

Superseding Historic Injustice

Author(s): Jeremy Waldron

Source: *Ethics*, Oct., 1992, Vol. 103, No. 1 (Oct., 1992), pp. 4-28

Published by: The University of Chicago Press

Stable URL: <http://www.jstor.com/stable/2381493>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



The University of Chicago Press is collaborating with JSTOR to digitize, preserve and extend access to *Ethics*

JSTOR

Superseding Historic Injustice*

Jeremy Waldron

I. INJUSTICE AND HISTORY

The history of white settlers' dealings with the aboriginal peoples of Australia, New Zealand, and North America is largely a history of injustice. People, or whole peoples, were attacked, defrauded, and expropriated; their lands were stolen and their lives were ruined. What are we to do about these injustices? We know what we should think about them: they are to be studied and condemned, remembered and lamented. But morality is a practical matter, and judgments of 'just' and 'unjust' like all moral judgments have implications for action. To say that a future act open to us now would be unjust is to commit ourselves to avoiding it. But what of past injustice? What is the practical importance now of a judgment that injustice occurred in the past?

In the first instance the question is one of metaethics. Moral judgments are prescriptive in their illocutionary force; they purport to guide choices.¹ But since the only choices we can guide are choices in front of us, judgments about the past must look beyond the particular events that are their ostensible subject matter. The best explanation

* An earlier version of this article was presented in 1990 at the annual conference of the New Zealand division of the Australasian Association of Philosophy. I am grateful to Graham Oddie for his invitation to attend that conference and to the Waitangi Foundation for their support. A later version was presented as a public lecture at Boalt Hall, University of California. I am particularly grateful to Robert Cooter, Meir Dan-Cohen, Einer Elhauge, Sanford Kadish, David Lewis, Richard Mulgan, Carol Sanger, Joseph Sax, Andrew Sharp, Henry Shue, and the editors and referees of this journal for their criticisms and suggestions.

1. Opinions differ in metaethics about whether this illocutionary function provides a complete explanation of the distinctively moral meaning of the words 'right,' 'wrong,' 'unjust,' etc. For the view that it does, see R. M. Hare, *The Language of Morals* (Oxford: Clarendon, 1952). But most moral philosophers concede that even if it is not the whole story, still it is an essential part of the explanation of the meaning of such words that they have this prescriptive function. The few philosophers who deny this do so purely because of the embarrassment it poses for their realist claims that moral judgments are nothing but judgments about matters of fact. For examples, see Michael Moore, "Moral Reality" (*Wisconsin Law Review* [1982], pp. 1061–1156); and David Brink, *Moral Realism and the Foundations of Ethics* (Cambridge: Cambridge University Press, 1989), chap. 3.

Ethics 103 (October 1992): 4–28

© 1992 by The University of Chicago. All rights reserved. 0014-1704/93/0301-0006\$01.00

of this relies on universalizability. When I make a moral judgment about an event *E*, I do so not in terms of the irreducible particularity of *E* but on the basis of some feature of *E* that other events might share. In saying, for example, “*E* was unjust,” I am saying, “There is something about *E* and the circumstances in which it is performed, such that any act of that kind performed in such circumstances would be unjust.” I am not so much prescribing the avoidance of *E* itself (a prescription that makes no sense if *E* is in the past), but prescribing the avoidance of *E*-type events. If *E* involved breaking a promise, or taking advantage of someone’s credulity, then our condemnation of it commits us to a similar condemnation of breaches of faith or exploitation in the present. Though *E* occurred 150 years ago, to condemn it is to express a determination now that in the choices we face, we will avoid actions of this kind.²

The point of doing this is not that we learn new and better standards for our lives from the judgments we make about the past. Unless we had those standards already, we would not make those judgments. But our moral understanding of the past is often a way of bringing to imaginative life the full implications of principles to which we are already in theory committed. To be disposed to act morally, it is not enough to be equipped with a list of appropriate principles. One also needs a sense of the type of situation in which these things may suddenly be at stake, the temptations that might lead one to betray them, and the circumstances and entanglements that make otherwise virtuous people start acting viciously. That is what history provides: a lesson about what it is like for people just like us—human, all too human—to face real moral danger.

Beyond that, there is an importance to the historical recollection of injustice that has to do with identity and contingency. It is a well-known characteristic of great injustice that those who suffer it go to their deaths with the conviction that these things must not be forgotten. It is easy to misread that as vain desire for vindication, a futile threat of infamy upon the perpetrators of an atrocity. But perhaps the determination to remember is bound up with the desire to sustain a specific character as a person or community against a background of infinite possibility. That *this* happened rather than *that*—that people were massacred (though they need not have been), that lands were taken (though they might have been bought fairly), that promises were broken (though they might have been kept)—the historic record has a fragility that consists, for large part, in the sheer contingency of what happened in the past. What happened might have been otherwise,

2. For this understanding of moral judgments made about the past, and for the assumed interaction between prescriptivity and universalizability, see R. M. Hare, *Freedom and Reason* (Oxford: Clarendon, 1963).

and, just because of that, it is not something one can reason back to if what actually took place has been forgotten or concealed.³

Each person establishes a sense of herself in terms of her ability to identify the subject or agency of her present thinking with that of certain acts and events that took place in the past, and in terms of her ability to hold fast to a distinction between memory so understood and wishes, fantasies, or various other ideas of things that might have happened but did not.⁴ But remembrance in this sense is equally important to communities—families, tribes, nations, parties—that is, to human entities that exist often for much longer than individual men and women. To neglect the historical record is to do violence to this identity and thus to the community that it sustains. And since communities help generate a deeper sense of identity for the individuals they comprise, neglecting or expunging the historical record is a way of undermining and insulting individuals as well.

When we are told to let bygones be bygones, we need to bear in mind also that the forgetfulness being urged on us is seldom the blank slate of historical oblivion. Thinking quickly fills up the vacuum with plausible tales of self-satisfaction, on the one side, and self-deprecation on the other. Those who as a matter of fact benefited from their ancestors' injustice will persuade themselves readily enough that their good fortune is due to the virtue of their race, while the descendants of their victims may too easily accept the story that they and their kind were always good for nothing. In the face of all this, only the deliberate enterprise of recollection (the enterprise we call "history"), coupled with the most determined sense that there is a difference between what happened and what we would like to think happened, can sustain the moral and cultural reality of self and community.

The topic of this article is reparation. But before I embark on my main discussion, I want to mention the role that the payment of money (or the return of lands or artifacts) may play in the embodiment of communal remembrance. Quite apart from any attempt genuinely to compensate victims or offset their losses, reparations may symbolize a society's undertaking not to forget or deny that a particular injustice took place, and to respect and help sustain a dignified sense of identity-in-memory for the people affected. A prominent recent example of this is the payment of token sums of compensation by the American government to the survivors of Japanese-American families uprooted, interned, and concentrated in 1942. The point of these payments was not to make up for the loss of home, business, opportunity, and standing

3. For a moving discussion, see Hannah Arendt, "Truth and Politics," in her collection *Between Past and Future: Six Exercises in Political Thought* (New York: Viking, 1968).

