PROPERTY'S RELATION TO HUMAN RIGHTS

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Abstract:

How does property relate to human rights? Is property itself a human right, or contrariwise, an impediment to other human rights? or is the relationship something else? This chapter explores three areas in which property has raised controversies in modern human rights discussions: first, property's connection to traditional groups' claims to protect cultural identity; second, property's role respecting human rights claims to social and economic rights; and finally, the role of property protection in deflecting other human rights abuses. This paper argues that in all these instances, property's relation to human rights is best treated pragmatically, framing particular issues by inquiring about the ways in which property might or might not support other human rights claims—an inquiry that sometimes leads to unexpected results.

Keywords: property, human rights, group vs individual claims, social and economic rights, wealth and rights, expropriation.

I. Introduction.

Commentators on property typically take the perspective of a property owner, often citing the famous passage in William Blackstone's *Commentaries* that describes property as the "sole and despotic dominion" that the owner enjoys over things, to the exclusion of all others (Blackstone 1765: 2:2). Blackstone himself immediately expressed grave doubts about this description, however, and particularly about the supposed origins of any such dominion (Rose 1998:604-605). Even if we put Blackstone's doubts to one side, however, we might observe that these famous lines concern not only the owner but the non-owners as well. Implicitly, property is a social institution in which individuals may play the role of owners but much more frequently play the role of non-owners, who must acknowledge and defer to the claims of others to control specific resources (Rose 2013:272).

What does this social institution do for us? Sometimes, nothing at all. There is no point in having property in things that are boundlessly available. But where resources are even somewhat scarce, the institution of property plays the very important role of deflecting conflict, instead encouraging forbearance and negotiation. Beyond that, property can serve a variety of important and to some degree overlapping functions: safeguarding a zone of autonomy for individuals (Claeys 2006:722); protecting their dignity and the signals of respect that they gain from others (Atuahene 2016); creating a basis for undertaking projects in the world (Radin 1982); diffusing political authority among many actors and thus deflecting concentration of power (Friedman 1962:7-21); maintaining individuals' independence and shielding them from subservience to others (Craig-Taylor 1998). Perhaps best known, however, is the economic role of property. Especially when taken together with trade and commerce, property incentivizes the creation of wealth by rewarding an owner's effort, planning and careful management of resources (Bentham 1902:109-119; Blackstone 1765: 2:7; Posner 2014: 40). This economic role entails a recognition of the importance of self-interest in motivating individuals, but self-interest is not the only motivator in property relations; people invest in their property for the sake of others, including their families, friends, churches, communities, and causes.

But from the perspective of rights, as is implicit in the Blackstonian lines, the institution of property roots itself not only in assertions of one's own claims but also in deference to the claims of others. In that sense, property relations act as a practical education in what it means to have and to respect rights.

It is especially interesting, then, that in contemporary human rights literature, property plays a role that is at best ambivalent. Some human rights advocates assert that property must itself be considered a human right (Alvarez 2018). But often property appears as a bully, as where advocates decry international enterprises that harp on property claims and investment agreements at the expense of local populations' well-being (Kaushal 2009:522-532); or they chastise property owners who resist

redistributive measures that might support human rights claims to essential resources (Pashkoff 1989:88; Moyn 2010: 17-22, 64); or they assert that developed-world technologists find local agricultural or medicinal products and then close them off with claims of intellectual property (Brown 2003: 95-143).

How, then, might property relate to human rights? Is property an impediment to human rights? or is it a human right itself? or something else? Let me say immediately that I have no particular expertise in human rights, and I am sure I will make many errors in describing the conceptions and literatures that are at stake. But from a superficial look at some to the contemporary works, it seems to me that the idea of human rights—as background rights that should naturally belong to all human beings—describes what is primarily a moral framework and only secondarily a matter of legal prescription (Shelton 2008; Regan and Hall 2016: 2020-2027). Having said that, however, human rights *are* legally prescribed insofar as governments have adopted laws binding themselves to human rights. This has occurred with sufficient frequency that such leading international law scholars as Jose Alvarez (2018) and John Sprankling (2014) can make the case that as a positive matter, there is already an international human right to property in a general sense. These and other commentators, however, point to substantial qualifications on property’s legal status as a human right, given that different political regimes vary widely in their treatment of property, and given that sanctions for violation are at best doubtful (Penalver 2000: 146-147).

My own intuition is that the strongest moral case for property as a human right relates to independence; the ability to acquire and own property is a bulwark against subservience to others. But aside from that minimalist consideration, I will remain agnostic on the issue whether property is or should be defined as a human right as a legal matter or even a moral one. So far as I can see, the modern human rights discussion after the Second World War (hereinafter WW II) began with issues with little obvious connection to property: first denouncing atrocity and official oppression, and later

expanding to encompass ever more elements of a full and meaningful life. These are admirable aims, and insofar as there are controversies about human rights, they seldom concern these overall goals but rather question whether a rights-based approach is the appropriate means to achieve those goals (Kennedy 2002, 101, 104, 125; cf Moyn 2014A, 61-62; Moyn 2014B, 151).

This pragmatic approach seems to me to be particularly appropriate with respect to property. Hence in this paper I will take the position that the most fruitful way to look at property's relation to human rights is practical— that is, to consider how the protection of property might or might not advance the general goals of a human rights agenda, whether or not one regards property as a human right in itself, or what such a right might mean.

