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Resources and the Property Rights Curse

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Legal theory is often thought to be subordinate to, or at best only parallel with, certain kinds of conceptual work in political philosophy. In recent years, emerging philosophical work has pursued the converse proposition, namely: the notion that legal concepts can guide at least some important and difficult questions of justice, particularly where theoretical divides have led to stalemate.[1] Such theoretical deadlock is arguably most profound in the context of global justice, where classic principles of political philosophy cannot always be effectively applied. Perhaps the best-developed and most promising proposal of this kind in recent years is the one that Leif Wenar has offered for analysing the global trade of resources.

Many of the world's poorest countries are rich in resources, but unaccountable political elites—military rulers or dictators—sell those resources to the wealthy developed world and keep the profits for themselves. Ordinary citizens do not enjoy a share in those profits, and are often victims of other injustices inflicted in the process of resource development and exploitation. Most political philosophers view the so-called "resource curse" as a problem of distributive justice. However, in a well-known 2008 article, Wenar argues that the problem is better understood as a violation of "property rights."[2] His proposal puts law in the service of political philosophy. It promises to spare political philosophers from the challenge of establishing novel rights and obligations in the face of a seemingly intractable debate about fundamental principles. No contentious normative argumentation is necessary, Wenar contends, because existing legal rules provide the conceptual categories that explain the wrongfulness of the resource curse, and establish the rights and obligations needed for its redress.

It has been five years since the publication of Wenar's article. Yet, the significance of his central suggestion has not been sufficiently appreciated. Nor has it received adequate critical attention. This paper evaluates the proposal by placing

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1. One prominent and well-known example is Jeremy Waldron's work on human dignity, which self-consciously takes law as a starting point, using legal concepts from international human rights law to inform philosophical debates. See *Dignity*, *Rank*, *and Rights* (New York: Oxford University Press, 2012). Similarly, in the human rights context, the legal status of human rights has sometimes been used to overcome certain philosophical objections about their universality. See, e.g., Charles R Beitz, "Human Rights as a Common Concern" (2001) 95 Am Pol Sci Rev 269. In the immigration context, Michael Blake has used antidiscrimination law to show why arguments for rights to freedom of association should not be given too much weight; and Ayelet Shachar and Ran Hirschl have used an analysis of the legal rules governing transfer of political membership to argue that citizenship requires greater scrutiny as a matter of global distributive justice. See Michael Blake, "Immigration, Association, and Antidiscrimination" (2012) 122 Ethics 748; Ayelet Shachar & Ran Hirschl, "Citizenship as Inherited Property" (2007) 35 Pol Theory 253.
2. Leif Wenar, "Property Rights and the Resource Curse" (2008) 36 Phil & Pub Aff 2 at 9.

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it in the broader context of issues of justice that arise from the development and exploitation of natural resources, or "resource justice" for short.

In reality, resource injustices afflict all countries, even if the greatest tragedies are seen among the world's poorest. Even in stable, well-developed democracies, corruption and other failures in the political process lead to resource management practices that strike many of us as morally problematic. Consider fast-track environmental review processes offered to repeat-players—often private for-profit entities with vast lobbying resources—who contract to develop resources on public lands. Approval shortcuts mean less public scrutiny of projects in environmentally fragile areas, allowing projects to gain momentum too quickly to attract public debate or organized opposition. Or consider countries that sell resource rights to foreign corporations. Money paid for those rights typically goes into the general revenue fund for government to spend as it sees fit. Yet, while socioeconomic benefits to the local community are talked up during the scoping and contracting phases of planning in order to diffuse controversy, promises of employment opportunities, investment, and infrastructure development often do not materialize, leaving the local community with no tangible benefit, and in many cases also with substantial environmental and social losses.

Once viewed in the context of common grievances like these, Wenar's proposed solution to the resource curse raises a significant question for liberal political philosophy. Namely, *could* a property-based approach, once appropriately grounded in a legal understanding of property, provide an alternative to distributive justice approaches for thinking about the obligations of government in the conservation and management of land and resources?

I am deeply sympathetic with Wenar's proposal, and share his intuition that resource justice is an area where deploying the legal concept "property"—a cluster concept that refers to the set of rules governing the use and control of resources—promises to do some important work that cannot be done by standard distributive justice frameworks. However, Wenar overstates the potential of the body of law he draws upon to resolve the resource curse, and in critical respects he simply gets the law wrong.

This is somewhat perplexing for a legally sophisticated philosopher like Wenar. The aim of this paper is to make sense of how and why the proposal goes wrong so that, ultimately, a property-based approach to resource justice can succeed. I suggest that Wenar's tactical error can be explained by the limited options currently available to political philosophers for thinking about the place of property in a theory of justice and, in particular, by the remarkable staying power of what I will refer to as the "consent-based" view of property, most famously associated with Robert Nozick.[3] Although it would not be fair to call him a Nozickian,[4] it is evident that in this context Wenar is nevertheless attracted to the elusive promise of "enforcing property rights" as a neat solution to a messy set of normative questions concerning the governance of land and natural resources.

3. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
4. See *infra* note 32 and accompanying text.

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In identifying this tactical error, this paper also contributes to the broader project of re-evaluating the appropriate division of labour between law and philosophy, a challenge that the unavoidably interdisciplinary nature of scholarship in this area presents. It contains some important lessons for the use of legal concepts in the philosophical analysis of social problems, and for the use of "property" in particular. Although the legal concept of property has been successfully deployed in political philosophy as a mode of critique, thus far it has had much more limited success as a substantive analytical tool. The "curse," I shall suggest, is that the two dominant philosophical frameworks for thinking about the place of property in a theory of justice are too narrowly focused on questions of allocation and exclusion, and are therefore poorly positioned to appreciate what considerations of property could contribute to both our understanding of and responses to resource injustice.

I. The resource justice literature & Wenar's novel proposal

There is now an expansive philosophical literature that places questions of resource justice within a global context, asking not only what duties a state has to its citizens with respect to resources, but also what duties states owe to non-citizens with respect to resources. In the main, the focus of this literature has been on questions of distributive justice: that is, issues concerning the fair allocation of resources and the wealth produced from those resources.[5] Traditionally, philosophical analysis of these issues has proceeded on the basis of the claims of the present generation, considered in light of past wrongs. Increasingly, however, philosophical analysis is done in the face of intergenerational claims as well, which in the view of at least some theorists require conservation of certain resources to meet the demands of future generations, and therefore entail limitations on present consumption.[6] Moreover, philosophers have increasingly distinguished claims made on behalf of individuals from claims made on behalf of groups, and have recognized that under at least some circumstances groups rather than individuals are the appropriate locus for resource claims.[7]

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5. Much of this literature takes John Rawls' *The Law of Peoples* as the point of departure. Some prominent examples include: Charles R Beitz, *Political Theory and International Relations*, revised ed (Princeton: Princeton University Press, 1979); Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009); Thomas W Pogge, *World Poverty and Human Rights*, 2d ed (Cambridge: Polity Press, 2008) at 202-21; Kok-Chor Tan, *Justice Without Borders*: *Cosmopolitanism, Nationalism, and Patriotism* (Cambridge: Cambridge University Press, 2004); Mathias Risse, *On Global Justice* (Princeton: Princeton University Press, 2012); Henry Shue, *Basic Rights*, 2d ed (Princeton: Princeton University Press, 1996).

6. See, e.g., Joseph Mazor, "Liberal Justice, Future People, and Natural Resource Conservation" (2010) 38 Phil & Pub Aff 380. Mazor provides a novel defense of resource conservation using traditional principles of liberal political philosophy. For a survey of approaches to intergenerational resource claims, see Axel Gosseries & Lukas H Meyer, eds, *Intergenerational Justice* (Oxford: Oxford University Press, 2009).

7. Burke A Hendrix, *Ownership, Authority*, *and Self-Determination* (University Park: Pennsylvania State University Press, 2008); Jacob T Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000) at 197-221.

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Sometimes these claims are characterized as "property rights."[8] Nevertheless, within this literature, the legal concept of property has played a secondary or derivative role in the following sense: property rules are prescribed by a normative account of entitlement (e.g., first occupancy theories, "labour-mixing" theories, etc.) and/or by a principle of distributive justice (e.g., the principle of utility, equality of opportunity, etc.). Although a legal understanding of property may place practical constraints on the normative prescriptions made by such theories, property does not perform any independent work in analysing what justice requires or how we ought to respond to a given injustice—independent, that is, from the theory of entitlement or theory of justice in play. One does not, in other words, *begin* with an analysis of the current rules and principles of property law *and then* proceed to derive normative prescriptions on the basis of standing law. Indeed, to purport to do so may seem to rest on a confusion about what it means to be doing political philosophy as opposed to legal theory.