4. John Locke, *An Essay concerning Human Understanding*, bk. 2, chap. 27, secs. 9–10, ed. John Yolton (London: Everyman's Library, 1965), vol. 1, pp. 280 ff.; see also Stuart Hampshire, *Thought and Action* (London: Chatto & Windus, 1970).

in the community which these people suffered at the hands of their fellow citizens, nor was it to make up for the discomfort and degradation of their internment. If that were the aim, much more would be necessary. The point was to mark—with something that counts in the United States—a clear public recognition that this injustice did happen, that it was the American people and their government that inflicted it, and that these people were among its victims. The payments give an earnest of good faith and sincerity to that acknowledgment. Like the gift I buy for someone I have stood up, the payment is a method of putting oneself out, or going out of one's way, to apologize. It is no objection to this that the payments are purely symbolic. Since identity is bound up with symbolism, a symbolic gesture may be as important to people as any material compensation.

II. THE COUNTERFACTUAL APPROACH TO REPARATION

I turn now to the view that a judgment about past injustice generates a demand for full and not merely symbolic reparation—a demand not just for remembrance but for substantial transfers of land, wealth, and resources in an effort actually to rectify past wrongs. I want to examine the difficulties that these demands give rise to, particularly when they conflict with other claims that may be made in the name of justice on the land, wealth, and resources in question.

It may seem as though the demand is hopeless from the start. What is it to correct an injustice? How can we reverse the past? If we are talking about injustice that took place several generations ago, surely there is nothing we can do now to heal the lives of the actual victims, to make them less miserable or to reduce their suffering. The only experiences we can affect are those of people living now and those who will live in the future.

But though these are obvious truths, we may miss something if we repeat them too often. To stand on the premise that the past cannot be changed is to ignore the fact that people and communities live whole lives, not just series of momentary events, and that an injustice may blight, not just hurt, such a life. Individuals make plans and they see themselves as living partly for the sake of their posterity; they build not only for themselves but for future generations. Whole communities may subsist for periods much longer than individual lifetimes. How they fare at a given stage and what they can offer in the way of culture, aspiration, and morale may depend very much on the present effect of events that took place several generations earlier. Thus, part of the moral significance of a past event has to do with the difference it makes to the present.

But then there is a sense in which we can affect the moral significance of past action. Even if we cannot alter the action itself we may be able to interfere with the normal course of its consequences. The present

surely looks different now from the way the present would look if a given injustice of the past had not occurred. Why not therefore change the present so that it looks more like the present that would have obtained in the absence of the injustice? Why not make it now as though the injustice had not happened, for all that its occurrence in the past is immutable and undeniable?

This is the approach taken by Robert Nozick in his account of the role played by a principle of rectification in a theory of historic entitlement:

This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice [namely, justice in acquisition and justice in transfer] and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.⁵

The trouble with this approach is the difficulty we have in saying what would have happened if some event (which did occur) had not taken place. To a certain extent we can appeal to causal laws or, more crudely, the normal course of events. We take a description of the actual world, with its history and natural laws intact, up until the problematic event of injustice (which we shall call event '*E*'). In the actual course of events, what followed *E* (events *F*, *G*, and *H*) is simply what results from applying natural laws to *E* as an initial condition. For example, if *E* was your seizure of the only water hole in the desert just as I was about to slake my thirst, then *F*—the event that follows *E*—would be what happens normally when one person is deprived of water and another is not: you live and I die. So, in our counterfactual reasoning, we replace *E* with its closest just counterpart, *E*+ (say, we share the water hole), and we apply the laws of nature to that to see what would have happened next. Presumably what would have happened next is that we both slake our thirst and both survive. The same laws of nature that yield *F* given *E*, yield a different sequel *F*+ given

5. Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Blackwell, 1974), pp. 152–53. To this passage, Nozick appends the following footnote: "If the principle of recodification of violations of the first two principles yields more than one description of holdings, then some choice must be made as to which of these is to be realized. Perhaps the sort of considerations about distributive justice and equality that I argue against play a legitimate role in this subsidiary choice" (p. 153n.).

the just alternative $E+$ and further sequels $G+$ and $H+$ on the basis of that.⁶ The task of rectification then is to take some present event or situation over which we do have control (e.g., H , a distribution of resources obtaining now) and alter it so that it conforms as closely as possible to its counterpart $H+$ —the situation that would obtain now if $E+$ rather than E had occurred.

But what if some of the events in the sequel to $E+$ are exercises of human choice rather than the inexorable working out of natural laws? Is it possible to say counterfactually how choices subsequent to $E+$ would have been made, so that we can determine what state of affairs ($H+$) would obtain now in a society of autonomous choosers, but for the problematic injustice? Suppose that if E had not occurred, you would have made me a fair offer to form a partnership to cultivate land near the oasis? How are we to know whether I would have accepted the offer? Had I accepted it, I might have acquired wealth that I would not otherwise have had and with it the opportunity to engage in other transactions. How are we to know which transactions I would have chosen to engage in? The problem quickly becomes intractable particularly where the counterfactual sequence $\{E+, F+, G+, H+\}$ is imagined to extend over several generations, and where the range of choices available at a given stage depends on the choices that would have been taken at some earlier stage.

This is not a mere academic difficulty. Suppose (counterfactually) that a certain piece of land had not been wrongfully appropriated from some Maori group in New Zealand in 1865. Then we must ask ourselves, What would the tribal owners of that land have done with it, if wrongful appropriation had not taken place? To ask this question is to ask how people would have exercised their freedom if they had had a real choice. Would they have hung on to the land and passed it on to future generations of the tribe? Or would they have sold it—but this time for a fair price—to the first honest settler who came along?⁷ And, if the latter, what would he have done with it? Sold it again? Passed it on to his children? Lost it in a poker game?

6. We could of course imagine a world in which not only $E+$ occurs instead of E but also in which the laws of nature are different (e.g., living beings can survive and flourish without water). But those worlds are of limited practical interest. The reason why we choose (in David Lewis's terminology) the closest possible world in which $E+$ occurs, and why 'closest' includes 'same laws of nature' is that that is the world which ought to have been in the contemplation of the agent who faced the choice between E and $E+$. See David Lewis, *Counterfactuals* (Cambridge, Mass.: Harvard University Press, 1973).

7. Often the injustice complained of is that some renegade member of the tribe disposed of tribal land as though it were his own private property. So if a piece of land is indeed tribally owned and its alienation prohibited by tribal custom, is there any point in asking how it would have been disposed of if the injustice of this individual's alienation of it had not occurred? Surely we ought to assume that, if the land had not

Part of our difficulty in answering these questions is our uncertainty about what we are doing when we try to make guesses about the way in which free will would have been exercised. The status of counterfactual reasoning about the exercise of human freedom is unclear. I do not mean that the exercise of human choice is necessarily unpredictable. We make predictions all the time about how people will exercise their freedom. But it is not clear why our best prediction on such a matter should have moral authority in the sort of speculations we are considering.

