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Appropriating Resources: Land Claims, Law, and Illicit Business

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Abstract Business ethicists should examine ethical issues that impinge on the perimeters of their specialized studies (Byrne 2011). This article addresses one peripheral issue that cries out for such consideration: the international resource privilege (IRP). After explaining briefly what the IRP involves I argue that it is unethical and should not be supported in international law. My argument is based on others' findings as to the consequences of current IRP transactions and of their ethically indefensible historical precedents. In particular I examine arguments from political philosophy for more equitable distribution of resources and appeals to property rights as a means of achieving this; business ethicists' critiques of contemporary resource appropriations; and legal historians' accounts of despoliation of aboriginal peoples, especially in what is now the United States, involving acquisition via conquest, asserted jurisdiction, and religious and racial preeminence. I also consider relevant human rights' standards; supportive views of some theorists, especially early modern realists and current supporters of group rights and multidimensional rectification; some de facto incidences of substantive restitution; and proposals for effecting further rectification.

Keywords Human rights · Illicit business · International resource privilege · Property rights · Rectification · Restitution

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Introduction: Property Usurpation in Human Affairs

Throughout recorded history, large-scale ownership and control of land and resources have typically been determined by the exercise of superior force. To counter this amoral basis for wealth distribution, some political philosophers have put forth principles aimed at fairer distribution of the world's wealth; but others argue against such proposals. Meanwhile, buyers and sellers the world over resort to the so-called might-makes-right approach and are exonerated by supportive international doctrines and decrees. Some scholars counter this acquiescence with arguments on behalf of the world's marginalized poor, including aboriginal peoples. This debate remains largely locked in theoretical claims and counter-claims. Even in the absence of theoretical consensus, though, an ethical case can be made that dispossessed peoples are entitled to rectification and restitution. And one prong of this case involves exposing the moral flaws in certain currently accepted business practices.

In current times, the consent of the governed is widely touted as a prerequisite for governmental legitimacy. However, as in ages past, property distribution may well be determined otherwise, namely, by effective control, i.e., the ability to govern. This is usually established through "the prior successful use of force" and maintained largely through oppression. In short, legitimacy with regard to resources is still tied to the "might-makes-right" doctrine as embodied in the right of conquest. Political theorists rarely defend this ancient test for sovereignty any more (Roth 2010). It is still alive, though, in business practice and international law. Pre-enlightenment standards of effective control and state necessity are being implemented to validate the actions of diverse usurpers (Sampford and Palmer 2005, p. 1) whose liability lacks clarification in law

(Newton and Kuhlman 2009). The principal attention-getting usurpers these days are terrorist groups; but the global impact of their activities is miniscule compared to that of transnational corporations. It is the latter I will examine here.

Transnational Norms for Property Acquisition

In accordance with Westphalian doctrine, the focus of attention in international law has been the relationship between and among nation states, especially as to rules that ought to determine what and how they may licitly act toward one another. This is still the case at least at first glance. However, the dominance of states has been substantially diminished by the emergence of capitalist institutions, which largely set the agenda for state-based activities in the world. Among these activities, locating and appropriating natural resources have become central to states' agendas. And to this end, effective control and state necessity have taken the form of an international resource privilege (IRP).

The IRP and Some Theoretical Alternatives

The IRP is a construct created to designate a common commercial practice typically legitimized under color of sovereign prerogatives. It involves how actors in the international community deal with changes in control of natural resources. In lieu of reliance on protracted litigation of competing ownership claims, the international community deems any entity that gains control of a valuable natural resource to be the rightful owner of that resource with full authority to trade it, howsoever the controlling entity may wish. Different theorists formulate this privilege differently, but on the whole, the trading rights to which it refers are accepted without hesitation among business operatives. This does not mean, however, that it is not subject to opposition. Victims of its seeming brutality may seek redress; sometimes, they are successful. Also, ethicists who entertain ideas not filtered through the capitalist ideal of a freely operating market offer serious counter-arguments.

The use of the acronym IRP in international studies' literature has been fostered by Pogge (2008). His project involves demonstrating that acceptance of the IRP constitutes a manifest flaunting of property law. Over several decades, he has put together a persuasive case that the poor of the world suffer the most from the present global arrangements. He complements this factual finding with two more controversial propositions: (1) the people living in rich countries are responsible for this misdistribution of the world's wealth insofar as they accept and utilize institutions that directly effect that misdistribution; and (2) the misdistribution could be eliminated if the people in rich countries would only acknowledge and act upon their negative duty not to support and sustain the harm-causing institutions. At the forefront of these institutions are those that utilize the IRP on a regular basis in pursuit of their business interests.

Most theorists of international relations agree that the present global arrangements perpetuate the untenable status of the poor; but many contest Pogge's assertions regarding responsibility and effective approaches to amelioration (Jaggar 2010). This issue of rectification aside, most are in accord that some of the ways in which the global economy is now conducted, including in particular the IRP, are unethical. It is accordingly fortuitous that sometimes IRP transactions are undercut and their participants are made to adhere to national and international property rights law. Pogge for one has espoused this intrusive approach, and it has been articulated in some detail by Wenar.

Wenar's point of departure is a straightforward recognition that natural resources—notably oil, natural gas, and minerals—belong to the people of any country within whose boundaries they are located. In defense of this starting point, he cites various sources of international law that inscribe this right, including the UN Treaty on Civil and Political Rights and the African Charter on Human and Peoples' Rights. Nonetheless, the typical reality is that wherever an authoritarian force gains control of resources, it enriches itself as it suppresses the people, putting them under a "resource curse." Global market rules include the IRP, and so any transaction carried out in accordance with this rule is deemed licit (except in circumstances where sanctions have been imposed on the seller and are enforced). In short, for purposes of trading valuable goods transnationally, an altogether acceptable seller is anyone who has reasonably reliable control over the goods being traded, without regard to legitimate ownership rights.