I will begin with a few very brief comments on my understanding of the rather ambiguous place of property in the modern debates over human rights. I will then take up three topics that especially probe the role of property in advancing human rights ideals. The first topic concerns a fairly well known issue: property's relationship to claims for social and economic rights, where property is often cast as a kind of villain or obstacle. Here I will observe that while property claims can indeed be too rigid, the protection of property actually can help to create the background economic progress that supports economic and social wellbeing. This is a well-known position, but less intuitively, I will also argue that more secure property rights can create conditions in which it is *politically* feasible to fulfil those social and economic claims.

The second topic is somewhat more recent in human rights discussions, that of claims for cultural preservation of tradition or indigenous peoples. My argument here takes an opposite trajectory: in connection with these claims, human rights proponents treat property as the hero of the story. But here too I will again take a partially contrarian position, arguing that property recognition can indeed be helpful in a larger sense of protecting the group, but that some serious caveats are in order.

Not only may group-based property fall short in an economic role, but equally important, group property can carry some dangers for human rights as a matter of democracy.

The third topic is only a very brief sketch, in which property is neither villain nor hero, but rather a signal or bellwether that links to the more central modern human rights concerns about atrocities. Here I will observe a point that I believe has not yet been much explored in human rights literature: that property deprivations threaten to accelerate other kinds of human rights abuses by creating constituencies for those abuses. Greater attention to property, on the other hand, might help to keep some of these massive human rights violations from spiraling out of control—or even better, might make them less likely in the first place. In keeping with this pragmatic observation, I will conclude that while property has a rather murky place in the world of human rights, attention to property rights can act as an important support for other kinds of rights.

II. The backdrop: where has property been in 20th century human rights discussions?

Human rights histories often point to two major sources: The first is the set of universalist pronouncements coming from the eighteenth-century American and French Revolutions, which followed an Enlightenment philosophical tradition in treating property as one of the essential rights of human beings and indeed as one of the bases for the societies they form.¹ The second is the array of declarations and decrees of international organizations at the end of WW II, much enhanced in the 1970s and thereafter, which were to become the starting point for modern human rights claims. (Sprankling 2014, 468-69; Moyn 2010, 120-121; Moyn 2018: 120-124)

My impression of these sources is that they differed in their contexts and their goals. To put it in an overly crude way, the eighteenth century activists and reformers aimed at changing their own

¹ The French Declaration of Rights of Man and of the Citizen (1789) included property; the American Declaration of Independence did not, but contemporary state declarations of rights did, and property was essential in American political thinking in the founding period (Sprankling 2014, 468-69)

governing institutions, whereas the mid-twentieth century human rights activists and reformers aimed to set a standard not only for their own governing institutions but just as importantly, for other people's governments. The allied victory in WW II gave the discussion of universal human rights a very different focus from that of eighteenth century revolutionaries. The immediate context was not reform at home, but rather the question how the Allies might come to grips with the atrocities perpetrated by the Axis powers—among other things justifying the postwar trials of Axis officials for the newly-created “crimes against humanity.” The new discussion of human rights thus initially centered on the horrific acts associated with the Axis regimes: displacement, enslavement, starvation and outright murder of whole population groups; imprisonment and torture of adversaries; suppression of dissent on all fronts.

Finding a just rebuke for these acts necessitated jettisoning a longstanding “Westphalian” tradition in international law, that of non-intervention into the internal affairs of other regimes.² The modern human rights movement builds on this transformation. For example, human rights theorist Leif Wenar specifically argues that human rights must put aside the Westphalian tradition. In his view, human rights violations in one nation may require others to intervene at least in the form of moral suasion, moral disapprobation, and moral support for the victims; or in the most serious cases trade sanctions or possibly (if very rarely) military intervention (Wenar 2005; Twiss 2004: 51-53). Other human rights advocates have been more cautious, arguing that human rights do not controvert sovereignty (Alvarez 2018). Still, human rights language has affected sovereignty not only because sovereign entities have ostensibly bound themselves to human rights principles through laws and treaties, but also because human rights language now serves as a medium through which external political figures and nongovernmental organizations can criticize those sovereign entities.

² “Westphalian” is named for the 1648 Treaty of Westphalia, which concluded a century of religious wars in Europe and permitted each ruler to determine the religion of his principality. The principle then generalized to one of non-intervention in internal affairs.

Property has been much less prominent in twentieth and twenty-first century human rights discourse than it was in the Age of Revolution, however. Property seizures and destruction played some role in the picture of totalitarian abuses in the post WWII discussions, but these paled by comparison to other much more dramatic horrors. In any event, the war alliance with the Soviet Union meant that in the postwar period, property seizures would not be a central topic in human rights pronouncements. In the United Nations' 1948 Universal Declaration of Human Rights (UDHR), Article 17 made the anodyne assertion that everyone has the right to own property and to be free of arbitrary seizures, but subsequent UN rights declarations omitted property until the end of the Cold War (Alvarez 2018; Sprankling 2014, 471-474)

Moreover, other human rights guarantees in the UDHR itself created some ambiguity about the status of property ownership as a human right, particularly the articles guaranteeing access to such social support as housing, nutrition, and education (Articles 25-26). These claims for access to resources potentially entail redistributive demands on the property of existing owners. Insofar as that is the case, it would seem that these kinds of claims raise questions about how, whether, and the degree to which human rights ideals can include both a right to property on the one hand, and redistributive rights on the other.

These ambiguities, however, are generally not at the forefront of ordinary news invoking human rights. As with the totalitarian abuses of the 1930s and 1940s, human rights stories after WWII have continued to focus most sharply on issues of mass murder and the brutal suppression of dissent, particularly in connection with outbreaks of violence in such places as Rwanda, Cambodia, and Bosnia, or in arbitrary detentions and murders in military dictatorships in Latin America and elsewhere. Property seizures have been a part of these terrible events, but murder and genocide command far greater attention.