Wenar's analysis of the resource curse is therefore unique in that he proposes to reverse the usual division of labour between normative moral and political philosophy, on the one hand, and legal theory, on the other. His starting point is not, for instance, a normative theory of the rights of a given group to certain territorial resources in virtue of their relationship to that territory, the methodological approach taken by some theorists of territorial rights.[9] Nor is his starting point a historical entitlement theory that confers property rights on individuals or collections of individuals on the basis of their moral standing, the methodological approach taken by some libertarians.[10] Instead, Wenar begins with the premise that the people who occupy a given political territory (i.e., a state) "own"—in the *legal* sense—the resources within that territory. From this premise, which I will refer to as "popular ownership" for shorthand, Wenar argues that "[t]he plainest criticism of global commerce today is not that it violates some abstract distributive standard, but that it *violates property rights*."[11]

To demonstrate that popular ownership in this sense is a widely-accepted legal principle, Wenar refers to international human rights instruments, and in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[12] These documents contain

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8. This is relatively uncommon in liberal egalitarian circles, for reasons discussed in section II below. However, "property ownership" characterizations of resource claims have been embraced by left-libertarians and by some theorists of indigenous rights. See, e.g., Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994); Hendrix, *supra* note 7.

9. See, e.g., Tamar Meisels, *Territorial Rights* (Dordrecht: Springer, 2005); David Miller, "Territorial Rights: Concept and Justification" (2012) 60 Pol Studies 252; David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007) at 201-30; Margaret Moore, "Natural Resources, Territorial Right, and Global Distributive Justice" (2012) 40 Pol Theory 84.

10. See, e.g., Nozick, *supra* note 3; Michael Otsuka, *Libertarianism Without Inequality* (New York: Oxford University Press, 2005); Steiner, *supra* note 8.

11. Wenar, *supra* note 2 at 1 [emphasis added]. Although Wenar takes existing state boundaries to constitute the relevant "people" who hold the property right, I use the term "popular" as opposed to "public" or "national ownership" because, for reasons presented below, it is important to the view that property rights vest in *the people* rather than in the state.

12. *Ibid* at 9-10. He also refers to a series of UN declarations on the status of natural resources; I discuss the relevance of these in section IV below.

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preambular provisions which provide, *inter alia*, that "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources."[13] He also refers to domestic constitutions that invoke similar language; for instance, by designating resources as "common heritage" that "belongs to" the people.[14] Finally, he refers to statements of political leaders who have publicly accepted these propositions.[15]

Critically, Wenar uses the idea of popular ownership to draw an analogy from legal rules governing the relationship between private property owners, sellers, and buyers in the context of commercial transactions to the conduct of states trading in resources.[16] This analogy forms Wenar's conceptual map for understanding injustice in the trade of resources. The rules he focuses on can be summarized as follows:

- In general, only the owner of a good or someone with the permission of the owner can sell that good.
- Depriving property owners of their property without their permission constitutes the crime of "theft."
- Selling and buying goods that have been sold without the owner's permission constitute the complementary crimes of "selling" and "receiving" "stolen goods." However, both legal offences are subject to the defence (i.e., excuse of criminal wrongdoing) that the good was sold or purchased in "good faith," where sellers or buyers can demonstrate that they were not aware or could not reasonably have been aware of the fact that the seller did not hold a clean title.
- Contracts that facilitate criminal activity are generally void (again, subject to the good faith exception) and this includes contracts for the sale of goods.

It is uncontroversial that these rules apply to the conduct of private parties. But Wenar's claim is that similar legal rules apply to state exploitation of territorial resources as well. Insofar as the current international legal system allows manifestly illegitimate political regimes to dispose of their resources in disregard of these rules, he contends, it is unjust.[17]

Why think that legal rules designed to govern the conduct of private parties similarly govern the conduct of states? Wenar's argument is that the fact that a people of a given territory *own* (again, in the legal sense) the natural resources within that territory is sufficient to justify this extension: just as A cannot use or otherwise dispose of B's property without B's permission, a government

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13. *International Covenant on Civil and Political Rights,* 16 December 1966, 999 UNTS 171, art 1; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, art 1.

14. Wenar only singles out Iraq and Angola as examples. However, recitations that purport to vest natural resources in public bodies are common in modern constitutions. For a comprehensive list of constitutional provisions of this kind, based on the survey of 130 constitutions worldwide, see Jeremy Webber & Kirsty Gover, "Proprietary Constitutionalism" in Tushnet et al, eds, *Routledge Handbook of Constitutional Law* (London: Routledge, 2013) 361-74 at 363, n 3.

15. Wenar, *supra* note 2 at 10, n 25.

16. *Ibid* at 16-19.

17. *Ibid* at 12-16.

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cannot dispose of the land and resources within its jurisdictional territory without its people's permission. He gives content to this idea through the notion of "consent."[18] Consent is given, he suggests, when there are institutions in place to ensure that policy decisions are made with reasonable transparency, and which provide mechanisms for public influence over those decisions.[19] Therefore, when other countries know, or reasonably ought to know, that these institutional conditions are lacking, they are prohibited from purchasing or trading in resources from that country.[20]

As a practical matter, however, Wenar observes that most consumer countries benefit from resource trade downstream in the supply chain, by purchasing finished products that are produced more cheaply in other countries, and that many of those producer countries may well continue to purchase "stolen" resources.[21] His solution is designed to address this difficulty. Rather than simply penalizing first purchasers (i.e., the would-be property rights violators), he proposes a tax and tariff system targeting countries that "trade in stolen goods." He further stipulates that those revenues be held in a "Clean Hands Trust" for the people from whom the resources were stolen, to be returned to them when institutional conditions improve.[22]

II. The challenge: reasons for resisting a property-based approach

The problem that Wenar addresses is an important one, and his analysis brings to light patent injustices in the global trade of resources that are too often hidden in plain sight. There is also much to commend in his proposed solution, which is powerful both in its simplicity and in its uncompromising condemnation of complicity in those unjust practices. Nevertheless, I suspect that many liberals would take exception to making property rights (rather than civil and political rights) the focal point of the analysis of injustice in the global trade of resources. Offered as an alternative to distributive justice approaches, Wenar's proposal must be evaluated against the prima facie objections that a property-based approach faces on this front.

A property-based approach raises two sets of concerns. First, "theft" and "stolen property" analogies will strike some as providing a poor understanding of both the wrong and the remedy. Second, the characterization of self-determination and territorial sovereignty over resources in terms of "property ownership" will generate suspicion that it invites a libertarian Trojan Horse into the analysis of resource use and control rights that may ultimately prove incompatible with the concerns of distributive justice.

To begin with, one concern is that the language of property rights doesn't do a good job of describing the wrong because it is too *object-centred*. One

18. *Ibid* at 19-20.
19. *Ibid* at 20-21.
20. *Ibid* at 21-22.
21. *Ibid* at 26-27.
22. *Ibid* at 28.

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might therefore object that property does not make human dignity or "personhood" central in the way that it ought to be. For example, a common criticism of Richard Posner's economic analysis of sexual crimes such as rape[23] is that "theft" inappropriately describes the injury, since it presupposes that "bodily integrity is an owned object with a price."[24] As a consequence, Posner grossly mischaracterizes the underlying social purpose of criminal laws against sexual violence, which he suggests is to protect the "market" in sex and marriage. Similarly, referring to unjustly appropriated resources as "stolen property" presupposes that the resources in question are objects with a price, when sometimes the concern is that the interest at stake (e.g., a clean and healthy environment) should not be up for sale at all.

Moreover, even when the alienability of a given resource is not in contention, one might contend that property's emphasis on control over objects is misplaced when the practices involved in exploiting resources and developing them into marketable commodities are the more immediate object of condemnation. It is for this reason that diamonds which are mined using exploitative child labour are referred to as "blood diamonds" rather than "stolen property."[25] It is not their sale without permission from the rightful owners that raises the gravest concern, but the human suffering involved in mining them. Even if governments developed those mineral resources with permission from the people and used the wealth generated from their sale to benefit the public, many would still find their sale objectionable.

A related concern is that a property-based approach does a poor job of prescribing an appropriate response to resource injustice. Wenar's proposal focuses on monetary compensation for the market value of the stolen resources. What is complained about in cases of resource injustice, however, is not simply lost profits from the sale of resources, but displacement of community and culture, opportunity costs associated with delayed socioeconomic development, environmental degradation precipitated by removal, and so on.[26] Deciding whether such losses are compensable and quantifying them are tasks that undermine the simplicity and feasibility of the proposed solution: it no longer looks more straightforward than what distributive justice approaches offer.