Commendably displeased with this system, based as it is on "a rule that is little more than a cloak for larceny" (2008, p. 1), Wenar would structure the market so that property rights law is applied to these transactions. To effect this enhancement of market ethicality, he proposes a number of conditions for recognition of a sale as legitimate. The seller, first of all, must be acting with "some sort of valid consent of the people," which is achievable only if they can find out about the sale, stop it without incurring severe costs, and not be subjected to extreme manipulation by the seller (2008, p. 9). To determine whether a given sale is likely to satisfy these conditions, evaluative standards need to be applied to the seller from beyond its sphere of control, e.g., by using Freedom House ratings to determine whether funds may be distributed to a government out of its Millennium Challenge Account (MCA). Founded in 1941 by Eleanor Roosevelt and Wendell

Willkie, this independent NGO assigns each country a rating from 1 (best) to 7 (worst) on civil liberties and political rights. Countries rated 6 (e.g., Iran, Syria, and Zimbabwe in 2008) afford people minimal civil rights; those rated 7 (e.g., Burma, North Korea, Somalia, and Sudan in 2008) preclude such rights. Corporations that deal with such countries can be subjected to litigation based on Freedom House standards and to an import tariff on the de facto stolen goods, e.g., oil, obtained from a banned seller. Tariff-derived funds can be held in a "Clean Hands Trust" until the status of the banned seller improves (Wenar 2010, pp. 141–147).

In short, proponents of fairer approaches to trade contend that expanded application of property rights can help diminish illicit dealing in stolen goods and thereby advance the cause of the poor throughout the world. Their case certainly merits support on political and diplomatic grounds; for historical reasons, however, it is morally problematic. For, the entire process of claiming and distributing property is, though on the surface subject to legal constraints, actually just the latest chapter of appropriation by force.

"Creative" Legal Property Acquisition

Property owners are obviously motivated to place a high value on the right of private property and, as a corollary, on punishing those who do not do so. Thus, property law has been meticulously developed over millennia, as have both civil and criminal law regarding misappropriation of what legally belongs to someone else. In this panoply of legal rules are many terms that cover every imaginable aspect of ownership and theft; and these are now a largely unexamined component of our ordinary vocabulary. To clarify the basis of ownership, we distinguish deeds, purchases, exchanges, gifts, and so on. As for theft, we refer to, for example, stolen goods, and specify the type of action whereby these are obtained, e.g., by rustling, forging, defrauding, shoplifting, burgling, pick pocketing, conning, or hacking: And having distinguished their respective degrees of malevolence, we assign each of them a suitable penalty. In short, we take "our things" very seriously; further, we expend considerable resources to the process of holding on to them. However, those of us in developed countries devote far less attention to the broader historical processes whereby these things initially become available to us. Therefore, not surprisingly, we tend not to notice that neither governments nor major corporations necessarily respect peoples' claims to rightful ownership. And the reasons for such extra-legal behavior are not too difficult to identify.

Planet earth's resources, still not supplemented from anywhere else, are finite; so its human inhabitants compete with one another for their control. The means that acquirers employ to this end have ranged from raw violence to multifaceted debate. From the latter have come various cautionary insights, but these have on balance been no match for the justificatory reasoning that the acquisitive have embodied in legal doctrines down through the ages. By these means, most of the natural resources of our planet have come to be controlled by a powerful few at the expense of the disempowered many, who are typically consigned to systemic poverty that is seldom recognized as an effect of others' overreaching. For, this corporate usurpation of inconvenient land claims has typically been state-facilitated, e.g., in the United States (Churchill 1996).

Recognition that redistribution of wealth in the world is a moral imperative is increasing. This recognition involves legal developments and proposals complemented by rethinking of the contestable origins of many current owners' claims. In practice, it manifests itself as a justice-seeking movement:

> Loose networks of actors in the North and South (including NGOs, grassroots organizations, academics, activists, and journalists) have drawn public attention to the "dark side" of globalizing business activity. In the mining sector this has involved the "David and Goliath" struggles of local and indigenous peoples facing appropriation of their lands, environmental threats, and violations of human rights. (Szablowski 2002, p. 249)

Before considering theoretical aspects of this movement, I will first review what some business ethicists have reported about the way extractive industry corporations have been dealing with aboriginal and other indigenous peoples. For, without explicitly citing the IRP, their findings show that this noxious principle of international law underlies many arrangements between extractive industry corporations and local peoples who occupy resource-rich lands.

Some studies, while recognizing that a mining operation causes harm to local communities, attribute that harm to a combination of government indifference and company failure to communicate, with no attention to property rights issues (e.g., Newenham-Kahindi 2011). Several others report that MNC expropriation is facilitated, e.g., in Sudan (Idahosa 2002, p. 233) and Peru (Szablowski 2002, p. 250), by governmental exercise of eminent domain. Szablowski (2002) shows how seemingly people-friendly property arrangements made by a mining company in Peru are subverted to the advantage of the company. This subversion involves the combined use of company-favoring "social specialists" and the World Bank's Operational Directive on Involuntary Resettlement to convey a sense of fairness while assigning all decision-making responsibilities to the mining company (pp. 249–256 and n. 6). This

top-down strategy prevails among extractive MNCs to the detriment of community needs.

Idemudia (2009) shows how three oil companies attempt to palliate their environmentally destructive activities in the Niger Delta by entering into community development partnerships (CDPs) which they unilaterally control in consort with the federal government. Mobil's non-functioning agricultural projects are "largely top-down in nature" except for limited contact with community elite. Meanwhile, damage caused by its gas flaring continues unabated, and Mobil has appealed a comparatively trivial $10 million award for oil spill damages (pp. 98–99, 101–103). The French oil company Total has put $350,000 into a bottom-up community development organization, but with no provision for the Eastern Obolo Communities to influence how it conducts its core business (pp. 103–105). Shell, in turn, makes "gifts" to communities from which it invites only ad hoc consultation and no input regarding oil spills (5400 officially recorded since 2006) or its routine gas flaring that lax government regulations accommodate (pp. 107–111).