In the burgeoning human rights discussions since the 1970s, scholars and activists have increasingly highlighted the very kinds of claims that render ambiguous the role of property in a human rights order. First, human rights proponents have expanded the conception of social and economic resource access rights that were initially stated in the UDHR. The Declaration enumerated rights to basic subsistence, education, health, meaningful work, among others, and these are now joined by claims to a growing list, many relating to environmental resources. As with any claimed right to resource access, these expanded claims have a potential impact on property insofar as they call on current property owner A to give up portions of her assets to assist recipient B; as such they lead to more questions how claims to social and economic rights relate to a purported human right to own property.

A second type of emergent claim grows out of UDHR's Articles 1 and 27, describing a right to equal dignity and to a right to participate in culture. Over the last few decades, these precepts have been memorialized in other documents and have come to center on property rights in groups, as a means to protect the dignity and lifeways of traditional peoples and especially indigenous populations. Property claims for these groups often include claims of land rights and sometimes intellectual property, and here they can confront the property claims of other persons and groups, repeating those A vs. B issues. But aside from these distributive issues, group rights pose other kinds of dilemmas for conventional property rights, relating to membership in the group and the authority of some group members over others.

In the next two parts of this article, I turn to these two relatively recent expansions of human rights discussions in an effort to discern their implications for the relationship between property and human rights. In both these claim areas, conflicts and convergences—including some unexpected examples of each—emerge between conventional property and human rights concerns. In the next and last part, I will outline another unexpected convergence: that between property and the prevention of

the kinds of dramatic abuses—including murder and displacement—that drove human rights thinking immediately after WWII and that now continue to dominate the news cycle.

III. Property and human rights claims to resource access; or, what looks bad about property may have a good side.

Since WWII, human rights discussions have asserted that these rights include not only life and liberty, but also access to resources sufficient to guarantee a decent mode of living—food, shelter, education, and health. These kinds of social and economic claims have been controversial even within the literature on human rights, but controversy has not halted more recent elaborations, some expanding the list to include access to a clean environment, to protection and restitution from the ravages of climate change, to specific resources such as water, as well as access to knowledge . (Larson 2017, 1307, 1318; Helfer 2007:1012-1014).

Claimed rights to resource access are sometimes called positive rights—as distinguished from “negative” rights, like freedom from arbitrary detention or torture or homicide, which basically call on governments to refrain from unjust activities. A major reason for their controversial nature is that all involve substantial expenditure of funds and demands on taxpayers, and in a context of finite resources, all expenditures require priorities and budgeting. A “rights” designation for resource access is unhelpful in prioritizing; instead, in the first instance, that designation would suggest that each matter requires maximal effort toward fulfilment, perhaps requiring more in taxes, and perhaps trumping more mundane expenditures like pothole repair.

Resource access demands on public budgets clearly involve property owners as taxpayers. To be sure, some claims to resource access focus on goods for the public at large – e.g., clean air or public sewerage systems; in many cases, as environmentalists observe, a shift of private funds to these public goods actually increases the total wealth of a society, and implicitly compensates taxpayers by making

everyone better off, even if some feel the costs more than others. (Rose 1997:57-58) But positive human rights claims often have a more focused distributional component, and these are the ones on which I wish to concentrate. Human rights claims may mean that some group of As are to pay for the B's food or housing—or pay B's water bill or give up intellectual property to B. And that is the major rub for property: insofar as B's access to these resources are called human rights, and insofar as A has to pay for them, A is very likely to object that these demands amount to an involuntary and uncompensated taking of A's property. In this rather simple scenario, if property is itself considered a human right, then the scenario pits one human right against another.

It is worth noting that some Marxist critics have depicted the movement for social and economic human rights as a coverup for the abuses of capitalism itself—a sop that excuses the wealthy As by requiring no more than a pittance in the pot for poverty-stricken Bs. Historian Samuel Moyn rejects the view that the human rights movement has an evil twin in neoliberalism, but he nevertheless argues that the human rights movement gives up too easily, satisfying itself with the paltry goal of *sufficiency* of personal welfare. Instead, according to Moyn, the real goal should be much grander, that is to say, *equality*, placing the As and Bs are on an equal plain (2018: 6, 174-176, 216-220).

But then, one might want to think why the As or anyone else has all that wealth in the first place. Economic thinkers have long associated property and contract, the building blocks of capitalism, with greater social wealth. The crude version was mentioned above: property rewards effort and planning with gains, while punishing carelessness and shortsightedness with loss. Contracts expand the range of this dynamic: by contracting with others, A can find more markets and opportunities, and can thus enhance the productivity of her efforts and the incentives to make more. But if successful A has to divide the gains from her efforts with unsuccessful B, she loses at least some of the incentive that drives her success. Similarly, if A's contractual relationships can be upended easily, she cannot make credible commitments and potential contracting partners will melt away; consequently she will not be able to

generate much wealth, or interest others in investing in her efforts. At the extreme, one can see the result on a national scale in a place like Venezuela in 2018, where governmental disruptions of property and contract have dramatically reduced the nation's wealth—and the willingness of others to invest.