Even supposing this could be done without much difficulty, however, there is an additional concern that expanding compensation to accommodate additional losses inappropriately characterizes the harm suffered by the victims in the manner already suggested. Namely, it implies that these forms of human suffering have a price, when arguably the complaint is precisely that wrongful resource exploitation transforms things which ought not to be sold into marketable objects.

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23. "An Economic Theory of the Criminal Law" (1985) 85 Colum L Rev 1193 at 1198-99.
24. Margaret Jane Radin, "Market-Inalienability" (1987) 100 Harv L Rev 1849 at 1880.
25. Wenar himself refers to "blood diamonds" when describing these practices in Sierra Leone, *supra* note 2 at 9.
26. This is a common objection to otherwise legal state expropriations of property, the idea being that *no* amount of compensation can make up for the loss of certain kinds of property (e.g., one's home, one's place in a particular community, etc.).

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A second and broader set of concerns has to do with the consequences of characterizing the public interest in resources as "ownership." Importantly, Wenar's popular ownership principle is not meant to serve as a limitation on private ownership, as is the case with left-libertarian theories of justice that use "common ownership" of the natural world to defend redistributive policies. Instead, it is meant to serve as a limitation on government power. In this respect, it is really a scaled-up notion of "private ownership" rather than a structurally unique property relationship—an issue I will return to, below. At this stage, we can observe that it isn't clear how or if Wenar's principle places *any* limitations on what individuals can own or what they can do with their property when it comes into conflict with the broader public interest. Popular ownership of natural resources may not turn out to be much of a limit on private appropriation, transfer, or use at all.

Moreover, given that the people (i.e., the "owners") are defined by the territorial boundaries of states, there is reason for concern that popular ownership of resources within a political territory rules out redistributive principles at the global level. When our focus is on the position of less well-off countries that suffer rather than benefit from being rich in resources, this possibility may not seem troubling. However, imagine a world in which a few powerful and wealthy countries happen to hold the world's supply of an essential resource, such as water, which the people of other less powerful and less wealthy countries desperately need.[27] Would we feel as comfortable with the proposition that those powerful and wealthy countries "own" their resources? For these reasons, liberals may well be sceptical about transplanting a concept that has its home in Nozickian libertarianism to account for the wrongs of resource exploitation for fear that doing so will preclude egalitarian solutions somewhere down the line.[28] Presented as an alternative to distributive justice, a property-based approach may not sit well.

In summary, Wenar's proposal invites criticism from liberals who have standing reasons to be sceptical of property-based solutions to what appear to be distributive justice problems. The worry is that characterizing wrongful resource exploitation as a violation of property rights cannot yield a satisfying solution either because it mischaracterizes or oversimplifies the interests at stake, or because it runs the risk of inserting illicit anti-redistributive premises into the analysis of those interests.

Given these concerns, it is imperative to demonstrate what focusing on property *adds* that non-property centric approaches cannot capture. If there is little to gain, then why not appeal to civil and political rights in the first instance and leave the rest to standard principles of distributive justice? This is the challenge that a property-based approach to resource justice faces.

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27. This is a modified example of one of Nozick's rationales for the Proviso, *supra* note 3 at 180.

28. Will Kymlicka, for instance, rejects "property ownership" as a basis for indigenous land and resource claims for precisely this reason. *Liberalism, Community and Culture* (New York: Oxford University Press, 1989) at 158-59, n 4. Similarly, Hendrix, *supra* note 7 at 75, expresses some discomfort with characterizing indigenous rights in terms of property ownership, although he ultimately suggests that it is a matter that must be left up to indigenous groups to decide.

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III. "Consent-based" vs "allocative" views of property

Whether or not these objections are well-founded depends largely on the underlying theory of property that guides the proposed framework. That is, I want to insist, they are not concerns inherent to a property-based approach to issues of justice. They are concerns that attend a particular view about property—or more precisely, a particular view about the place of property in a theory of justice—that liberals find troubling. I will refer to this as the "consent-based" view of property. Such views:

(1) prioritize property rights over other kinds of human rights;

(2) privilege private ownership over other kinds of property interests; and

(3) conceptualize private ownership as an absolute and exclusive right over a particular object.

Although elements of this view can be found throughout the classic liberal philosophical tradition, in the contemporary literature it is a view most commonly associated with Robert Nozick and his followers.[29] Such views are often accompanied by an "anti-positivist" theory of entitlement: that is, a theory that rejects the thesis that property rights are nothing more than contingent (permissive) grants from the state to dispose of particular resources for certain purposes.

On consent-based views of property the most basic and fundamental purpose of property rules is not to coordinate activity, or to serve use and enjoyment, but to affirm a core notion of personal inviolability that reflects the equal status of human beings. The idea that individuals are private property owners is thus supposed to function as an important normative constraint on both the conduct of others, and on the legitimate exercise of political power. It is in this sense that "consent" is the lynchpin for such views. The key inquiry is always whether or not a particular transfer of property is consensual: non-consensual transfers are illegitimate *because* they violate property rights.

The prominent alternative to the consent-based view in the philosophical literature is what I will call the "pure allocative" view. This is the view held by most liberal egalitarians. Pure allocative views of property:

(1) prioritize other kinds of human rights over property rights;

(2) privilege private ownership over other kinds of property interests *only insofar as* private ownership better promotes more basic or fundamental social values, or is more efficient at achieving the desired distribution of resources (e.g., because it generates a larger social surplus to distribute);

29. It would not, however, be fair to attribute this view to libertarians across the board. Many libertarians, particularly outside of philosophical circles, recognize that government enforcement of any property regime requires "forced" (i.e., non-consensual) transfers to operate effectively and, by implication, are necessarily redistributive. This includes taxes levied for external defense, law enforcement, and the provision of public goods (in the classic economic sense). See, e.g., Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985).

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(3) conceptualize private ownership as a contingent and ultimately defeasible claim to use a particular resource, subject to the welfare of others.

On this view of property, the function of property rules is purely (re)distributive: property rights allocate entitlements to income or wealth generated from the exploitation and development of resources. Moreover, *how* they do so is partly a function of social convention, but principally a function of public policy. Such views thus generally accept the "positivist" thesis that property rights are permissive entitlements that are granted by the state according to principles of distributive justice.

The allure of the consent-based view, and the Nozickian version of this view in particular, over the pure allocative view is twofold. First, the consent-based view captures deep intuitions about inviolability that resonate with lay-conceptions of property rights in many Western, liberal democracies (and especially so in the United States). Second, and more importantly for present purposes, the consent-based view promises to resolve contentious questions of justice on the purportedly less contentious grounds of whether property rights have been violated.

The trouble is that this is highly implausible. In order to make good on this promise, property must form an internally consistent and coherent system of rules that is sufficiently self-defining so as to be categorically isolated from the political process and unencumbered by considerations of the public good. This, in turn, requires the kind of assumptions about the origins and nature of property found in Nozick's historical entitlement theory, wherein property "fill[s] the space of rights," unambiguously exhausting the universe of entitlements and corresponding obligations.[30] However, as critics have shown, such notions are not grounded in the legal reality of property rules but in a property "myth."[31]

Now, Wenar is no Nozickian. Indeed, elsewhere, he has defended a theory of *private* property rights that reflects robust legal realist sensibilities.[32] Yet, I will argue, it is evident that in the context of this specific problem, which implicates *public* rather than private ownership, he is attracted to a property-based approach because he is (wittingly or unwittingly) attracted to the Nozickian solution to questions of justice. In effect, Wenar's proposal reinvents the Nozickian solution by replacing its problematic historical entitlement theory underpinnings with existing legal rules and institutions. The temptation of this move clear: *if*

30. Jeremy Waldron, "Nozick and Locke: Filling the Space of Rights" (2005) 22 Soc Phil & Pol 81 at 82.

31. See, e.g., Barbara Fried, "Does Nozick have a Theory of Property Rights?" in Ralf M Bader & John Meadowcroft, eds, *The Cambridge Companion to Nozick's Anarchy, State, and Utopia* (Cambridge: Cambridge University Press, 2012) 230-52; "Left-Libertarianism: A Review Essay" (2004) 32 Phil & Pub Aff 66; "Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market-Based Distribution" (1995) 24 Phil & Pub Aff 226; Liam B Murphy & Thomas Nagel, *The Myth of Ownership*: *Taxes and Justice* (New York: Oxford University Press, 2002).