Might outcomes be different in countries faced with different social and historical circumstances? Perhaps, but not without overcoming major obstacles, as the Canadian mining company Pacific Rim failed to do when it sought to extract gold from the El Dorado mine in El Salvador (Collins 2009). In 2005, it got a license to mine from the federal government, owner of all mineral rights in the country. Therefore, it dutifully assigned royalties to both federal and local governments. The people, however, hardened by years of civil war in their country and backed by various NGOs, insisted on being included in Pacific Rim's business strategy. Several reports prepared by third parties were very critical. Oxfam's report, issued in February 2009, warned that "in most cases the long term environmental and social costs of mining outweighed short-term economic benefit" (p. 261). A month later, the populist Farabundo Marti National Liberation Front (FMLN) was elected into office. Pacific Rim filed for CAFTA Arbitration Proceedings to recover $77 million of costs and damages (p. 261), and anti-mining advocates became assassins' targets.

After a no less socially irresponsible period (from 1973 to mid-1990s) in West Papua, Indonesia, the American mining company Freeport-McMoRan Copper and Gold has since achieved a better outcome, even with regard to indigenous property rights (Rifai-Hasan 2009). At stake here is the world's largest gold mine, which for years has brought immense profits to Freeport and wealth to government and local elites as well as the US and Indonesian power brokers (Rifai-Hasan 2009, p. 134; Leith 2003). Freeport and the US agencies have together, according to Rifai-Hasan (p. 137), paid the government US$4.4 billion. For years, though, the indigenous Amungme and Kamoro peoples endured poverty and environmental degradation. Then, under successively greater pressure from NGOs, media, and a new democratic government, Freeport (1) set up the Land Rights Trust Fund to officially recognize indigenous land rights and provide compensation and (2) instituted the so-called One-Percent Fund to allocate some $15 million annually for 10 years. As of 2005, the latter had generated over $100 million, to which the mining company Rio Tinto added $87 million. In addition to funding modern health care facilities, Freeport was putting $500,000 a year into "a job training and promotion program for Kamoro and Amungme landowning villages" whose citizens make up one-fourth of Freeport's 8000 workers (Rifai-Hasan 2009, p. 136). Under the democratic government elected in 1998, a law was passed in 2001 that assigns Papua 70% of its mineral wealth. Combined with progress toward environmental management, Freeport's presence in Papua may be deemed partially advantageous to its people.

Attainment of property rights has not come easily to indigenous peoples, however. In Fiji, after vast tracts of communal lands were alienated to help the inauguration of a sugar industry, a British Crown Colony governor restricted further sales of native land (Daye 2009). In South Africa, the gold mining company Placer Dome, together with USAID, Canada's CIDA, and some NGOs, developed Project CARE to help some 2600 laid-off gold miners find remunerative employment (Bird 2009b). Neither action, however, directly addressed any native ownership claims.

By contrast, an agreement reached in 2011 between Rio Tinto and certain Australian aborigines seems encouraging (see below). However, as business ethicists have noted regarding other agreements elsewhere, the devil is certainly in the details: And whatever the future may bring, the past offers little assurance that concern for human rights is a major consideration in the global economy. All the more reason to consider what Bird calls "legacy issues": "contemporary issues which have been shaped (usually in negative ways) by actions taken by particular agents in the past" (2009a, p. 207).

Early Modern Approaches to Creative Legal Acquisition

For many centuries, acquisition was widely based on nothing more righteous than the right of conquest (Korman 1996). In time, this reliance on brute force gave way to systems of acquisition which though no less greedy were based on claims to legality. From the Middle Ages on, appropriators in the "Old World" appealed to religious prerogatives. Thus, Muslim conquerors were assured that Allah wanted the best for them; and Christian war-mongers preached that God favored their expansionary aims. The

mixed results of jihads and Crusades did not support either's claim to ownership. However, as Europeans extended their acquisitive appetites to the newly discovered non-Christian lands, Popes allocated their ownership to Christian nations. Thus, Pope Nicholas V's bull *Romanus Pontifex* (1452) gave lands in West Africa to Portugal, and Pope Alexander VI's *Inter caetera* (1493) assured Spain that Christopher Columbus and his successors were justified in their efforts to claim and conquer lands in the Western hemisphere.

Complementing this conquistadorial ideology was a steady refinement of the concept of private property. Its development was long hampered, though, by reliance on acquisition by force, especially on behalf of a sovereign. Thus, during Europe's feudal eras control of land depended largely on backing the right monarch at the right time. In time, of course, monarchies became associated with more geographically circumscribed areas and, at the same time, with the organizational overlay identified as a state. Wars between states became the standard way to gain territory from or lose it to another state. In this setting, the fact of owning property and the extent thereof depended on the relationship one was able to maintain with a protective state. Lacking such a relationship, one's holdings were vulnerable to despoliation by feckless friend or furious foe. And none were more vulnerable than the original inhabitants of lands newly subject to European purview.

As Europeans began exploring the "New World" after 1492, philosophers began theorizing about how ownership of real property is established. These acquisition theories are diverse, complex, and still debated. Their interpreters tend to agree, though, that each theory accepts at least implicitly the following points: (1) Europeans' recourse to conquest and genocide to achieve domination does not preclude their becoming owners of the newly discovered lands; (2) indigenous peoples "discovered" by Europeans were inherently qualified only to occupy land but not strictly speaking to own it as property; and (3) property is to be controlled preeminently by the (European) nation-state and subordinately by individuals whom it chooses to favor (meaning almost exclusively white citizens and émigré settlers). These claims were indeed widely upheld; but the relevant views of the theorists in question were more subtle and nuanced.

Writing a century after westward exploration ensued, Dutch legal scholar Grotius wrote that individuals could take ownership of "unoccupied lands" that have not been "previously occupied by the people" and have not been otherwise disposed of under relevant civil laws of a sovereign and/or captors of the land (1901, chap. II, para. 231; chap. VI, para. 1046). Grotius's English contemporary Hobbes is less flexible regarding initial acquisition in that he precludes initial ownership until after people have entered into a social contract whereby control of property is vested in a state. For, he noted, "the savage people in many places of *America*… have no government at all" but live "in that brutish manner" that is surmounted precisely by contracting together to establish a government of laws (1651/1968, Part I, chap. 13, p. 187). Therefore, in Hobbes's view, the "savages" lack the infrastructure that property rights presuppose.

These are by no means ethereal ideas about ownership. For, by the time their presenters died, both the Dutch and the English had begun to colonize what they called, respectively, New Amsterdam and New England (so called to this day). Though put forth far from the frontier where aggrandizement was occurring, such views surely played a role in the property-multiplying expansions of nation-states.