On the whole, property and contract are not zero-sum games; commerce thrives where the payoffs go not only to A but also to the Bs and Cs and Ds, her business clients and associates and employees too; hence collectively, individuals' wealth turns into Adam Smith's *Wealth of Nations*. But well-being and even riches are the carrot while the threat of penury is the stick for the As, the Bs, and all the others; and the prospects of both carrot and stick are essential parts of what makes property/contract regimes generate wealth, both individually and socially.

Thus if property is to act as an economic driver—and it is widely thought that this is a chief function of property--the unpleasant truth is that inequality is baked in. Regimes can certainly insist that all the As and Bs reduce the external harms from their activities and pay their share for public goods, and thus A and B have less for their private activities, but the implicit compensation is that all are better off from the resulting increase in public wealth. More controversially, regimes can even insist on transfers from the As to the Bs, and they can even structure property so as to incorporate transfer duties. The result will be greater equality, but very possibly at a price. That price would come from a tradeoff between equality and wealth generation. As Jeremy Bentham observed, the regime of thoroughgoing equality may well mean an equality of poverty—not desirable for either A nor B, even for the modest goal of sufficiency (Bentham 1802: 119-122).

But is the tradeoff actually so sharp? Even capitalist A may wish to make some transfers, if for no other purpose than to quiet the discontented rumblings of the Bs (Michelman 1977-1978: 154). There is a less obviously self-interested reason, however, why the As may be willing to transfer wealth to the Bs in a capitalist regime: as Aristotle observed, greater possessions make liberality possible. It is not that poor people are ungenerous—far from it, there are many, many examples of great generosity

among impoverished people--but simply that having more makes it easier to give more (Aristotle 1962: 85 [Book 4, ch. 1]). Early proponents of capitalism expanded on related ideas, pointing out that trade accustoms people to consider what other people want, as opposed to what one can force others to do; in the eighteenth century parlance, commerce “softens manners” (Hirschman 1977: 56-63). In spite of Marx’s mid-nineteenth century ridicule of “gentle commerce,” historians have linked capitalism to the origins of modern philanthropy in the eighteenth century, as traders vastly widened their commercial circles and grew interested in and sympathetic to people very different from themselves (Haskell 1985: 555-563).³ Hence we might expect wealthier societies to engage in more charitable giving or alternatively, to give greater political support for redistributive taxation for social welfare or public goods, though the picture is certainly mixed (Eaves 2008; Frolich et al 2016).

How then are we to understand property’s relation to human rights in this context? Adam Smith’s lectures on jurisprudence (1978 [1766]:7-9) divided rights into perfect and imperfect rights, with the perfect rights being those that one is entitled to compel by natural and civil justice (including property), and imperfect rights being those that one claims through appeals to a common humanity. There is no reason to think that Smith thought that imperfect rights were a null set; despite his sometimes acid comments on the morals of the rich (Smith 1976 [1759]: 183-185, it is more likely that he thought that imperfect rights might be better fulfilled where secure property and contract resulted in the creation of wealth that could be directed to the well-being of those in need.

With regard to some of the specific claims of the newer human rights thinking, as in a right to a healthful environment, some economic theories sound a faint echo of the old Aristotelian observation that property lubricates liberality. The idea of a “Kuznets curve” argues that environmental quality suffers in the early stages of economic development, but then recovers and prospers as a nation grows

³ Insofar as modern Marxist commentators criticize today’s human rights discussions as an artifact of late twentieth century global capitalism (Moyn 2014B:149-150, 155-60), they curiously recall the parallel growth of commerce and philanthropy two centuries earlier.

wealthier and as its residents turn their attention to issues of quality of life. The underlying idea is that environmental quality is something of a luxury good—only feasible when wealth grows to a certain level. There is certainly room for skepticism about the Kuznets curve and its applicability to the environment, but one does see some support in the recent turn of China to long-neglected environmental issues (Kysar 2003: 249-51; Percival 2011).

Thus with respect to human right claims for social and economic rights, property appears in an ambiguous position. Property claims can certainly be set up as an unwelcome obstruction to what are called positive rights – or what Adam Smith would have called imperfect rights—which call for a transfer of resources from wealthier persons to poorer persons, or from private goods to public goods like environmental quality. But at the same time, secure rights to individual property help to generate the social wealth that makes those transfers possible both economically and politically.

At the same time, property should not be understood as an untouchable and unchangeable right, and indeed the contents of property have always been in some flux depending on resource pressure and the need to reduce common pool losses, as economists have noted (Libecap 1989:12-16). The balance between private and public goods thus differs with a whole range of varying conditions. Even more sharply, the balance between security for existing property rights on the one hand, and transfer programs on the other, may implicitly or explicitly entail a choice between wealth and equality. Political decisionmakers may strike these balances differently under different circumstances, and they require more flexibility about property than a static and rigid human rights designation for property would entail.

Nevertheless, considerable security for individual property is important and even essential to move toward the human rights goal of resource access, even if this means that social and economic claims to human rights are softened to the Smithean sense of imperfect rights. Even the modest goal of sufficiency demands this.

