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The Right to Stay

Patrick M. McFadden

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The Right to Stay

*Patrick M. McFadden**

ABSTRACT

People often fight for their homes. Once established, homes are vital centers of life, and their threatened loss generates predictable resistance. This Article shows how the human desire not to be moved is protected by the law. Such protection can be found in both U.S. domestic and international law, although the two systems of law vary widely in their approach. Since World War II, international scholars and lawmakers have been deeply concerned with promoting the legal rights of people to leave and return to their own countries. This Article emphasizes a different, but equally important right: the right of people, if they wish, to stay exactly where they are.

This Article examines how states protect individuals who wish to preserve an established home. First, the author summarizes the approach of U.S. law. In particular, he examines how property law and constitutional provisions provide a continued right to possess property. Second, the

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author examines international legal protections, focusing on the rules of war, the rights of indigenous peoples and aliens, and relevant norms from international human rights instruments. Finally, the Article compares the advantages and disadvantages of the international and U.S. approaches.

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I. INTRODUCTION

The desire to put down roots—to settle in and not be moved—is evident everywhere, but probably clearest in the countryside. In western Kansas, where this author grew up, men and women take pride in having farmed the same ground for their entire lives, the same ground farmed by their parents and grandparents before them. Each in turn has learned the land—its precise topography and vegetation, its challenges, and its possibilities of fruitfulness. From the land comes life and a way of life, handed on from generation to generation. It is always

a cause of sadness when a farm passes out of a family's hands, for it is a defeat of sorts—a loss of stewardship and a severing of longstanding ties. It is always a tragedy, mild or profound, when a sale of the land has been forced.¹

Things are different in the city, where home and work are much more likely to be physically separated, where the housing stock is more fungible, and where renting—with its implied transience—is much more common.² As a consequence, it is rarer for urban and suburban homes to remain in the same family through several generations. But even urban dwellers hate to move. Although the urban connection with living space is more utilitarian, the home is nonetheless a center of life. Even the one-year apartment dweller feels the effect. The great little record shop is down the street and around the corner. Every morning the woman at the dry-cleaner's waves hello. Friends live nearby. A regular parking space has been secured. Even in the city, moving is a cause for some regret and visits to an old neighborhood predictably inspire nostalgic rumination. Forced moves are particularly distressing.³

In both its urban and rural manifestations, the desire to stay where one is, and not to be moved, is deeply rooted in the human psyche. Biologists connect it with a territoriality found in many

1. The loss of farm ownership is a source of drama not missed by film producers. See, e.g., *COUNTRY* (Buena Vista 1984); *PLACES IN THE HEART* (Tri-Star 1984); *THE RIVER* (Universal 1984).

2. On residential patterns in urban areas, see MICHAEL J. DOUCET & JOHN WEAVER, *HOUSING THE NORTH AMERICAN CITY* 388-419 (1991) (detailing the development of apartment housing); WILLIAM C. APGAR & HENRY O. POLLAKOWSKI, *HOUSING MOBILITY AND CHOICE* (1986); PETER S.K. CHI, U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, *POPULATION REDISTRIBUTION AND CHANGES IN HOUSING TENURE STATUS IN THE UNITED STATES* 21 (1980) (discussing, *inter alia*, transience of renters); JOHN L. GOODMAN, *URBAN RESIDENTIAL MOBILITY* 13 (1978) (noting that renters are about four times more likely than homeowners to move in any year); CONSTANCE PERIN, *EVERYTHING IN ITS PLACE* 32-80 (1977) (describing the social meaning of the change from renting to home ownership).

3. Professor Bell makes the point nicely:

The home not only provides the basic necessity of shelter but is also central to an individual's emotional and personal life. The intangible connection between [individuals] and [their homes] is not limited to homeowners. For tenants as well an involuntary removal from the home can be devastating, depriving the tenant of both physical and emotional security.

Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 483 (1985).

other animals.⁴ Poets and other writers have long described it in tales of home: staying home, leaving home, and returning home.⁵ With less beauty, but with a certain systematic precision, the desire (or need) to stay has been charted and analyzed by sociologists and psychologists.⁶ Their findings are not surprising: to move is to face change, often dramatic change—the tearing away of old connections and relationships, the exchange of the known for the unknown. Moving brings threats, stress, and unhappiness.⁷

It should not be surprising that a desire so strong and deep as the desire to stay is reflected in the law. Indeed, once one begins to think in terms of a *right* to stay, one begins to see it everywhere, in both domestic and international practice. There are, however, some curiosities in the translation from human desire to legal right. First, the underlying normative principle—founded in biology, sociology, psychology, and history—seems both simple and clear: people ought not to be moved against their will. And yet the law is not explicitly organized around this principle and its possible exceptions. Instead, the right to stay is founded on a series of disparate provisions, which collectively, though inelegantly, secure the right. The second curiosity is that the U.S. domestic provisions securing a right to stay are radically different from the

4. See, e.g., ROBERT ARDREY, *THE TERRITORIAL IMPERATIVE* (1966); JONATHAN L. FREEDMAN, *CROWDING AND BEHAVIOR* 32 (1975) (“[M]any animals probably have [territorial instincts] under conditions involving limited food supply or protection of the nest or family . . .”). Cf. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *4 (“In the case of habitations in particular, it was natural to observe, that even the brute creation to whom every thing else was in common, maintained a kind of permanent property in their dwellings. . . . Hence a property was soon established in every man’s house and home stall.”).

5. The Bible is an extraordinarily rich source for such stories, the earliest, most dramatic ones involving the expulsion of Adam and Eve from the Garden of Eden, *Genesis* 3, and the exodus of the Jews from Egypt, *Exodus* 11-14. In ancient Greek literature, Homer’s *Odyssey* tells the story of Odysseus’s return home from the Trojan wars. HOMER, *THE ODYSSEY* (Walter Shewring trans., 1980). In twentieth century U.S. literature, one of the greatest stories of home is told in JOHN STEINBECK, *THE GRAPES OF WRATH* (1939).

6. See, e.g., Marcia S. Hausman & James R. Reed, *Psychological Issues in Relocation: Response to Change*, 17 J. CAREER DEV. 247 (Summer 1991) (discussing relocation as crisis event with associated feelings of anger, loss, and low self-esteem); Thayer Scudder & Elizabeth Colson, *From Welfare to Development: A Conceptual Framework for the Analysis of Dislocated People, in INVOLUNTARY MIGRATION AND RESETTLEMENT: THE PROBLEMS AND RESPONSES OF DISLOCATED PEOPLE* 269-71 (Art Hansen & Anthony Oliver-Smith eds., 1982) (describing the physiological, psychological, and socio-cultural stress of moving); John Claydon, *Internationally Uprooted People and the Transnational Protection of Minority Culture*, 24 N.Y.L. SCH. L. REV. 125, 130-34 (1978) (surveying the cultural deprivations experienced by those forced to leave their homelands).

7. See *supra* note 6.

international provisions, even though both sets of provisions respond to the same human need.

This Article has two purposes. First, it seeks to demonstrate that the law, both domestic and international, does indeed secure a "right to stay," even though the term itself, or one like it, is seldom used.⁸ Second, the Article explores the differences between the U.S. and international approaches in securing that right. Part II describes the U.S. approach and Part III the international. Part IV summarizes the differences, discusses the advantages and disadvantages of each approach, and suggests some directions in which each system could profitably move.

The right to stay is more than an academic curiosity. Every year, for all sorts of reasons, hundreds of thousands of people, perhaps millions, are forced to move from their homes.⁹ For those involved, these movements are seldom desired and often tragic.¹⁰ National interests are threatened, too, as nations work to accommodate, often with declining enthusiasm, the resulting inflows of persons moving from somewhere else.¹¹ In recent

8. One author recently argued that a "right not to be displaced" ought to be recognized as an international human right. Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U. J. INT'L L. & POL'Y 689, 741-48 (1994). Such a right, however, is not incorporated in any human rights treaty, and the author's argument that such a right is needed is not entirely convincing. See *id.* at 748 ("[C]ertain human rights are likely to be violated whenever displacement occurs."). Still, the article provides a useful collection of international legal rules that are implicated in the forced movement of persons. *Id.* at 717-35. See also Alfred de Zayas, *The Right to the Homeland, Ethnic Cleansing and the International Criminal Tribunal* 31 (Mar. 9, 1995) (unpublished manuscript, on file with author) (calling for reaffirmation of "the right of the homeland").

U.S. law, on the other hand, seems never to have been analyzed for its protections of a "right to stay," though certain aspects of that protection have often been collected and analyzed. On the protection of mortgage debtors, see, e.g., MICHAEL T. MADISON & ROBERT M. ZINMAN, *MODERN REAL ESTATE FINANCING* 285-90, 1016-34 (1991).

9. See, e.g., Robin Wright, *World View; Millions Adrift in Their Own Lands*, L.A. TIMES, Mar. 8, 1994, World Report, at 1 (surveying plight of millions of internally displaced persons); Jacques Quenod's *Report on Refugees, Displaced Persons and Returnees*, U.N. ESCOR, 2d Sess., 37th plen. mtg. ¶10, U.N. Doc. E/1991/109/Add.1 (1991) (estimating then current number of border-crossing refugees at 17 million, and internally displaced persons at 24 million) [hereinafter *Quenod Report*]. See also Unrepresented Nations and Peoples Organization, *Human Rights Dimensions of Population Transfer, Conference Held in Tallin, Estonia, January 1992* (David Goldberg, rapporteur, 1992) (considering forced transfers from around the world).

10. See, e.g., Nancy Mallin, *Uprooted People*, COMPANY, Summer 1992, at 2-5 (describing "Refugee Voices," a program publicizing the plight of refugees by broadcasting their stories told in their own words).

11. David A. Martin, *The New Asylum Seekers*, in *THE NEW ASYLUM SEEKERS* 1 (David A. Martin ed., 1986) (detailing history of post-World War II refugee flows and responses); *Report of the Group of Governmental Experts on International*

years, a great deal of necessary and helpful attention has been given to the question of how to handle the victims of forced movement after they have taken flight. The result has been a burgeoning law of refugees¹² and internally displaced persons.¹³ But it is also clearly time to address the prior question: how to keep people from being moved in the first place.¹⁴

II. THE U.S. APPROACH

In the United States, the right to stay is secured primarily through property law. Owners of estates in land, both homeowners and tenants, have the right to possess their property and to exclude others, including those who would seek to move the owners somewhere else. So long as ownership of the estate subsists, a continued right to possession is guaranteed.¹⁵ Freehold estates (today, fee simple and life estates) can be lost in only a limited number of ways (e.g., in a forced sale to pay the owner's debts, in an eminent domain proceeding, or in a statutory

Cooperation to Avert New Refugee Flows, U.N. GAOR, 41st Sess., Prel. List Item 78, ¶¶ 38-40, U.N. Doc. A/41/324 (1986) (describing international burdens created by coercive population movements). The United States is a frequent destination for migrants, both voluntary and involuntary. See Jeffrey S. Passel & Michael Fix, *U.S. Immigration in a Global Context: Past, Present & Future*, 2 IND. J. GLOBAL L. STUD. 5, 6 (1994) (noting that 2% of world's population lives outside country of birth, 22 million of whom are living in the United States).

12. See, generally, THE INTERNATIONAL REFUGEE CRISIS: BRITISH AND CANADIAN RESPONSES (Vaughan Robinson ed., 1993); LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE HUMAN RIGHTS OF REFUGEES AND DISPLACED PERSONS: PROTECTIONS AFFORDED REFUGEES, ASYLUM SEEKERS AND DISPLACED PERSONS UNDER INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN AND REFUGEE LAW (1991) [hereinafter LAWYERS COMMITTEE]; REFUGEE LAW AND POLICY: INTERNATIONAL AND UNITED STATES RESPONSES (Ved P. Nanda ed., 1989); RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 393-458 (2d rev. ed. 1988); THE NEW ASYLUM SEEKERS, *supra* note 11.

13. See, e.g., FRANCIS M. DENG, PROTECTING THE DISPOSSESSED 1-20, 133-40 (1993); Richard Plender, *The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced*, 6 INT'L J. REFUGEE L. 345 (1994); Corrine E. Lewis, *Dealing with the Problem of Internally Displaced Persons*, 6 GEO. IMMIGR. L.J. 693 (1992); Ved P. Nanda, *International Law and the Refugee Challenge: Mass Expulsion and Internally Displaced Persons*, 28 WILLAMETTE L. REV. 791 (1992).

14. The right to stay is also to be distinguished from the related rights to leave and return to one's homeland, about which there is a growing body of literature and continued interest. See, e.g., ALAN DOWTY, CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT (1987); HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE (1987); Stig Jagerskiold, *The Freedom of Movement*, in THE INTERNATIONAL BILL OF RIGHTS 166 (Louis Henkin ed., 1981); Rosalyn Higgins, *The Right in International Law of an Individual to Enter, Stay in and Leave a Country*, 49 INT'L AFF. 341 (1973).

15. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 26 (2d ed. 1993).

forfeiture).¹⁶ Nonfreehold estates (leaseholds) can be lost in similar ways, but are more commonly lost for nonpayment of rent and breaches of other tenant covenants.¹⁷ The right to stay is protected not only by limiting the modes of loss, but also by hedging them in with substantive and procedural requirements that limit their actual occurrence.

A. Limiting First-Order Causes of Loss

1. Debt

Homes can be lost on account of debt, but not easily. There is a longstanding tradition in U.S. law that protects real estate, particularly residences, from forced sale by creditors. This is a significant concession in a commercial society, where economic health depends on the continued availability of credit, and thus on the timely repayment of debt. In such a society, every barrier to the forced sale of residential real estate constitutes a tribute to the right to stay and a willingness to risk economic harm for the purpose of giving homeowners every possible chance to stay where they are.

General creditors who lack a secured interest in a debtor's home confront two major hurdles in forcing the sale of a personal residence. First, such creditors must reduce their debt to a court judgment.¹⁸ Second, they must initiate a procedure of court-

16. Each of these causes of loss will be discussed *infra*. Freehold estates can also be lost by adverse possession, but adverse possession claims are not particularly relevant to the present discussion. If an owner is in possession of his or her residence, there is hardly any chance of there being an adverse possessor in the same residence, much less an adverse possessor who has been around long enough to establish an ownership claim. On adverse possession generally, see *id.* at 807-15; JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 333-39 (3d ed. 1989). Freehold estates can also be lost, like any item of property, through mistake, fraud, double-dealing, or other sorts of chicanery, at least when innocent third parties and recording acts are involved. See, e.g., *Mortensen v. Lingo*, 99 F. Supp. 585 (D. Alaska 1951) (holding that the first grantee lost to the second grantee (from a common grantor) because the first deed was improperly indexed in the records); *Patterson v. Bryant*, 5 S.E.2d 849 (N.C. 1939) (holding that the first grantee lost to the second grantee (from a common grantor) because the second grantee recorded first); *Strong v. Whybark*, 102 S.W. 968 (Mo. 1907) (holding that the first grantee lost to the second grantee (from a common grantor) because the second grantee recorded first).

17. See *infra* notes 41-53 and accompanying text.

18. See DAVID G. EPSTEIN & STEVE H. NICKLES, DEBT 5-6 (1994); ELIZABETH WARREN & JAY L. WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 51-52 (2d ed. 1991).

sponsored levy and sale,¹⁹ a procedure that specially protects the debtor's home. The primary form of this protection is the homestead exemption, which typically exempts a debtor's home (or a maximum dollar value thereof) from levy and sale by general creditors.²⁰ In addition, many states have established a general statutory preference that a debtor's personal property be levied upon first. The debtor's home, an item of real property, is thus saved from levy and sale unless other assets are insufficient.²¹

Even secured creditors, who hold a lien on the very home at issue, face serious challenges when they attempt to force a sale. Contractors, suppliers, and other holders of statutory liens must comply strictly with the statutory procedures relevant to their particular liens. Compliance is sometimes complicated and always time-sensitive, both to establish the lien initially and to enforce it later.²² Holders of contractually generated liens, primarily mortgage lenders, have the nominal option of devising quicker, easier procedures for the sale of a delinquent debtor's home, but even they find forced sales difficult.²³ Mortgage debtors are often protected by a number of judicial and legislative mandates, including carefully monitored duties of good faith and due diligence on the part of the lenders;²⁴ obligatory opportunities

19. EPSTEIN & NICKLES, *supra* note 18, at 6-12; WARREN & WESTBROOK, *supra* note 18, at 52-53.

20. See generally THOMPSON ON REAL PROPERTY § 21.03 (David A. Thomas ed. 1994); 1 AMERICAN LAW OF PROPERTY §§ 5.75-5.120 (1952); Joseph McKnight, *Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle*, 86 S.W. HIST. L.Q. 364 (1983). Homestead protection is not complete: (1) only debtors with "families" are entitled to protection; (2) the dollar amount of protection is often low; and (3) there is typically no protection against several kinds of debts (tax liens, purchase money liens, and mechanics' and suppliers' liens). But for all that, the homestead exemption represents a clear acknowledgment that the home is to be treated differently in the debt-collection process.

21. EPSTEIN & NICKLES, *supra* note 18, at 7.

22. See generally Michael G. Walsh, *A Mechanics' Lien Primer for the General Practitioner*, 37 PRAC. LAW. 77, 86-88 (1991); Daniel R. Frost, *Mechanics' Liens*, in REAL PROPERTY PRACTICE AND LITIGATION 592, 602-03 (Beverly J. Quail ed., 1990).

23. MADISON & ZINMAN, *supra* note 8, at 1024 ("[S]ome states have so encumbered the [foreclosure] process with borrower protections as to make foreclosure a very time-consuming and expensive proposition.").

24. See, e.g., *Williams v. Resolution GGF OY*, 630 N.E.2d 581, 584 (Mass. 1994) (The mortgagee "must act in good faith and must use reasonable diligence to protect the interests of the mortgagor."); *Murphy v. Financial Dev. Corp.*, 495 A.2d 1245 (N.H. 1985) (Mortgage lenders did not violate duty of good faith, but did fail to exercise due diligence in obtaining a fair price at the foreclosure sale.). See also UNIF. LAND TRANSACTIONS ACT § 3-508(a) (noting that all aspects of the foreclosure sale must be "reasonable"); David H. Fishman, *The Foreclosure Sale*, in 3 THE ACREL PAPERS 47, 55-56 (1992) (listing over 20 grounds upon which a foreclosure sale can be overturned).

for the debtor to cure defaults by making late payments to the lender;²⁵ and a right of the debtor to repurchase the property from the winning bidder at the foreclosure sale.²⁶

Governments, as creditors, fare little better than their private counterparts. The nonpayment of property taxes, for example, typically triggers special procedures under which the relevant state or local government can force the sale of the taxed property.²⁷ Law and practice vary a great deal among states,²⁸ but, on the whole, such procedures are notoriously protective of the property tax debtor. Typically the property tax liability must have remained unpaid for a substantial period of time before a tax sale is ordered. When such a sale is ordered, the debtor can bring the proceedings to a halt by paying the taxes (with interest and penalties) at any time before the sale. Even after the sale, the debtor is given a significant period of time to redeem the property.²⁹ The entire process, from the initial imposition of property tax liability to the delivery of a deed to a new owner, usually involves several different steps by several different actors. The complexity of the process serves to protect the tax debtor, since courts are prone to overturn tax sales for a formal deficiency

25. GEORGE LEFCOE, *REAL ESTATE TRANSACTIONS* 469 (1993); Robert M. Washburn, *The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales*, 53 S. CAL. L. REV. 843, 929-30 (1980) (statutorily required time periods between default and foreclosure).

26. LEFCOE, *supra* note 25, at 470; GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* §§ 8.4-8.8 (3d ed. 1993); MADISON & ZINMAN, *supra* note 8, at 1027-28. For a recent, national survey of foreclosure law, see *FORECLOSURE LAW AND RELATED REMEDIES: A STATE-BY-STATE DIGEST* (Sidney A. Keyles ed., 1995).

27. See, e.g., Ellen F. Friedman, Note, *The Constitutionality of Request Notice Provisions in In Rem Tax Foreclosures*, 56 FORDHAM L. REV. 1209, 1211-17 (1988) (national summary of property tax statutes, procedures, and importance).

28. RAYMOND J. WERNER & ROBERT KRATOVIL, *REAL ESTATE LAW* 654 (10th ed. 1992) ("[L]aws regarding levy, assessment, and collection of the [property] tax vary considerably, so that few general statements can be made that will be universally true.").

29. For the Illinois system, see, e.g., 35 ILCS 200/21-5 (tax sales and related procedures for collecting delinquent property taxes); *Rosewell v. Chicago Title & Trust Co.*, 459 N.E.2d 966 (Ill. 1984) (summarizing the tax sale and tax deed system in Illinois); Guerinio Turano, *Redemption from Tax Sales in Illinois—Confusion Galore*, 23 J. MARSHALL L. REV. 107 (1989) (survey of Illinois redemption law and practice).

at any step,³⁰ and to examine carefully whether the due process rights of all interested parties are vindicated.³¹

2. Governmental Takings: Eminent Domain and Forfeiture

Homeowners, both freeholders and leaseholders, can also lose their estates by government condemnation, but this authority, too, is highly circumscribed. A legally defensible taking requires a legitimate public purpose,³² the payment of just compensation,³³ and a fair process throughout.³⁴ These requirements make takings a lengthy and expensive proposition, helping to assure, as a practical matter, that public authorities are circumspect in their exercise of the power.³⁵

Homeowners can also suffer a civil or criminal forfeiture of their estate, and thus be forced to move, if they commit certain offenses on the premises.³⁶ The forfeiture of real property as a penalty for criminal acts has a venerable history in Anglo-American law, reaching back at least as far as thirteenth-century England.³⁷ The practice had fallen out of fashion in the United

30. *E.g.*, *Wallace v. President Street, L.P.*, 430 S.E.2d 1 (Ga. 1993) (Tax sale purchaser's quiet title action failed because redemption foreclosure notice was timed improperly.); *see* WERNER & KRATOVIL, *supra* note 28, at 659 ("[A] tax title acquired through normal tax sale usually constitutes the flimsiest sort of title, since deviation from the technical requirements of the law will invalidate the title.")

31. *See, e.g.*, *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (holding that publication notice in a tax sale insufficient under due process clause); Michael H. Rubin & E. Keith Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite*, 48 LA. L. REV. 535 (1988) (describing the effect of *Mennonite* on Louisiana tax sale practice and procedure); Carla W. Tanner, Note, *Forfeited and Delinquent Lands: Resolving the Due Process Deficiencies*, 96 W. VA. L. REV. 251, 253-55 (1993) (detailing due process concerns under West Virginia law and practice).

32. *See, e.g.*, THE AMERICAN LAW OF REAL PROPERTY §§ 17.01[b] & 17.03 (Arthur R. Guadio et al. eds., 1994); *Missouri Pac. Ry. Co. v. Nebraska ex rel. Bd. of Transp.*, 164 U.S. 403 (1896).

33. *See, e.g.*, THE AMERICAN LAW OF REAL PROPERTY, *supra* note 32, §§ 17.01[c] & 17.04; *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

34. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 58 (4th ed. 1992) (Compensation obligation prevents the government from overusing the taking power.).

35. *See* U.S. CONST. amend. V. *See generally* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

36. *See, e.g.*, 21 U.S.C. § 881(a)(7) (1988 & Supp. 1993) (civil forfeiture of real property used in illegal drug transaction); *id.* § 853 (criminal forfeiture of property by a person convicted of an illegal drug activity); 18 U.S.C. § 1963 (1988) (RICO forfeiture of property used in drug dealing).

37. 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 351-52, 466 (1968). *See also* Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and Western*

States in the late twentieth century, until it was revived in 1984, when Congress added real property to the list of assets subject to forfeiture under the Comprehensive Drug Abuse Prevention and Control Act of 1970.³⁸ The increased use of forfeiture by federal authorities to combat the drug trade is both fascinating and alarming.³⁹ But, whatever their current wisdom or future prospects, these sorts of forfeitures, like other governmental and private takings, are circumscribed by substantive and procedural rules that limit their actual occurrence.⁴⁰

3. Breaches of Lease Covenants

Leaseholders, unlike freeholders, also risk the loss of their homes for failing to pay their rent on time or for breaching other covenants contained in their leases. These additional sources of loss are indeed significant, but they too are circumscribed. It was an early tribute to the right to stay—and is still true today—that breaches of rent and other tenant covenants do not give the landlord an automatic right to terminate the tenant's possession. The right to dispossess the tenant arises only from explicit language in the lease or from a special statute.⁴¹

The right to stay took a serious beating in the nineteenth century when state legislatures began to enact summary eviction statutes, creating quick, streamlined procedures under which landlords could remove tenants for the nonpayment of rent.⁴² Since their introduction, however, these statutes have undergone an inexorable series of tenant-friendly changes (often by judicial

Notions of Sovereignty, 46 TEMP. L.Q. 169 (1973); 1 WILLIAM BLACKSTONE, COMMENTARIES *289-90; James R. Maxwell, Comment, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768 (1977).

38. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. §§ 801-971 (1988)). In 1984, real estate was added to the list of property interests subject to forfeiture found at 21 U.S.C. § 881(a). Forfeitures of *personal* property have been more common in this century. See Susan J. Parcels, Note, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435, 435-37 (1982).

39. See, e.g., Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217 (1992); Sean D. Smith, Comment, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303 (1988).

40. See, e.g., 21 U.S.C. §§ 881(b)-(j) (1988 & Supp. 1993) (statutory requirements, substantive and procedural); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (noting that a pre-deprivation hearing is generally required by the Constitution).