This, to Europeans, was the Age of Discovery, during which they claimed for themselves lands that, though occupied, they treated as unseen by a human being before their arrival. Had these de facto late arrivers considered aboriginal people to be fully human, they might have appealed to a right of conquest. In lieu thereof, the "discovery doctrine" served as sufficient legal justification for colonial and post-colonial appropriation of all lands now known to exist regardless of which species resided therein beforehand. The Europeans, in other words, created laws to justify their acquisitive desires. So did the British everywhere including the New World; once the United States was founded, its new government followed suit. First Congress made the U.S. Executive branch the ruling realtor regarding Indian lands by passing the 1790 Indian Nonintercourse Act, which requires federal approval of any transfer of land from Indians to others. Then, the U.S. Supreme Court centralized such aggrandizement via a trilogy of appropriation justifying cases, beginning with *Johnson v. M'Intosh* (1823).

These cases placed control of land appropriation in the federal government rather than in the individual states, but not without controversy as to how whites were to acquire Native American lands. First, some white settlers claimed ownership of lands they had purchased from tribes in the Midwest; and Chief Justice Marshall personally wanted to validate some Revolutionary War veterans' ownership of lands in Kentucky. Therefore, he persuaded his court to rule that, Indians having no legitimate state, their right of occupancy must yield to ownership by a legitimate state, meaning any of the new "American states." The governments of Georgia and Mississippi thereupon enacted laws ordering removal of Indians from their territory. Marshall in turn tried to minimize the scope of *Johnson* by stressing treaty rights in *Worcester v. Georgia* (31 US 515, 1832). Then, Marshall died, and President Andrew Jackson's newly appointed majority on the court ruled in *Mitchel v.*

United States I (34 US 711, 1835) that only a sovereign, i.e., the United States, discovers land and thereby acquires full title thereto. And with this ruling, the discovery doctrine became the unquestioned legal foundation for appropriation from coast to coast (Robertson 2005).

In *Mitchel* and other related cases, Native Americans were characterized as non-owning occupants with no legitimate claims to the lands they occupied. In contrast, the United States, like its predecessors in sovereign aggrandizement, was declared to have an exclusive right to take by force or purchase any and all such lands. It is no coincidence, then, that when de Tocqueville observed in 1831 how the Indian tribes were being pushed ever farther West with the full support of the law, he concluded that they would be extinct once the settlers reached the Pacific coast (2000, pp. 321–339). This systematic exploitation that borders on genocide had already been practiced against blacks brought to the New World from Africa; and the Nazis in Germany made similar claims to justify annihilating the Jews (Thomas 1992; Sterba 1996, pp. 446–447).

Legal historian Banner (2005) argues that the systematic expropriation practiced in the New World was based not on a right of conquest but on the new arrivals' ability to shape a legal framework conducive to their land ownership. This settler-favoring legal framework achieved its purpose all too well. Nor was it unique to North America. A comparable process of expropriation was carried out throughout the lands in the Pacific region (Banner 2007). In Australia and New Zealand, for example, white settlers took aboriginal lands for themselves on grounds that before their arrival there were no human inhabitants. These uninhabited lands were *terra nullius* and as such ripe for first claims to ownership.

These creative acts of legitimation of global theft are now largely repudiated. However, they survive in the United States in the concept and practice of sovereign ownership. As I will discuss below, this widely recognized power of a nation-state has underpinned some aboriginal rectification in the United States, especially via land-in-trust arrangements. Here I will concentrate on its manifestation as eminent domain. This concept asserts the right of a sovereign government to take private property for public use, and dates back to Grotius's concept of *dominium eminens* in his *De Jure Belli et Pacis* (1625). It was included as a federal power in the Fifth Amendment to the US Constitution, was extended to the states via the Fourteenth Amendment, and, over the years, has been interpreted ever more broadly (Wenar 1997). In the process, public use has come to be associated less with community and more with corporate benefit (Byrne 1988). In 2005, in fact, the U.S. Supreme Court held 5–4 in *Kelo v. City of New London* (545 U.S. 469) that under the public use provision a public authority may use its condemnatory power to transfer private property from one owner to another primarily for the new owner's benefit.

This transferal prerogative, though commonly available to utilities and developers, is controversial. Some socialist philosophers actually favor people-oriented public exercise of sovereignty (Anton et al. 2000, p. 13), but libertarians strongly disagree. Quite apart from this somewhat narrow debate, however, sovereignty is also being exercised to benefit not corporate interests but people who have been unjustly despoiled. This trend has begun to have some serious institutional support.

Rights of Indigenous Peoples and Rectification

In accord with theorists' more idealist accounts of justice, international law in recent times has embraced human rights as a pole star and among the human rights it upholds are those of indigenous peoples. These latter rights are set forth in the International Labor Organization (ILO) Indigenous and Tribal Peoples Convention (No. 169), the Universal Declaration of Human Rights, the International Covenants, the Convention on the Elimination of All Forms of Racial Discrimination, and other international human rights treaties and Declarations. Key among these Declarations is the U.N. Declaration on the Rights of Indigenous Peoples, adopted in September 2007 with 144 states in favor, 11 abstentions, and four votes against on the part of countries with the largest indigenous populations: the United States, Canada, Australia, and New Zealand. Australia having since endorsed the Declaration and Canada adopting a position of support, only New Zealand and the United States remain opposed.

Among the rights articulated in these documents are some that pertain directly to the focus of this article. As formulated by the People's Decade of Human Rights Education (PDHRE), they include:

> The human right to maintain their distinctive spiritual and material relationship with (their) lands, to own land individually and in community with others, and to transfer land rights according to their customs.
> The human right to use, manage and safeguard the natural resources pertaining to their lands.
> The human right to full and effective participation in shaping decisions and policies concerning their group and community, at the local, national and international levels, including policies relating to economic and social development.

These and other interrelated human rights should be included in and targeted by any program that aims at rectification of the property claims of indigenous peoples. For,

they make possible the fundamental human right that is at stake: the human right of indigenous peoples to exist.