IV Property and human rights claims of traditional communities; or, what looks good about property may have some problems

In 2001, the Inter-American Court of Human Rights (IACtHR) decided the landmark human rights case of *Awas Tingni v. Nicaragua*. The case pitted an indigenous community against the government of Nicaragua after the latter had granted a logging concession on lands occupied by the community, without the community's consent. Although the Awas Tingnis' lands had never been formally titled, the Court's decision required Nicaragua to recognize their communal land rights and their traditional modes of tenure. (Anaya and Griffith 2002: 11-12; Alvarez 2018: 27-31). Following that case and three similar IACtHR cases over the next few years, the UN General Assembly adopted a resolution in 2007 entitled the Universal Declaration of the Rights of Indigenous Peoples. The Declaration, while not legally binding in itself, signaled the growing human rights interest in the claims of indigenous populations—including indigenous land claims, reflecting these groups' spiritual and cultural connections to their lands (UNDRIP arts 25-26). In subsequent years, other indigenous groups have successfully deployed human rights arguments to vindicate communal property rights in to customarily occupied lands

The Awas Tingni victory and its successors would appear to give a clear and welcome signal that property is a human right insofar as it protects the integrity of indigenous groups, whose dispossession and oppression has been a matter of concern at least to some since the beginning of colonization (Marks 1998: 164-172). Whatever the complaints of disappointed modern concessionaires, here too the problem has not been too much property but too little, in that traditional and customary communal claims have gone unrecognized or unappreciated in modern states. There are many reasons for this. One is a history of colonialism, supported by the self-serving doctrines that have treated indigenous territory as "empty"; or theories that have treated indigenous land use practices as wasteful and unproductive; or more sympathetic if paternalistic claims that if indigenous groups had full property

rights, they would sell out too cheaply and without understanding the consequences (E. g., Banner 20-28, 62-63, 73-78). Then too there are issues arising from the entrenchment arising from past encroachments – the established settlements that have already created expectations of permanence, the international trade and development agreements that are disrupted by recognizing indigenous claims.

Hence recognition of indigenous and traditional communities' land claims has been late in coming. But one could also explain this tardiness with modern economic theories about the evolution of property as an institution. These evolutionary theories begin with the observation that property regimes always entail costs for demarcation and defense, and that they do not emerge until the costs of such regimes are outweighed by their benefits, which for economists principally mean such matters as incentivizing effort and reducing conflict and common pool losses. (Demsetz 1967) Indeed, even then, property regimes may not materialize. (Libecap 1989: 19-26) But when they do, in the standard evolutionary stories, property rights move from none at all for plentiful and uncontested resources, through group-based communal property, to modernist property; the last is relatively firmly demarked, owned by identifiable individuals or entities, alienable to other individuals or entities, and typically backed by organized governmental enforcement (Schorr 2018: 508-514).

In this evolutionary picture, group-based or communal property generally precedes modern individual property chronologically, but in practice, communal property finds only limited recognition in formal, modernist property. Modernist formal regimes can adjust to property held by groups, but generally only insofar as the group is a collectivity of identifiable individual claims, as in corporate shares or condominium units. Traditional groups' property arrangements are different: membership in the group may be difficult to define; the members' individual entitlements are only held according to internal communal norms and allocations; and individual' holdings may not be alienable to outsiders if

they are alienable at all. With those characteristics, traditional group-based property is quite alien to formal regimes (Rose 2011: 34-35).

Since the costs of defining or even recognizing traditional group property are high for formal regimes, standard economic theory would suggest that traditional communal property would arrive late if at all to the modernist, formal property table. On the other hand, once the costs of the modernist disregard of communal property become more visible – as in displacement of traditional communities, and in conflicts and protests that stymie national development projects and international concessions—then one might expect that governmental institutions would begin to find ways to bestow formal property status on indigenous communal claims.

Thus theories about the evolution of property rights take us some distance in understanding the earlier lack of recognition of traditional peoples' property claims. But let us also look more closely at other complications arising from the differences between traditionalist and modernist property regimes. We can put to one side such expensive but relatively uncomplicated matters as paying off international concessionaires who find their projects halted by newly recognized indigenous claims—not uncomplicated politically, but uncomplicated in the sense that we know how to do this in modernist property systems. But consider the issue of membership: if an indigenous communal group claims property on a group basis, who is and who is not a member of the group?

The experience of the United States in dealing with indigenous claims is instructive. In the early contacts between indigenous peoples and European settlers, quite a number of the latter joined indigenous communities, possibly leading to the conclusion that membership might be defined by cultural assimilation and adherence to customary practices. But this is a vague and uncertain way to define who may enjoy entitlements, and it is not easy for modernist property to recognize. Indeed, modernist property has long rejected uncertain definitions of indefinite group membership. A case in point is something called the Rule Against Perpetuities (RAP) in property law. The rather complicated

RAP appears chiefly in legal issues over wills and estates, because it aims to limit the control that a current property owner can exercise over future heirs. It does this in part by requiring the owner to specify exactly who the heirs will be, and denies inheritance rights to anyone in a group defined so loosely as “the members of the PTA” or even “my grandchildren.” In the case of American indigenous communities, the government of the United States has fallen back on other measures to specify membership, notably blood quotients—that is, racial definitions that are rejected in other contexts in US law, that were not a part of historic native American practice, and that are rejected by some as a repellant colonial holdover (Jarvis 2017; Lyte 2016).

An instance of the membership issue emerged in the late 1960s and early 1970s when oil was discovered on Alaska’s North Slope. Officials in the United States realized that because native Alaskan land claims had never been formally settled, those claims might impede the construction of a pipeline to carry oil across the state. In the Alaska Native Claims Settlement Act of 1971 (ANCSA), Congress created a complex system of native Alaskan corporations to control land and resources; membership in these corporations was allocated to persons of native Alaskan heritage who were alive in the year that the law passed—that is to say, to specifically identifiable persons rather than those later accepted through indefinite communal norms (Blair 2016).