Suppose that I am attempting to predict how my aunt will dispose of her estate. My best guess, based on all the evidence, is that having no dependents she will leave it to Amnesty International, well known as her one cherished cause. In fact, my aunt surprises everyone by leaving everything to an obscure home for stray dogs that she has only just heard of. My prediction is confounded. But the important point is the following. Even though my prediction was reasonable, even though it was based on the best available evidence, it is her whimsical decision that carries the day. My guess has no normative authority whatever with regard to the disposition of her estate. All that matters is what she eventually chooses.

If this is true of decision making in the real world, then I think it plays havoc with the idea that, normatively, the appropriate thing to do in the rectification of injustice is to make rational and informed guesses about how people would have exercised their freedom in a hypothetical world. For if such guesses carry no moral weight in the real world, why should any moral weight be associated with their use in counterfactual speculation?

This is not an epistemic difficulty. It is not that there is some fact of the matter (what this person would have chosen to do with her goods if things had been different) and our difficulty lies in discovering

been wrongfully disposed of, it would have remained the property of the tribe. So, it might be thought, there should be no difficulty in showing that the counterfactual approach requires its present restoration to the tribe. Unfortunately, things are more complicated than that. There are two other things that might have happened if the injustice had not taken place. The members of the tribe might have decided, in the exercise of their powers as communal owners, to sell some of the land. Or the members of the tribe might have decided, in an exercise of sovereignty over their own laws and customs, to abrogate the system of communal property. Both possibilities need to be taken into account in any realistic reconstruction of what would have happened if the injustice had not taken place. The second is particularly important. All societies change their customs and laws, including their property laws, from time to time, and there is every reason to imagine such change as a probable and reasonable response to new circumstances and conditions on the part of such flexible and resourceful polities as Maori tribes, for example. If we are honestly inquiring into what would have happened in a just world, we have to take at least the possibility of such adaptive exercises of sovereignty into account.

what that is. The thing about freedom is that there is no fact of the matter anywhere until the choice has been made. It is the act of choosing that has authority, not the existence as such of the chosen option.

Of course there are situations in which we do think it acceptable to substitute our best guess about what a person would have done for that person's actual choice. If my aunt's investments have been entrusted to me, and there is a crisis in the stock market while she is abroad and incommunicado, I must do what I figure she would have done: hold the stocks in the companies to which she has a sentimental attachment and sell the rest. Maybe she would have acted whimsically and done the opposite, but as her trustee this is morally the best I can do. By doing this I adopt in effect a rational choice approach to the decision: given what I know about her preferences, I act in a way that will maximize her utility. She might have acted perversely or she might not. But given that her hypothetical consent is my only warrant to act in this matter at all, I can do nothing except choose rationally to give content to the hypothesis.

Now we are unlikely to be able to reach conclusions this determinate in applying the rational choice approach to aboriginal land claims. We will probably not be in a position to say that selling to Q rather than to R would have been the rational thing for P to do if he had not been forcibly dispossessed, and that selling to S rather than T would have been the rational thing for Q to do if P had sold the land to him rather than to R, and so on down a reconstructed chain of entitlement. But broader conclusions may be available. Suppose P enjoyed a certain level of utility derived from his holdings, U_E , just before the events complained of took place. Then any rational choice reconstruction about what would have happened but for the injustice will maintain P's utility at that level at least. No rational chooser enters a voluntary transaction to make himself worse off. So any account of what would have happened had all transactions been voluntary will require P to emerge at least as well off as he was at the beginning of the story. If in actual reality he is worse off, the counterfactual approach will require that he be restored to a level at or above U_E . By making our rational choice assumptions airy enough, we can reach similar conclusions about the well-being of P's descendants and the well-being of the person who dispossessed P and of his descendants as well. And these conclusions are likely to match our intuitions: if the injustice had not taken place, the descendants of those who suffered it would be better off than they are and descendants of those who perpetrated it would be somewhat worse off than they are. So a transfer from the latter to the former seems justified.

However, several difficulties remain. One concerns what might be called the contagion of injustice. Suppose I possess a piece of land

which I inherited from my father who bought it from his sister-in-law who bought it from a settler who obtained it in the mid-nineteenth century from a fraudulent transaction with a member of the Maori tribe. The counterfactual approach to reparation suggests that some transfer from me to the surviving members of the tribe may be required in order to bring the present state of affairs closer to the state of affairs that would have obtained if the fraud had not been perpetrated. Unfortunately we cannot leave the matter there. My neighbor may be in possession of a similar piece of land whose pedigree, considered in itself, is impeccable: there is no fraud, no coercion, no expropriation in the history of her holding. Still the price my neighbor (and her predecessors in title) paid for her land is likely to have been affected by the low price that was paid for my land (on account of the original fraud). Thus, rectification of the injustice will involve an adjustment of her holding as well. We cannot assume that rectificatory transfers will be confined to those who have had dealings with tainted holdings. All present holdings are called in question by this business of winding the film back to the injustice, changing that frame (from *E* to *E*+), and then winding the film forward to see what results. If one person behaves unjustly, particularly in the context of a market, the injustice will have an effect not only on her immediate victim, but—via the price mechanism—on all those who trade in the market in question. Some will gain and some will lose as a result of the injustice, and any attempt at rectification—any attempt to implement the state of affairs that would have obtained but for the injustice—will involve interfering with those holdings as well.

Worse still, the events of justice and injustice may make a considerable difference in who exists at a later time. We cannot simply hold the *dramatis personae* constant in our speculations. Children may be conceived and born, and leave descendants, who would not have existed if the injustice had not occurred. Short of putting them to death for their repugnancy to our counterfactuals, the present approach offers no guidance at all as to how their claims are to be dealt with.

A more general difficulty has to do with our application of rational choice in counterfactual reconstruction. People can and often do act freely to their own disadvantage, and usually when they do, they are held to the result. A man who actually loses his land in a reckless though voluntary wager and who accepts the justice of the outcome may be entitled to wonder why, in the attention we pay to aboriginal reparations, we insulate people from the possibility of similar vicissitudes. He may say, "If we are going to reconstruct a history of rational choice, let us do so for all holdings, giving everyone what they would have had if they had never acted voluntarily to their own disadvantage. Maybe that will lead to a more just world. But if we are not prepared to do that, if we insist that it is alright, from the point of view of justice,

to leave a person like me stuck with the results of his actual choices, it may be more consistent to admit that we simply can't say what (by the same token) justice now requires in the case of those whose ancestors were wrongfully dispossessed."

