



Traditionally, we have divided the responsibility for facing various dangers not on the basis of what interests or rights are threatened, but instead by the source of the threat. Thus, the judicial system protects security of life, liberty, property, and contract—all against threats by individual offenders; the Environmental Protection Agency protects many of our vital interests and rights against threats to the environment—furthermore, not against all threats to the environment, only those “that come from thoughtless or ruthless human policies.” Different public authorities, on Baier’s view, “take on different public ‘enemies,’ each of which may threaten several vital interests.” Should we worry that under this division of labor no one is thinking about all the threats to security of life, or coordinating all measures to protect it?

Baier thinks not: “To try to deal in one budget (the total lifesaving budget) with the threat to human life posed by a rise in terrorism, and to deal with the threat terrorism poses to liberty in a different budget (the total liberty-saving budget) would lead to less, not greater, coordination. Doubtless there are better ways to partition our public labor than we have yet devised, but . . . ‘rationalizing,’ if that amounts to identifying some abstract common goal in several areas and then adopting an efficient total plan to reach it, aiming at consistency in all the areas affected, may be one of those rational strategies that it is even more rational to restrict.”

MacLean agrees that it would be a mistake for federal regulatory agencies to aim in a coordinated way at maximizing the overall efficiency of how government resources for lifesaving are expended. Regulatory agencies like EPA and OSHA “are not invisible bureaucracies which were established to duplicate the work of

the Office of Management and Budget and bring efficiency and coherence to regulatory policies. They are, rather, very public institutions, which the public expects in part to give voice to the ideals of a society that cares deeply about the lives and health of its citizens.”

Although we now realize how important it is to the nation and its economy for these agencies to be cost conscious, “nevertheless, when the Administrator of EPA appears at a press conference to announce a regulatory decision, people are not concerned primarily with knowing that the agency has found the ideal cost-benefit ratio. People want to know that the things they value deeply—our health, the environment, and our natural resources—are being guarded and protected by the agency we have created to be the trustee of these values.”

In sum, the actions of such agencies have symbolic and expressive significance. MacLean suggests that this might help us to understand the “rituals” that have been forced on some of these agencies, like the taboos against looking at cost-benefit analyses or establishing a social value of human life. It might help us to understand why modest inconsistencies in achieving our lifesaving goals may be less worrisome than certain efforts to correct them. If life is indeed sacred, we may not always choose to protect it in the most efficient way but in a way that recognizes—and expresses—its special value.

The median lifesaving costs cited are taken from John D. Graham and James W. Vaupel, “Value of a Life: What Difference Does It Make?” *Risk Analysis*, Vol. 1, No. 1 (1981). The views of Allan Gibbard, Douglas MacLean, and Annette Baier are taken from their chapters in *Values at Risk*, edited by Douglas MacLean, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Littlefield, 1986). To order *Values at Risk*, see p. 15.

This Land Is Whose Land?

In December, 1971, the Alaska Native Claims Settlement Act (ANCSA) attempted to deal with the land claims of Alaska natives by providing a land and cash settlement administered through state-chartered corporations. Under the terms of ANCSA this corporate stock is inalienable until 1991. This date is now only five years away.

Last fall the independent Alaska Native Review Commission, established by the Inuit Circumpolar Conference, issued a report on what ANCSA, originally claimed to be the most liberal settlement ever reached with native America, actually means to native people. Headed by distinguished Canadian jurist Thomas R. Berger, the commission held meetings in

62 native villages and heard testimony from over 1400 native people.

In what follows, Berger distills the findings of the commission, which are presented in full in his book, *Village Journey*, published in 1985 by Hill and Wang. In response, Franklin Ducheneaux, Counsel on Indian Affairs of the Committee on Interior and Insular Affairs of the U.S. House of Representatives, places ANCSA in the context of earlier settlements with native Americans in the Lower 48. Both Berger’s and Ducheneaux’s remarks are drawn from presentations they made at a Maryland Colloquium on Public Philosophy, sponsored by the Center for Philosophy and Public Policy, which was held on Capitol Hill last year.

Alaska Land Claims: Fifteen Years Later

In Alaska, 1991 has become a deadline—a symbol for issues that the Alaska Native Claims Settlement Act of 1971 (ANCSA) raises for Alaska natives. The year following 1991 is also a symbolic year. For 1992 is the 500th anniversary of Columbus's first voyage to the New World. Here in America the two great streams of humanity, from the Old World and the New, encountered each other. One was able to dominate the other. This has given rise to a recurring ethical question: How can a fair accommodation be reached between the dominant society and the native peoples of the New World?