41. See CUNNINGHAM ET AL., *supra* note 15, at 398.

42. See RESTATEMENT (SECOND) OF PROPERTY § 12.1 statutory note at 399-405, § 14.1 statutory note at 3-11 (1977) [hereinafter RESTATEMENT OF PROPERTY].

decision), which slow the proceedings and make them otherwise less attractive to landlords.⁴³

The continuing vitality of the right to stay is also demonstrated by the slow strangulation of the landlord's right to "self-help" evictions. Lock-outs, furniture removals, temporary entries, and other actions aimed at removing unwanted tenants, without recourse to the courts, were once acceptable so long as the landlord was truly entitled to possession of the premises and used no more force than was necessary.⁴⁴ Most states now permit self-help evictions only if peaceable, and a growing number of jurisdictions prohibit them entirely.⁴⁵

The "landlord-tenant revolution" of the past thirty years has greatly expanded tenants' rights to stay where they are.⁴⁶ In prerevolutionary days, for example, a landlord could refuse to renew an expired term of years or, with proper notice, could terminate a periodic tenancy or tenancy at will for any reason or for no reason at all.⁴⁷ Today, certain reasons for terminating tenancies have been prohibited in every jurisdiction. Tenants can, for example, resist terminations prompted by racial or gender bias⁴⁸ or in retaliation for their complaints to local officials about the condition of the demised premises.⁴⁹ Some jurisdictions go even further, requiring landlords to have a *good* reason before they can terminate a tenancy.⁵⁰

Those parts of the landlord-tenant revolution aimed at improving the *quality* of the demised premises also have important ramifications for the right to stay. Imposing on

43. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 499 (3d ed., 1995).

44. *Id.* at 496.

45. RESTATEMENT OF PROPERTY, *supra* note 42, § 14.2 reporter's note at 16 (self-help prohibited unless preserved by local law); ROBERT SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 407-08 (1980) (modern trend away from self-help).

46. *See* Bell, *supra* note 3, at 491-501 (recent doctrinal developments that increase tenants' security of tenure); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 520, 533-38 (1984) (recent doctrinal developments that increase tenants' security of tenure).

47. DUKEMINIER & KRIER, *supra* note 43, at 425-27.

48. *See, e.g.*, Bell, *supra* note 3, at 493 (state and federal limitations on lease terminations and nonrenewals on account of race, sex, and other grounds); 42 U.S.C. § 3604(a) (1988) (Fair Housing Act prohibition against denying a dwelling to a person on account, *inter alia*, of race or sex).

49. *See, e.g.*, *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969) (defense against retaliatory eviction recognized); Bell, *supra* note 3, at 494-501 (reviewing judicial and statutory development of retaliatory eviction doctrine); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 5.101, 7B U.L.A. 503 (1972) (prohibition of retaliatory eviction); MODEL RESIDENTIAL LANDLORD TENANT CODE § 2-407 (1969) (prohibition of retaliatory eviction).

50. *See, e.g.*, N.J. STAT. ANN. § 2A:18-61.1 (West 1987).

landlords an obligation to keep their premises habitable⁵¹ eliminates a whole class of reasons to move. In theory, a tenant no longer needs to change apartments in order to have a working toilet.⁵² In addition, a breach of the implied warranty of habitability can serve as a defense in a landlord's summary action for possession.⁵³

B. *The Right to Stay, Expanded and Secured*

1. Expansion Through Licenses

Once a right to stay is secured by the ownership of an estate, the law of licenses permits the extension of that right to all whom the title-holder chooses.⁵⁴ Although subject to revocation by the title-holding licensor, the licensee's right to stay is good against all third parties. For example, if A owns a house and agrees to let B live there, no one else can dispossess B without incurring liability to both B and A.⁵⁵

The right to stay is further secured by the law's restrictions on the licensor's otherwise unfettered power of revocation. Licenses coupled with an interest and those subject to estoppel cannot be revoked.⁵⁶ In addition, licenses among family members are subject to family law obligations of support. Licenses to one's spouse and children are not entirely at the licensor's will, either in the granting or revoking. For example, if a wife owns a house, her obligation of marital support presumptively requires that her husband be permitted to live there too, and she cannot ask him to

51. See Jonathan M. Purver, Annotation, *Modern Status of Rules as to the Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R. 3d 646 (1971) (collecting judicial cases that invoke such an obligation in the absence of statutes); Jane E. Bockus, Comment, *Retaliatory Eviction in Texas—An Analysis and a Proposal*, 10 ST. MARY'S L.J. 303, 309 n.56 (1978) (collecting statutes).

52. See, e.g., *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985) (overflowing toilet, along with other deficiencies, constituted breach of implied warranty of habitability); *Hilder v. St. Peter*, 144 Vt. 150, 478 A.2d 202 (1984) (overflowing toilet, along with other deficiencies, constituted breach of implied warranty of habitability).

53. CUNNINGHAM ET AL., *supra* note 15, at 401.

54. 3 THOMPSON ON REAL PROPERTY § 64.02 (David A. Thomas ed., 1994). For a discussion of licenses in land under common law, see Alfred F. Conard, *An Analysis of Licenses in Land*, 42 COLUM. L. REV. 809 (1942).

55. Conard, *supra* note 54, at 814.

56. See Charles E. Clark, *Licenses in Real Property Law*, 21 COLUM. L. REV. 757, 767-82 (1921).

leave for just any reason at all.⁵⁷ Minor children have an even stronger claim not to be moved from their parents' homes.⁵⁸

2. Added Security: Removing Second-Order Causes of Loss

License-driven extensions of the right to stay depend entirely on the existence of an underlying property right. If licensors, as sole title-holders, lose their possessory interests in their homes, licensees lose their interests as well. For example, if parents lose the family home in a foreclosure sale, their children must move out with them. This suggests that further manifestations of a legal right to stay can be found in laws that limit or ameliorate the underlying conditions that threaten property holders, including leaseholders, with the loss of their possessory rights.

People frequently lose title for financial reasons such as failure to pay the landlord, the bank, the county tax collector, or other creditors. Legislatures are thus particularly attentive to those situations in which rents or home-related debts can rise precipitously and unexpectedly, situations that are most likely to threaten the loss of one's home. By minimizing those situations, the right to stay is strengthened. This is the common theme running through rent control ordinances,⁵⁹ emergency rent assistance,⁶⁰ caps on property taxes,⁶¹ restrictions on variable-rate mortgages,⁶² and condominium-conversion legislation.⁶³ All tend to keep owners and renters where they are.

57. See, e.g., HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §§ 7.1, 7.3 (2d ed. 1987) (spousal obligations of support); Blanche Crozier, *Marital Support*, 15 B.U. L. REV. 28, 33 (1935) (Wife's right of support, at a minimum, includes privilege of living with husband.). But see Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 563-67 (1974) (courts generally unwilling to give cause of action to wife for inadequate support during marriage).

58. Parents are limited in their ability to expel minor children because of the parental obligation of support. See, e.g., Robert M. Horowitz, *Economic Interests of Children*, in LEGAL RIGHTS OF CHILDREN 10, 12-18, 22-23 (Robert M. Horowitz & Howard A. Davidson eds., 1984) [hereinafter *Legal Rights of Children*]. In order to remove children from the parental home, the state must show abuse or similar maltreatment. *Id.* at 262-312.

59. See CUNNINGHAM ET AL., *supra* note 15, at 371.

60. See, e.g., N.Y. SOC. SERV. LAW § 350-j (3) (McKinney 1992).

61. California's Proposition 13, passed in 1978, is one of the most famous efforts in this regard. CAL. CONST. art. XIII A, §§ 1-6.

62. See, e.g., N.Y. GEN. OBLIG. LAW § 5-501(4) (McKinney 1989); PA. STAT. ANN. tit. 41 § 301 (1995); see also Christopher Caswell, Comment, *The New Mortgages: A Functional Legal Analysis*, 10 FLA. ST. U. L. REV. 95 (1982).

63. See, e.g., WARREN FREEDMAN & JONATHAN B. ALTER, *THE LAW OF CONDOMINIA AND PROPERTY OWNERS' ASSOCIATIONS* 26-28 (1992) (problems and responses to condominium conversion); see also David A. Fine, Comment, *The Condominium Conversion Problem: Causes and Solutions*, 1980 DUKE L. J. 306;

3. Added Security: The Law Outside of Property

Although a right to stay is secured primarily through property law, other laws sustain the right as well. Individuals are secured against forced relocations by tort actions for trespass (the tort law response to the property law violation), as well as assault, battery, and false imprisonment,⁶⁴ and by criminal laws prohibiting assault, battery, burglary, and kidnapping.⁶⁵ Entries by government officials are constrained by the Fourth Amendment's prohibition against unreasonable searches and seizures.⁶⁶

The most dramatic of forced movements, the punishment of exile, has been described as "a penalty thus far unknown to our law and at most but doubtfully within Congress' power."⁶⁷ In addition, the law has slowly destroyed or modified all those statutes that gave one person the right to determine where another should live. Long gone are slavery, indentured servitude, and a marriage relation that permitted husbands to determine where their wives should live.⁶⁸ Today, in private relations, only minor children are left at the residential mercy of others, and even they are realizing a marginal growth in their ability to decide where they will live.⁶⁹

Note, *The Validity of Ordinances Limiting Condominium Conversion*, 78 MICH. L. REV. 124 (1979).

64. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13 (5th ed. 1984) (trespass to land); *id.* § 10 (assault); *id.* § 9 (battery); *id.* § 11 (false imprisonment).

65. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 7.16 (2d ed. 1986) (assault); *id.* § 7.15 (battery); *id.* § 8.13 (burglary); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 229-34 (3d ed. 1982) (kidnapping).

66. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

67. *Klapprott v. United States*, 335 U.S. 601, 616-17 (1949) (Rutledge, J., concurring). See also *Kungys v. United States*, 485 U.S. 759, 791 (1988) (Stevens, J., concurring in judgment) (Denaturalization, a punishment tantamount to exile and banishment, is a "patently excessive" penalty for false statements made during naturalization proceedings.); *Olim v. Wakinekona*, 461 U.S. 238, 252-53 n.1 (1983) ("[C]ompelling a person 'to quit a city, place or country, for a specified period of time, or for life,' has long been considered a unique and severe deprivation, and was specifically outlawed [in England].") (Marshall, J., dissenting) (quoting *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting)).

68. On the ancient English rights of husbands, see 2 POLLOCK & MAITLAND, *supra* note 37, at 405-07, 414-20.

69. See, e.g., Howard A. Davidson & Katherine Gerlach, *Child Custody Disputes: The Child's Perspective*, in LEGAL RIGHTS OF CHILDREN, *supra* note 58, at 243-48.

C. *Property Law and the Right to Stay*

United States law secures a right to stay primarily through the law of property, with secondary support from family, tort, criminal, and constitutional law. But property law dominates, and securing a right to stay through property law has several important consequences. First, the method requires that the right to stay be *acquired*. "If you wish to secure for yourself a right not to be moved," says the law, "get yourself an estate in land. The longer the better." Affirmative acquisitions are required, whether by purchase, gift, devise, or descent. Consequently, the poor are more likely to have shorter estates or no estates at all. If the right to stay is truly fundamental, it is curious that it is not guaranteed to everyone on roughly the same terms.

Second, a property-based right to stay is highly vulnerable to commercial loss. "Once you acquire an estate in land," the law continues, "you cannot be moved for the length of that estate, so long as you keep your creditors happy: pay your rent, pay your mortgage, pay your taxes, indeed, pay all your debts with sufficient timeliness so that no creditor is roused to move against you." Once acquired, the right to stay lasts only so long as one pays one's debts. The result could hardly be different in a system tied to property. After all, property is an item of commerce. We buy and sell it, lend and borrow against it, and invest and speculate with it. Yet, it is curious that the right to stay, if truly fundamental, should be so vulnerable to commercial loss.

Grounding a right to stay in property law produces results that cut against the right's universality and security, but it also has advantages. A property-based right to stay has a welcome brittleness; it is easily violated and thus vigorously protects the human interest in not being moved. It is good against all levels and all branches of government; against all corporations, partnerships, and other juristic persons; and against all individuals—bosses, siblings, spouses, children, friends, bullies, and thieves. Furthermore, the property-based right to stay is violated regardless of whether the right-holder is forced to move across the hall, down the street, or beyond the national borders. The right is violated regardless of whether the dispossession is permanent or lasts for only a few minutes. The advantage of this brittleness becomes especially apparent when contrasted with international law's protection of the right to stay.