ANCSA’s insistence on individually defined entitlements has been controversial among native Alaskans, and more generally, the modernist limitation of rights to specific individuals seems somewhat obsessive. But there are reasons: one is that modernist property deals with claims that may become extremely valuable, by comparison to the generally modest value of traditionalist communal entitlements like fishing or grazing rights. Specific membership criteria thus become important in order to fend off opportunistic claimants, a point that Native American groups themselves have recognized, as for example when some tribal groups began to invest in casino gambling (Jarvis 2017).

Moreover, while group ownership may serve well one purpose of property institutions – the protection of dignity – it is less likely to serve others. Group-held property dilutes a major function of property regimes, that is, incentivizing individual efforts to manage resources so as to enhance their value, given that the group shares at least part of any payoffs. Similarly, traditional group-held or group-constrained property often presents obstacles to purchase by outsiders, with the result that group-held property may limit the insiders' market activities, and thus indirectly lessen their incentives for effort and investment.

But there is also another and more profound reason for the modernist insistence on individual claims, a reason that sounds in democratic values. Potential conflicts between group rights and individual rights have been observed in human rights literature more generally (Twiss 2004: 41-47), but they have a special salience in connection with property. At the extreme, simply allocating property to a communal group effectively designates *governance* to the community's norms and practices about property holdings, including the community's norms of authority and its practices of resource allocation. Communal leaders may be wise and just and environmentally sensitive in their decisions about the allocation of property rights and duties, but they may also be misogynist or dismissive of claims of community members considered less worthy. Leaders may be selected only by and from among a privileged few. Those leaders may insist on their own power to distribute access to resources, and they may not permit members to alienate their individual claims. In turn, this means that dissatisfied members cannot depart with assets from their prior efforts, which may mean that they cannot depart at all. In short, recognizing property in a communal group may result in substantial departures from the democratic practices of the larger community (Rose 2011: 33-34, Sunder 2000: 75-76, 96-98). One finds a trace of this concern in some 19th century American courts' rejection of custom as a basis for property ownership; as one such court stated, in a democratic nation, property claims cannot be governed by

customary practice but must follow constitutional norms in which leaders are elected and accountable (Delaplane v Crenshaw 1860:475; Rose 1994:123-124).

In the intellectual property area, one can find a similar mixture of concerns about traditional groups' property as a human right--some positive developments for traditional group claims, but also some potentially troubling matters. Indigenous people's cultural productions and references have long been fair game for non-native enterprises that have appropriated indigenous symbols and artwork for brands and labels, with neither compensation to native communities nor heed for cultural sensitivities. Crazy Horse adorns malt liquor, joined by Jeep Cherokee and a Zuni symbol on New Mexico's state flag, to name only a few. Similarly, commercial entrepreneurs have sometimes found and refined traditional peoples' medicinal and agricultural practices without consultation or compensation (Brown 2003: 69-109). It is thus a very welcome development that traditional peoples have been able to exercise some control over these productions and take some gains from their use by others, as for example the Maori assertion of control over the Haka warrior dance—approved for the New Zealand All Black rugby team, but disapproved for Fiat automobiles (Connelly 2009).

Insofar as traditional groups demand compensation, their claims are not markedly different from any other IP claims. IP regimes, like other property regimes, rest in large part on a theory of incentives. They are supposed to encourage creativity by allocating rights to creators and inventors, and it seems only fair that traditional groups too should be able to assert a right to compensation. On the other hand, some aspects of traditional people's intellectual property claims fit only uneasily into the modernist statutory regimes for copyright, patent and trademark. As with land claims, issues of membership and identity arise. Traditional productions often result from long accretions of practice by many different persons; moreover, they may have diffused over time to many groups. Who are the creators who deserve control and recompense? Even well-meaning commercial enterprises have found themselves buffeted by numerous community claims that they cannot easily sort out. When traditional

groups seek not compensation but rather privacy or secrecy, the claims are even less suitable for modernist IP regimes, which generally aim at the dissemination of useful information and the creative arts (Brown 2003: 11-35, 111-114, 119-125).

Finally, in traditional groups IP claims, some hints of democratic concerns echo those of land claims. Consider *Bulun-Bulen and Milpururru v. R & T Textiles* (1998), an important intellectual property case decided in Australia twenty years ago. The case concerned an Aboriginal artist who created one of the “Dreaming” paintings that have come into much demand in recent decades. While non-Aboriginal entrepreneurs initially copied these paintings at will for such items as t-shirts, Australia now quite properly recognizes them as artistic productions deserving copyright protection. Leaders of Bulun Bulun’s aboriginal community, however, claimed along with Bulun Bulun himself that his Dreamings originated in their legends and culture, and that the community along with the artist had a claim to ownership rights in the artist’s work. The Australian court acceded to this claim and conceded some rights to the community, including a right to consultation and consent before the Dreaming painting could be sold (Bulen-Bulen 1998; Brown 2003: 43-67). However happy the conclusion for the Aboriginal parties involved in this case, including the artist, similar cases could easily pit the traditional group leadership against one of their own members, not only potentially disincentivizing his artistic production but also potentially controlling his work, restricting the kinds of art he produced, and limiting his ability to engage in an independent profession (Sunder 2000: 90-93).

I want to stress that the emerging grants of property recognition to traditional groups is a substantial advance over the lack of any such recognition. Riding roughshod over these groups’ claims has been the rule for centuries. Past practice has led to terrible displacements and disruptions of the lives of people who in all justice should have been asked for consent before their lands or creative works were taken or simply destroyed. The evolutionary story about property is correct insofar as it suggests that modernist property regimes have only recently begun to come to terms with the terrible costs

associated with nonrecognition of traditional claims. In pointing out the remaining problems, I wish only to note that recognition of group property, while clearly preferable to nothing at all, carries problems of a different sort for property regimes within democratic governments.