The Land

ANCSA is a landmark in the settlement of native claims in the modern era. With it Congress officially "extinguished" all title and rights the aboriginal people of Alaska traditionally held to their land. In its place, Congress established 12 regional corporations (a 13th regional corporation represents non-resident Alaska natives) and 200 village corporations. Each Alaska native received 100 shares in a village corporation and 200 shares in a regional corporation. Title to 44 million acres of land was then conveyed to the corporations, together with a monetary settlement of \$962.5 million. (A small percentage of these funds was passed through the corporations to individuals.) Thus, as individuals and as tribal entities, Alaska natives received little money and no land. What they received were shares in the newly formed corporations. The point is a significant one; it is the basis for present concerns about the future of native land in Alaska.

The majority of village corporations are at present in financial difficulty, some even threatened with bankruptcy, and losses have been frequent in the regional corporations as well. The climate, geography, and the limited economic prospects in the Arctic and sub-Arctic regions militate against corporate success. But to Alaska natives, the success or failure of the corporations is not the paramount issue, except as it bears on the question of the land.

There are, under ANCSA, three principal threats to continued native ownership of native land:

(1) Corporate failure. Bankruptcy is already a real possibility. If it occurred, corporate assets, including land, could be attached by creditors.

(2) Corporate takeover. After 1991, shares in the native corporations can be sold to non-natives. Take over the corporations, and you take over the land.

(3) Possible taxation. Twenty years after conveyance, lands received by the native corporations, even though undeveloped, can be taxed under state authority. In the 1990s, if Alaska state oil revenues continue to decline, there may be a call to tax native lands in rural Alaska. Failure to pay taxes imposed on subsistence lands could result in land passing to the state.

Furthermore, only those natives alive in 1971 received shares. Thus, though the rising generation of Alaska natives may acquire shares by inheritance, as a whole they have no legal interest, direct or indirect, in their ancestral lands.

For these reasons there is widespread dissatisfaction with ANCSA among Alaska natives. Native people understand that although ANCSA has been since 1971 the means of holding native land, it does not offer future protection for that land; they realize that in fact it is the very instrument under which they may lose their land.

Sovereignty and Subsistence

The United States takes pride in being a home for peoples of any religion or race, any language or culture. Immigrants by the millions have come to the United States. As individuals, as families, they chose America and its institutional arrangements. But native Americans did not choose America in this sense. They were here first, with their own societies, laws, and institutions.

ANCSA did not address the key issue of self-government for native people. The native peoples of the New World have always thought of themselves as sovereign peoples, requiring their own autonomous institutions. Are native corporations a sufficient expression of the distinct identity of native peoples? Or should native institutions be political as well, with legal authority? The question arises with particular force in Alaska as 1991 draws near.

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The sovereignty movement is the product of twin crises, both having their origins in ANCSA. I have discussed the threat that 1991 presents to continued native ownership of native land. But it was not only aboriginal title that was extinguished by ANCSA. Aboriginal rights of hunting and fishing—that is to say, to subsistence—were also extinguished. Now native rights to make a living off the land depend on a network of state and federal laws, which often restrict subsistence activities in the name of protecting them. Subsistence is a dynamic enterprise, but government regulatory regimes try to confine it within a steel web of exact definitions, locations, and numbers. Such pre-

cision cannot respond quickly to ever-changing human needs and environmental conditions, to which native practices have traditionally been sensitive. This dual threat has led villagers to consider ways of severing the land from the corporations. For subsistence is more than survival in rural Alaska; working in harmony with the land is a way of life.

Recommendations

In every country (including the United States) where there has been a settlement since ANCSA, the main features of ANCSA have been rejected: the idea of shareholders' corporations; the proposition that native

ment on village-owned ANCSA lands.

Regarding sovereignty and subsistence, the state should recognize traditional tribal governments as appropriate local governments for all purposes under state law. Tribal governments should have exclusive jurisdiction over fish and wildlife on native lands, whether owned by native corporations or by tribal governments. On federal and state lands (90 percent of Alaska's land area), native governments in partnership with state and federal governments should exercise jurisdiction on all hunting, trapping, and gathering lands used by tribal members. Rights of access on state and federal lands and waters and a share of resources fully sufficient for

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land, even though undeveloped, may be liable to taxation; the disinheritance of future generations.

Since the land is now a corporate asset, it is not possible simply to urge that a law should be passed transferring the land from native corporations to tribal governments. But shareholders of village corporations who are concerned that their land may be lost should transfer their holdings to tribal governments to keep the land in native ownership, and regional corporations should consider transferring land to the villages or to regional tribal organizations. Unlike corporations, tribal governments cannot fail, cannot be taken over, and cannot be made liable to pay state taxes. Furthermore, this arrangement accommodates the children disinherited by ANCSA, since they would have been born into tribal membership. Congress can help by passing legislation to facilitate the transfer of land by village corporations to tribal governments without regard for dissenters' rights and to clarify the village tribal governments' right to exercise a veto power over all subsurface develop-

native subsistence must be guaranteed.