32. See, e.g., Leif Wenar, "Original Acquisition of Private Property" (1998) 107 Mind 799 and "The Concept of Property and the Takings Clause" (1997) 97 Colum L Rev 1923.

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he is correct in thinking that simply enforcing existing property rights is a solution to the resource curse, *then* this would absolve philosophers of the difficult task of explaining the specific duties that governments owe to their citizens, and to members of the global community, with respect to particular resources. Unfortunately, this turns out to be too good to be true.

IV. The legal status of popular ownership

Officially, Wenar is neutral on the theory of property underlying his analysis. In response to the set of *prima facie* objections canvassed in section II, his suggestion is that enforcing property rights is a viable solution to the resource curse because popular ownership of resources is both well-established in law and enforceable by existing legal institutions. Therefore, he need not be committed to the sort of consent-based view that raises these concerns—nor, indeed, need he be committed to *any* particular view of property. This is purportedly one of the main advantages of Wenar's criterion of resource justice. Although powerful in its practical implications, it is theoretically modest: it only points out violations of existing legal rules, as opposed to defending a normative theory that requires creating "new" legal rules and "novel" legal institutions to enforce them.[33]

The trouble is that Wenar does not establish the proposition that the people of a given state own the resources within that state's territory so much as he simply asserts it. He assumes that it is an obvious and uncontroversial proposition that describes existing legal obligations, thus requiring little defence. In reality, however, the legal status of popular ownership is a great deal more complicated than Wenar lets on.

In the first place, Wenar is wrong to assume that popular ownership is an uncontroversial principle of international or domestic law. He correctly observes that popular ownership-like language appears in many human rights instruments and domestic constitutions. However, he does not explore the legal consequences of the recitals that he refers to. Nor does he acknowledge the historical context in which they were adopted. By and large, these recitals are the product of an era when developing countries, and newly independent countries in particular, were anxious to assert their permanent sovereignty over territorial resources against foreign investment, which was seen as a continuation of economic colonialism.[34] Unsurprisingly, in light of this historical context, the effect of these recitals has not been to restrict state power to exploit and trade in resources. To the contrary, they operate as statements of territorial sovereignty; that is, they assert a state's jurisdictional right to determine the property regime within its established

33. *Supra* note 2 at 2.

34. These concerns are reflected in a series of United Nations General Assembly Resolutions on "Permanent Sovereignty Over Natural Resources" passed in the 1950s, culminating in GA Resolution 1803 in 1962, and in the 1974 *Declaration on the Establishment of a New International Economic Order* (*NIEO*). For a general overview of the history, see Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Aalphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) at 1-74.

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territorial boundaries without external interference from other states or the international community.[35]

Moreover, even divorced from their historical context and contemporary legal function, declarations to the effect that resources "belong to" or are "the common heritage of" the people of a nation, whether found in international or domestic law, are not sufficient to establish that the people own those resources. For one thing, the idea that resources are owned by the people stands in conflict with the longstanding property law principle *cuius est solum*, which entails that private land owners have both surface and subsurface property rights in the ground below their land.[36] Far from being uncontroversial, in many contemporary states giving effect to popular ownership of resources would have profound consequences for existing entitlements, effectively extinguishing subsurface property rights, and even eliminating many surface property rights, without compensation to landowners.[37]

This kind of approach is, of course, open to states that have adopted the international law instruments that Wenar cites, or that have otherwise incorporated similar language within their domestic constitutions. However, to suggest that it is legally *required* of them is quite another thing. To the extent that popular ownership-like language has any self-executing legal effect on the exercise of government powers, the more plausible view is that it imposes a modest duty on the state to regulate land and resource development in a manner that is consistent with the public interest. But that is not a property right, it is simply an affirmation of democratic majority rule.

Finally, even were we to assume that something more ambitious is intended, there is a non-trivial challenge in explaining how "the people" of a given territory constitute a legal personality capable of acquiring and holding legal rights of ownership in the first place. This difficulty is compounded in states where the notion of "the people" is contested or otherwise inchoate, particularly in post-colonial settings and in states with minority indigenous populations that exercise rights of self-governance. One solution, of course, is to simply vest the property right in the state, thus avoiding the problem of defining "the people." But this solution comes at the cost of explaining why *any* state transfers of resources would

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35. Indeed, one reason for the split between the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as distinct covenants implementing the UN Declaration of Human Rights had to do with concerns that member states would be required to adopt a particular kind of property regime. Moreover, the "right to property" was excluded from both instruments in place of the language in art. 1, which affirms the territorial sovereignty of each member state. For a useful overview, see Rhoda E Howard-Hassmann, "Reconsidering the Right to Own Property" (2013) 12 J Hum Rts 180.

36. Today there are well-recognized limitations to this principle, particularly in the context of air rights. However, there is still a strong presumption that land ownership includes rights to surface and subsurface resources.

37. This was precisely the source of controversy over South Africa's *Mineral & Petroleum Resources Development Act*, No 28 of 2002, which abolished private ownership of mineral resources, vested them in the state, and created a licensing scheme that gave priority to applications from historically marginalized groups. The scheme was ultimately challenged (unsuccessfully) as an "acquisition" of private property without just and equitable compensation pursuant to s 25(2) of the South African Constitution. See *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9.

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be illegitimate, bringing us full-circle back to popular ownership as an assertion of a state's territorial sovereignty.

In short, popular ownership, understood as a limitation on the state's exercise of its powers over its territorial resources, is neither a widely accepted nor a well-established legal principle. It cannot simply be assumed to describe the legal relationship between the people who occupy a territory and the state with respect to the resources within that territory or to define the duties of governments. It requires both a defence and a more precise articulation of the obligations that it entails. If Wenar's proposed solution to the resource curse is to succeed, he must therefore: (1) establish some normative basis for popular ownership and explain what it entails, and (2) show that the set of legal rules that popular ownership entails are both desirable and capable of implementation.

V. Resource justice as a problem of "property"?

Perhaps what the foregoing reveals is only that Wenar's proposal is even more theoretically modest than imagined. There are, after all, important *pragmatic* reasons why one might be drawn to a property-based approach even if it isn't accurate to say that territorial resources are owned (in the legal sense) by the people who occupy that political territory. Namely, property presents a more straightforward way of convincing global leaders to take action. As Wenar puts it, "[t]he idea that the natural resources of a country belong to the people of that country is so intuitive that most will need no more proof than its statement."[38]

There is no doubt that much of the appeal of Wenar's proposal comes from its simplicity: dictators who sell off their country's resources and keep the wealth for themselves are stealing from the people; and the countries that purchase those resources are receiving stolen goods. "Owning" and "stealing" appeal to basic lay-notions of right and wrong. Distributive justice-based critiques of the global trade in resources, by contrast, often seem too complicated and abstract to rally public support or to otherwise persuade those in a position to do something about the problem to take action. Moreover, they provide no widely agreed-upon solutions.

This strategic point is not implausible. Even so, I take it that Wenar's point is meant to be a theoretical one. His suggestion is not simply that the rhetoric of property is useful but that property represents a *distinct way* of thinking about the relationship of a people to territorial resources, and correspondingly the duties of governments, and that this presents an important alternative to distributive justice.

It is this theoretical suggestion that I propose to examine. Although Wenar is incorrect to assume that popular ownership is an uncontroversial and well-established legal rule, he is correct, in my view, to insist that the resource curse is not simply a problem of distributive justice but also a problem of property. Political philosophers have not adequately appreciated this idea and, unfortunately, Wenar

38. *Supra* note 2 at 10.

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doesn't do a good job of explaining what it means. To appreciate its potential importance for philosophical analysis in this area, it is imperative to see how, at the most basic level, distributive justice and property capture different aspects of a given problem of resource justice.

Distributive justice concerns the allocation of benefits associated with a particular physical asset: typically income or wealth. *Property* concerns the use and control of the physical assets themselves. Thus, in the context of matters concerning the exploitation and sale of natural resources, considerations of distributive justice address the problem of who should get the proceeds from the sale of resources and how the shares should be divided, whereas considerations of property address the problem of whether the trade in those resources should occur at all and, if so, how resource development activities should be managed. While resource exploitation implicates both, and no solution to *any* problem of resource justice is complete without both, they are nevertheless distinct concerns. So, for instance, the distribution of the proceeds of a sale of resources could be just while violating property rights. Similarly, a sale of resources could respect property rights even while the proceeds of that sale are illegitimately distributed.