The dilemma is a difficult one. On the one hand, there is nothing normatively conclusive about rational choice predictions. Why should the exaction of specific reparation in the real world be oriented to what the idealized agents of rational choice would have secured for themselves in a hypothetical world? On the other hand, hypothetical rational choice is essential to our normative thinking about justice. Modern contractarian theories consist almost entirely of asking what the people of a society would have agreed to in the way of institutions governing the distribution of resources, had they been consulted.⁸ But it is characteristic of such approaches that they are holistic, systemic, and structural rather than local and specific in their conclusions and recommendations. We deploy the counterfactuals of modern contractarianism to evaluate the entire basic structure of a society, not to evaluate some particular distribution among a subset of its members.⁹

The issue is particularly acute because the reparations that these counterfactuals support are likely to have a wide effect on holdings across the board. The case is quite different from the simple situation of my aunt's investments, where I ask only what she would have done with her capital and do not attempt to redistribute a whole array of different people's holdings. Reparation of historic injustice really is redistributive: it moves resources from one person to another. It seems unfair to do this on a basis that reconstructs a profile of holdings by attributing rational choice motivations to only some, and not all, of the parties who are affected.

Ultimately, what is raised here is the question of whether it is possible to rectify particular injustices without undertaking a comprehensive redistribution that addresses all claims of justice that may be made. The counterfactual approach aims to bring the present state of affairs as close as possible to the state of affairs that would have obtained if some specifically identified injustice had not occurred. But why stop there? Why be content merely to bring about the state of affairs that would have ensued if this injustice had not occurred? Why not try to make things even better than they would have been if that particular unjust transaction, or any unjust transaction, had not taken

8. See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971); and T. M. Scanlon, "Contractualism and Utilitarianism" in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1986).

9. See Rawls, p. 7. For the distinction between holistic and piecemeal uses of contractarian models, see Kim Scheppele and Jeremy Waldron, "Contractarian Methods in Political and Legal Evaluation," *Yale Journal of Law and Humanities* 3 (1991): 206–10.

place? Are we so sure that a smooth transition, untainted by particular injustice, from some early nineteenth-century status quo ante would leave us now where we actually want to be? Quite apart from particular frauds and expropriations, things were not marvelous in the nineteenth century. Many people lacked access to any significant resources, and many people had much more than what one might regard as a fair share. Why take all that as the baseline for our present reconstruction?

III. THE PERPETUATION AND REMISSION OF INJUSTICE

So far we have focused on the effects of isolated acts of injustice like event *E*, events that took place firmly in the past. But we are seldom so fortunate as to confront injustice in discrete doses. The world we know is characterized by patterns of injustice, by standing arrangements—rules, laws, regimes, and other institutions—that operate unjustly day after day. Though the establishment of such an arrangement was an unjust event when it took place in the past, its injustice then consisted primarily in the injustice it promised for the future. To judge that establishment unjust is to commit oneself to putting a stop to the ongoing situation; it is a commitment to prevent the perpetuation of the injustice that the law or the institution embodies; it is to commit oneself to its remission.

Suppose someone stole my car yesterday. That is an unjust act that took place at a certain place and at a certain time: at 9:30 A.M. on September 5, my car was stolen from the parking lot. Clearly anyone committed to the prevention of injustice should have tried to stop the theft taking place. But once the car has been driven nefariously out of the parking lot, the matter does not end there. For now there is a continuing injustice: I lack possession of an automobile to which I am entitled, and the thief possesses an automobile to which she is not entitled. Taking the car away from the thief and returning it to me, the rightful owner, is not a way of compensating me for an injustice that took place in the past; it is a way of remitting an injustice that is ongoing into the present. Phrases like ‘Let bygones be bygones’ are inappropriate here. The loss of my car is not a bygone: it is a continuing state of affairs.

The implications of this example are clear for the historic cases we are considering. Instead of regarding the expropriation of aboriginal lands as an isolated act of injustice that took place at a certain time now relegated firmly to the past, we may think of it as a persisting injustice. The injustice persists, and it is perpetuated by the legal system as long as the land that was expropriated is not returned to those from whom it was taken. On this model, the rectification of injustice is a much simpler matter than the approach we discussed in the previous section. We do not have to engage in any counterfactual

speculation. We simply give the property back to the person or group from whom it was taken and thus put an end to what would otherwise be its continued expropriation.

Difficulties arise of course if the original owner has died, for then there is no one to whom the property can be restored. We could give it to her heirs and successors, but in doing so we are already setting off down the counterfactual road, reckoning that this is what the proprietor's wish would have been had she had control of her property. Fortunately, that difficulty is obviated in the case of many aboriginal claims: usually the property is owned by a tribe, a nation, or a community—some entity that endures over time in spite of mortality of its individual members. It is this enduring entity that has been dispossessed, and the same entity is on hand now more than a hundred years later to claim its heritage.

What, if any, are the difficulties with this approach? It does not involve any of the problems of counterfactual reasoning that we identified earlier, but does it face any other problems? As I see it, the main difficulty is the following. Are we sure that the entitlement that was originally violated all those years ago is an entitlement that survives into the present? The approach we are considering depends on the claim that the right that was violated when white settlers first seized the land can be identified as a right that is still being violated today by settlers' successors in title. Their possession of the land today is said to be as wrongful *vis-à-vis* the present tribal owners as the original expropriation. Can this view be justified?

It is widely believed that some rights are capable of "fading" in their moral importance by virtue of the passage of time and by the sheer persistence of what was originally a wrongful infringement. In the law of property, we recognize doctrines of prescription and adverse possession. In criminal procedure and in torts, we think it important to have statutes of limitations. The familiarity of these doctrines no doubt contributes to the widespread belief that, after several generations have passed, certain wrongs are simply not worth correcting. Think of the earlier example of the theft of my automobile. Certainly, the car should be returned if the thief is discovered within weeks or months of the incident. But what if she is never caught? What if the stolen car remains in her family for decades and is eventually passed down as an heirloom to her children and grandchildren? Are we so sure that when the circumstances of its acquisition eventually come to light, it should be returned without further ado to me or my estate?

The view that a violated entitlement can "fade" with time may seem unfair. The injustice complained of is precisely that the rightful owner has been dispossessed. It seems harsh if the fact of her dispossession is used as a way of weakening her claim. It may also seem

to involve some moral hazard by providing an incentive for wrongdoers to cling to their ill-gotten gains, in the hope that the entitlement they violated will fade away because of their adverse possession.