The democracy problem, if I may call it that, emerges in particular because the recognition of group-based property rights is a kind of concession of sovereignty, to be exercised by whoever leads the group, and in a manner that is independent of and possibly quite different from the constitutional order of the recognizing state. One must ask, how is this compatible with the underlying idea of human rights? After all, human rights thinking is a major step away from the old Westphalian consensus, according to which sovereign states avoid interfering with the ways that other sovereigns deal with internal matters. On the contrary, the modern effort to assert universal human rights implicitly or explicitly rejects the immunity of sovereign states from exterior judgment, whatever the pronouncements to the contrary (e.g. UNDRIP 2007, art. 46). Recognition of property rights in traditional groups, while clearly an advance over practices that trampled those groups' livelihoods and cultures, nevertheless looks very like a return to Westphalia on a smaller scale--now at the level of the governance practices of traditional groups *within* modernist states (Shahar 1998: 287-288).

I would suggest that the set of issues associated with recognition of traditional groups' property – identity of members, institutional purposes, and governance practices—generate many of the conflicts that arise between traditional customary property arrangements on the one hand, and modernist, state-secured property regimes on the other. Are there ways around these problems? I am not sure any are entirely satisfactory, but several paths come to mind.

One well-known path is trusteeship, in which the larger government holds title to the traditional community's property but in trust for the community members. This is roughly the relationship of the United States government to native American tribal reservations, which formally are part of the public lands of the nation but are "reserved" for the use of tribal members. The history of these reservations,

however, is not promising for the trusteeship model. Quite aside from its numerous broken promises, the United States has found the trusteeship role uncomfortable, and for a time even tried to shuck it off by breaking up the reservations into individually owned plots (Dawes Act 1887). The current regime is something that one might call supervised self-government, but it is at best a dubious model. Tribal populations are among the most poverty-stricken in the nation; among other things, the fact of trusteeship means that that tribes and tribal members generally cannot alienate reservation lands to non-tribal members, and in turn this means that they cannot use reservation lands to leverage conventional outside financing for economic development. Moreover, the implicit paternalism of the trusteeship model makes it seem unlikely model to satisfy the dignitary concerns raised by modern human rights thinking.

A second path is more individualistic, as was described above with corporations. The organization as a whole owns property, but each of the members also own individual shares in the whole, and those shares can be cashed out individually. This approach contrasts sharply with traditional common property practices, but perhaps out of disappointment with the trusteeship model, the United States took this path with ANCSA in 1971, when it established the large Alaska native corporations as owners of natural resources in major parts of the state, and designated then-living Alaska natives as individual shareholders. After a somewhat rough beginning, Alaska's native corporations by now have become economically formidable. One should note, however, that ANCSA's corporate structure has raised serious doubts among Alaska natives, particularly over the very issues that separate ANCSA's corporate form from ordinary practices in traditional communities. Notable points of contention have concerned the initial exclusion from share allocation of native Alaskans born after the Act took effect, and the possible alienability of native shares to non-natives—contemplated by the original statute after a twenty-year period, but still not permitted as of 2018 (Blair 2016: 273-278).

Still a third path is suggested by what legal scholars Michael Heller and Hanoch Dagan have called the “liberal commons.” This kind of common property regime retains the collective’s ability to regulate the whole, but it diverges from traditional property regimes by incorporating a limited right to *exit*, which in turn indirectly protects individual members’ rights vis-à-vis the group (Heller and Dagan 2001: 567-570, 597-603). One contemporary model approximates something like the co-op form most often seen in some older residential communities. A right to exit, however, is linked to the twin issues of membership and alienability: a member of a community cannot realistically exit unless she has assets that she can alienate and then take the proceeds. As presented by Dagan and Heller, the liberal commons community may regulate but not entirely ban the individual insider’s right to exit and the purchaser’s or donee’s concomitant right to enter.

If we think of the liberal commons as one intermediating model for the relationship between traditional communities and the metropolitan modernist state, we see a hint at the relationship between property and human rights. Property in this model plays a role at two levels: the community’s property protects its claims as a group over against outsiders, but within the group, the individual members’ property protects each member’s ability to decide on his or her relationship to the group. One might see property at these various levels as an essential support to other human rights—rights to the community’s cultural identity, but also rights to life, liberty and individual choice within the cultural community.

III. Property and Atrocity—a brief discussion

In this paper so far, I have digressed quite far from the issue that made me interested in writing on the topic of property and human rights in the first place, and which I can only briefly describe here: that is, a particularly *political* aspect to expropriation of private property. To put it bluntly,

expropriation can create constituencies for violations of other kinds of rights, along with support for the regimes that engage in those violations.

If we think back to the post WWII development of human rights, the issues of greatest concern were massive atrocities of displacement and murder, particularly directed at minority populations. But expropriation had a role in these atrocities, sometimes as a precursor, often as a means to create support for the regime and hatred of those forced out. Expropriation was an overt part of the Nazi treatment of Jews, as “Aryanization” took business properties from Jewish owners and transferred those properties to others with better so-called Aryan credentials. The new “owners” certainly had no interest in the return of the former owners, and no real interest in considering their fate. On the contrary, their new endowments turned them into constituents for expulsion and supporters of the expelling regime, whatever the consequences to the former residents.