To make this distinction more concrete, let us imagine a proposal to harvest timber from an ancient forest, which is located on a mix of public and privately owned land. Let us suppose that the forest, in virtue of its age, is rich in biological diversity, containing many plant and animal species that cannot be found elsewhere. Let us further suppose that it has played a formative role in the way of life of the people who live there, who appreciate its natural beauty as well as the tourism it attracts. Their understanding of community is informed by a shared sense that they are stewards of the forest and guardians of its plant and animal species; indeed, the government park authority, which oversees activities on the public forestlands, has been staffed almost entirely by community members since its inception. In addition, the forest has a special significance for local indigenous peoples, for whom the forestlands are also a spiritual home. Finally, community members overwhelmingly depend on tourism related business for their livelihood; they have owned and operated most of these businesses (e.g., tour companies, guest houses, food stores and the like) for several generations, since visitors started coming to the forest.

From the perspective of *distributive justice*, the principal question that the proposed timber harvest presents is how the profits from the sale of the timber should be allocated. If the timber is harvested from public land, is it up to the government to allocate the profits however it sees fit, or must it give priority to certain groups? In particular, should the local population have a special claim to some of those profits—for example, by way of compensating for losses they incur? If so, which losses require compensation? Moreover, can the state retain the profits solely for the benefit of the citizens within its territorial jurisdiction, or does it owe duties to share the profits with outsiders who have the misfortune of being born in resource poor countries? If the timber is harvested from privately owned land, are the owners of the land entitled to keep the profits to themselves

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or should they be taxed? If so, should the profits be subject to ordinary income taxation, or should private owners of forestland incur a resource rent tax when they harvest timber? And, again, should the allocation of the tax revenues favour the local population? This is a familiar set of questions from the philosophical literature on resource justice.

From the perspective of *property*, however, a quite different set of questions arises. Most pertinently: should ownership of this kind of forestland, whether by a public authority or a private person, include the right to harvest timber at all? And if so, on what terms or conditions can it be harvested? That is, can all of the timber be harvested from the land, and can it be harvested in any manner that those undertaking the work see fit? Or, if it must be harvested in a more limited way, what are those limitations? This set of questions bears on issues concerning the control of the physical asset, the forestland, including whether title should be exclusively in public hands, or whether a mix of private and public ownership is desirable. Moreover, it bears on issues concerning the particular entitlements and obligations that should inhere in the title, including questions of alienability, and the severability of resource interests (including the timber) from the title. To be sure, the allocation of income or wealth may well be among the considerations that point in favour of a particular set of entitlements and obligations. The point is that they are clearly not the only considerations in play.

For instance, many jurisdictions strictly forbid exploiting resources on land with special cultural or ecological significance. This can be achieved through legislation that makes certain kinds of development impermissible, including both environmental law and ordinary land use controls such as zoning. Moreover, some jurisdictions choose to abolish private ownership of certain kinds of land altogether (e.g., by compulsory acquisition through eminent domain and creation of a public land trust). On the other hand, most jurisdictions also recognize the need to strike a balance between socioeconomic, environmental, and cultural values, and thus allow resource development in more limited ways—even on sensitive lands—by regulating how, when, and by whom resources can be exploited. For example, states have widely adopted environmental impact assessment legislation,[39] and many have also subjected certain lands to international scrutiny under the UNESCO World Heritage scheme.[40] These kinds of legal instruments function as *ex ante* regulatory controls on resource exploitation. Before proposed resource development activities can proceed, such instruments require (in broad terms) that socioeconomic, environmental and cultural factors be evaluated; that forms of community consultation be undertaken; and that mitigating measures be adopted.

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39. Over 100 countries currently have some form of domestic environmental impact assessment legislation in place. For an overview of these approaches, including a survey of international instruments that incorporate environmental impact assessment, see Neil Craik, *The International Law of Environmental Impact Assessment* (Cambridge: Cambridge University Press, 2008).

40. This program was established by the *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972. There are currently 190 states that have ratified the convention, and the World Heritage properties list includes 1007 sites worldwide. See online: UNESCO World Heritage Centre http://whc.unesco.org/.

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The purpose of considering this example has been to illustrate the difference between the kinds of considerations that arise under a distributive justice perspective and those that arise under a property-based perspective. Notice that, as presented here, property encompasses a more diverse set of concerns than the concerns that are found in the consent-based view. On the consent-based view, property concerns rights of exclusion and immunity from interference. As a consequence, property is a source of tension with the concerns of distributive justice; for, it is difficult to argue that taxation (whether in the form of a global resource tax on states, or in the form of a tax on private owners) does not interfere with the power of property owners to control their property. By contrast, the property-based concerns presented here are not incompatible with the concerns of distributive justice. They are just different concerns.

We are now in a position to appreciate some reasons why it might be important to keep these aspects of a given resource justice problem distinct. On the one hand, we might want to resist the idea that there is no further issue of resource justice beyond respecting property rights. That is, of course, the conceit of the consent-based view. On the other hand, we might also want to resist an idea implicit in the pure allocative view—implicit, at least, in how that view is often presented—which is the idea that resource justice is exhausted by an equitable distribution of the material wealth that resources generate. In particular, this might be resisted because there are aspects of a people's relationship to the land and physical environment they occupy that require consideration but which simply cannot be captured by considerations of distributive justice, as the timber harvesting example suggests.

VI. Evaluation: does the proposal succeed?

With the above distinction in mind, the question is whether Wenar has made a compelling case for the view that property is a distinct aspect of resource justice. This requires examining his proposal in a bit more detail. Despite attempting to remain non-committal about the theory of property underlying the popular ownership principle, I will show that Wenar's analysis of the resource curse in fact has a consent-based orientation. This poses significant difficulties for the view, I argue, because it prevents him from deploying property law to any real advantage. My argument is twofold: I demonstrate that the view, despite claiming to offer a property-based approach, has very little to do with property law; simultaneously, I demonstrate some advantages that taking considerations of property seriously would have.

A. Popular ownership as a consent-based rule

I am primarily interested in how Wenar operationalizes popular ownership and gives it content and less so in its foundation: as we have seen, he doesn't give much attention to the latter because he assumes (mistakenly) that it is a well-established legal principle. Nevertheless, Wenar does provide some hints about

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his preferred normative defence of popular ownership. This is worth considering for what it suggests about how the concept of property is being deployed.

In his limited defence of the principle, Wenar appears to rely on a variation of the "self-ownership" thesis associated with Nozickian libertarianism, scaled-up to the nation-state. Just as some libertarians use "self-ownership" to describe the relationship of individual persons to their physical endowments, Wenar uses "popular ownership" to describe the relationship of a people to a physical territory. "A people" (defined by territorial boundaries) are entitled to the physical environment that constitutes the geographical territory they occupy in virtue of the self-evident fact that it "belongs" to them.[41]

Although Wenar does not describe the incidents of popular ownership, his analysis bears this out. To begin with, he quite explicitly casts the relationship between popular ownership and government management of resources in terms of consent. As outlined above, the authority of a government to sell publicly owned resources is conceptualized using the same legal principles that govern commercial transactions for the sale of goods: consent of the owner, and good faith on the part of the purchaser. On the seller side of the bargain, the consent condition is satisfied by a set of "minimum conditions" that must obtain in order to regard the people as authorizing the sale of resources. These conditions include "minimal civil liberties and bare-bones political rights" and "a minimally adequate rule of law."[42] On the buyer side of the bargain, good faith is satisfied by "authoritative notice" that those conditions obtain. Concretely, Wenar suggests that standards set forth by the Freedom House development index would fulfil the notice requirement.[43]

In addition, it is evident that the term "ownership" is meant to capture a moral status: the status of "the people" as holding an exclusive right to exploit and profit from land and resources as against others (including, pertinently in this context, the state). The purpose of describing land and resources as the "property" of the people is thus to invalidate non-consensual interference, and not (for example) to regulate the manner of land use or resource development. Popular ownership, in other words, is an assertion of the inviolability of the rights of a people over the territorial resources with which they physically coincide.[44]

There is therefore an obvious consent-based orientation to the manner in which Wenar deploys property. This is, perhaps, not surprising given the limited options on the table. The pure allocative view doesn't assign a role to property in the analysis of questions of justice at all. If the aim is to show that considerations of property form an alternative basis for analysing questions of resource justice, then the consent-based view seems like the more attractive option, particularly if allowing legal rules (rather than historical entitlement theory) to do some of the conceptual work can remedy some of the view's well-known shortcomings.

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41. *Supra* note 2 at 9.
42. *Ibid* at 21.
43. *Ibid* at 22.
44. Wenar invokes the notion of rights as "side constraints," which supports this reading of the view. *Ibid* at 32, citing Nozick, *supra* note 3.