Still, the view that certain rights are prescriptable has a number of things to be said in its favor. Some are simply pragmatic. Statutes of limitations are inspired as much by procedural difficulties about evidence and memory, as by any doctrine about rights. It is hard to establish what happened if we are enquiring into the events that occurred decades or generations ago. There are nonprocedural pragmatic arguments also. For better or worse, people build up structures of expectation around the resources that are actually under their control. If a person controls a resource over a long enough period, then she and others may organize their lives and their economic activity around the premise that that resource is "hers," without much regard to the distant provenance of her entitlement. Upsetting these expectations in the name of restitutive justice is bound to be costly and disruptive.¹⁰

There may be reasons of principle as well. One set of reasons has to do with changes in background social and economic circumstances. If the requirements of justice are sensitive to circumstances such as the size of the population or the incidence of scarcity, then there is no guarantee that those requirements (and the rights that they constitute) will remain constant in relation to a given resource or piece of land as the decades and generations go by. I shall deal with this in detail in the next section of this article.

The other reason entitlements may fade has to do with the basis of the rights themselves. Theories of historic entitlement, like the theory of John Locke or the theory sketched more recently by Robert Nozick, focus on the establishment of an intimate relation between a person and a resource as the basis of property rights.¹¹ A person works with an object, shaping and modifying it, so that it becomes imbued with part of her personality; it comes to contain a part of herself. But if the right is taken out of her hands for a long period, the intimacy of that relation may evaporate.

Whether this happens depends partly on what we take to be the morally important relation between the person and the thing. In John Locke's theory, the relation is described as mixing one's labor.¹² A

10. Hence the insistence of Jeremy Bentham on absolute security of expectations as the proper basis of a utilitarian theory of property. See the extract from Jeremy Bentham, *Principles of the Civil Code*, in *Property: Mainstream and Critical Positions*, ed. C. B. MacPherson (Oxford: Blackwell, 1978), pp. 42–58.

11. John Locke, *Two Treatises of Government* (1689), ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), bk. 2, chap. 5; Nozick, chap. 7. There is a comprehensive discussion of this approach in Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon, 1988), chaps. 6, 7.

12. Locke, *Two Treatises*, bk. 2, chap. 5, sec. 27.

person mixes her labor with a piece of land, and the land comes to embody her efforts; that labor is now like a jewel embedded in the land for all time. So anyone who takes hold of the land is necessarily taking hold of the jewel. And no one can doubt that the jewel—the labor—continues to belong to the original person who invested it. So even if a hundred years of adverse possession go by, the land still contains the labor—and thus part of the personality—of that individual. The labor is intrinsically and essentially hers, though embedded in an object that has been out of her possession for all that time. As long as the personality of this individual commands our moral respect, she is always entitled to demand this part of it back.¹³

Unfortunately, as I have argued elsewhere, the Lockean image of labor (whether it is individual or cooperative) being literally embedded or mixed in an object is incoherent.¹⁴ Even if it did make sense, the idea would be far too strong to do the work its proponents want it to do. For it would be impossible to explain how property rights thus acquired could be alienable—how they could be transferred, through sale or gift, from one person to another—without offense to the personality of the original acquirer. If a resource, once labored on, contains for all time a fragment of the laborer's personality, how can that same resource be held legitimately by someone to whom that laborer has chosen to transfer it? Not only that, but how can that second entitlement (the entitlement of the transferee) have anything like the moral force of the original entitlement?¹⁵ Does a fragment of the transferee's personality replace the original nugget of labor in the object? If it does (and if we can make sense of the idea that this is possible), then surely we cannot dismiss out of hand the possibility that an expropriator may also in time replace the original embedded labor of the person she expropriated with something of her own.

In recent years, historical entitlement has been found its most able and consistent defender in Robert Nozick, and some reliance on Nozick's approach is almost inevitable for any defender of historic reparations.¹⁶ But Nozick also dismissed the conundrums of Locke's theory about the "mixing of labor." He retained the form of a Lockean approach—insisting that an adequate theory of justice must be founded

13. It is not hard to see how this could be adapted to express a conclusion about the labor and the identity or personality of a whole community. A community takes possession of a resource by investing the labor of its members. The resource now contains something of the community's spirit and personality. And this is what the community is claiming back when it demands the restoration of stolen lands.

14. See Jeremy Waldron, "Two Worries about Mixing One's Labor," *Philosophical Quarterly* 33 (1983): 37–44; and Waldron, *Right to Private Property*, pp. 171–94. See also the criticisms of Locke's idea in Nozick, pp. 174–75.

15. For a full elaboration of this problem, see Waldron, *Right to Private Property*, pp. 259–62.

16. Nozick, chap. 7.

on some principle of unilateral acquisition—without telling us much about the content of that principle or how it might be justified.¹⁷ However, the task of filling in the content cannot be indefinitely postponed because the substance and justification of a principle of acquisition will partly determine what we can do with it. Do entitlements based on acquisition fade over time, or can we appeal to them generations later as a basis for reparation? We cannot answer this question until we know what the entitlement theorist proposes to put in the place of the incoherent Lockean idea.

If we abandon Locke's image of the mixing of labor, the most plausible account of initial acquisition goes like this. An individual, P, who takes possession of an object or a piece of land and who works on it, alters it, and uses it, makes it in effect a part of her life, a pivotal point in her thinking, planning, and action. She shapes it in a certain way—ploughing it, for example, or practicing good husbandry in her hunting over it—so as to allow it to perform a certain role in her life and activity not only now but in the future. If someone else, Q, comes along and seizes the land, taking it from P without her consent, then the whole structure of action is disrupted. P's planning and the structure of P's action are destroyed and replaced by that of Q. Moreover, P did not have to do anything equivalent to this disruption in order to establish the resource as the center of her life. Before P took it, shaped it, etc., the resource was the center of nobody's life. But when Q took it, it was already the center of P's. This asymmetry between the first and subsequent appropriator is the basis of P's historical entitlement and the basis of its moral priority. It is the reason why we say that Q's taking is wrong in a way that P's original appropriation was not, despite the fact that both parties are seeking to realize their autonomous purposes in the resource.

If any defense of historical entitlement is possible, it is going to be something along those lines. But—unfortunately—if this sort of line is taken, then we have a justification for historical entitlement that is vulnerable to prescription, a justification that is weakened by the historic persistence of dispossession, a justification that does fade over time. If something was taken from me decades ago, the claim that it now forms the center of my life and that it is still indispensable to the

17. There were good reasons for this reticence: it was worth focusing for a while on the question of what the basic shape of a theory of justice should be. As Nozick put it, "I am as well aware as anyone of how sketchy my discussion of the entitlement theory has been. But I no more believe that we need to have formulated a complete alternative theory in order to reject Rawls's undeniably great advance over utilitarianism, than Rawls needed a complete alternative theory before he could reject utilitarianism. What more does one need or can one have, than a sketch of a plausible alternative view, which from its very different perspective highlights the inadequacies of the best existing well-worked-out theory?" (Nozick, p. 230).

exercise of my autonomy is much less credible. For I must have developed some structure of subsistence. And that will be where my efforts have gone and where my planning and my practical thinking have been focused. I may of course yearn for the lost resource and spend a lot of time wishing that I had it back. I may even organize my life around the campaign for its restoration. But that is not the same thing as the basis of the original claim. The original entitlement is based on the idea that I have organized my life around the use of this object, not that I have organized my life around the specific project of hanging on to it or getting it back.