These recommendations are based on the testimony of native peoples in dozens of native villages. They are based on what the native peoples told me they want to do for themselves. Nothing less than the recommendations made here will enable village Alaska to survive. I have seen the effects of assimilationist policies in the villages. Among many Alaska natives there is a feeling of deep, bitter resignation, a sense of irretrievable loss. This has a bearing on the rates of alcoholism, violence, and suicide in rural Alaska. It seems reasonable to suppose that if native peoples can regain a measure of control over their communities and an opportunity to make a living off the land, they will have a firm basis for a renewed collective and personal sense of worth and well-being. The choices Americans confront in Alaska may, in the long sweep of history, provide a unique opportunity to do justice to native peoples. It is an opportunity they must not reject.

—Thomas R. Berger

ANCSA: New Words, Same Story

ANCSA has been hailed as a departure for the resolution of native claims, a step forward from a past in which land was wrested from native people in unjust and inhumane ways. But I would like to suggest that the structure of the ANCSA settlement, based upon a corporate administration of settlement lands and settlement funds, is very much similar to the whole allotment policy for Indians down in the Lower 48 that began in 1887.

From its inception this country developed through the taking of Indian land. The whole series of wars and conflicts that occurred almost from the time that the first non-Indian set foot on the soil of North America was really motivated by the desire and need of non-Indians to secure land. Non-Indians would move into Indian territory, the Indians would defend their territory, wars would result, the Indians would be defeated and driven back, the non-Indians would take the land. The process kept repeating.

By 1887, the date of the General Allotment Act, almost all Indian tribes had been militarily subjugated. Tribes that had not been "eliminated" in the Eastern seaboard had been placed upon reservations. The land that they were placed upon was generally land that non-Indians didn't want. The white man had already taken, through military conquest and through imposed treaties, all the land he felt was desirable.

Toward the end of the century, however, surging immigration created a new impetus for more land. And technology had developed whereby "worthless" desert land could be put to "productive use." But the Indians were sitting on it. How, then, to get it?

Two forces, evil and good, joined together to bring about the General Allotment Act of 1887: the greed of land developers and the compassion of liberal humanitarians, concerned to do something to ameliorate the terrible poverty and misery in which Indians existed on the reservations. Good Christian people felt at that time that the way to help the Indians was to make good Christian farmers out of them. As good Christian farmers, Indians would no longer need their tribal, communal land or their system of tribal government—all they would need was a plot of their own, some oxen, a plow, and a little money to get them into the farming business. Well, this set nicely with those people in the West who wanted to get at the land. This was a way to do it, in two respects.

First, you pass a law through Congress requiring that the reservations be allotted: each head of family gets his allotment of acres, his few implements, his oxen. This serves the purposes of the do-gooders, because the Indians are now going to become good Christian farmers. Then, whatever is left over is "surplus" land, to be opened to white homesteading. And there just happened to be a lot of surplus land left over.

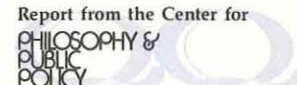
The second avenue of getting at the land was developed somewhat later, when it was discovered that you couldn't make a good Christian farmer out of a person who had his roots in a hunting and gathering economy; you couldn't simply make a good white Christian farmer out of an Indian by giving him a tract of land and an ox, particularly since the tracts of land in many cases were inadequate to begin with.

If the Indians couldn't use the land, what would be a good use for it? Well, there were some white farmers who would like to lease it. So you change the law and permit the Indian first to lease and then to sell his land. There he is, in desperate poverty, and the only asset he has is that land, which he can't use. So he sells it and the land goes out of Indian ownership.

ANCSA is basically no different. The lands and the money of ANCSA are the same as the lands and the reservations of the Indian tribes down here in the 1800s. How should these lands be administered in a settlement? Well, you don't set up reservations. You don't have the lands owned communally by a tribe with tribal jurisdiction and the continuance of native culture. Instead, create corporations for the natives, and each native that belongs to that particular corporation will be issued a share of stock. And they'll learn how to be, not good white Christian farmers, but good white Christian stockholders. But realizing that they know nothing about stockholding and corporations and shares and dividends, just as the Indians in the 1880s knew nothing about farming, we'll make the stock inalienable for twenty years, by which time presumably they *will* have become knowledgeable, sophisticated, suit-and-vest wearing stockholders, able to deal wisely with their stock.