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B. What role does property play in the analysis of resource justice?

I now want to demonstrate the difficulties that conceiving popular ownership as a consent-based rule poses for Wenar's analysis. In doing so, my goal is ultimately to suggest some reasons why the consent-based framework, despite making property central to the analysis of questions of justice, is in fact poorly suited to capture what a legal understanding of property could contribute. Before I turn to that task, however, it is worth observing that there are good reasons, quite independent of this concern, for being sceptical about the appeal to territorial boundaries as the basis for generating property rights.

While the self-ownership principle has its own set of difficulties as a source of *private* property rights, at least in that context it is accompanied by a moral account of the relationship between individual persons, their own bodies, and their physical interactions with the natural world that could potentially ground property relationships.[45] Relying on the territorial boundaries of states to establish property relationships, by contrast, simply begs the question. In absence of some kind of normative argument, we have no reason to think that the people within a given state "own" the resources within its territorial boundaries simply because they happen to physically coincide. We could just as easily assert that the people of the world own all of the world's resources, irrespective of political boundaries; indeed, this is a serious point of contention between cosmopolitans and nationalists in the global justice literature. Even if self-ownership was a plausible foundation for private ownership, then, there is good reason to think that popular ownership cannot be "scaled up" but must be structurally different in character.

The basis for popular ownership of resources is thus ultimately left unresolved. But my main concern is not whether a plausible account of popular ownership is possible—an issue that, manifestly, requires normative work if the principle is meant to stand for something more than the territorial sovereignty of established states. My concern is rather with how property is deployed, and it is here that we encounter deeper problems with the proposal. For, as a result of its consent-based orientation, the notion of popular ownership that Wenar deploys turns out to have very little to do with property in the legal sense: that is, rules governing the use and control of resources.

To see this, we can begin by observing that the problem of resource injustice, as Wenar describes it, is not that some countries have failed to adopt and enforce the right kind of resource management and conservation practices. The problem is that they lack a minimally legitimate government. But while the right of a people to have decisions about territorial resources made by a minimally legitimate government is no doubt important to resource justice, it is odd to describe this as a "property right."

This is not simply a point about terminology. Articulating the requirements of popular ownership in this manner does not allow Wenar to take advantage of distinctive features of property rules that could, I suggest, point in favour of a

45. See, e.g., Nozick, *supra* note 3 at 30-35, 48-51, 172; GA Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge University Press, 1995) at 144-64.

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property-based approach. Instead of developing a set of rules and principles to guide resource development, the central concern of the analysis becomes enforcing an abstract right to have decisions about resources made under certain institutional conditions. The objectives are to punish transgressors and make them pay, and to invalidate non-consensual exchanges, not to reform land use and resource management practices. Accordingly, Wenar looks to the criminal law and to the body of contract law governing the commercial sale of goods, and has very little to say about the law of property. As I will demonstrate in what follows, this makes the view unattractive in various ways.

i. Criminal law vs. property law

To begin with, by classifying wrongful resource exploitation as "theft," Wenar focuses primarily on the criminal law rather than the civil law (the domain of property law) as a remedial tool.[46] From a legal perspective, this move is somewhat puzzling. For, in doing so, he places the onus on states to bring prosecutions to remedy property rights violations. Although private prosecutions are possible, they are rare: the state is generally thought to hold a monopoly on prosecution. This does not seem promising in a context where states themselves are the perpetrators of the wrong. States may well resist prosecuting other states in the interest of ensuring the continuation of the presumption of territorial sovereignty.

Leaving this procedural issue aside, the more important point for my purposes concerns the subject matter of criminal law. Focusing on criminal law makes what, at least intuitively, seem like central resource justice concerns somewhat peripheral to the analysis of wrongs and remedies. Criminal law is concerned primarily with the conduct of the wrongdoer and issues such as responsibility, punishment, and rehabilitation. Criminal law is not concerned with the particulars of the system of property rules: it is simply a means, among others, for protecting existing property rights, whatever those happen to be. In this case, the existing property right (if it can be so called) is a right to have resource management decisions made by a minimally legitimate government. At best, then, a prosecution for theft and related crimes affirms that requirement. It says nothing of what rules ought to exist. Resource management practices—questions concerning who can exploit resources, under what circumstances, and subject to what conditions—lie beyond the purview of the criminal law. They are the subject matter of property law.

ii. Commercial law vs. property law

Commercial law is also poorly suited for capturing the significance of property rules. It is a species of contract law, which concerns the enforceability of promises for the exchange of goods rather than the exchangeability of goods or

46. Wenar mentions that civil lawsuits are possible, *supra* note 2 at 25-26. However, they are not the focal point of his discussion.

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the use of goods beyond exchange. That is, commercial law is not concerned with the development (or non-development) of resources beyond their fitness for exchange. This is an important point of difference from the concerns of property law as far as resources go. Property is concerned, broadly, with establishing social practices concerning the management of resources, or in some cases maintaining conventional practices not established by law. Property rules reflect both the material features of particular kinds of resources, such as scarcity and physical location, and the social values attached to them and their use.

Although protecting the integrity of owners and affirming their status as rights-holders through mechanisms of consent and exclusion is one function of property rules, it is not the sole function. In the first place, ownership does not always include the right to alienate, and often includes limitations on transfer and use. This is likely to be the case when a resource is scare and not easily renewable or substitutable, and is simultaneously deemed highly socially valuable. It is for this reason, for example, that in many jurisdictions water cannot be "owned," strictly speaking, but can only be exploited on the basis of a limited entitlement (e.g., a permit or license), subject both to the competing consumption claims of others and non-consumptive uses (such as navigation, or recreational and aesthetic enjoyment, in the case of surface bodies of water).[47] In this respect, mechanisms of consent and exclusion are probably more accurately conceived in terms of their human coordination functions than in terms of establishing personal (or, for that matter, popular) inviolability.

Moreover, there are important exceptions to the good faith rule in the case of land which similarly caution against placing too much emphasis on consent and exclusion. For instance, the doctrine of adverse possession confers a property right in a bad faith possessor when the owner fails to object in a timely manner. Where it applies, adverse possession reflects social values assigned to the formation of human attachment to a given tract of land through ongoing use.

Thus one problem with treating concerns about the exploitation of resources as if they are reducible to the concerns of the area of contract law governing the sale of goods is that it obscures what is manifestly a more diverse set of concerns that property rules serve. A second and related problem is that looking at resource issues through the commercial law lens results in a rather anaemic view of property relationships. For instance, Wenar likens the relationship between the people and government with respect to resources to that of shareholders of a corporation.[48] "Like shareholders of a corporation," he explains, "most citizens will not be interested in tracking the administration of their assets."[49]

In my view, the shareholder analogy is misguided because it undersells the significance of property relationships. It suggests that managing profits from the

47. This principle has its origins in an ancient Roman law maxim, which was later adopted in England under the *Magna Charta*. Today it can be found in a variety of civil law and common law jurisdictions; the most active take-up has been in the United States, where it is known as the "public trust doctrine." See, e.g., California Real Estate Digest, 3d ed (Eagan, MN: Thomson Reuters, 2008) "Public Lands," s 39.

48. *Supra* note 2 at 10.

49. *Ibid* at 10.

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sale of resources is the overriding consideration of justice implicated by resource exploitation. Against this characterization, I would argue that the administration of assets—that is, deciding *how* land and resources will be managed and exploited—forms part of the core subject matter of resource justice. Indeed, the fact that the administration of assets falls within the subject matter of resource justice is precisely what indicates the need to consider property rules in the first place. If the allocation of profits was the sole concern of resource justice, then we could be content to focus solely on considerations of distributive justice. However, as I have been suggesting, there are good reasons for thinking that evaluating the adequacy of resource management practices requires attention to more than simply the allocation of profits.

iii. Compensation vs. property-specific remedies

Wenar's prescribed remedy further obscures what considerations of property could contribute to an understanding of resource justice.[50] The focal point of that remedy, recall, is monetary compensation for the market value of the taken resource. I have already noted one set of limitations with monetary compensation as a remedy: namely, it is unlikely to cover certain kinds of losses because they are controversial or difficult to quantify, and in some cases money simply cannot restore what was lost. We can now add that many of these limitations are reflected in the body of legal rules concerning awards for damages.[51]

In that earlier discussion, I suggested that these limitations of monetary compensation as a response to injury and wrongdoing are a reason why some liberals might resist a property-based approach to resource justice. In fact, however, property law appreciates these limitations and seeks to overcome them in various ways. Wenar's focus on compensation is unable to capture this.