It may be objected that this argument furnishes an incentive to anyone who is inclined to violate another's rights. She knows that if she steals resources and hangs on to the proceeds, her victim will have to reorder his life and, once he does, he will no longer be in a position to claim that the stolen resources should be restored because of their centrality to his plans. But I do not see how this difficulty can be avoided, unless we introduce a different theory of the basis of property entitlements. We cannot pretend that a long-stolen resource continues to play a part in the original owner's life when in fact it does not, merely in order to avoid the moral hazard of this incentive effect. What the objection shows, I think, is that the normal line of argument for property entitlements based on autonomy is simply insufficient to establish imprescriptible rights. And what the failure of Locke's argument shows is that any case for making property rights fully imprescriptible is likely to run into other serious difficulties.

Historical entitlement theories are most impressive when moral entitlement is conjoined with present possession. Then it seems plausible to suggest that continued possession of the object might be indispensable to the possessor's autonomy and that an attack on possession is an attack on autonomy. But when the conjunction is disrupted, particularly when, as in the cases we are considering, it is disrupted for a considerable period of time, the claim looks much shakier.

I think this argument is important, by the way, but not always conclusive. It may not apply so clearly to cases where the dispossessed subject is a tribe or community, rather than an individual, and where the holding of which it has been dispossessed is particularly important for its sense of identity as a community. Many of the aboriginal claims, in New Zealand, Australia, and North America, have to do with burial grounds or lands which have some other symbolic or religious significance. Religions and cultural traditions we know are very resilient, and the claim that the lost lands form the center of a present way of life—and remain sacred objects despite their loss—may be as credible a hundred years on as it was at the time of the dispossession. In this regard, claims that land of religious significance should be returned to its original owners may have an edge over claims for the return of

lands whose significance for them is mainly material or economic. Over the decades people are likely to have developed new modes of subsistence, making the claim that the land is crucial to their present way of life less credible in the economic case than in the religious case.

IV. CIRCUMSTANCES AND SUPERSESSION

I mentioned two ways in which an entitlement might be vulnerable to the passage of time. As well as the one we have just considered, there is also an important point to be made about changes in background circumstances that occur in the period after the original violation. I have in mind changes in population, changes in resource availability, occurrence of famine or ecological disaster, and so on. To assess these cases we have to ask questions about the relation between justice and background circumstances. Is justice relative to circumstances? Do entitlements change as circumstances change? If so, does the significance of past injustice change also? Or should we simply say that once something becomes mine it remains mine (and so it remains wrong for you to keep it), no matter what else happens in the world?

It is difficult to resist the conclusion that entitlements are sensitive to circumstances. Certainly, the level of our concern for various human predicaments is sensitive to the circumstances that constitute those predicaments. One's concern about poverty, for example, varies depending on the extent of the opportunities available to the poor: to be poor but to have some opportunity for amelioration is to be in a better predicament than to be poor with no opportunities at all. Similarly, our concern for the homeless may vary with the season of the year or the climate of the state in which they live. And these are not just fluctuations in subjective response: they are circumstantially sensitive variations in what we would take to be the appropriate level of concern. Now, the (appropriate) level of our concern about such predicaments is directly related to the burden of justification that must be shouldered by those who defend property rights. If an individual makes a claim to the exclusive use or possession of some resources in our territory, then the difficulty of sustaining that claim will clearly have some relation to the level of our concern about the plight of other persons who will have to be excluded from the resources if the claim is recognized. The only theory of property entitlement that would be totally immune to variations in background circumstances would be one that did not accept any burden of justification in relation to our real concerns.

We can express this claim about sensitivity to circumstances as follows. In the case of almost every putative entitlement, it is possible to imagine a pair of different circumstances, C_1 and C_2 , such that the entitlement can only barely be justified in C_1 and cannot be justified at all in C_2 . The shift from C_1 to C_2 represents a tipping point so far as the justification of the entitlement is concerned.

If this is accepted it clearly makes a difference to the original acquisition of property rights. A scale of acquisition that might be appropriate in a plentiful environment with a small population may be quite inappropriate in the same environment with a large population, or with the same population once natural resources have become depleted. In a plentiful environment with a small population, an individual appropriation of land makes no one worse off. As John Locke put it, "He that leaves as much as another can make use of, does as good as take nothing at all. No Body could think himself injur'd by the drinking of another Man, though he took a good Draught, who had a whole River of the same Water left him to quench his thirst. And the case of Land and Water, where there is enough of both, is perfectly the same."¹⁸ But as Locke also recognized, the picture changed once the population increased to the point where scarcity was felt. If one person's appropriation cast a shadow on the survival prospects of others, then it evidently raised questions of a moral character that were not raised when resources were as plentiful as water in a river.¹⁹ One does not need the exact formulation of a "Lockean proviso" to see this. It is simply that there are real and felt moral concerns in the one case that have to be addressed which are not present in the other.

The same point is recognized by Robert Nozick. The principle of acquisition that forms the linchpin of his theory depends for its acceptability on the claim that individual appropriations of previously unowned goods do not worsen anybody's situation.²⁰ (Nozick wishes, as far as possible, to present initial acquisition in the same light of Pareto improvement as consensual transfer.) We need not worry about the exact details of this proviso or of the various Lockean and Nozickian formulations of it.²¹ What is clear is that in any plausible theory of historic entitlement, there is some spectrum of social circumstances, relating to the effect a putative acquisition would have on the prospects and life chances of other people, such that the further one goes along this spectrum the less inclined we are to say that the acquisition in question generates legitimate rights.

So far I have talked about one acquisitive act, A_1 , taking place in one set of circumstances, C_1 , and another acquisitive act, A_2 , taking place in different circumstances, C_2 . I have said that circumstances may make a difference so that the conditions for the moral legitimacy of A_2 may be different from the conditions for the moral legitimacy of A_1 (even though, considered in themselves, A_1 and A_2 are the same type of act). However, we know that acquisition is not an isolated act.

18. Locke, *Two Treatises*, bk. 2, sec. 33.

19. *Ibid.*, bk. 2, secs. 36 ff.

20. Nozick, pp. 174 ff.

21. But see the discussion in Jeremy Waldron, "Enough and as Good Left for Others," *Philosophical Quarterly* 29 (1979): 319–28.

By laboring on a resource, the would-be acquirer not only takes it now but also purports to appropriate it permanently. The effect of her acquisition continues to be felt long after the acquisitive action has taken place. What happens, then, if circumstances change after the moment of the acquisitive act but during the time that the act has effect, that is, during the period of ownership to which the acquisitive action gives rise? A person performs acquisitive act A_1 , in circumstances C_1 that make it legitimate. She establishes a title for herself (and her successors) that endures through time. During that time circumstances change, so that conditions C_2 now obtain, and conditions C_2 are such that an equivalent act of appropriation would not be legitimate. What effect does this change have on the legitimacy of the title founded by action A_1 ?