III. THE INTERNATIONAL APPROACH

International law protects the right to stay, but in very different ways from those found in U.S. law. The similarity of ultimate results confirms the right to stay's universal and deeply felt significance; the divergent means of attaining those results reflect differing historical obsessions and modes of development that characterize the two legal systems. International law, especially treaty law, moves along three broad lines of development. New law-making efforts tend to focus either on: (1) particular types of urgent *situations* (war, hijacking, ozone-depletion), (2) particular *classes of persons* thought to warrant special attention and protection (migrants, ethnic minorities, children), or (3) *individuals*, in the development of international human rights. The human interest in resisting forced movement is reflected in all three lines of development. Manifestations of a right to stay, for example, can be found in "situational" treaties on war and other armed conflicts,⁷⁰ genocide,⁷¹ apartheid,⁷² economic development,⁷³ and the environment.⁷⁴ Aspects of the

70. See, e.g., Hague Regulations Respecting the Laws and Customs of War on Land, Annex, art. 46, 36 Stat. 2277, T.S. No. 539 ("[P]rivate property . . . must be respected [and] cannot be confiscated.") [hereinafter Hague Regulations]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 3(1)(b), 49, 53, 75 U.N.T.S. 287, 290, 318, 322 (no hostage-taking; limits on forced movements; no destruction of real property) [hereinafter Geneva Convention]; Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, arts. 51, 52, 85(4)(a), 1125 U.N.T.S. 3, 26, 27, 42, 16 I.L.M. 1391 (protection of civilian population and objects; population transfers characterized as "grave breaches") [hereinafter Protocol I]; Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 17, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (prohibition of forced movement of civilians) [hereinafter Protocol II].

71. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, arts. II(c) & (e), 78 U.N.T.S. 277 ("Genocide" is defined as including the imposition of conditions of life calculated to bring about a group's physical destruction and the forcible transfer of children from one group to another.).

72. See, e.g., International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. II(d), 1015 U.N.T.S. 243 (1974) (prohibiting racial segregation by area and expropriation of landed property) [hereinafter Apartheid Convention]; see also International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5(d)(i), 660 U.N.T.S. 195 (1966) (prohibiting racial discrimination in freedom of movement and residence) [hereinafter Racial Discrimination Convention].

73. See, e.g., Charter of Economic Rights and Duties of States, Dec. 12, 1974, G.A. Res. 3281, U.N. GAOR, 29th Sess., Agenda Item 48, art. 16, (1975), reprinted in 14 I.L.M. 251, 258 (1975) (elimination of apartheid and racial discrimination as a prerequisite of development); *Proposed Text of the Draft Code of Conduct on Transnational Corporations*, U.N. ESCOR, 2d Sess., Annex, Agenda

right can also be found in "class" legislation regarding workers,⁷⁵ refugees,⁷⁶ aliens,⁷⁷ stateless persons,⁷⁸ children,⁷⁹ indigenous people,⁸⁰ and women.⁸¹ And protection of the right can be found

Item 7(d), ¶ 25, at 9, U.N. Doc. E/1990/94 (1990) (conditions of work and life subject to ILO's Tripartite Declaration).

74. See, e.g., *Report of the United Nations Conference on the Human Environment*, June 10, 1972, Recommendations 1, 15, 16, at 6, 8, 9, U.N. Doc. A/Conf.48/14 (1972), reprinted in 11 I.L.M. 1416, 1417-19 (1972) (end to apartheid and racial segregation; planning for human settlements and urbanization; demographic policies); *World Charter for Nature*, Oct. 28, 1982, G.A. Res. 37/7, U.N. GAOR, 21st Sess., Supp No. 51, at 12, U.N. Doc. A/37/51 & Add. 1 (1982) (subsistence and settlement of populations); *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, June 13, 1992, princ. 5(a), UNCED Doc. A/CONF.151/6/Rev.1, reprinted in 31 I.L.M. 881 (1992) (rights of indigenous populations and other forest dwellers to be protected, *inter alia*, in land tenure arrangements).

75. See, e.g., *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Feb. 25, 1991, G.A. Res. 45/158, U.N. GAOR, 45th Sess., 69th pln. mtg. at 263-65, arts. 8(2), 14, 15, 20(2), 22 (1991) (right of migrant workers and families to enter and remain in state of origin; no arbitrary or unlawful interference with home; property rights; no loss of authorization of residence for failing to fulfill work contract, unless fulfillment is condition of authorization; no collective expulsions); *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, art. 8(1), in INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1981, 821, 823 (1982) (stating that loss of employment shall not imply withdrawal of authorization of residence or work permit).

76. See, e.g., *Convention Relating to the Status of Refugees*, July 28, 1951, arts. 10, 13, 21, 26, 32, 33, 19 U.S.T. 6259, 189 U.N.T.S. 137 (continuity of residence; rights to immovable property; housing; right to choose place of residence; limits on expulsion and forced return) [hereinafter *Refugee Convention*]; *Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (removing, *inter alia*, *Refugee Convention's* time limits in definition of refugee).

77. See, e.g., *State Responsibility and International Claims*, in 5 HACKWORTH DIGEST § 520, at 471-72 (international minimum standard regarding the treatment of the alien's person and property).

78. See, e.g., *Convention Relating to the Status of Stateless Persons*, Sept. 28, 1954, arts. 13, 26, 31, 360 U.N.T.S. 117 (property rights; choice of residence; non-expulsion) [hereinafter *Stateless Persons Convention*].

79. See, e.g., *Convention on the Rights of the Child*, Nov. 20, 1989, arts. 7(1), 8(1), 9(1), 10(1), 11(1), 16, 28 I.L.M. 1457 (1989) (right to be cared for "as far as possible" by one's parents; preservation of family relations; children not to be separated from parents against their will; right to enter and leave state party for family reunification; obligation to combat illicit transfer and nonreturn of children abroad; prohibition against arbitrary or unlawful interference with home).

80. See, e.g., *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, arts. 13, 14, 16, 18, 28 I.L.M. 1382 (confirming relationship of indigenous people with lands occupied; promoting ownership and possession of traditionally occupied lands; limiting removals from land; regulating intrusion upon or use of lands) [hereinafter *Indigenous Peoples Convention*].

in human rights instruments aimed at developing individual rights rather than the rights of groups or classes.⁸²

Predictably, a right developed in disparate contexts suffers from gaps, contradictions, and other anomalies. Successive groups of treaty-makers have had very different objects in mind as they went about their work. In addition, they labored over a period of time during which both legal views and geopolitical realities changed dramatically. Explicit treaty references to a right to stay began about fifty years ago, and some relevant customary law arose more than one hundred years before that. A right developed over a long period, by lawmakers with different goals, should be expected to suffer inconsistencies and other

81. See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, arts. 15(2), 15(4), 16(1)(h), 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) (equal rights to administer property; equal rights regarding freedom of movement and freedom to choose residence and domicile; equality with husband regarding "ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration").

82. Documents of universal application include: *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter *Eco Soc Covenant*]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) [hereinafter *Civ Pol Covenant*].

Regional, European instruments include, e.g. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*]; Protocol (No. 1) to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 1, 213 U.N.T.S. 262 (peaceful enjoyment of possessions) [hereinafter *European Protocol No. 1*]; Protocol (No. 4) to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, arts. 2, 3, 4, Europ. T.S. No. 46 (1986), (freedom to choose residence; expulsion of nationals prohibited; collective expulsion of aliens prohibited) [hereinafter *European Protocol No. 4*]; Protocol (No. 7) to the Convention for the Protection of Human Rights and Fundamental Freedoms, Extending the List of Civil and Political Rights, Nov. 22, 1984, art. 1 (limiting individual expulsions of aliens); European Social Charter, Oct. 18, 1961, art. 19(8), 529 U.N.T.S. 89 (migrant workers' right not to be expelled).

Regional, American instruments include, e.g. American Declaration of the Rights and Duties of Man, May 2, 1948, O.A.S. Res. 30, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965) [hereinafter *American Declaration*]; American Convention on Human Rights, Nov. 22, 1969, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev.1, Corr.2, (1970), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter *American Convention*].

Regional, African instruments include, e.g., African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5, *reprinted in* 21 I.L.M. 59 (1982) [hereinafter *Banjul Charter*].

forms of incoherence.⁸³ The worry over differences, however, clouds the larger, more important picture. In document after document, whenever or wherever treaty-makers have taken up subjects related to the question of where people live, a right to stay has been protected in some form. The significant fact is the right's recurrence.

A. *The Law of War*

Under international law, a right not to be moved is explicitly guaranteed in two contexts. The first is the law of war. Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention) provides:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

....

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.⁸⁴

This convention was concluded shortly after World War II and has enjoyed virtually universal support ever since;⁸⁵ its provisions on forced movement are remarkably strong and detailed. They unambiguously condemn forcible transfers of several sorts, "regardless of motive," and then carefully specify the exceptions under which forced movements are permissible. The treaty even imposes operational requirements on those movements that are permissible. A later protocol to the convention makes a violation

83. See Claire Palley, *Population Transfers*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS 219, 219 (Donna Gomien ed., 1993) ("[A]ccidents of historical development and *ad hoc* evolution of specific situational rules" have obscured similarities in population transfers.).

84. Geneva Convention, *supra* note 70, art. 49.

85. More than 180 nations are parties to the convention, including the United States. U.S. DEPT. OF STATE, TREATIES IN FORCE 414-15 (1995).

of these provisions a "grave breach" of that protocol,⁸⁶ and thus a war crime,⁸⁷ subjecting both the perpetrators and their superiors to criminal liability.⁸⁸

Despite its strength, Article 49 only applies during war or other international armed conflict, and only to those conflicts between parties to the treaty.⁸⁹ Furthermore, it applies only for the benefit of civilians, not otherwise covered under related conventions regarding military personnel and prisoners of war,⁹⁰ who: (i) are nationals of a nonneutral state that is a treaty party, and (ii) find themselves in the hands of another state that is also a treaty party.⁹¹

A later protocol extends similar protections to armed conflicts within a single state, primarily those in which the state's own forces face a well-organized, territory-holding opponent.⁹² Article 17 of that protocol provides:

86. Protocol I, *supra* note 70, art. 85(4)(a).

87. *Id.* art. 85(5).

88. *Id.* art. 86(2).

89. Geneva Convention, *supra* note 70, art. 2 (The convention applies to wars and other armed conflicts (i) between treaty parties and (ii) between treaty parties and non-treaty parties who accept and apply its provisions.). The provisions may extend to other international conflicts on the theory that the convention is declaratory of customary international law, generally binding in all states. *See, e.g.*, 2 GEORG SCHWARZENBERGER, *INTERNATIONAL LAW* 165-66 (3d ed. 1968) (discussing status of Geneva Convention as custom); Theodor Meron, *Deportation of Civilians as a War Crime Under Customary Law*, in *BROADENING THE FRONTIERS OF HUMAN RIGHTS* 201 (Donna Gomien ed., 1993) (Deportations from occupied territories had been prohibited under customary international law before the Geneva Convention.).

90. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

91. Geneva Convention, *supra* note 70, art. 4. Article 49 also presumes the existence of "occupied territory." That is, if a civilian falls into the hands of the enemy in the course of hostilities, but before "occupation" of the relevant area is established, Article 49 does not yet apply. *Id.* art. 49. *See* FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 55 (1987) (discussing that a territory is "occupied" only when "actually placed under the authority of the hostile army") (quoting Hague Regulations, *supra* note 70); Davis P. Goodman, Note, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 *STAN. L. REV.* 1573, 1573-75 (1985) ("Occupation" begins when actual fighting has ceased in an area, and the occupier has control, having ousted the local sovereign.).

92. Protocol II, *supra* note 70, art. 1 (Protocol II applies to armed conflicts within the territory of one treaty party, "between its armed forces and dissident armed forces . . . which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.⁹³

This provision is less detailed than the original one covering international conflicts, but still explicitly secures a right not to be moved.⁹⁴

B. *The Rights of Indigenous Peoples*

Internationally, an explicit guarantee of a right to stay appears in one other context, relating to the rights of indigenous peoples. The International Labour Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Indigenous Peoples Convention),⁹⁵ adopted in 1989, aims to establish the rights, *inter alia*, of people whose ancestors inhabited a place later conquered or colonized, and who currently retain at least some of their own social, political, or similar institutions.⁹⁶ Part II of the Indigenous Peoples Convention concerns land rights, and several of its provisions are relevant to this discussion.

The land provisions begin with Article 13: "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands . . . which they occupy or otherwise use, and in particular the collective aspects of this relationship."⁹⁷ This Article is remarkable for explicitly recognizing the ties that bind people to the land they inhabit. Such explicit recognition is rare

military operations and to implement this Protocol," but not including riots and similar disturbances.)

93. *Id.* art. 17.

94. See generally Christa Meindersma, *Legal Issues Surrounding Population Transfers in Conflict Situations*, 41 NETH. INT'L L. REV. 31 (1994).

95. Indigenous Peoples Convention, *supra* note 80. Although the convention entered into force on Sept. 5, 1991, at present only four states have become parties: Bolivia, Colombia, Mexico, and Norway.

