agency to regulate fishing was presented and failed (pp. 168-69).

give one example, from an environmental point of view it could be argued that Marine Protected Areas (MPAs) located in the High Seas would fare better if owned by, or leased to, specific conservation NGOs rather than states.

Second, as for the shape that such an agency should take, Moore says very little, but there are some examples already out there from which one might draw inspiration. One is the International Seabed Authority (ISA), which regulates deep seabed mining and is mandated to ensure that the marine environment is protected from any harmful effects that might arise as a result of exploration and exploitation. Another is the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which establishes and administers fishing quotas—especially of krill—in the Southern Ocean, with an ecosystem-based management approach.¹⁰ To be sure, these agencies suffer from the sempiternal problem of entities of their type: namely, they are binding for members only, and have weak powers of enforcement even over the latter. Their presence, nonetheless, signals the interest of their members in arriving at least at some minimal agreement regarding the use of the commons, while putting some peer-pressure on non-members and dissenters.

One of Moore's main goals in writing this book was 'to develop coherent principles to govern our international order as we enter... a potentially more dangerous, more conflict-ridden period' (p. 243). While most of the conflicts she examines are long-standing, historic ones, I would entice her to further develop her idea of one or several multi-lateral jurisdictional authorities

¹⁰ See, respectively, International Seabed Authority (ISA), <https://www.isa.org.jm/>, and CCAMLR, <https://www.ccamlr.org/>, both accessed March 29, 2016.

governing unoccupied natural resources as a way in which present and future conflicts over the latter should be resolved. In a context where current territorial arrangements are showing themselves to be insufficient to guarantee the long-term sustainability of the planet, conceiving alternative ways of governance such as these seem all the more urgent. That they seem not immediately feasible should not prevent us from theorizing about them, and giving arguments as to why it would be commendable to adopt them.

2.1. *Unoccupied land on earth and off-world*

Two further points to be discussed in Moore's account of unoccupied natural resources regard her definition of land as the 'portion of the *earth surface* not covered by water' (p. 15, my emphasis), and her unstated assumption that all potentially inhabitable land has already been claimed as territory. Because both are tightly knit, I discuss them together.

Moore conceives of all the land that is left unoccupied in the planet as having a purely instrumental value: what remains unoccupied, thus, are only resources, but not any geographical spots of the kind where political, self-determining collectives could gain jurisdiction. In short, her belief seems to be that there is no physical space left to found new territories, and this leads her to ignore altogether the question of what would count as just first acquisition today.

But this is not the case. While presently some sub-antarctic islands and the northern tip of the Antarctic Peninsula might not have the most cheerful weather, thanks to global climate change it is not far-fetched to suppose that these areas will become inhabitable all year long in the middle and long-term. In fact, they already are: the Chilean base, Villa Las Estrellas, has a permanent

population of around 80 people in winter time that doubles in summer time, while the Argentinian Esperanza base lodges around 50 people year-round.¹¹ To be sure, Moore could reply that the geographical area where these bases lay is already claimed by the United Kingdom, Chile and Argentina as part of their respective ‘antarctic territories’ and so is, in a sense, already *occupied*. These claims, however, were *frozen* in 1959, when the Antarctic Treaty System (ATM) was created, and it seems at least questionable that, were they to *melt* (if, for instance, the ATM came to an end or changed dramatically), standard territorial rights would straightforwardly be gained by any or all of these countries over that area.¹² Put differently, Antarctica remains ‘the world’s last store of natural resources’ and is, in this respect, a potential site of conflict for property-like claims.¹³ In the case of living marine resources, as already mentioned, these claims have partially been dealt with through the CCAMLR, by setting fishing quotas and issuing fishing permits to its 25 member states. In the continent itself, meanwhile, the Protocol on Environmental Protection put a moratorium upon all extractive activities until 2048, seeking to preserve it exclusively for peace and science. This does not preclude, however, that Antarctica might also become a potential site of conflict for politically-minded collectives pursuing their projects of self-determination; that is, a potential site for the expansion of already existing territories, but

¹¹ See, respectively, <http://www.visitchile.com/es/villa-las-estrellas/>, and <http://www.marambio.aq/baseesperanza.html>, both accessed March 30, 2016.

¹² See, specifically, Article IV of the Antarctic Treaty: http://www.ats.aq/documents/ats/treaty_original.pdf, accessed March 30, 2016.

¹³ Keith Suter, *World Law and the Last Wilderness* (New South Wales: Friends of the Earth, 1979, p. 22).

maybe also for the formation of new ones.¹⁴ Furthermore, just as the definition of natural resources proposed by Moore depends on the context, what counts as land to be turned into territory should also be understood in this way. If this is so, even if Antarctica remained inhospitable, it could become increasingly inhabitable as building, transport and telecommunication technologies improve.