The answer has to be that it calls the legitimacy of that title into question. We can reach this conclusion by two routes.

The first and most straightforward argument is that property entitlements constrain us over a period of time, and they do so continually in the sense that they constantly call for action in support of them or they constantly involve action undertaken in their exercise. Day after day, an owner performs acts whose legitimacy is based on her entitlement; if she did not have the entitlement, she would have no right to perform these acts. Also, day after day, the owner faces explicit or implicit challenges from others, wanting to use her resource; if she did not have the entitlement to rely on she would not be in a moral position to rebut or resist these challenges. So each time she exercises her right and each time she resists an encroachment, she relies on the entitlement founded by A_1 . At each of those times, the legitimacy of what she does depends on the appropriateness of her entitlement as a moral right at that time. So long as circumstances remain unchanged or so long as any changes are broadly consonant with the necessary conditions for the legitimacy of her entitlement, the fact that her claim is, so to speak, renewed day after day is not a worry. Its renewal is automatic. But if circumstances change radically in the way we have been envisaging, the continued application of her entitlement cannot be taken for granted.

The second line of argument is a response to an objection that might be made. Someone might object as follows:

Surely if the original appropriation were legitimate, the conditions of its legitimacy would take into account the normal vicissitudes of human life including the prospect that things might change, goods become scarce, etc. To say that P acquires an entitlement by A_1 is surely to say that she acquires an entitlement that endures even in the face of changing circumstances. That is why we subject A_1 to such strict scrutiny, for its purports to found an enduring entitlement, not a temporary and circumstantially vul-

nerable one. The test for initial appropriation should be severe and morally rigorous, but if A_1 passes this test, it should not have to face further scrutiny later simply because conditions are not the same.

Here is the response to this objection. Maybe it is a good thing for the test of the initial acquisition, A_1 , to take into account the possibility that conditions may change and therefore only to certify entitlements that survive that consideration. But it surely cannot be the upshot of this that, in circumstances C_1 , only those acquisitions are certified that would be valid in all circumstances including C_2 . That would be wasteful and pointless: why shouldn't people act as though goods are plentiful, at least when they are plentiful?

No. If a rigorous test of initial acquisition does take future vicissitudes into account, it will do so in a more subtle way. What it will do is provide *ab initio*, in the terms of the entitlement, that the exact array of rights, liberties, and powers is to be circumstantially sensitive. Thus, what P acquires through A_1 , are rights that entitle her to do one set of things in C_1 , and another, perhaps more restricted, set of things in C_2 . So, as before, the net effect of P's entitlement does vary, depending on the circumstances. If, for example, P acquires an oasis in conditions of plenty, she acquires (i) a right to use it freely and exclude others from its use so long as water remains plentiful in the territory, and (ii) a duty to share it with others on some fair basis if ever water becomes scarce. The right that is (permanently) acquired through A_1 is thus circumstantially sensitive in the actions it licenses.

If all this is accepted so far as justice in acquisition is concerned, it must also apply to issues and allegations of injustice. Suppose a person has legitimately acquired an object in circumstances of plenty, C_1 , and another person comes along and snatches it from her. That act of snatching, we may say, is an injustice. But the very same action of snatching an already appropriated object may not be wrong in a different set of circumstances, C_2 , where desperate scarcity has set in and the snatcher has no other means of staying alive. One and the same type of action may be injustice in one set of circumstances and not injustice in another.²²

22. The point can be borne out by comparing the following passages from Locke's *Two Treatises*. The first follows on from the statement about conditions of plenty that was quoted a page or two earlier: "He that has as good left for his Improvement, as was already taken up, needed not complain, ought not to meddle with what was already improved by another's Labour: If he did, 'tis plain he desired the benefit of another's Pains, which he had no right to, and not the Ground which God had given him in common with others to labour on, and whereof there was good left, as that already possessed." But the second passage raises the specter of scarcity: "God . . . has given no one of his Children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods;

I hope it is clear where the argument is going. I said that the burden of justifying an exclusive entitlement depends (in part) on the impact of others' interests of being excluded from the resources in question and that that impact is likely to vary as circumstances change. Similarly an acquisition which is legitimate in one set of circumstances may not be legitimate in another set of circumstances. From this I inferred that an initially legitimate acquisition may become illegitimate or have its legitimacy restricted (as the basis of an ongoing entitlement) at a later time on account of a change in circumstances. By exactly similar reasoning, it seems possible that an act which counted as an injustice when it was committed in circumstances C_1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C_1 to C_2 . When this happens, I shall say the injustice has been *superseded*.

Consider the following example.²³ On the savanna, a number of groups appropriate water holes, in conditions where it is known that there are enough water holes for each group. So long as these conditions obtain, it seems reasonable for the members of given group, P, to use the water hole they have appropriated without asking permission of other groups with whom they share the plains; and it may even seem reasonable for them to exclude members of other groups from the casual use of their water holes, saying to them, "You have your own water hole. Go off and use that, and leave ours alone." But suppose there is an ecological disaster, and all the water holes dry up except the one that the members of P are using. Then in these changed circumstances, notwithstanding the legitimacy of their original appropriation, it is no longer in order for P to exclude others from their water hole. Indeed it may no longer be in order for members of P to casually use "their own" water hole in the way they did before. In the new circumstances, it may be incumbent on them to draw up a rationing scheme that allows for the needs of everyone in the territory to be satisfied from this one resource. Changing circumstances can have an effect on ownership rights notwithstanding the moral legitimacy of the original appropriation.

Next, suppose as before that in circumstances of plenty various groups on the savanna are legitimately in possession of their respective water holes. One day, motivated purely by greed, members of group

so that it cannot justly be denied him, when his pressing Wants call for it." An action which may be condemned in one set of circumstances as the covetous meddling of someone too lazy to fend for herself, becomes in another set of circumstances the exercise of a right, which may not be resisted by the initial appropriator.

23. The example is suggested by David Lyons, "The New Indian Claims and Original Rights to Land," in *Reading Nozick*, ed. J. Paul (Oxford: Blackwell, 1982), p. 371.

Q descend on the water hole possessed by group P and insist on sharing that with them. (What's more they do not allow reciprocity; they do not allow members of P to share any water hole that was legitimately in the possession of Q.) That is an injustice. But then circumstances change, and all the water holes of the territory dry up except the one that originally belonged to P. The members of group Q are already sharing that water hole on the basis of their earlier incursion. But now that circumstances have changed, they are entitled to share that water hole; it no longer counts as an injustice. It is in fact part of what justice now requires. The initial injustice by Q against P has been superseded by circumstances.