96. *Id.* art. 1(b) (definition of indigenous populations); see also *id.* art. 1(a) (definition of tribal peoples); *id.* art. 2 (importance of self-identification).

97. *Id.* art. 13(1).

internationally⁹⁸ and its appearance in a recent treaty suggests a growing recognition of those ties. It is curious that this recognition should come, for apparently the first and only time, in relation to indigenous and tribal peoples, implying that close ties to the land are only possible for persons with ancestors of a particular sort.

Article 14 of the Indigenous Peoples Convention provides:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. . . .
2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.⁹⁹

In this Article, the convention seeks to regularize and legalize the relationship between indigenous peoples and the land they occupy by securing their use with *rights* of use and their possession with *rights* of possession and ownership. This, too, is remarkable, because it represents an unequivocal recommendation for the use and expansion of rights in private property. This is both novel and ironic in an international legal system that, for the past forty years, has treated the institution of private property as if it were a debilitating and highly communicable disease, primarily to be quarantined and never encouraged.¹⁰⁰ Traces of this view can still be seen in Article 14's failure to use the phrase "private property" and in the collective cast to its suggestion that legal rights to possession be established.

Finally, in Article 16 of the Indigenous Peoples Convention, the right to stay is explicitly established:

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and

98. It seems simply to have been taken for granted, for example, in the law of war's prohibition of forced transfers. See *supra* notes 84-94 and accompanying text.

99. Indigenous Peoples Convention, *supra* note 80, art. 14.

100. See *infra* notes 124-30 and accompanying text.

regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the people concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.¹⁰¹

Not surprisingly, this Article shares the form of the Geneva Convention's Article 49;¹⁰² it contains a statement of the prohibition against forced movement, a provision for exceptions, and a statement of rules and procedures to be followed in executing permissible removals. The two articles share commonalities of substance as well, including a high level of necessity required before a forced movement can be justified and a strong preference for temporary dislocations rather than permanent ones. Finally, and sadly, the two articles share a limited range of application. Although each constitutes a model of "right to stay" legislation, neither applies universally, and the Indigenous Peoples Convention has attracted so few parties that, symbolism aside, its practical effect is severely limited.¹⁰³

C. *Rights of Aliens*

One hundred years before these developments, international law had developed another manifestation of the right to stay. By the middle of the nineteenth century, customary international law had come to protect both the personal security and the property of persons living in states other than their own, a protection that helped to keep aliens from being moved against their will. Individuals, of course, are always subject to the laws and regulations of the nation in which they live, regardless of whether they are citizens.¹⁰⁴ Nonetheless, by the mid-nineteenth century

101. Indigenous Peoples Convention, *supra* note 80, art. 16.

102. Geneva Convention, *supra* note 70, art. 49.

103. See *supra* note 95 (only four parties to Indigenous Peoples Convention).

104. See, e.g., JAMES L. BRIERLY, *THE LAW OF NATIONS* 278 (Sir Humphrey Waldock ed., 6th ed. 1963); HACKWORTH DIGEST, *supra* note 77, at 471; ALWYN V.

states considered themselves obliged to accord aliens within their borders a certain minimal level of treatment. To put it in a way that makes the rule's origins clearer, states considered that their own nationals were entitled to a minimal level of civilized treatment when they entered the territory of other states. If their citizens were not so treated, the states whose nationals were mistreated had a claim against the offending states. The basic structure of this legal regime continues to the present day.¹⁰⁵

When aliens are forcibly moved from their homes, the international minimum standard is implicated. Traditionally, that standard has at least two components, the first regarding the treatment of aliens generally and the second regarding the treatment of aliens' property. The general standard is violated if the state's action "amount[s] to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."¹⁰⁶ A forced move from one's home, whether across the street or across the border, can obviously be carried out so savagely or viciously that it constitutes a violation of this standard, but such a violation concerns the conditions of the move rather than the move itself. Restrictions on the very fact of movement, something closer to a right to stay, are instead grounded in the property component of the international minimum standard.

The traditional view is that a state may take the property of an alien only for a public purpose, in return for compensation that is prompt, adequate, and effective, and in a way that does not discriminate unreasonably between different classes of aliens or between aliens and nationals.¹⁰⁷ Such protection does not preclude a forced move, but, by severely limiting the conditions under which real property is taken, the right to stay can be

FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 73 (1938).

105. See, e.g., Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 1, 2-3 (Richard B. Lillich ed., 1983); F. V. GARCIA-AMADOR ET AL., *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 1-2 (1974); ANDREAS H. ROTH, *THE MINIMUM STANDARD OF INTERNATIONAL LAW APPLIED TO ALIENS* (1949); FREEMAN, *supra* note 104, at 53-83.

106. *Neer v. United Mexican States (U.S. v. Mex.)*, 4 R.I.A.A. 60, 61-62 (Oct. 15, 1926).

107. See, e.g., *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 712(1) & cmts. (b)-(f) (1987) (hereinafter *RESTATEMENT*); Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 123 (1984); Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 657, 662 (1980).

secured in much the same way that the "takings clause" of the U.S. Constitution secures the U.S. right not to be moved.¹⁰⁸

Two possible limits should be noted. First, as a historical matter, the property safeguards of the international minimum standard have been applied most commonly to the expropriation of foreign-owned businesses and other commercial property.¹⁰⁹ There is not much available evidence of their application to resist or condemn the forced movement of individual families from their homes. Still, the traditional rules make no distinction between commercial and residential property.¹¹⁰ In addition, the property rules have in fact been used to oppose forced movements of families when their scale is sufficiently large to generate public debate and documentary evidence.¹¹¹

Second, historical usage aside, the current details—even the very existence—of an international minimum standard regarding property are open to question.¹¹² For decades, several Latin American states have resisted the proposition that there is a minimum international standard for the treatment of aliens, arguing instead that aliens are entitled only to the same treatment as the host country's own nationals.¹¹³ Beginning after World War II, and accelerating during the 1960s and 1970s, states in other parts of the world began to object to the international standard. Obsessed with the related phenomena of colonialism, imperialism, and private foreign capital, many states sought to modify or abrogate the restrictions on expropriations that required compensation of the traditional sort, or indeed, that permitted *any* international oversight over "domestic"

108. See *supra* notes 32-35 and accompanying text.

109. See, e.g., *Sedco, Inc. v. National Iranian Oil Co.*, 10 Iran-U.S. Cl. Trib. Rep. 180 (1986) (oil drilling rigs, related equipment and land); *Texaco Overseas Petroleum Co. v. Libyan Arab Republic (U.S. v. Libya)*, reprinted in 17 I.L.M. 1 (1978) (property and rights of two U.S. oil companies); *Factory at Chorzow, Merits (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) (nitrate factory); *Certain German Interests in Polish Upper Silesia*, 1926 P.C.I.J. (ser. A) No. 7 (nitrate factory and other property of two German companies).

110. See *supra* note 107 and accompanying text.

111. Property arguments were made, for example, to oppose the mass expulsion of Asians from Uganda in 1972. For a relevant debate in the United Nations, see U.N. GAOR, 27th Sess., General Comm. (203d mtg.) at 35-37, U.N. Doc. A/BUR/SR.203 (1972). See also Frank Wooldridge & Vishnu D. Sharma, *International Law and the Expulsion of Ugandan Asians*, 9 INT'L LAW. 30, 62-74 (1975); Richard Plender, *The Ugandan Crisis and the Right of Expulsion Under International Law*, INT'L COMM. JURISTS (Dec. 1972) at 19, 27; R. C. Chhangani, Notes and Comments, *Expulsion of Ugandan Asians and International Law*, 12 INDIAN J. INT'L L. 400, 403-05 (1972).

112. For a concise account of the situation, see RESTATEMENT, *supra* note 107, § 712 Reporters' Note 1.

113. See MALCOLM N. SHAW, INTERNATIONAL LAW 512 (3d ed. 1991).

expropriation decisions,¹¹⁴ developments famously contained in a series of resolutions from the United Nations General Assembly.¹¹⁵ Now, in the 1990s, there is legitimate debate about whether a new standard for expropriation has come into existence, and, if so, what exactly are its terms. National opinions vary significantly, and, in the face of this variation, it would be foolhardy to suggest that the right to stay is *reliably* secured around the world by the property prong of the international minimum standard.¹¹⁶

D. *International Human Rights*

The laws of war, the laws regarding the treatment of indigenous peoples, and the international minimum standard all help to establish a right to stay, but in clearly limited contexts. Universal protection that applies to everyone, all the time, can instead be found in a series of human rights documents developed and adopted after World War II. International human rights documents are significant because they typically pertain to all persons—citizens, aliens, and stateless persons—living within a nation's borders¹¹⁷ and are not limited in their application

114. See, e.g., R.P. ANAND, *INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES* 40-41 (1986); S.N. Guha Roy, *Is the Law of Responsibility of States for Injures to Allens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863, 866-69 (1961).

115. *General Assembly Resolution on Permanent Sovereignty over Natural Resources*, G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (1962); *General Assembly Resolution on Permanent Sovereignty over Natural Resources*, G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973), reprinted in 13 I.L.M. 238 (1974); *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974); *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (1974).

116. Several nations have denied the existence of any international standard regarding expropriations. Others have officially recognized modifications. The United States, on the other hand, has steadfastly taken the position that the traditional standard—no discrimination, public purpose, and prompt, adequate and effective compensation—is still the binding international standard for expropriations. See, e.g., Pamela B. Gann, *Compensation Standard for Expropriation*, 23 COLUM. J. TRANSNAT'L L. 615, 618-20 (1985); Brice M. Clagett, *The Expropriation Issue Before the Iran-United States Claims Tribunal: Is "Just Compensation" Required by International Law or Not?*, 16 LAW & POL'Y INT'L BUS. 813, 815 (1984).

117. See, e.g., RESTATEMENT, *supra* note 107, § 701 ("A state is obligated to respect the human rights of persons *subject to its jurisdiction*." (emphasis added)); *id.*, Part VII, Introductory Note, at 144 (International human rights apply "to all human beings, not to aliens alone.").

either to times of war or peace.¹¹⁸ These documents do not create a "right to stay" in those precise terms, but establish a series of closely related rights that collectively prohibit the forced movement of individuals and groups.

1. The Right to Property

In U.S. law, property rights play a major role in securing a right to stay. The situation is far different internationally. In 1948, the Universal Declaration of Human Rights (the Universal Declaration) succinctly and straightforwardly declared, in Article 17, that "[e]veryone has the right to own property alone as well as in association with others." "No one shall be arbitrarily deprived of his property."¹¹⁹ Despite its strength, Article 17 lacks detail¹²⁰ and is limited elsewhere by broadly stated exceptions for "morality, public order, and the general welfare in a democratic society."¹²¹ In addition, the Universal Declaration is by its own terms a "common standard of achievement"¹²² rather than a binding legal obligation.¹²³ Limited as it is, however, Article 17 marks the zenith of international law's protection of a universal right to private property.

Affected by the same experiences of colonialism, imperialism, and foreign capital that helped to destabilize the property component of the international minimum standard¹²⁴ and driven by a commitment to socialism in one or more of its many forms, a number of states found themselves increasingly unwilling to accept an international legal obligation to uphold the institution

118. Such documents typically permit state derogations from required conduct during times of war or other public emergency. See, e.g., Civ Pol Covenant, *supra* note 82, art. 4. The documents themselves, and the rights established therein, however, presumptively apply at all times.

119. *Universal Declaration*, *supra* note 82, art. 17.

120. See, e.g., Gudmundur Alfredson, *Article 17*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* 255, 256-57 [hereinafter *UNIVERSAL DECLARATION*] (Asbjorn Eide et al. eds., 1992) (Despite the absence of explicit exceptions, "it is foreseen that persons can be deprived of their property under certain circumstances.").

121. *Universal Declaration*, *supra* note 82, art. 29(2); see also *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 783 (Bruno Simma ed., 1994) (possibility of misuse of exceptions).

122. *Universal Declaration*, *supra* note 82, prmbi.

123. On the legal status of the Universal Declaration of Human Rights, see, e.g., *RESTATEMENT*, *supra* note 107, Part VII, Introductory Note, at 147; *id.*, § 701 Reporters' Notes 4 & 6; *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 121, at 783-84; *SHAW*, *supra* note 113, at 196-97; *HERSH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS* 408-17 (1950).