But when the stock becomes alienable in 1991, the same thing will happen to it that happened to many, many allotments of land down here in the Lower 48 in the early 1900s. For the natives in the villages, that piece of paper does not represent their land, their culture, their religion, their way of life. The land's going to be there. So when someone comes along and offers them money for that piece of paper, they sell it, and thereby, not realizing it, sell their land. Between 1887 and 1934 literally millions and millions of acres were lost to Indian people, until in 1934, the Indian Reorganization Act was passed, stopping allotments and returning whatever was left of the "surplus" land (normally the very worst of it) to the tribes. So, in a way, what the village people of Alaska are today asking for is their own "Indian Reorganization Act" to correct the devastation of these past policies: the allotment acts, the laws authorizing lease of lands, the laws authorizing sale of lands, the fragmentation of tribal communities because of the fragmentation of the land.

These policies didn't work down here. They didn't



make Indians overnight, or over a period of two generations, into good, hard working, saving, investing, Christian families. It takes a longer period of time to transform "uncivilized" society into what we view as civilized society. Yet it was expected that in fifty years the Indians would acquire the trappings of a civilization that it took non-Indians five hundred years to acquire. How could this not fail? Likewise, native people in the rural communities of Alaska existed in 1971 at the economic, social, and cultural stage in which Indians down here existed in the last century, and yet they were expected to make a leap from that level of societal and cultural development, in twenty years, up

to a corporate society. It will not work. It can't work. The land will pass from native ownership and be lost once again.

In the late 1800s a Menominee tribal chief came to Washington, D.C., to conduct business relating to the loss of Indian lands. He was given by the officials in Washington the modern-day suit of that time—top hat, cutaway coat, and vest—and he put it on. And the chief who looked so impressive and dignified in his buckskins, moccasins, and feathers, now looked ridiculous. And he looked at himself, and he said, "This is the way the white man's law fits the Indian." It doesn't.

—Franklin Ducheneaux

The Legacy of Nuremberg

Forty years ago, on September 30, 1946, the trial of the major war criminals of the Third Reich came to a close in the ruined city of Nuremberg. It is a commonplace that the trial was an "historic" occasion, that it left a legacy for future generations. The men who conceived and conducted the trial understood it that way; they intended it to be epoch-making and viewed their own words and deeds (not, perhaps, without a touch of self-aggrandizement) through a reverse telescope from the eyes of a distant and more pacific age.

It is impossible for us to read accounts of the Nuremberg trial without realizing that it signifies something much different to us than it did to those who conceived it. For us, Nuremberg is a judicial footnote to the Holocaust. It stands for the condemnation and punishment of genocide, and its central achievement lies in recognizing the category of *crimes against humanity*: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds . . . whether or not in violation of the domestic law of the country where perpetrated." For those who conceived the trial, on the other hand, its great accomplishment was to be the criminalization of aggressive war, inaugurating an age of world order. For this reason, its decisive legal achievement lay in recognizing the category of *crimes against peace*: "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances. . . ."

This idea that Nuremberg was to be the Trial to End All War seems fantastic and naive forty years (and 150 wars) later. It is also a dangerous and mistaken idea that has done much to vitiate the real achievements of the trial, in particular the condemnation of crimes against humanity. The Nuremberg Charter incorporates an intellectual confusion, leaving us, as we shall see,

with a legacy that is at best equivocal and at worst immoral.

Aggression and Sovereignty

At neither the Nuremberg nor the Tokyo trials was the crime of aggression defined. But in 1974 the United Nations offered the following definition: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State. . . ." Though it was not until 1974 that aggression was linked explicitly with the violation of sovereignty, this definition is clearly in the spirit of Nuremberg. But what, then, is sovereignty?

The concept was formulated in the early modern era, the era in which the nation-state began to emerge in Europe. It signified that there is only one ultimate source of law in a state, namely the state's sovereign. From this follows the notorious doctrine of *act of state*, which exempts sovereigns from legal liability for their depredations against other states, on the theory that prosecution of the sovereign of one state by the court of another state amounts to one state's exercising jurisdiction over another.

Historically, the doctrine of sovereignty was formulated to secure the dominance of secular authority over the Church; the doctrine, however, had the additional consequence that so-called "natural law"—constraints on the content of law ascertainable by reason alone—had no place in the theory (since in practice the Church claimed the right to announce natural law—despite the fact that it was supposed to be a matter of reason and not revelation). Nothing constrained the sovereign: from the fact that he was the sole lawmaker it followed that he was the highest lawmaker as well. There are no domestic legal standards according to which he himself can be held responsible, unless these are self-imposed. Conjoined with the act-of-state doctrine, this