Mainstream theorists have not been ardent supporters of rectification for indigenous peoples. Indeed, many—including especially postmodernists—discredit the very idea of an ethnic group as a mere "invention" (Sollors 1995). Among those who have taken up the rectification issue, however, there has been a discernible increase in support for pragmatic interventions beyond theoretical impasse. This increase in support can be traced from Pre-Revolution Era philosophers to contemporary critics of the most influential nay-sayers.

Philosopher Locke is sometimes considered a pro-conquest ideologue, but not by anyone who actually reads everything on this subject. His often cited contractarian theory is ambiguous with regard to initial acquisition because he posits both that people honor property rights already in the state of nature and that they form states so their property can be safeguarded more effectively. Regarding the latter, his famous proviso (that in taking one must always leave "as much and as good" for others) is often interpreted as a rule for white settlers. However, his clear condemnation of acquisition by conquest (1764, chap. XIV) cannot be read that way. For, in his *Two Treatises*, he firmly defends the priority of private property and its inheritance over the claims of a conqueror, however just its recourse to war may be. As for attempts to associate Locke with the flimflam doctrine of *vacuum domicilium* (vacant land), Corcoran's research clearly supports his dissenting conclusion (n.d., p. 18):

> Locke surely did recognize that the Indians' enjoyment of their property was meager and did not engender the ease and bounty of a civil laborious life. But Locke equally recognized that what was theirs was theirs.

Thus did Locke address the issue of initial acquisition rights. And as westward expansion intensified after his time, so did the initial rights issue. In particular, after Locke, two philosophers alive during the American Revolution, Hume and Rousseau, and another during the French Revolution, Kant, addressed initial acquisition. None enthusiastically supported conquest as a basis for ownership.

Eschewing theory with regard to initial acquisition, Hume simply states as a fact that most governments "have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent or voluntary subjection of the people" (1748/1972, p. 151).

For Rousseau, unlike Locke, the social contract conveys ownership to the state which then determines how property is to be distributed among the people. How this affects indigenous people, however, is not altogether clear. He berates the conquistador Balboa for thinking he could claim the entirety of South America for Spain; however, he does so both in support of "its former inhabitants" and of "all the other princes of the world" (1762/1972, bk. I, chap. 9). The latter, says Rousseau, exercise preeminent jurisdiction over private holdings. How are such holdings initiated? Rousseau's answer: His theory applies whether private owners form a community first and then acquire land or become owners first and then form a community. Unanswered as to these options is where such lands are to be found.

Kant's views on these matters are complex and controversial. He backed indigenous peoples' claims to their lands far more than did Locke or Hume, but also defended a right to visit that opened the door to diminished exclusivity (Waligore 2009, pp. 30, 38). Early in his career he considered whites better qualified to own property than non-whites (Mills 1997, pp. 69–71); but later he largely abandoned this racist view (Kleingeld 2007). He was a confirmed anti-imperialist (Muthu 2003); so he can hardly be associated with the view that only white Europeans are qualified to control the world's wealth.

Of course, not all white Europeans shared the world's wealth equally, especially in the wake of the socially disruptive behemoth of corporate ownership that emerged during the Industrial Revolution. In response, Marx and Engels linked ownership rights to labor and called on the working dispossessed to reclaim what is rightfully theirs; and Proudhon repudiated the very concept of property as a misguided curse on people's relationship with the world. None of these revolutionary outlooks, though, foresaw the catastrophic consequences of property nationalization in the twentieth-century.

As Communist states' indifference to individual rights became increasingly apparent in the twentieth century and the cold war era emerged, some capitalist-oriented philosophers reactivated hypothetical just societies to provide a basis for some publicly administered redistribution of wealth. Best known among these is liberal philosopher Rawls whose ideal theory sets a floor on people's access to goods within a nation-state (1971) if not in the world at large (1999). While liberals have turned this approach into a veritable cottage industry, most libertarians oppose it. However, Rawls's libertarian colleague Nozick was only partially opposed. Echoing Hume, he begins by acknowledging that "(s)ome people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges" (Nozick 1974, p. 152). His solution: After positing one principle to govern initial acquisitions and another to govern transfers, he adds that whatever has not been thus acquired is to be returned to a rightful owner via a process of rectification.

Nozick only hinted at how the rectification process might be worked out (1974, pp. 152–153), e.g., apply "patterned principles of distributive justice" (p. 231) to compensate victims of injustice so they are no worse off than they would have been if no injustice had taken place. Business ethicist Hailwood (2001) appeals to this so-called No Net Harm Criterion (Kavka 1982) to justify redistribution on the basis of need. However, individualist scholars say no such criterion can be rationally applied across generations. So most libertarian philosophers (e.g., Meyer 2003) and some others as well (e.g., Sher 1980, 2005) have concluded that no substantive restoration of property rights across generations is ethically obligatory or feasible.

Liberals as well as socialists are skeptical about intermediate groups; but some are open to meeting individual needs collectively, e.g., by means of public ownership (Anton et al. 2000). Libertarians, though, are wary of any meddling with private ownership of goods. Whether addressing contemporary or transgenerational rectification, they identify both donors and recipients of rectification only as individuals.

Some scholars have sought to circumvent this individualist impasse. Litan (1977), for example, suggested basing relevant claims on egalitarian principles applied to groups or societies as well as individuals (p. 243). Lyons (1977), while accepting the reality of tribal groups and endorsing government-based reparations for current injustices to them, argued that the Native Americans' original acquisition land claims are defeasible. Wenar (1998) counters that a belated redistribution of original acquisition private property could be done if based on a utilitarian cost–benefit analysis that he calls a "vector-sum approach."

By contrast, reliance on an exclusively individual-oriented approach to rectification generates a discontinuity between the past and the present individuals (the so-called non-identity problem) and barrier-creating changed circumstances that exonerate people today from responsibility for wrongful acquisitions in the past. Some say these findings support postponing rectificatory arrangements in the real world; however, it does so only if one thinks exclusively of individuals over time and not of groups, including particular tribes.