124. See *supra* notes 114-16 and accompanying text.

of private property.¹²⁵ The reticence is clearly symbolized by the absence of property rights from the two great international covenants that followed the Universal Declaration of Human Rights, which were designed to flesh out and make legally binding the aims of the earlier instrument.¹²⁶ The International Covenant on Economic, Social and Cultural Rights, for example, establishes universal human rights to work, to join trade unions, to social security, to an adequate standard of living, to education, and to the highest attainable standards of physical and mental health.¹²⁷ There is, however, no mention of a right to own property. The International Covenant on Civil and Political Rights secures to everyone a right to life, to liberty, to a fair criminal process, to freedom from torture and slavery, and to freedom of thought, assembly, and association.¹²⁸ Once again, however, there is no mention of a right to own property. The United States has taken the position that the omission of private property rights in both Covenants was not intended to eliminate or weaken those rights,¹²⁹ but the omission certainly did nothing to strengthen them. Other human rights instruments of universal significance guarantee to particular groups *equality with others* in their rights to property, but those instruments are silent on just what those property rights must be or the conditions under which they may be abridged.¹³⁰

125. See, e.g., RESTATEMENT, *supra* note 107, § 702 cmt. k (wide disagreement among states as to the scope and content of the property right); PAUL SIEGHART, *THE LAWFUL RIGHTS OF MANKIND* 130-31 (1985) (describing reticence to adopt an international right to property); MANOUCHEHR GANJI, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 143 (1962) (early U.N. difficulties in adopting human rights provisions regarding property).

126. On the relation between the International Covenants and the Universal Declaration of Human Rights, see, e.g., RESTATEMENT, *supra* note 107, part VII, Introductory Note, at 145; *id.* § 701, Reporters' Note 6. On the absence of property rights from the two International Covenants, see, e.g., Alfredson, *supra* note 120, at 259-60.

127. Eco Soc Covenant, *supra* note 82, arts. 6 (right to work); 8 (trade unions); 9 (social security); 11 (adequate standard of living); 12 (physical and mental health); and 13 (education).

128. Civ Pol Covenant, *supra* note 82; arts. 6 (life); 7 (torture); 8 (slavery); 9 (liberty); 14 (fair trial); 18 & 19 (freedom of thought); 21 (assembly); 22 (association).

129. See Nash, *supra* note 107, at 662.

130. See, e.g., Apartheid Convention, *supra* note 72, art. II(d) (no discrimination or segregation in land rights); Racial Discrimination Convention, *supra* note 72, art. 5(d)(v) (no racial discrimination in right to own property); Stateless Persons Convention, *supra* note 78, art. 13 (equality of treatment between stateless persons and aliens regarding movable and immovable property).

The right to property has fared better in regional instruments. The American Convention on Human Rights (the American Convention), with twenty-four state parties, provides that "[e]veryone has the right to the use and enjoyment of his property."¹³¹ The African Charter on Human and Peoples' Rights (the Banjul Charter), with forty-nine state parties, provides that "the right to property shall be guaranteed."¹³² Finally, Protocol (No. 1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, with twenty-three state parties, provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions."¹³³ In each case, however, the rights described can be overcome by a vaguely described public interest,¹³⁴ and only the American Convention explicitly requires compensation for a public taking,¹³⁵ which is the most effective way to insure the seriousness of the public need.

In sum, the right to stay is promoted, but far from guaranteed, by an international right to private property.¹³⁶ No universally applicable human rights treaty recognizes an individual right to private property, and many states are not party to any regional treaty that does. Even parties to the regional arrangements can legitimately interpret their property obligations differently, and the right to property clearly means more in some jurisdictions than in others. A right to stay secured in this way is thus secured unevenly. Finally, even with a growing agreement on the meaning of the regional property rights,¹³⁷ the distribution

131. American Convention, *supra* note 82, art. 21. See also American Declaration, *supra* note 82, art. XXXIII ("Every person has the right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.").

132. Banjul Charter, *supra* note 82, art. 14.

133. European Protocol No. 1, *supra* note 82, art. 1.

134. *Id.* art. 1 (The state has the right to control the use of property "in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."); Banjul Charter, *supra* note 82, art. 14 (Property right "may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."); American Convention, *supra* note 82, art. 21(1) (The use and enjoyment of property may be subordinated to "the interest of society.").

135. American Convention, *supra* note 82, art. 21(2). But see Banjul Charter, *supra* note 82, art. 21(2) (dispossessed "people" entitled to lawful recovery of their property as well as to "adequate compensation").

136. Paul Sieghart concludes: "[W]hatever the 'right to property' may be, it is more weakly protected than any other" in international human rights treaties. SIEGHART, *supra* note 125, at 132.

137. This is inevitable as experience develops with each of these instruments and the clauses they contain. The development of the "European" property right, for example, is traced in A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE 213-18 (3d ed. 1993).

of *property*, especially long-term interests in real property, varies so significantly among nations that property law's protection of a right to stay varies significantly as well.

But the desire to stay is a strong one, and international law has developed a series of rights that protects this desire regardless of how private property is viewed or distributed. Almost every major human rights document developed since World War II has recognized and reinforced a right not to be expelled from one's own country, a right to choose one's residence, and a right to be protected against arbitrary interference with one's home.¹³⁸ These are the primary guarantees against forced movement. Depending on the details, forced movements can also implicate international human rights against discrimination¹³⁹ and degrading treatment,¹⁴⁰ as well as the rights to life,¹⁴¹ self-determination,¹⁴² free choice of employment,¹⁴³ and culture.¹⁴⁴ This Article concentrates on the primary guarantees.

138. Each of these rights will be discussed *infra*, Part III.D.2, 3, and 4.

139. See, e.g., American Declaration, *supra* note 82, art. 2; American Convention, *supra* note 82, art. 1; Banjul Charter, *supra* note 82, art. 2; Racial Discrimination Convention, *supra* note 72, art. 1; Stateless Persons Convention, *supra* note 78, art. 3; European Convention, *supra* note 82, art. 14; Civ Pol Covenant, *supra* note 82, art. 2; *Universal Declaration*, *supra* note 82, art. 2; see also U.N. Charter art. 1, ¶ 3 (a United Nations purpose to promote human rights "without distinction as to race, sex, language, or religion").

140. E.g., American Convention, *supra* note 82, art. 5; American Declaration, *supra* note 82, art. 26; Banjul Charter, *supra* note 82, art. 5; Racial Discrimination Convention, *supra* note 72, art. 5(b); European Convention, *supra* note 82, art. 3; Civ Pol Covenant, *supra* note 82, art. 7; *Universal Declaration*, *supra* note 82, art. 5.

141. E.g., American Convention, *supra* note 82, art. 4; American Declaration, *supra* note 82, art. 1; Banjul Charter, *supra* note 82, art. 4; European Convention, *supra* note 82, art. 2; Civ Pol Covenant, *supra* note 82, art. 6; *Universal Declaration*, *supra* note 82, art. 3.

142. E.g., Banjul Charter, *supra* note 82, art. 20; Civ Pol Covenant, *supra* note 82, art. 1; Eco Soc Covenant, *supra* note 82, art. 1; *Universal Declaration*, *supra* note 82, art. 21(3); see also U.N. CHARTER, art. 1, ¶ 2 (respect for self-determination of peoples). The notion of self-determination is most commonly applied to peoples rather than individuals, so it would be implicated primarily when groups of persons are forced to move from their homes.

143. E.g., American Declaration, *supra* note 82, art. 14; Banjul Charter, *supra* note 82, art. 15; Racial Discrimination Convention, *supra* note 72, art. 5(e)(i); European Social Charter, *supra* note 82, art. 1; Eco Soc Covenant, *supra* note 82, art. 6; *Universal Declaration*, *supra* note 82, art. 23.

144. E.g., American Declaration, *supra* note 82, art. 13; Racial Discrimination Convention, *supra* note 72, art. 5(e)(6); Eco Soc Covenant, *supra* note 82, art. 15; Civ Pol Covenant, *supra* note 82, art. 27; *Universal Declaration*, *supra* note 82, art. 27.

2. Freedom from Expulsion

In 1948, the Universal Declaration of Human Rights condemned arbitrary exile,¹⁴⁵ and almost every major human rights instrument since that time has contained a proscription against expulsion across national borders.¹⁴⁶ As might be expected, the prohibition is seldom absolute, but is subject to exceptions provided by law, based on requirements of national security, public order, health, or morality.¹⁴⁷ Of greater interest, however, are the distinctions often made in these instruments between nationals and aliens on the one hand, and between individual and mass expulsions on the other. Nationals are more likely to be protected than aliens,¹⁴⁸ and groups are more likely to be protected than individuals.¹⁴⁹ Such distinctions are

145. *Universal Declaration*, *supra* note 82, art. 9.

146. *E.g.*, American Declaration, *supra* note 82, art. 8; American Convention, *supra* note 82, art. 22; Banjul Charter, *supra* note 82, art. 12; Stateless Persons Convention, *supra* note 78, art. 31; European Protocol No. 4, *supra* note 82, arts. 3 & 4; European Social Charter, *supra* note 82, art. 19(8); Civ Pol Covenant, *supra* note 82, art. 13.

147. *E.g.*, American Declaration, *supra* note 82, art. 28 (rights limited by security of all, general welfare and advancement of democracy); American Convention, *supra* note 82, art. 22(3) (crime prevention, national security, public safety, public order, public morals, public health); Stateless Persons Convention, *supra* note 78, art. 31(1) (national security and public order); European Social Charter, *supra* note 82, art. 19(8) (national security, public interest or morality); *Universal Declaration*, *supra* note 82, art. 29(2) (morality, public order, general welfare).

148. Some human rights instruments flatly prohibit the expulsion of nationals under any circumstances. *E.g.*, American Declaration, *supra* note 82, art. 8 (A national has the right not to leave his home state "except by his own will."); American Convention, *supra* note 82, art. 22(5) (Nationals cannot be expelled from their home states.); European Protocol No. 4, *supra* note 82, art. 3(1) (Nationals cannot be expelled from their home states.). Aliens and stateless people are not so well protected. *See, e.g.*, American Convention, *supra* note 82, art. 22(6) (Aliens can be expelled pursuant to a "decision reached in accordance with law."); Banjul Charter, *supra* note 82, art. 12(4) (A nonnational can be expelled pursuant to a "decision taken in accordance with the law."); Stateless Persons Convention, *supra* note 78, art. 31 (Stateless persons can be expelled for reasons of national security or public order, pursuant to "a decision reached in accordance with due process of law," subject to other restrictions.); Civ Pol Covenant, *supra* note 82, art. 13 (Aliens can be expelled pursuant to lawful decision and other requirements.). *See also* THE MOVEMENT OF PERSONS ACROSS BORDERS 85-97 (Louis B. Sohn & Thomas Buergenthal eds., 1992) (expulsion rules regarding aliens and nationals); Guy S. Goodwin-Gill, *The Limits of the Power of Expulsion in Public International Law*, 47 BRIT. Y.B. INT'L L. 55 (1977) (limits on states' power to expel aliens).

149. Mass expulsions are more likely to be prohibited than individual expulsions. Because nationals are often considered safe from expulsion, this distinction usually manifests itself as a prohibition against the mass expulsion (but not the individual expulsion) of aliens. *E.g.*, American Convention, *supra*

commonplace in international law, where the concept of nationality is both fundamental and pervasive,¹⁵⁰ and where the numerical dimensions of a problem often have a bearing on its suitability for international resolution.¹⁵¹

Still, from the viewpoint of the basic human interest involved, the distinctions are decidedly odd. From the individual's perspective, home is home; the color of one's passport makes no difference. It begs the question to argue that the distinction between nationals and aliens is justified because aliens have a lowered expectation of security. Expectations are lowered (if indeed they are) mainly because international law has heretofore commonly made distinctions between aliens and nationals.¹⁵² Nor does it matter much, from the individual's perspective, whether he or she is expelled individually or with many others. It is untenable to suggest that the disruption to one's life is made worse because others' lives are similarly disrupted. International

note 82, art. 22(9) (collective expulsion of aliens prohibited); Banjul Charter, *supra* note 82, art. 12(5) (mass expulsion of nonnationals prohibited); European Protocol No. 4, *supra* note 82, art. 4 (collective expulsion of aliens prohibited). See generally Jean-Marie Henckaerts, *The Current Status and Content of the Prohibition of Mass Expulsion of Aliens*, 15 HUM. RTS. L.J. 301 (1994) (exemplary survey of current law and practice).

150. See, e.g., SHAW, *supra* note 113, at 504.

[Nationality is] . . . the vital link between the individual and the benefits of international law. Although international law is now moving to a stage whereby individuals may acquire rights free from the interposition of the state, the basic proposition remains that in a state-oriented world system, it is only through the medium of the state that the individual may obtain the full range of benefits under international law, and nationality is the key.

Id.

151. A great many issues do not reach international attention until the numbers of people involved grow sufficiently large. A single, unjustified killing of a citizen by a police officer will not usually generate international attention; a killing of thousands will. See RESTATEMENT, *supra* note 107, § 702(g) & cmt. m. (A state violates customary international law if it practices, encourages, or condones a consistent pattern of gross violations of human rights.).

152. See generally RICHARD B. LILICH, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* (1984). The situation is slowly changing, but aliens still suffer special vulnerabilities under international law. Professor Lillich concludes:

While the trend has been towards greater protection of the alien from the chilling effect of the State's far-reaching sovereign powers over his or her admission, stay and expulsion, the extent of such protection varies greatly, leaving aliens in many States inadequately protected, both substantively and procedurally, at the present time.