Moore's narrow definition of land as earthbound only should be challenged on the same grounds: while talk of space colonies and off-world territories today might sound restricted to Hollywood productions, their coming into existence is a matter of time. Envisaging this and taking advantage of a loophole in the Outer Space Treaty (which precludes the appropriation of outer space resources by states, but says nothing about individuals or commercial enterprises), the American entrepreneur Dennis Hope started a profitable business called *Moon Estates*, selling and administering patches of land in the Moon, Mars and Venus. Almost two decades after its inception, the company claims to have six million customers, including George Bush, the Hilton Hotels and Tom Cruise.¹⁵ Hope's self-appointed status as land

¹⁴ For how the former might happen, see Doaa Abdel-Motaal, "Antarctica: The Battle for the Seventh Continent" (Praeger, 2016). As for new territorial agents developing their own self-determination projects in Antarctica, this could eventually happen as growing colonies of people living there on a permanent basis decide, for example, to become independent from their sending states. This might sound science-fictional under the current restricting provisions of the ATM and its Environmental Protocol, but it could take place if, for example, the mining ban is lifted and the continent becomes a new global pole of economic activities.

¹⁵ In its Article II, the Outer Space Treaty establishes that '[o]uter space, including the moon and other celestial bodies, is not subject to *national* appropriation by claim of sovereignty, by means of use or occupation, or by any other means' (United Nations General Assembly 1967, my emphasis). This

administrator in these celestial bodies might be regarded as irrisory by down-to-earth lawyers and policy-makers. His business success as much as the silence of both governments and international organizations regarding the legitimacy of his actions reveal, however, that issues of extra-terrestrial settling will have to be tackled sooner or later by theories of territorial rights and by international law.

In sum, while a tacit assumption along Moore's book seems to be the unavailability of land to be turned into territory, I have suggested that this assumption is unwarranted. In a world where the last frontiers for human presence are being extended both in heaven and on earth, a normative account of just first acquisition and just territorial expansion (or their impossibility) would be a timely addition to her theory of territorial rights.

III

Disaggregating Rights over Occupied Natural Resources: A Further Twist

To recall, when it comes to states' rights over their occupied natural resources, Moore suggests that a certain degree of control is necessary for politically-constituted collectives to meaningfully exercise their self-determination. From this does not follow, however, that states should fully profit from their use and exploitation. Furthermore, integrating an important valuable

leaves open, according to Hope, the possibility of individuals and other non-governmental entities appropriating bits and pieces of outer space. See Rachel Hardwick, "Dennis M. Hope Has Owned the Moon Since 1980 Because He Says So," *Vice*, April 11, 2013. <http://www.vice.com/read/ive-owned-the-moon-since-1980>, and <https://www.moonstates.com>, accessed April 4, 2016.

insight from cosmopolitans, Moore recognizes that the collective right to self-determination must be consistent with the basic right to subsistence of everyone. By this she means that: ‘(1) political communities in which people are collectively self-determining are themselves necessary for people to secure their basic rights; (2) the subsistence rights of others can be met without violating collective self-determination; and (3) collective self-determination is not the reason why these rights aren’t met’ (p. 182).

Moore thinks that fairer rules regarding trade and development at the global level, as well as more redistribution from wealthy to poorer areas of the world should be enough to guarantee the satisfaction of the basic subsistence rights of everyone. In other words, the collective right to decide how to administer and use resources within one’s territory should not be affected if these measures were implemented. What is more, following Jeremy Waldron, Moore points out that the relevant question when pitting subsistence rights against the right to self-determination is not only which right is more important, but also the interest that the right is supposed to protect and the policy.¹⁶ In practice this means that, when striving to fulfill the basic rights of everyone, the first solution to consider should not be to violate people’s right to self-determination. Other policies to achieve the same result should be tried first.

Notwithstanding, Moore recognizes that this view is too optimistic. There might be cases, she says, where the only way to guarantee that global subsistence rights are met is by exploiting some resource located in a given territory, even against the will of the people. Her example is that of a country that uniquely possesses a mineral needed to cure a serious illness that causes

¹⁶ Jeremy Waldron, “Rights in Conflict,” *Ethics* vol. 99, no. 3: pp. 503–19.

many deaths somewhere else in the world. Despite of knowing this, the people in the country decide to leave the mineral in the ground. Their presumptive right to make this sort of decision should be outweighed by the right to subsistence of those likely to contract the disease.