Once again, it may be objected that this reasoning generates a moral hazard—an incentive for wrongdoers to seize others' lands confident in the knowledge that if they hang on to them wrongfully for long enough their possession may eventually become rightful.²⁴ But the argument of this section is not that the passage of time per se supersedes all claims of injustice. Rather, the argument is that claims about justice and injustice must be responsive to changes in circumstances. Suppose there had been no injustice: still, a change in circumstances (such as a great increase in world population) might justify our forcing the aboriginal inhabitants of some territory to share their land with others. If this is so, then the same change in circumstances in the real world can justify our saying that the others' occupation of some of their lands, which was previously wrongful, may become morally permissible. There is no moral hazard in this supersession because the aboriginal inhabitants would have had to share their lands, whether the original injustice had taken place or not.

I do not think this possibility—of the supersession of past injustice—can be denied, except at the cost of making one's theory of historical entitlement utterly impervious to variations in the circumstance in which holdings are acquired and withheld from others. If circumstances make a difference to what counts as a just acquisition, then they must make a difference also to what counts as an unjust incursion. And if they make a difference to that, then in principle we must concede that a change in circumstances can affect whether a particular continuation of adverse possession remains an injustice or not.

Of course, from the fact that supersession is a possibility, it does not follow that it always happens. Everything depends on which circumstances are taken to be morally significant and how as matter of fact circumstances have changed. It may be that some of the historic injustices that concern us have not been superseded and that, even under modern circumstances, the possession of certain aboriginal lands

24. I am grateful to Carol Sanger for this formulation of the objection.

by the descendants of those who expropriated their original owners remains a crying injustice. My argument is not intended to rule that out. But there have been huge changes since North America and Australasia were settled by white colonists. The population has increased manyfold, and most of the descendants of the colonists, unlike their ancestors, have nowhere else to go. We cannot be sure that these changes in circumstances supersede the injustice of their continued possession of aboriginal lands, but it would not be surprising if they did. The facts that have changed are exactly the sort of facts one would expect to make a difference to the justice of a set of entitlements over resources.

V. CONCLUSION

It is important that defenders of aboriginal claims face up to the possibility of the supersession of historic injustice. Even if this particular thesis about supersession is mistaken, some account has to be given of the impact on aboriginal claims and on the reparation of generations-old injustices of the demographic and ecological changes that have taken place.

Apart from anything else, the changes that have taken place over the past two hundred years mean that the costs of respecting primeval entitlements are much greater now than they were in 1800. Two hundred years ago, a small aboriginal group could have exclusive domination of "a large and fruitful Territory"²⁵ without much prejudice to the needs and interests of very many other human beings. Today, such exclusive rights would mean many people going hungry who might otherwise be fed and many people living in poverty who might otherwise have an opportunity to make a decent life. Irrespective of the occurrence of past injustice, this imbalance would have to be rectified sooner or later. That is the basis for my argument that claims about historic injustice predicated on the status quo ante may be superseded by our determination to distribute the resources of the world in a way that is fair to all of its existing inhabitants.

Behind the thesis of supersession lies a determination to focus upon present and prospective costs—the suffering and the deprivation over which we still have some control. The idea is that any conception of justice which is to be made practically relevant for the way we act now must be a scheme that takes into account modern circumstances and the way those affect the conditions under which people presently live their lives. Arguments for reparation take as conclusive claims of entitlement oriented toward circumstances that are radically different from those we actually face: claims of entitlement based on the habitation of a territory by a small fraction of its present population, and claims

25. The phrase is from Locke, *Two Treatises*, bk. 2, sec. 41.

of entitlement based on the determination to ignore the present dispersal of persons and peoples on the face of the earth, simply because the historic mechanisms of such dispersal were savagely implicated in injustice. And yet, here we all are. The present circumstances are the ones that are real: it is in the actual world that people starve or are hurt or degraded if the demands of justice in relation to their circumstances are not met. Justice, we say, is a matter of the greatest importance. But the importance to be accorded it is relative to what may actually happen if justice is not done, not to what might have happened if injustice in the past had been avoided.

I want to end by emphasizing two points that qualify or clarify this thesis of the supersession of historic injustice. First, what I have said applies only if an honest attempt is being made to arrange things justly for the future. If no such attempt is being made, there is nothing to overwhelm or supersede the enterprise of reparation. My thesis is not intended as a defense of complacency or inactivity, and to the extent that opponents of reparation are complacent about the injustice of the status quo, their resistance is rightly condemned. Repairing historic injustice is, as we have seen, a difficult business and, as a matter of fact, it is almost always undertaken by people of good will. The only thing that can trump that enterprise is an honest and committed resolve to do justice for the future, a resolve to address present circumstances in a way that respects the claims and needs of everyone.

Second, my thesis is not that such resolve has priority over all rectificatory actions. I claim only that it has priority over reparation which might carry us in a direction contrary to that which is indicated by a prospective theory of justice. Often and understandably, claims based on reparation and claims based on forward-looking principles will coincide, for, as we saw in Section III above, past injustice is not without its present effects. It is a fact that many of the descendants of those who were defrauded and expropriated live demoralized in lives of relative poverty—relative, that is, to the descendants of those who defrauded them. If the relief of poverty and the more equal distribution of resources is the aim of a prospective theory of justice, it is likely that the effect of rectifying past wrongs will carry us some distance in this direction. All the same, it is worth stressing that it is the impulse to justice now that should lead the way in this process, not the reparation of something whose wrongness is understood primarily in relation to conditions that no longer obtain.

Entitlements that fade with time, counterfactuals that are impossible to verify, injustices that are overtaken by circumstances—all this is a bit distant, I am afraid, from the simple conviction that, if something was wrongly taken, it must be right to give it back. The arguments I have made may seem to deflate a lot of the honest enthusiasm that surrounds aboriginal claims and the hope that now for the first time

in centuries we may be ready to do justice to people and peoples whom we have perennially maltreated. The arguments may also seem to compromise justice unnecessarily, as they shift from the straightforward logic of compensation to an arcane and calculative casuistry that tries to balance incommensurable claims.

But societies are not simple circumstances, and it does not detract one bit from the importance of justice nor from the force of the duties it generates to insist that its requirements are complex and that they may be sensitive to differences in circumstance. Even the members of a modern society not afflicted by a history like ours would find the demands of justice difficult to discern and hard to weigh: the modern discussion of the subject, with the utopian cast of its "perfect compliance" assumptions, has made that at least clear.²⁶ It is true that in many cases the complexity of these issues does not diminish our ability to recognize acts of injustice—stark and awful—like direct expropriation and genocide. The fallacy lies in thinking that the directness of such perception and the outrage that attends it translate into simple and straightforward certainty about what is to be done once such injustices have occurred.

"First come, first served." "We were here first." These simplicities have always been unpleasant ways of denying present aspirations or resisting current claims of need. They become no more pleasant, and in the end no more persuasive, by being associated with respect for aboriginal peoples or revulsion from the violence and expropriation that have disfigured our history.

26. For the assumption of "perfect compliance," see Rawls, pp. 8–9.