The progeny of power regarding property is a world in which increasingly the haves have more and the have-nots less. The former do pay token attention to the needs of the latter, in part via government policies that allow for what is called aid, in part via philanthropic interventions. Rarely does this attending to the impoverished have any lasting effect on the allocation of resources among humans, nor does it constitute a beacon of hope for their betterment. For, the basis for sympathy is often only a concern that poverty ignored can generate unrest that reaches the doors of the rich. If, however, one takes seriously the morally suspect origins of this state of affairs, one is likely to favor a "war on poverty" that amounts to more than face-saving pacification. To advance this objective, one needs to move beyond the individual-oriented escape routes to intergenerational rectification. This can be done, I contend, by characterizing the issue as one involving the victimization of one group by another (Thompson 2001, p. 115).

Group Rights as a Basis for Intergenerational Rectification

Focusing now on group rights, I consider first some theorists who systematically avoid or undermine group-oriented thinking about reparations; then I discuss a legal philosopher who links individuals and groups to justify transgenerational rectification, and other philosophers whose attention to group rights supports that approach. Lastly, I will suggest that the legal status of a corporation is a possible way to institutionalize group rights with regard to indigenous peoples' justice claims.

Opponents of full reparations for wrongful initial acquisition stress the discontinuity between the past and present individuals to discredit the very concept of intergenerational rectification. In the wake of this "non-identity problem," their analysis cannot but arrive at a negative conclusion: Only individuals were treated unjustly in the past and they are deceased, so there is no moral connection between them and anyone alive now or in future. The key corollary: No present owners are responsible for the well-being of individuals alive today regardless of how much their ancestors were harmed in the past.

Corlett (2002) identifies different versions of this type of argument according to their principal focus, to wit, historical complexity, and counterfactual considerations; utilitarian assessment of social utility; the difficulty of assigning collective responsibility; a claim that acquired rights trump original land rights; and another analogous claim that changed circumstances may supersede historic injustice. These objections vary in detail and import, but they can be illustrated by elaborating the supersession claim, which is associated with legal philosopher Waldron.

Waldron (1992) endorses symbolic reparations to past victims; but he finds full reparation unmanageable because of the complexity of reconstructing all the transactions involved in a counterfactual sequence from an original to a hypothetical owner. Even an acquisition-based entitlement to identifiable alienated property may "fade" over time, he contends, due to changed circumstances. This, he says, applies even to dispossessed communal lands that have no religious but only material or economic significance. As for the latter, a claim once uncontestable may be "superseded" under changed circumstances. Take the case of Manhattan Island, which has manifestly undergone development since

purchased for a pittance from native Americans four centuries ago. To illustrate this point, Waldron borrows an example from Lyons (1977, pp. 261, 264–265): a water hole that once belonged uncontestably to one group would have to be shared if in time the water supply of others living in the same area were to dry up. So, Waldron concludes, first come may not deserve to be perpetually first served. This transformative rationale, he contends, applies even to native languages and cultures: they should give way to the complex offerings of today's global culture in keeping with Kant's notions of hospitality and cosmopolitan right (Waldron 1995; Waligore 2009, pp. 28–32).

Some philosophers counter Waldron's changed circumstances stance with alternative solutions. Tully (1994) recommends that a state negotiate rather than unilaterally resolve indigenous property claims. Wenar's proposed vector-sum approach, alluded to above, would introduce a cost-benefit analysis into such negotiations. Patton (2005) faults Waldron for addressing the Australasian situation only with regard to historical injustice while ignoring both aboriginals' right to equal treatment and their right to recognition and respect. Waligore (2009) disputes Waldron's expansion of Kantian hospitality to argue that indigenous peoples should be respected and negotiated with "qua peoples" albeit not as nation states (pp. 30, 32, 52). The pragmatic import of these writers' suggestions is undeniable, so it is encouraging that they are supported by new in-depth application of group-rights thinking to initial acquisition concerns.

Singularly important in this regard is Herstein's (2008, 2009) ground-breaking recognition of groups as key to developing transgenerational rights that are not negated by concerns about the non-identity problem. To this end, he focuses on what he calls constitutive harm: "harms currently living individuals suffer as a function of the harms their group or community presently suffers as a consequence of historic wrongs," i.e., "*as members* of historically wronged groups" (2009, pp. 232–233). By this move, he stays "within the contours of person-affecting ethics" (pp. 234, 245) as he considers how persons currently alive are harmed because of their "identity-forming attachments" (p. 248) to the "constituting interests" of a group that has undergone harm in the past and has maintained continuity over time. This approach, he says, focuses on Sandel's "situated self" (pp. 260–261) rather than Sandel's "unencumbered self" that is presupposed by pursuers of the aggregative account of harm that succumbs to the non-identity problem (p. 262).

Other philosophers are less concerned than Herstein with avoiding the non-identity problem as they defend rectification on the basis of group rights. For communitarians, these are a buffer against and antidote to extremist versions of both individualism and state sovereignty (Stapleton 1995). Young (1989) adds a political dimension by urging state recognition of "differently identified groups" precisely in view of their differences rather than as undifferentiated communities that some opposed to unrelated individuals. As it were in response to her call for a "politics of difference," others stress the under-appreciated status of women (e.g., Pateman 1988) and of racial minorities (e.g., Mills 1997) to correct the exclusively white male presuppositions of contract theory. Mills in particular argues that by focusing on an idealized polity a contract theorist, e.g., Rawls, ignores the domination that has determined who owns what; for, this canonical forgetfulness excludes non-whites from the social contract that assigns rights. To remedy this bias in and beyond academe, he would derive legitimate reparations from a non-ideal theory that addresses what he calls the "domination contract" (Mills 2008).

Complementing these calls for government to respect legitimate differences among groups in society are various arguments expounded by political theorists on behalf of aboriginal peoples' rights to restitution. Canadian philosopher Kymlicka is noted for his liberal justification of "multicultural citizenship" to support the rights of aboriginal ("first nation") peoples in his country (1995b; see also 1995a). Lyons (1977) similarly defends the right of Native American tribes to restitution directly from the federal government, not so much on the basis of their original title to property but on the basis of the government's legal responsibility as trustee on their behalf. Several political theorists argue for even stronger entitlement based on restorative or indigenous justice (Thompson 2001; Stiltz 2010; Bradford n.d.)