The fact that this is the only example given by Moore suggests, in my view, that she does not take seriously enough the possibility that the collective right to control natural resources may be constrained much more often and more substantially depending on how one understands subsistence rights in claims (2) and (3) above. If subsistence rights are not only about the immediate survival of the individual, but also about the middle and long-term prospects for the human species, then there seems to be a third category of resources in need of independent normative treatment. These are natural resources that are within occupied territory, but are at the same time part of the *systemic commons*. By these I mean geographic areas of the earth that provide key water or ecosystem services, or help to regulate the climate system, so that their loss would greatly jeopardize the lives of human beings on earth. The classic example are rainforests, which act both as biodiversity hot-spots and carbon sinks, and are crucial for regulating the planet's overall temperature and climate patterns. If rainforests should be preserved for the good of all mankind, then their control, use and exploitation by independent self-determining collectives seems less plausible, or at least in need of further defense—especially if their plans involve chopping them up unsustainably rather than conserving them on a long-term basis.¹⁷

¹⁷ Megan Blomfield makes a similar point when she says that, when it comes to territorial rights over carbon sinks (she calls them 'greenhouse gases sinks'), the interests of the state and of the individuals and collectives within it should

When pitted against basic subsistence rights, then, the right to self-determination of states over their natural resources may be constrained not only in that the latter may be forced to *exploit* a given resource (as in Moore’s example), but also in that they may be forced *not to exploit* it.

The question that follows, then, is how territorial rights should be granted accordingly. Theorists writing about the ethics of climate change and, more precisely, about the specific issue of mitigation via preservation of carbon sinks, have tended to assume that, if properly compensated, states with large extensions of rainforest (which are mostly poor states) would happily leave their valuable ecological resources on the ground. That is, they have tended to assume that opting for conservation instead of exploitation would not damage in any fundamental way their projects of self-determination.¹⁸ But what if they did? And what if they were not willing to give these projects up? Would it then be legitimate for an external agent to dictate what should be done for the sake of the global common good? I think that the answer

be taken into account, but without disregarding the important interests of outside actors who may be reliant on the resource, or who may be harmed by certain uses of it. The conclusion is that territorial rights over carbon sinks should be tempered by these considerations: Megan Blomfield, “Global Common Resources and the Just Distribution of Emission Shares,” *Journal of Political Philosophy* Vol. 21, no. 3 (2013): pp. 283–304.

¹⁸ See, for example, Chris Armstrong, “Fairness, Free-Riding and Rainforest Protection,” *Political Theory* Vol. 44, no. 1 (2016): pp. 106–30, and Ed Page, “Qui Bono? Justice in the Distribution of the Benefits and Burdens of Avoided Deforestation,” *Res Publica* (2015), advance online publication: doi:10.1007/s11158-015-9313-y. Here it could also be argued that states’ right to control, use and exploit vast oil and gas deposits lying under their occupied territories should be constrained in a similar manner, insofar as the unleashed exploitation of the latter puts further stress on the planetary systems and thus seriously affects the prospects of human life on earth.

is a qualified *yes*. Just as use of the atmosphere's absorptive capacity by states should ideally be regulated by a multi-lateral authority, so should the use of carbon sinks, wherever they lie. This would mean extending the jurisdictional scope of such an authority so that it includes not only unoccupied resources, but also the occupied systemic commons. It would also mean asking in what ways governance over these two kinds of natural resources should be similar or different (for example, whether some sort of compensation to states should be given in exchange for control of the occupied systemic commons). Given that this seems an even greater leap in the direction of immediately unfeasible political theory, it is an open question whether Moore would be happy to take it.

IV Concluding Remarks

There are two major moves that characterize Margaret Moore's theory of resource rights, as part of her more encompassing theory of territorial rights. On the one hand, Moore *ensovereigns* one or more still nonexistent multi-lateral agencies to establish, administer and enforce property rules over the unoccupied natural resources of the earth, for the common good of all. On the other hand, she *desovereigns* territorial entities in two steps. First, she denies that a right to fully profit from their occupied natural resources follows from the right to self-determination of their members. Second, she makes their right to control natural resources defeasible in situations where basic subsistence rights are at stake.

In this article I have suggested directions in which her theory may be fruitfully expanded and refined: by developing an account of how one or more multi-lateral agencies for the governance of

unoccupied natural resources should be framed, and by defining the *people* that are to be part of them; by not foreclosing the possibility that new or extended territorial claims may arise both on earth and extra-terrestrially in the not-so-far future, and by elaborating on what just first acquisition or just expansion of territory would look like; and by saying more on the balance between subsistence rights and rights to self-determination over natural resources, specifically when it comes to the occupied systemic commons.

Moore has done a great job providing us with a plausible theory of territorial rights that is however not shy about disagreeing with the status quo. If anything, these comments have purported to present her main ideas when it comes to natural resources and the rights of self-determining collectives over them, while at the same time signaling to those aspects of her work where further theoretical elaboration would be welcome.

University of Oslo

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