Id. at 122.

law may well be justified, on other grounds, in drawing the distinctions of nationality and numbers in the law of expulsions,¹⁵³ but these distinctions create and sustain an obvious dissonance between factual desire and legal right. Indeed, the dissonance helps to explain international law's sporadic movement toward obliterating these distinctions, as seen most clearly in the development of the European human rights system¹⁵⁴ and the fairly constant suggestions of commentators and scholars to the same effect.¹⁵⁵

3. Freedom of Residence

Expulsion law only catches relocations at the border, keeping individuals in the country, but not in their homes. Further protection is provided by the "freedom of residence," which, like the freedom from expulsion, has been proclaimed in almost every major human rights instrument since the Universal Declaration of Human Rights.¹⁵⁶ But, unlike the freedom from expulsion, the freedom of residence has not been limited by nationality or numbers. The Universal Declaration of Human Rights, for example, extends the freedom of residence to "everyone."¹⁵⁷ The African Charter on Human and Peoples' Rights extends it to "every individual."¹⁵⁸ Even the most restrictive versions of the right, found in the International Covenant on Civil and Political Rights and regional European and U.S. instruments, add only the qualification that persons be "lawfully within" the territory of the state in order to enjoy the freedom of residence.¹⁵⁹

153. See *supra* notes 148-51 and accompanying text.

154. European human rights instruments have removed the distinction between individual and mass expulsions of nationals, European Protocol No. 4, *supra* note 82, art. 3(1), and prohibit mass expulsions of aliens, *id.*, art. 4. This leaves open only the possibility of expelling individual aliens. The European Social Charter protects one class of aliens, migrant workers from other states who are parties to the Charter, from individual expulsion, except on specifically delineated grounds. European Social Charter, *supra* note 82, art. 19(8).

155. E.g., Plender, *supra* note 111, at 19-27.

156. The *Universal Declaration* provides that "[e]veryone has the right to freedom of movement and residence within the borders of each state." *Universal Declaration*, *supra* note 82, art. 13. Similar language appears in: American Declaration, *supra* note 82, art. 8; American Convention, *supra* note 82, art. 22; Banjul Charter, *supra* note 82, art. 12; Racial Discrimination Convention, *supra* note 72, art. 5(d)(i); Stateless Persons Convention, *supra* note 78, art. 26; European Protocol No. 4, *supra* note 82, art. 2(1); Civ Pol Covenant, *supra* note 82, art. 12.

157. *Universal Declaration*, *supra* note 82, art. 13.

158. Banjul Charter, *supra* note 82, art. 12(1).

159. Civ Pol Covenant, *supra* note 82, art. 12(1) (freedom of residence extended to "[e]veryone lawfully within the territory"); European Convention, *supra* note 82, art. 2(1) ("[e]veryone lawfully within the territory"); American

Still, the freedom of residence is not the same as a right to stay, and at least one regional version of the freedom is very different indeed. The American Convention on Human Rights provides that "[e]very person lawfully in the territory of a State Party has the right to move about in it and to reside in it subject to the provisions of the law."¹⁶⁰ The phrasing suggests that everyone has a right to reside *somewhere* in the state, but not in any place in particular, including one's current home. This reading is bolstered by the earlier American Declaration on the Rights and Duties of Man, which provides that "[e]very person has the right to fix his residence within the territory of the state of which he is a national,"¹⁶¹ again suggesting a right to reside *somewhere* within the state, but nowhere in particular. On such a reading, an individual could certainly be moved, and moved more than once, so long as another place within the national borders were always made available.

Elsewhere the right is stronger. While the U.S. regional system establishes a right "to reside in" a state, the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights speak instead of a "freedom of residence."¹⁶² This small but significant change in language implies an ability to *choose* where one lives. Indeed, the International Covenant on Civil and Political Rights and European human rights documents are explicit in declaring that everyone lawfully within the territory of a state has the "freedom to choose his residence."¹⁶³

Still, the "freedom to choose one's residence" is an illusive freedom, and only partially protects a right to stay. A "freedom to choose" clearly covers the *initial* decision to move *to* a place, but not so clearly the continuing residence *in* a place. The connection between the two is one of logic and standard legal interpretation: a freedom to make the initial choice of residence would largely be eviscerated if the state were permitted to overturn that choice immediately or whenever, thereafter, it wished. To give substance to any decisional right, one must limit the right of others (in this case, the right of the state) to overturn the decisions actually

Convention, *supra* note 82, art. 22(1) ("[e]very person lawfully in the territory"). Only the American Declaration on the Rights and Duties of Man has limited the freedom of residence to nationals. American Declaration, *supra* note 82, art. 8.

160. American Convention, *supra* note 82, art. 22(1).

161. American Declaration, *supra* note 82, art. 8.

162. *Universal Declaration*, *supra* note 82, art. 13(1); *Banjul Charter*, *supra* note 82, art. 12(1).

163. *Civ Pol Covenant*, *supra* note 82, art. 12(1). See, e.g., *European Convention*, *supra* note 82, art. 2(1).

made. For this reason, it is commonly assumed that the freedom to choose one's residence entails a right not to be moved.¹⁶⁴

The freedom of residence, however, does not fully protect a right to stay. There are three reasons for this conclusion. First, the freedom of residence is itself riddled with exceptions. The International Covenant on Civil and Political Rights is typical, permitting restrictions on the freedom of residence for reasons of "national security, public order (*ordre public*), public health or morals or the rights and freedoms of others,"¹⁶⁵ as well as subjecting the freedom to complete suspension in times of "public emergency."¹⁶⁶ In the European and U.S. versions of the freedom, one's choice of residence can be limited for all the reasons set out in the International Covenant,¹⁶⁷ on the additional grounds of "public safety" and crime prevention,¹⁶⁸ and for "particular areas," whenever justified by "the public interest in a democratic society."¹⁶⁹ A right to stay, derived from this freedom, is necessarily subject to the same long list of exceptions.

Second, even when the "freedom of residence" applies, it does not guarantee the right to choose any particular residence. The present author, for example, has no "right" to choose Apartment 17A at 1224 North Lake Shore Drive in Chicago, a choice that would doubtlessly upset the current owners and puzzle the

164. *E.g.* Stavropoulou, *supra* note 8, at 726 (The right not to move is a component of freedom of movement.); Christopher M. Goebel, *A Unified Concept of Population Transfer* (Revised), 22 *DENV. J. INT'L L. & POL'Y* 1, 18 (1993) (Population transfer may violate freedom of movement and freedom to choose residence.); Rosalyn Higgins, *Liberty of Movement Within the Territory of a State: The Contribution of the Committee on Human Rights*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY* 325, 336 (Yoram Dinstein ed., 1989) (forced removals "necessarily incompatible" with the right freely to select one's residence).

165. *Civ Pol Covenant*, *supra* note 82, art. 12(3).

166. *Id.* art. 4(1).

167. *See* European Protocol No. 4, *supra* note 82, art. 2(3) (grounds for exceptions to freedom of residence); American Convention, *supra* note 82, art. 22(3) (grounds for exceptions to freedom of residence); European Convention, *supra* note 82, art. 15(1) (derogation in "time of war or other public emergency"); American Convention, *supra* note 82, art. 27 (derogation in "time of war, public danger or other emergency").

168. European Protocol No. 4, *supra* note 82, art. 2(3); American Convention, *supra* note 82, art. 22(3).

169. European Protocol No. 4, *supra* note 82, art. 2(4); *accord* American Convention, *supra* note 82, art. 22(4) ("[D]esignated zones" can be restricted for reasons of "public interest.").

The Banjul Charter contains only one exception, but it's a large one: "Every individual shall have the right to freedom of movement and residence within the borders of a State *provided he abides by the law.*" Banjul Charter, *supra* note 82, art. 12(1) (emphasis added).

building's management.¹⁷⁰ Because the freedom of residence does not guarantee a right to choose any particular place, it cannot, as a *matter of logic*, entail a right to stay in any particular place. The freedom of residence thus fails to secure the most important aspect of the right to stay—the right to remain exactly where one is.

The “geographical” strength of the freedom of residence is open to serious question. The freedom connotes, *inter alia*, that a state may not prohibit persons from living within particular areas inside its borders.¹⁷¹ But what is the size or nature of those areas? The answer is crucial because an extrapolated right to stay depends on it. If the “freedom of residence” means only that people have the right to live in any region of the country they wish, then their “right to stay” is only a right to remain within the region they have chosen, and the government can properly move them any place within it. If the “freedom of residence” instead means that people have a “right to live” in any city they wish, their right to stay is stronger, but still permits forced moves within the metropolitan area.¹⁷²

Third, geographical questions aside, the argument for implying a right to stay from the freedom of residence works only at the margin. A right to choose one's residence is undoubtedly made chimerical if the state is permitted to overturn the choice at any time or for any reason.¹⁷³ But what if a state waits five years, or even just two years, before ousting a family? Is the initial decision still “chimerical” and the state power implicitly denied? What if state-sponsored removals are limited to three permissible grounds, or even to six permissible grounds? Is the initial decision still “chimerical” and the state power implicitly denied?

170. Under the “freedom of residence” in the Universal Declaration of Human Rights, “[o]ne cannot demand to set up a house on other people's property.” Atle Grahl-Madsen, *Article 13*, in *UNIVERSAL DECLARATION*, *supra* note 120, at 203, 209.

171. See Higgins, *supra* note 14, at 343 (States do not feel entitled to restrict the movement of nationals, except in highly sensitive military areas.).

172. See Atle Grahl-Madsen, *Article 13*, in *UNIVERSAL DECLARATION*, *supra* note 120, at 209 (A person may choose whether to live in a city, town, village, or in the countryside, and may also choose which city, town, village, or district, without special permission from the government.).

173. See, e.g., *Mpandanjila v. Zaire*, U.N. Comm. on Human Rights 138/1983, reported in U.N. GAOR, 41st Sess., Supp. No. 40, Annex VIII, at 121-24 (1986) (internal banishment of President's political opponents a violation of article 12(1) of the Covenant on Civil and Political Rights); *Mpaka-Nsusu v. Zaire*, U.N. Comm. on Human Rights 157/1983, reported in U.N. GAOR, Supp. No. 40, Annex VIII, at 142 (1986) (internal banishment of President's political opponents a violation of article 12(1) of the Covenant on Civil and Political Rights). Both cases are discussed in Higgins, *supra* note 164, at 341-42.

In short, one can extrapolate from the "freedom of residence" only obvious, minimal limitations on state-sponsored removals.¹⁷⁴ Stronger, more detailed limitations cannot be derived in this way.

4. Rights to Privacy and Home

The last major international human right protecting a right to stay is the freedom from arbitrary interference with one's home. The International Covenant on Civil and Political Rights provides, for example, that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation" and "[e]veryone has the right to the protection of the law against such interference or attacks."¹⁷⁵ Substantially identical language, or substantially identical protection, appears in most other major human rights instruments.¹⁷⁶

Like most international human rights, this "home right" is subject to exceptions¹⁷⁷ and can be suspended in time of public emergency.¹⁷⁸ These features, of course, diminish the right's effectiveness in securing a right to stay. Still, the "home right" is especially interesting for two reasons. First, it obliges nations not only to refrain from interference themselves, but to provide

174. That is, states must not be permitted to move persons in a completely arbitrary way or at any time they wish.

175. Civ Pol Covenant, *supra* note 82, art. 17.

176. *E.g.*, *Universal Declaration*, *supra* note 82, art. 12 (substantially identical language); *American Convention*, *supra* note 82, art. 11 (substantially identical language); *European Convention*, *supra* note 82, art. 8 (same); *American Declaration*, *supra* note 82, art. 9 (substantially identical protection: "[E]very person has the right to the inviolability of his home.").

177. Nonarbitrary or lawful interferences would obviously be permitted. See Civ Pol Covenant, *supra* note 82, art. 17(1) ("arbitrary or unlawful" interference prohibited); *Universal Declaration*, *supra* note 82, art. 12 ("arbitrary" interference); *American Convention*, *supra* note 82, art. 11(2) ("arbitrary or abusive" interference). The *European Convention for the Protection of Human Rights and Fundamental Freedoms* contains a familiar list of exceptions:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 82, art. 8(2).

178. See Civ Pol Covenant, *supra* note 82, art. 4 (derogation in time of "public emergency"); *European Convention*, *supra* note 82, art. 15(1) (derogation in "time of war or other public emergency"); *American Convention*, *supra* note 82, art. 27(1) (derogation in "time of war, public danger, of other emergency").

protection against interference by private persons.¹⁷⁹ Second, the "home right" works as an early warning system for future dislocations, tripping an alarm at interferences that fall short of forced physical movement, but that could lead to or encourage such a movement. A series of ransackings by police officers, for example, designed to force the residents out of their home or out of the country, would not necessarily violate the other human rights discussed in this Article, but would violate the "home right." Forced movements themselves would seem to violate the "home right" as well, although it has seldom been used in that or any other context.¹⁸⁰ Historically, the "home right" has been understood primarily as a component of a wider "right to privacy," not as a bulwark against forced movement.¹⁸¹ Even so, there is some precedent for invoking the "home right" in cases of forced movement,¹⁸² and such use may increase in the future.