Whatever theoretical basis one adopts to legitimate rectification of historic harms done to a continuing group, the process of effecting that rectification will rarely be simple and straightforward—whence the need for carefully wrought, deliberative approaches. In their absence, highly problematic outcomes may ensue, e.g., in postcolonial Africa. A worst case scenario is Zimbabwe: By transferring productive agricultural lands from white owners to unqualified blacks, President Mugabe ruined his country's economy—albeit possibly not forever (Rogers 2010). Meanwhile, organized forces brutally compete for control of natural resources there and in other post-colonial countries. These are unquestionably failed states. However, as discussed above, most efforts at rectification have emanated from corporations acting in their own interest. Taking this consideration into account, I will now suggest another way to legitimate the group rights of indigenous peoples, namely, by authorizing tribes to exist as corporations.

In general, transcendence of mainstream approaches to rectification requires acknowledging the existence of

different groups within a given society and according them rights as groups. As we have seen, recognition of group rights has been pursued along several different tracks, somewhat collectively by human rights advocates, more selectively by philosophers who defend cultural diversity, or via Herstein's (2008) constitutive individual approach. What each of these presupposes but none clearly establishes is cross-generational group stability. Such stability is readily assumed with respect to a state; but the doctrine of state sovereignty is not applied to native tribes. By contrast, constitutional law in the United States has moved steadily toward affording corporations comparable sovereignty.

Corporations may not be persons to a metaphysician but legally they have that status in international law and ever more robustly in U.S. constitutional law. Ever since the 1886 U.S. Supreme Court case (*Santa Clara County v. Southern Pacific R. Co.*, 118 US 394) referred to corporations as persons they have been so treated to determine their rights under law even as their individual members change over time. The present Supreme Court has even decided that a corporation of any size is so person-like that the federal government cannot even limit the amount of money it spends to influence candidates and holders of public office (*Citizens United v. Federal Election Commission*, 558 U.S. No. 08-205, decided January 2010)—even, presumably, if that corporation is foreign-owned. This ruling is politically debatable; but it shows that group rights have a more robust status in law than in metaphysics.

This corporatization idea is, of course, readily countered by noting how a corporation with extensive assets can overwhelm a poorer corporate opponent via such devices as a hostile takeover. There is, however, more than one kind of asset. Thus, groups as powerful as the major corporations sometimes find themselves on the defensive because they fail to recognize the rights of other less powerful but nonetheless organized groups. This is exemplified in India, where a major mining enterprise is being challenged by primitive groups who have lived for centuries on land rich in minerals (Kazmin 2010), and in Brazil, where developers of a rocket-launching base are being opposed by centuries-old settlements of ex-slaves (Moffett 2008). The complexity of such moves is illustrated by what happened when the Haitian government tried to benefit its people by purchasing oil from Venezuela at a much lower cost than what it was paying majors like ExxonMobil and Chevron: These companies, in collusion with the US embassy in Haiti, put diplomatic and operational obstacles in the way of this so-called Petro-Caribe deal (Coughlin and Ives 2011). Such power plays are common in a world dominated by TNCs. Alternative arrangements are nonetheless ethically encouraged and some facts on the ground attest to their feasibility.

Some Reparatory Steps in the Right Direction

There are, in summary, many proposals aimed at rectifying past injustice to indigenous peoples. Of these many are far reaching and not easily accomplished. However, this is not to say nothing can be done. Moreover, given the current posture of the United States as the world's disseminator and guarantor of human rights, it behooves this country to show its dedication to such principles within the area of its primary jurisdiction. This is not merely a public relations priority. For, say the proponents of justice for indigenous peoples, such a stance is basic to the moral standing of the United States (e.g., Yamamoto et al. 2003; Corlett 2002). Impossible to bring about? Not necessarily, given that in the United States and elsewhere ways are being found to do the impossible. These involve in particular rectificatory laws and practices.

Laws have been in place for centuries to meet the basic needs of the poor. These laws have never been robustly compensatory. They have typically targeted only petitioning individuals, not groups as such. Thus, they mimic the standard approach to reimbursing victims of crime. Some recent developments, however, come close to acknowledging group rights, in certain circumstances.

First, symbolic reparations have become fairly common, especially in the form of truth and reconciliation commissions (TRCs). More than twenty such reparations have been carried out since 1974, on nearly every continent, and others are being called for. Some require actual monetary and property returns, although imperfectly.

There have also been meaningful and substantive restorations of property to aborigines, e.g., in the United States. After noting some of the legal maneuvers involved in appropriation of Native American lands throughout and beyond the nineteenth century, I shall cite some legal steps taken in the twentieth century to rectify those past injustices.

After the 1823–1832 Marshall Trilogy, the so-called Manifest Destiny characterized the US westward expansion. This ravenous doctrine was then facilitated in 1887 by passage of the General Allotment (or Dawes) Act, which changed the communal ownership of tribal lands to individual ownership. A process of acreage allotment as a by-product identified "excess" lands that were inevitably sold to non-Indians. Further facilitating this overarching expropriation, the U.S. Supreme Court ruled in 1903 (*Lone Wolf v. Hitchcock*) that Congress has absolute authority to unilaterally abrogate treaties it has signed with Indian nations. The disastrous consequences of this colonizing policy were then documented in the 1928 Merriam Report. In response, the new Roosevelt Administration enacted the Indian Reorganization Act (IRA) of 1934 that authorized tribal self-government. These developments were subsequently terminated and only partially restored by more recent modifications,

including provisions for casinos (The Indian Gaming Regulatory Act of 1988, 25 U.S.C. sec. 2719) and mining operations. Especially important in relationship to rectification, though, is the highly controversial but judicially defended empowerment of the Department of Interior (DOI) to put Indian land in federal trust to protect it from dispersal.