One sees variations on this theme in other sites of atrocity, as in the war in Bosnia, where Serbs took over Muslim properties, or in Rwanda, where Hutu neighbors moved into the homes and plots of their murdered Tutsi neighbors. Notoriously repressive East German and Cuban governments transferred the property of “class enemies” to others, thereby creating a class of new possessors to support existing governments—for all their repressions--and fueling fear of any regime change that might restore the prior owners while sharply complicating ultimate resolutions (Penalver 2000:213-214). As I write, Myanmar’s rulers are brutally forcing longstanding Rohingya migrant communities from their lands, and I have every expectation that those lands will soon be occupied by other Burmese, who will then staunchly support Myanmar’s rulers in resisting human rights-based calls for Rohingya repatriation.

Daniel Sharfstein has argued that people can come to feel especially entitled to property not in spite but rather *because of* the hurtful and even vicious acts involved in its acquisition. Among his numerous examples are the appropriations of lands that followed the murders and terrorization of both Native Americans and African Americans—actions that the United States government all too often

tolerated in fact if not in principle (Sharfstein 2012: 660-665, 682-683). In an especially chilling illustration of the point, Sharfstein quotes a statement made by a white man who resisted the voting rights activism in Mississippi in the 1960s: “We killed two-month old Indian babies to take this country and now they want to take it away and give it to the Niggers” (Sharfstein 2012:637). Few would be so coarse, but the statement is telling in its link of purported property entitlement to the grossest of human rights violations.

Sharfstein’ citation chiefly concerned white settlers who took a bloody shortcut to what they saw as economic opportunities, abandoning property’s fundamental practice of negotiation and trade, at the terrible expense of or indigenous communities—and then rooting their claims in the acts of atrocity themselves. But readers will observe that this citation sounds an echo in the mid-twentieth century human rights focus on totalitarian atrocity. Nowadays, one often hears of dictatorial leaders who enrich themselves by transferring their opponents’ property to themselves and their cronies, and who then resist any change to the new status quo for fear of their own impoverishment. But what I wish to stress is that these same regimes can benefit from expropriative transfers in a subtler way. Expropriations and transfers can serve to create political constituencies for murderous and repressive regimes—constituencies of persons who at worst enthusiastically promote further rights violations and at best simply avert their eyes (e.g. Arsenault 2011). Even without the active leadership of elites, governments’ simple neglect of involuntary transfers can create constituencies for treating some groups as “other,” and denying those groups recognition and dignity within the polity. Thus I would suggest that the politics of constituency-construction should be a major reason for human rights concern about the treatment of property.

This is not to say, however, that property rights can never change, or even to condemn all transfers. As a practical matter, there are many good reasons why property rights may change shape and extent. Indeed, property owners know this even if they do not like it. Owners know about property

taxes and about the public's power of eminent domain and police powers; they know that they may lose their properties if they neglect them for a long time and someone else mistakenly moves in; they know that public policies may support some level of redistribution for purposes with which they do not necessarily agree. What is important in protecting property is the protection of reasonable expectations, taking into account that expectations evolve over time. Thus a very important component of property's security is adherence to a rule of law even as property expectations change-- or at a minimum adherence to normal or customary practice--and the avoidance of sudden and unusual or violent intrusions. The property transfers that signal and promote human rights violations are often exactly that: sudden and unusual, and often violent.

CONCLUSION. David Hume once observed that the virtue of justice, on which property depends, is not natural to human beings, because it requires a kind of self-restraint not inborne to individuals. But he also observed that this foundation of property *is* natural in the sense that people together are naturally inclined to invent useful and necessary institutions, of which property is clearly one (Hume 1948 [1739] 54-55, 61-62). Property's relation to human rights might best be seen in this light – as an institution that is very useful in the protection of other rights, but whose justifications are pragmatic rather than natural.

In principle, in a rights-based ideal world, each piece of property would be rooted in a just origin, followed by a sequence of voluntary transfers up to the present (Nozick 1974:150-172). But as Henry Smith has pointed out, it is unrealistic to expect that we can find such a heroic record with respect to most property (Ellickson, Rose and Smith 2014: 74).⁴ It was with good reason that Blackstone's had anxieties the origins of title. Like it or not, much property has an equivocal past, tolerated in the present because people have gotten used to a current arrangement and based

⁴ Smith wrote the note that makes this observation.

significant decisions on it, and because righting one historic injustice may cause a current injustice or unveil another injustice in the more distant past. There is of course a limit to toleration and sometimes good reasons to alter existing property relations; but the past casts a shadow on property that has no equivalent with claims against murder or torture. With respect to those issues, rights-based thinking is much cleaner.

All the same, though it may be murky by comparison to matters normally considered as human rights, property plays very significant roles in supporting those human rights. This chapter has touched on some of these roles: a regime of reasonably secure property can encourage the wealth-production that in turn permits expenditures on general economic well-being and environmental quality; recognition of traditional people's property claims can help to prevent the encroachments that impoverish them economically as well as culturally; recognition of property rights can protect these groups as well as other despised minorities from expropriation—and also from the emergence of constituencies that tolerate or applaud other rights violations.

In these areas and others as well, property presents contradictions and ambiguities if considered a human right in itself. Nevertheless, there may be pragmatic reasons for naming property as a human right in order to advance other elements of a wider human rights agenda. But if I may revert to the early pages of this essay, it is important to recall that property is not merely the dominion of owner A over resource X; even more importantly, property entails the recognition of A's rights by *non*-owners B, C, D, Property thus is an institution through which we learn that other people have rights, and we learn to respect them. In that educative capacity as in others, property is not the enemy of human rights. Property is a friend, indeed an essential friend.

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