In the first place, the legally preferred remedy for wrongful deprivations of property is not compensation but return of the property to the lawful owner. Compensation is thought to be second best precisely because money cannot replace what has been taken, or can do so only imperfectly. This problem is thought to be especially pernicious in the case of land, in virtue of the unique or non-fungible character of particular parcels, as well as the forms of human attachment that land is thought to generate.

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50. Presumably, given his focus on the criminal law, this compensation is typically in the form of a fine or restitution paid to a public authority. For, unlike prosecutions, there is no possibility of private collection: only public authorities can punish criminal wrongdoers. To simplify things, however, I shall assume that this doesn't raise any special problems, and that criminal fines are interchangeable with civil damages. I have also not separately considered the issue of whether differences between restitution (damages aimed at correcting for unjust enrichment) or compensation (damages aimed at making the injured party whole) figure into the account, since Wenar himself does not make anything of this distinction.

51. Market value forms the baseline for compensation. While compensation for other losses such as opportunity costs is available in some circumstances, it is unusual to compensate for losses associated with the subjective valuation of a particular good, particularly in absence of an enforceable agreement reflecting that valuation. See, e.g., *Restatement (Third) of Restitution*, s 49, comment f (2011).

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It is true that return of the taken property is unlikely to be practically feasible or desirable for many kinds of resources. Nevertheless, the idea that it is the first-best option should be given weight in evaluating the adequacy of a proposed remedy because it offers a more complete understanding of what is at stake in injuries to property relationships. For example, once this perspective is taken, other forms of compensation (e.g., development work by the offenders, including human development and environmental restoration), as well as non-compensation based remedies (e.g., formal acknowledgements of wrongdoing and apologies, or changes to the legal framework to prevent future harms) may appear to be more appropriate than compensation for market value. Although such remedies are hardly unique to property law, a more careful attention to the character of the property relationship—as opposed to the conduct of the wrongdoer—brings them into focus.

A second way that property law seeks to overcome these limitations is through making injunctive relief available in a wider range of circumstances than other areas of law. The availability of an injunction is thought to be one distinguishing feature of proprietary as opposed to other kinds of legally enforceable interests, and especially of property interests in land.[52] Land owners need not rely on the threat of compensation to protect their property interests, but can seek a prospective order that enjoins others from engaging in activities that are likely to injure their property interests, or that requires others to perform certain activities to protect their property interests. The rationale lies in the idea that many property relationships are irreparable if injured, and by implication, that compensation is inappropriate since it has an incomplete deterrent function.[53]

The greater availability of injunctive relief highlights another limitation of monetary compensation for protecting relationships to land and resources: namely, it is backward-looking. Waiting until a resource has been "stolen" will often mean waiting until it is too late to prevent the harm.[54] The advantage of property law, from this perspective, is not simply the availability of injunctive relief, but its subject matter: rules governing the use and control of resources. The right kind of rules, at least in principle, can have behavioural consequences that minimize the need to rely on enjoining the harmful activities of others.

C. Why a consent-based rule is inadequate to protect resources

So far, I have suggested that greater attention to property rules would both improve the analysis of questions of resource justice, and yield better solutions to

52. Conceptually, this can be traced to Calabresi and Melamed's well-known distinction between "property rules" and "liability rules." Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089.

53. It is incomplete because the loss has an objective valuation (i.e., it is set by a standard, such a market value, that is determined by courts), and it could be the case that performing the injurious act and paying for the injury is more valuable to the transgressor than not acting.

54. It should be observed that in criminal law there are limitations on injunctive relief that apply in virtue of criminal law's punitive nature. This observation further suggests that a focus on property crimes is misguided.

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wrongful resource exploitation. I have also suggested that Wenar's notion of popular ownership is unable to capture this because it is a consent-based rule. This leads to a more general criticism of the proposal, which is that, in virtue of its failure to take considerations of property on board, it is too weak to adequately protect many interests in land and resources that we might want a criterion of resource justice to protect.

A consequence of Wenar's focus on institutional conditions is that *any* set of property rules promulgated by a minimally legitimate government will satisfy his criterion for resource justice. This has the advantage of permitting, as a matter of resource justice, a wide range of different land and resource management regimes.[55] However, while this might seem like an attractive feature of the view, there are reasons for thinking that it is too permissive.

Wenar's principle of popular ownership only concerns how decisions about resources are made and does not go to the substance of those decisions. The procedural focus itself might not be troubling but for the fact that the criteria for legitimate decision-making are extremely minimal and formalistic. Among other things, they do not appear to impose serious demands on political representation or voting, let alone address problems such as the undue influence of powerful elites or interest group bargaining, factors that are often present in resource management decisions. Even decisions with potentially grave and irreversible consequences for land and resources only require that citizens have constructive as opposed to actual notice of those decisions (i.e., the means available to find out).[56]

For this reason, Wenar's criterion will be extremely controversial in cases where a state's institutional conditions just meet the minimum threshold he defines. But even in the case of well-established democracies, experience suggests that it would be naïve to think that the rule of law and respect for basic civil and political liberties pre-empt questions of resource justice. These concerns alone seem like enough to suggest that a more demanding criterion for assessing the legitimacy of decisions concerning land and resources is desirable.

In addition, there are significant factors that influence the perceived legitimacy of resource decisions, and yet fall outside of the minimum institutional conditions that Wenar identifies, which make the case for a more demanding criterion even stronger. The circumstances I have in mind include: a history of political instability and conflict around resource issues (e.g., Venezuela); deeply entrenched inequities in the distribution of and access to resources (e.g., South Africa); and the presence of indigenous populations with resource claims that have not received adequate legal recognition (a situation that describes many countries in the world, including stable, well-established democracies such as Canada, the United States, and Australia).[57]

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55. *Supra* note 2 at 11.
56. *Ibid* at 11.
57. It is worth noting on this front that the Supreme Court of Canada has recently made its first formal declaration of Aboriginal title, arising out of a long-standing dispute involving British Columbia's grant of a commercial logging license on lands traditionally occupied by a band of the Tsilhqot'in. See *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44.

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These factors strengthen the case for why resource decisions require more careful attention to the relationship of particular groups to land and resources than what a criterion based exclusively on minimal institutional conditions can offer. Moreover, they highlight some additional difficulties with simply deferring to the territorial boundaries of existing states for the purpose of defining "the people" and the "property" that they "own." Giving content to the specific legal rules that are necessary to address these kinds of concerns requires an account the "people" who constitute the relevant legal personality, and it requires an account of the relationship of that people to certain resources or lands *such that* particular rules concerning the control and use of those resources or lands ought to follow.

In this sense, the legal concept of property is not a shortcut that allows one to sidestep difficult questions of resource justice. It is, however, a tool that political philosophers could deploy to give greater attention to aspects of the relationships between people, land, and resources that fall beyond the purview of distributive justice.

VII. Diagnosis: where does the proposal go wrong?

Wenar does not address this set of objections. He appears to be more concerned with showing why a property-based approach is neither inconsistent with other human rights priorities nor overly ambitious.[58] This is understandable, given the significant resistance that a property-based approach to questions of resource justice is likely to encounter. However, it is not sufficient to address the challenge outlined above: Wenar does not explain the specific sense in which resource injustice can be viewed as a problem of property. Because popular ownership is conceptualized in a consent-based manner, the right to exclude others and the prohibition on non-consensual interference are its most salient features. Accordingly, "popular ownership" functions as a placeholder for the conditions of popular consent: basic civil and political liberties, democratic governance and the rule of law. Yet, if institutional conditions are more central to resource justice than property rules, then why not focus directly on institutional conditions?

Many liberals would be happy to accept this conclusion, having suspected all along that civil and political rights—not property rights—are the key to rectifying resource injustices.[59] My own view is that Wenar's basic intuition is correct, but under-theorized.

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58. For instance, he emphasizes that: "[t]here need not be a 'resource rights' revolution to follow the human rights revolution," that "citizens need not be involved in, or even aware of, the management of natural resources" and that his account "forbids only flagrant injustice." *Supra* note 2 at 15, 11-12.

59. Wenar even expresses some ambivalence on this point. For instance, he notes that the United States has banned energy companies from trading with Sudan since 1997 based on Sudan's poor human rights record. He then explains that "[t]he property-based approach here would *only add* that American energy companies should be barred from trading with the Sudanese government *specifically because* this regime is violating the human rights *that are property rights*." *Ibid* at 27 [emphasis added].