Federal trust responsibility was established already by the Marshall Trilogy as a corollary of sovereign ownership. The 1934 IRA operationalized this trust relationship, leading to the return of over two million acres to various tribes in the first 20 years of the Act's existence. This total has since grown to 9 million acres. Though continually operating in the face of multiple legal challenges, the DOI now holds in trust over 55 million acres of Indian lands. Moreover, Native Americans have been buying ever more land to put in trust. Intended "to restore Indian land bases, to rehabilitate Indian economic life and to foster recovery from centuries of oppression" (NCAI n.d.), these efforts are bitterly contested by non-Indians because they remove lands from the tax rolls of state and local governments (NCAI n.d.; Wikipedia, "Indian Reorganization Act," n.d.). Given the arid condition of so much of the land in question, this tax-related objection seems exaggerated. It might apply more aptly to Ward Churchill's "Buffalo Commons" proposal, which would restore to Indian tribes vast acres of land located in western Kansas and eastern Colorado extending from the Canadian border to southern Texas (quoted by Corlett 2002, pp. 163–164). However, even this proposal seems realistic now that the Obama Administration has decided to pay $3.4 billion to settle a 13-year-old lawsuit filed in behalf of Native Americans and tribes to whom the US government failed to pay royalties for mineral and grazing leases on land it held in trust for them (Wilkinson 2009; Fahrenthold 2009).

Comparable legal efforts are also underway in Australia and New Zealand. After years of exonerating despoilers via the doctrine of *terra nullius*, courts in these countries have invalidated this concept (notably in the 1992 *Mabo* case). As a result. aboriginal peoples are regaining large tracts of land, notably in Western Australia and in the Northern Territory. (Meanwhile, some Israelis claim that the West Bank, though inhabited by Palestinians, became a *terra nullius* when the British departed.)

Other indications that at least partial rectification is feasible include actions involving crop loans to black farmers in the United States, return of property once owned by Holocaust victims, and (possible) return to residents of land held by the US military forces.

As approved by the court and Congress, the U.S. Department of Agriculture has been authorized to make cash payments to compensate black farmers who were systematically denied crop loans that were routinely granted to white farmers. On the basis of the 1999 *Pigford v. Glickman* ruling (D.C. District Court, 185 F.R.D. 82), awards totaling about $100 million were made in the following decade. To accommodate other claimants who had been unable to file before the original deadline, supplemental legislation (2008, 2010) appropriated an additional $1.25 billion to be divided into $60,000 payments to each certifiable plaintiff (Cowan and Feder 2010).

Also relevant is the return of property once owned by Holocaust victims to their survivors. Within well-ordered societies, theft of private property has, of course, long been treated as a criminal act; but theft of a group's property has not been routinely protected on the level of state action. It is remarkable, then, that government-level responses are now established to counter the effects of Nazi-era confiscations whereby people in that regime blatantly appropriated the property of a group of individuals, most of whom were Jewish. One such case involves Swiss banks that had seized Jewish depositors' assets.[1] Another involves the return of looted property, especially art works, to survivors and heirs of victims. Though certainly meritorious, such efforts are focused on privately owned property rather than the holdings of social groups as such.

A third example involves the return of some US military bases to their land's prior occupants. After World War II, the United States built huge bases in countries where it intended to remain indefinitely, notably Germany and Japan. Over a half century later, the US military is hard pressed to justify its continued presence, especially in Japan. A precedent is the U.S. Navy's 2004 departure from Vieques, a Puerto Rico island that it rendered incalculably toxic by using it as a base for bombing practice (Billing 2004).

Finally, one of the most far-reaching restitution cases ever: The Rio Tinto Reconciliation Action Plan, whereby this mining giant will pay aboriginal tribes $2 billion over the next 40 years to expand its iron operations on 70,000 km^2 of indigenous lands in the Pilbara region of Western Australia (Gordon 2011). Whatever this agreement's overall outcome, it involves replacing the 40-year heavy-handed and exploitative treatment of traditional owners with a like term of arrangements aimed at providing employment, education, and revenues to be placed in trust for future generations of aboriginal people.

Conclusion: An Agenda Item for Business Ethicists

Not every business ethicist is inclined to delve into matters political. Some, however, by virtue of their familiarity with

[1] 'Court TV Library: Miscellaneous Cases–Survivors of the Nazi Regime Sue Swiss Banks for Seized Assets', 1999, available at http://www.courttv.com/legaldocs/misc/naziswiss.html. See also http://www.swissbankclaims.com.

the details of questionable business practices, have a head start on evaluating problematic corporate practices such as those considered in this article. This knowledge base enables them to appreciate public policy changes that target abuses legally endorsed in the past. In particular, there now exists a body of studies that brings to light some dubious applications of the IRP with regard to indigenous peoples in various parts of the world. These studies show, among other things, that public and political pressure can bring about modifications in unmitigated IRP arrangements.

In the United States, as elsewhere, there has been some improvement, but many basic corrections are still needed. Neither Congress nor courts have been friendly toward Native Americans. Their pandering to socially indifferent commercial interests has led to longstanding mistreatment. What needs to happen now is pressuring resource companies and others to become socially responsible corporations. This, surely, is something a business ethicist so disposed might help bring about.

Fortunately, some legislative and judicial procedures are in place to facilitate implementation of these goals. These procedures are by no means adequate or infallible; but given the public backing, they can make an appreciable difference. The public debate underway may not advance theoretical analyses; yet it merits the attention of all who are interested in restoring just holdings. Among changes in policy and practice that advocates might support are the following US-related changes.

The US endorsement of the 2007 UN Declaration on the Rights of Indigenous Peoples (see Graham 2009);

Development of responsible and accountable management of Individual Indian Money (IIM) accounts by the US Department of Interior;

Reversal by the U.S. Supreme Court of its longstanding indifference to and hostility toward the property rights of indigenous peoples;

Legislative and judicial renunciation by the United States of its colonial policy toward the Native Americans that requires the government, through the Department of the Interior, to act as trustee for any and all of Indian lands;

The US government's empowerment of Native Americans to control their lands and resources, in compliance with Article 1 as well as Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992.

Consistent with the tenor of these steps toward institutionalizing indigenous peoples' rights, business ethicists at the University of Queensland (Australia) Centre for Social Responsibility in Mining have developed justice-based criteria—as yet minimally adopted—to assess mine-community grievance procedures (Kemp et al. 2011). Following their lead, others could in future add theory-derived policy change proposals that, where adopted, would replace unilateral corporate-controlled approaches to property disposition and control. As here argued, one way to improve international law in this regard would be to expose the IRP for what it is: an insidious mantra for justifying misappropriation. Its continued viability undermines any assertion that corporate social responsibility is functioning at the very heart of transnational relations.

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