IV. CONCLUSION

Both domestic and international law are tenacious in their defense of a right to stay, but the right is easily overlooked. Because there is little use of the phrases "right to stay" or "right not to be moved,"¹⁸³ the phenomenon to which these phrases refer tends to be ignored. But once attention is drawn to the underlying desire, and once a legal right is named, the right to stay makes itself manifest in a dozen places. In the United States, the right to stay can be seen in the strictly limited number of ways that people can lose their possessory estates; in the ease with which possessory rights can be extended from owners to others; in the procedures that must be followed when a loss of a possessory estate is threatened; in the laws aimed at avoiding

179. See Civ Pol Covenant, *supra* note 82, art. 17(2); American Convention, *supra* note 82, art. 12(3); European Convention, *supra* note 82, art. 8(2) (reference to "public authority" in clause (2) suggesting that protection in clause (1) covers actions by both public and private persons).

180. See, e.g., ROBERTSON & MERRILLS, *supra* note 137, at 138 (relatively little case law on "home right" in the European Convention on Human Rights).

181. See Lars Adam Rehof, *Article 12*, in UNIVERSAL DECLARATION, *supra* note 120, at 188.

182. See *Cyprus v. Turkey*, Applications 6780/74 & 6950/75, 4 Eur. H.R. Rep. 482, ¶¶ 208-10 (1976) (Eviction of residents in northern part of Cyprus in connection with Turkish invasion of 1974 was a violation of Art. 8 of European Convention.).

183. For one of the few sustained efforts to garner support for the use of such a phrase, see Stavropoulou, *supra* note 8, at 748 (arguing for explicit recognition of a "right not to be displaced"); see also de Zayas, *supra* note 8 ("right to the homeland").

sudden financial distresses that typically lead to such losses; in the torts of trespass, assault, battery, and false imprisonment; in the crimes of assault, battery, burglary, and kidnapping; in family law obligations of support; and in constitutional prohibitions against unlawful searches and seizures.¹⁸⁴ Internationally, the right to stay can be seen in the rules restricting the actions of occupying powers during armed conflict; in the land rights of indigenous peoples; in the international minimum standard for the treatment of aliens; and in the international human rights to private property, the freedom from expulsion, the freedom to choose one's residence, and the freedom from the arbitrary interference with one's home.¹⁸⁵ Like the "right of privacy" a century ago,¹⁸⁶ the right to stay is one of the great present-day legal marvels of the day. Largely unobserved because frequently unnamed, still it rumbles and boils through the law, and once observed, connects an extraordinary variety of laws not previously understood to be related.¹⁸⁷

U.S. domestic and international law defend the right to stay in strikingly different ways. In U.S. law, the defense is primarily founded in property law, with some additional, but clearly secondary, support coming from tort, criminal, family, and constitutional law. Internationally, the right to stay is founded on a series of provisions, no one of which could be said to dominate: an explicit guarantee of the right, but only good in times of war; another explicit guarantee, but only good for indigenous peoples; a less explicit guarantee, only good for aliens; and four international human rights, good for almost all people all the time, but which may or may not apply depending on the circumstances. Which approach is better?

One is tempted to prefer the U.S. approach, and on grounds other than reflexive provincialism. First, the *form* of U.S. protection—one major body of law, with minor supporting roles played by others—appears simpler than the international approach. That appearance, of course, is partly deceiving. It is true that international lawyers examining a case of forced movement might find themselves initially researching at least

184. See *supra* Part II.

185. See *supra* Part III.

186. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

187. *Id.* See KEETON ET AL., *supra* note 64, at 849 (Regarding the right to privacy, Warren and Brandeis "reviewed a number of cases in which relief had been afforded on the basis of defamation, invasion of some property right, or breach of confidence or an implied contract, and concluded that they were in reality based upon a broader principle which was entitled to separate recognition.").

seven areas of law, and that U.S. lawyers are likely to be researching only one, but that "one" is extraordinarily complex. Every student of U.S. property law knows that the singularity of the source says nothing about the simplicity of the analysis.

Still, the division of the international analysis into several categories does increase the possibilities for incoherence. United States property lawyers and judges work self-consciously within a single area of law, and thus tend to check whether new developments are congruent or consistent with older practices throughout the field.¹⁸⁸ When there are gaps or anomalies, corrective action is often taken.¹⁸⁹ In contrast, international lawyers and treaty-makers who are developing proposals, for example, on the proper treatment of indigenous peoples, are less likely to insist that the proposals be congruent or consistent with all the laws of war.¹⁹⁰ In the international protection of the right to stay, gaps and anomalies are easy to find.¹⁹¹

One should not, however, make too much of the disarray. Some of it is unavoidable, some of it is wise, and almost none of it is of practical concern. The international system faces challenges of extraordinary variety on a daily basis; a cacophony of voices requires a multiplicity of responses. The singular U.S. response of protecting the right to stay with property law works as well as it

188. Property is a thoroughly modern subject of thoroughly antiquated origins. Probably in no other area of law does one see more, or even as many, strains of the old in the new. . . . Property law has, to be sure, undergone constant change, but—at least in Anglo-American experience—it has not been revolutionized. Its enduring mix of old and new, rife with uneasy tensions, reflects more than an institution that has evolved over centuries and across cultures; it reflects as well two often conflicting objectives—promoting stability and accommodating change—that property systems must serve.

DUKEMINIER & KRIER, *supra* note 43, at xxxiii.

189. A nice, if homely, example is provided by the shift from the "title theory" to the "lien theory" of mortgages. Once the change is made in a particular state, courts must work out its ramifications in many different contexts, seeking consistency with the new theory. The Illinois story is told in *Harms v. Sprague*, 473 N.E.2d 930, 933-34 (Ill. 1984).

190. The law of war is explicitly concerned with border crossing; the law regarding indigenous people is not. The Indigenous Peoples Convention is explicitly concerned about compensation for property taken; the law of war is not. Compare Geneva Convention, *supra* note 70, art. 49 (discussion, *supra*, Part III.A) with Indigenous Peoples Convention, *supra* note 80, art. 16 (discussion, *supra*, Part III.B).

191. See, e.g., Goebel, *supra* note 164, at 3-4, 10, 19, 20 (noting differences in current treatment of displaced and resettled persons); Stavropoulou, *supra* note 8, at 724-25, 738-39 (contrasting, *inter alia*, war-time and peacetime protections against displacement; contrasting variable applicability of human rights norms to forced transfers).

does because U.S. citizens have relatively clear, and shared, views on private property in real estate. When those shared views are missing, as they are in the international system, the effectiveness of the U.S. response declines precipitously. Given the uneven status of property law around the world, given the very great differences in the social, economic, and political circumstances of nation-states, international law cannot adequately protect the right to stay with an effort grounded solely in private property. Instead, it wisely protects the right to stay by drawing on the concept of personal privacy, the anciently recognized tie between citizen and homeland, the notion of residential choice, and the humanitarian impulse to minimize the civilian tragedy of war.¹⁹²

As a result of such a multivariant response, almost any forced movement of any person from one place to another will violate international law.¹⁹³ Doctrinal gaps are thus more theoretical than real. Furthermore, there appear to be no instances in which international doctrine regarding the right to stay is so inconsistent that states are required to act in two different ways simultaneously, or that individuals are given contradictory rights. Thus, while there are clearly opportunities for some doctrinal housekeeping,¹⁹⁴ the relative need for such work is a bit doubtful. As in many areas of international law, those who would seek to improve the right to stay are generally better off working toward better recognition and enforcement of the existing rules, rather than the production of more or better rules.¹⁹⁵

Nonetheless, if better international doctrine is desired, the U.S. way of protecting the right to stay suggests a fruitful line of development. Property law produces a clear and early tripwire for catching violations of the right to stay. In a property law system, legal protection is engaged whenever a property line is crossed,¹⁹⁶

192. See *supra* Part III.

193. See Stavropoulou, *supra* note 8, at 738 ("A great majority of cases of displacement are highly likely to result in the violation of at least one human right.")

194. See Goebel, *supra* note 164; Stavropoulou, *supra* note 8.

195. Accord Neil H. Afan, Essay, *International Human Rights Law in the Twenty-First Century: Effective Municipal Implementation or Paeon to Platitudes*, 18 *FORDHAM INT'L L.J.* 1756, 1761 (1995) (movement needed to incorporate international human rights standards in national law and policy); R. Jackli, *What Does the Future Hold for International Humanitarian Law?*, 9 *AUSTL. Y.B. INT'L L.* 384, 385-86 (plethora of international legal instruments diminishes their value; work needed to improve respect for existing rules); Richard A. Leach, Comment, *Effective Enforcement of the Law of Nations: A Proposed International Human Rights Organization*, 15 *CAL. W. INT'L L.J.* 705, 706, 727-28 (rules, principles, and norms are already in place; steps needed to strengthen enforcement).

196. If not privileged, the line-crossing is a trespass. See *KEETON ET AL.*, *supra* note 64, at 70-72.

whenever a home is entered. Without that line, the next fully established checkpoint under international law lies at the national border, where the freedom from expulsion is engaged.¹⁹⁷ A great deal of human suffering can be caused, and has been caused, before any border is reached.¹⁹⁸ Those interested in solidifying an international right to stay can usefully promote the wider and more frequent recognition of property rights in international practice. For many reasons, this approach has seldom been considered, much less pursued, by international lawmakers and commentators.¹⁹⁹

It is also clear that human rights law is the best vehicle for improving the international protection against forced movements. "Situational" approaches, illustrated by the law of war, can only ameliorate problems appertaining to the situation regulated. "Class" approaches, illustrated by the older law regarding the treatment of aliens and the newer law regarding indigenous peoples, can only ameliorate problems appertaining to the subject classes. International human rights law, because of its universal applicability, provides the only mode of legal development capable of protecting the right to stay in a comprehensive and coherent way. This again points to the wisdom of developing and refining an international right to property, though it also suggests the usefulness of developing and refining the "home right," the international human right to be free from arbitrary or unlawful interference with one's home.

The U.S. experience teaches the value of an individual right to property, but also displays the right's weaknesses as a guarantor of a right to stay. First, interests in property must be acquired, leading to an uneven protection of the right to stay whenever there is an uneven distribution of property ownership. Second, interests in property are vulnerable to commercial loss, an odd vulnerability for any human right. This suggests, at the

197. See *supra* Part III.D.2.

198. On the plight of internally displaced persons, see, e.g., *Quenod Report*, *supra* note 9; Roberta Cohen, *International Protection for Internally Displaced Persons*, in *HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY* 17-19 (Louis Henkin & John L. Hargrove, eds., 1994).

199. See, e.g., *Quenod Report*, *supra* note 9 (concentrating on better coordination of United Nations entities); Stavropoulou, *supra* note 8 (concentrating on adoption of a newly explicated right not to be displaced); LAWYERS' COMMITTEE, *supra* note 12 (concentrating on rights of persons after they have taken flight). Generally speaking, international law regarding the movement of people has generated a great deal more interest than property rights. Compare JULIAN R. FRIEDMAN & MARC I. SHERMAN, *HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW BIBLIOGRAPHY* 234-43 (1985) (materials on movement of people; 56 entries) with *id.* 256-57 (materials on property; 6 entries).

international level, that protection of the right to stay be developed and maintained both inside and outside of property law. It also suggests the value, at the U.S. level, of working for an ever wider distribution of home ownership, and for a progressive reduction in the circumstances under which people are moved from their homes simply on account of money. Such work will seem radical only to those unacquainted with the history of the United States,²⁰⁰ and misguided only to those unacquainted with the deepest longings of the human heart.

200. It has long been U.S. public policy, through administrations both Republican and Democratic, to encourage home ownership. *See, e.g.*, R. ALLEN HAYS, *THE FEDERAL GOVERNMENT & URBAN HOUSING* 89-90 (2d ed. 1995); *FEDERAL HOUSING POLICY AND PROGRAMS: PAST AND PRESENT* 39-40 (J. Paul Mitchell ed., 1985); JOHN C. WEICHER, *HOUSING: FEDERAL POLICIES AND PROGRAMS* (1980). Likewise, there is a longstanding tradition of protecting home-owning debtors from losing their homes on account of that debt. *See supra* Part II.A.1. In addition, there is the more recent development of improving the security of tenants in the continued possession of their leaseholds. *See supra* Part II.A.3; Bell, *supra* note 3, at 483-84 (growing perception that a residential tenant's expectation of continuity sometimes outweighs landlord's rights).