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Considerations of property form an independent basis for evaluating resource management practices. Property draws our attention to aspects of the relationships formed between people, land and resources that have generally not received adequate attention in the philosophical literature, such as the role that human interaction with the physical environment plays in sustaining community and culture. Focusing exclusively on considerations of distributive justice leads to an incomplete view of the demands of resource justice because distributive justice singles out only one aspect of those relationships, namely, who should profit from the exploitation and sale of resources. In circumstances where different aspects of those relationships are at stake, such as cultural continuity or environmental health, a response that focuses on the allocation of profits from the exploitation and sale of resources is at best remedial: a response to an injury after the fact, which may not adequately compensate for losses. At worst, it simply misconceives the nature of the interests and values at stake.

It is important not to overstate this claim. A property-based approach is not meant to displace considerations of distributive justice. Indeed, in some cases, all that resource justice might require is that others have a share in the wealth generated from the exploitation of a particular resource. Nevertheless, it seems important to leave open the possibility that resource justice requires some limitations on the ability of owners (public or private) to exploit natural resources beyond the requirement that others share in their profits, or even the possibility that the exploitation of certain resources is impermissible. Capturing these dimensions of problems of resource justice is what property adds that cannot be captured by considerations of distributive justice alone.

The two predominant views of property in the philosophical literature are not well equipped to deploy property law in this manner, however. There are two problems with both views. Appreciating these problems helps explain where Wenar's proposal goes wrong, and it also provides some guidance for political philosophers who are interested in taking considerations of property seriously.

The first problem is that the consent-based view and the pure allocative view both see distributive justice and property as conflicting and mutually exclusive approaches to tackling a particular resource justice problem, when they should be viewed as complementary. As a result, both views are mistaken about the appropriate place of property in analysing questions of resource justice. Consent-based views promise too much from property, and in doing so deliver very little. "Enforcing property rights" is a placeholder for a range of considerations that may or may not have anything to do with property. Pure allocative views expect nothing, and in doing so overlook significant issues concerning the use and control of physical assets that cannot be addressed through the allocation of income and wealth but which could be addressed through property rules.

The second and related problem is that they are too myopic in their view of the values that property serves. Whereas the consent-based view is overly focused on exclusion, the pure allocative view is overly focused on instrumental value, and in particular material wealth. As a result, there are a range of values that property rules can serve that seem significant to analysing and rectifying

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issues of resource justice that neither view adequately addresses. Perhaps most pertinently in this context, there are pressing environmental, and sociocultural questions about which resources are exploitable, how, when, and by whom.

Wenar's proposal comes up short, then, not because he is mistaken to view resource injustice as a problem of property. It comes up short because he fails to articulate what property's functions are beyond regulating exclusion through consent, a consequence of his consent-based characterization of popular ownership. Moreover, the specific manner in which that consent-based criterion is formulated, with its focus on institutional conditions, makes it difficult to see what advantage a property-based approach has over a distributive justice approach. The view fails to account for the sense in which a territory "belongs to" a people such that popular ownership entails any specific government obligations concerning the management of land and resources. Indeed, the relationship described is not really a property right at all.

VIII. Conclusion: the use of legal concepts in political philosophy and the precarious status of "property"

Many liberal political philosophers have been reluctant to suggest that property is an independent consideration in analysing problems of justice. This is understandable when proposals for property-based criteria of justice have so often been presented as if they are incompatible with the broader concerns of egalitarian political philosophy. A critical insight of Wenar's proposal is therefore to suggest that a legal understanding of property could be put in the service of political philosophy in order to simultaneously resist the idea that considerations of property are reducible to the concerns of distributive justice, while ultimately avoiding some of the problems that property-based approaches are typically thought to have. Although Wenar does not succeed in demonstrating what property adds that cannot be captured by a standard distributive justice framework, his proposal merits greater theoretical attention than it has so far received for drawing attention to some significant shortcomings in current philosophical approaches to questions of resource justice, and also for what it suggests about rethinking the division of labour between legal theory and political philosophy.

I have argued that property is a distinctive aspect of resource justice, and that political philosophers both can and ought to give independent weight to property rules in the analysis of questions of resource justice, a move that does not require abandoning commitments to distributive justice. In particular, I have suggested that injuries that cannot be redressed by (or that are otherwise inadequately captured by) compensation, such as environmental, social and cultural harms, would be better handled through property rules. However, these are only meant to illustrate some of the advantages of a property-based approach, and not to be an exhaustive list of circumstances where it would be worthwhile to treat property as a distinct set of considerations. In general, it can be said that the utility of engaging in an analysis of property rules lies in bringing out aspects of human relationships with the physical environment that cannot be adequately evaluated

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through a purely instrumental view of land and resources, or that cannot be adequately responded to through mechanisms of wealth allocation. This may well extend to other circumstances not considered here.

Despite his important provocation to liberal political philosophers, my concern with Wenar's proposal is that the legal concept of property is not deployed to this end, but is instead deployed to sidestep thorny normative debates in this area. One debate that comes to mind is the debate about territorial resource rights, or how to define "the people" to whom a particular resource belongs, a set of questions that has long divided the global justice literature and that Wenar does not engage. Resource justice requires a way to adjudicate disputes between different groups, or subsets of "the people," and their distinct claims with respect to land and resources. In the context of global trade, it also requires a way to address the demands of other peoples. At present, however, there is no firmly established legal principle which entails that the resources in a given jurisdiction are owned by "the people" in the sense that Wenar has in mind.

The terms of that debate must therefore be confronted head on. To effectively analyse the global trade of resources as a problem of property, one must provide an account of the relationship between a people and the land and resources in the particular political territory that they occupy, and demonstrate both how that relationship gives rise to specific duties on the part of government and how those duties can be enforced by its citizens. This work can be usefully guided by the consideration of legal rules, including the law of property, but legal rules do not provide a way around it.

I would like to conclude by considering some of the broader implications that this has for the use of legal concepts to analyse problems in political philosophy, and how this bears on the concept of "property" in particular. There is an important cautionary lesson here for political philosophers who would like to avail themselves of legal concepts to inform normative debates. Law has its own logic, which is generated through practical experience and guided by concrete problems that must be understood and ultimately resolved within the limited (and indeed sometimes quite limiting) frame of legal institutions. Philosophy often divides up the conceptual landscape of a particular subject or set of issues in a very different way from law because it lacks the same experiential, problem-driven register and is not encumbered by the same institutional constraints.

Although these differences between the two disciplines have traditionally been thought to give priority to philosophical approaches in theorizing social problems, methodological divides and constraints produced by schools of thought within philosophy itself increasingly suggest that this priority might be reversed, at least in the context of certain social problems. Thus, when properly deployed, law has the potential to provide a conceptual framework that sheds light on issues that have fallen beyond the purview of philosophical approaches. Legal theory may therefore play not only a critical role in pointing out where philosophical approaches generate prescriptions that are incapable of real-world implementation, but a substantive role in analysing what is at stake in a given social problem and how we might respond.

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This more ambitious role for law in philosophical analysis contains greater risks for cross-disciplinary misunderstanding, however. The key difficulty is that philosophers' expectations about a given legal concept are typically informed by the operation of an analogous philosophical concept, when the latter may in fact perform very different functions from its legal counterpart. For this kind of interdisciplinary engagement to be successful, it is imperative that the legal concept in play be understood on its own terms: it cannot simply be imported into a philosophical debate divorced from an understanding of how that concept operates in the context of legal institutions.

This explains the precarious status of "property" in political philosophy, where the dominant philosophical understandings remain somewhat disconnected from the legal reality of property rules. This disconnect has not prevented legal understandings of property from serving as an important mode of critique of philosophical projects that purport to put property rights in the service of a substantive moral or political view, as the influential work of Barbara Fried, Liam Murphy and Thomas Nagel demonstrates.[60] To the extent that such projects advance prescriptive views about what the law ought to be, or how legal institutions ought to be reconfigured to reflect certain normative commitments, legal theorists and legally-minded philosophers have been successful in drawing attention to improbable assumptions being made about how the relevant legal rules and institutions do in fact operate.

Unfortunately, however, the disconnect between the dominant philosophical views of property, on the one hand, and property as a legal concept, on the other, has been a "curse" for the more ambitious project. As I have demonstrated in this paper, the gap between philosophical and legal understandings of property presents a significant obstacle for appreciating what an analysis of property could add to current distributive justice approaches. For that reason, the legal concept of property is unlikely to play more than a critical role until the dominant philosophical understandings of the place of property in a theory of justice are questioned and revised. By demonstrating how considerations of property could usefully inform the philosophical analysis of issues concerning the management of land and other natural resources, my hope is to have shown that this initiative is worthy of pursuit.

60. See references in *supra* note 31.

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