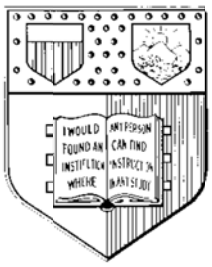


# The Complexities of Land Reparations


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# THE COMPLEXITIES OF LAND REPARATIONS

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"Once the toothpaste is out of the tube, it's hard to get it back in."
--attributed to H.R. ("Bob") Haldeman§

*Abstract: The question whether unjust dispossessions of land perpetrated on whole peoples in the past should be corrected by restitution in kind, that is, granting reparations in the form of returning land to the dispossessed former owners or their present-day successors is substantially more complex than the questions posed by other forms of reparations. I argue that the complexities involved in all of the situations where claims for land reparations are made to correct historic injustices give us good reasons to be hesitant about granting such claims. At the same time, we should not dismiss such claims out of hand. Reparations which take a form other than restitution of dispossessed land may be both necessary and sufficient to establish a public marker of acknowledgment.*

When an injustice to a property right has been perpetrated by a wrongful appropriation, it is perhaps natural to think that justice requires that the object in question be returned to its original owner. Justice is not done, at least not completely, our intuitions run, solely by requiring the wrongdoer to pay money damages and certainly not by an apology alone. Only a full restoration of the thing itself to the rightful owner will do, we are perhaps apt to say. The common law often reflects precisely that intuition. I take a ring that has been in my family for generations to a jeweler to have it appraised. When I return, the jeweler, discovering that the ring would command an enormous sum on the market, refuses to give it back but offers me a price that is far greater than the value that I expected the ring to be worth yet far less than what it could fetch at an auction at Sotheby's. I refuse and demand return of the ring itself, which the jeweler refuses. I then sue the jeweler for return of the ring. Assuming that I can prove ownership, clearly I will win, as I should.

But suppose that when I return to collect my ring, I learn that the jeweler no longer has it, but has sold it to an innocent buyer who paid a fair price for the ring. If I sue the buyer for return of the ring, will I still prevail? This is a harder case because now the possessor of the ring is not the original wrongdoer. Not only that, but the possessor is an innocent party whose own *bona fides* are apt to draw our sympathies. As between two innocent parties, who is entitled to the ring? The law is more complicated here. The general rule is that a thief cannot never transfer good title. This is but an application of the ancient rule *nemo dat quod non habet* ("you cannot

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§ *Available at* http://www.quotationsbook.com/quote/34309

give what you do not have"). Under this simple rule the original owner was permitted to recover the purloined object. Under a limited exception known as the doctrine of market overt, however, a bona fide purchaser may acquire good title from a thief if the sale takes place in an open market.[1] Civil law expands the exception. German law, for example, provides that the buyer in good faith who acquired a good under normal circumstances gains good title if he bought it on the market or from a trader and from someone to whom the good was voluntarily entrusted.[2] The law's more complicated responses to this situation reflects the fact that where we are dealing with two innocent parties our intuitions fail us. At least, they are not nearly so strong as in the simple case with which I began.

And so it is with respect to the topic that I shall address here—the return of land to dispossessed peoples from whom it was unjustly appropriated. The question whether unjust dispossessions of land perpetrated on whole peoples in the past should be corrected by restitution in kind, that is, granting reparations in the form of returning land to the dispossessed former owners or their present-day successors is substantially more complex than the problem of claims to an object by two innocent parties. In the remainder of my remarks I shall outline the sources of this greater complexity and shall suggest why our intuitions about the proper resolution of such claims are apt to be ambivalent. I shall argue that the complexities involved in all of the situations where claims for land reparations are made to correct historic injustices give us good reasons to be hesitant about granting such claims. At the same time, we should not dismiss such claims out of hand: As Jeremy Waldron has pointed out, "[R]eparations 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."[3] Reparations which take a form other than restitution of dispossessed land may be both necessary and sufficient to establish a public marker of acknowledgment.

## I. THREE SOURCES OF COMPLEXITY

Claims to reparations of land unjustly appropriated from entire peoples in the past are fraught with many complexities. Some of these can be worked out, of course, through flexible administrative mechanisms. I want to focus here, however, on three sources of complexity that are not simply a matter of administrative difficulty but that raise normative challenges to the claims. They can go under the headings of *time*, *land*, and *peoples*.

### A. Time

The passage of long periods of time following unjustified appropriations of property can have negative effects, both legally and morally, on the force of claims for return of the property in question. This is true in the simple cases of wrongful dispossessions, such as my ring example, as well as more complex situations of historic injustices. In simple cases like the purloined ring, the original owner, even if she was initially entitled to recover the object from the present

[1] English law recognizes the doctrine of market overt for centuries until it was statutorily abolished in 1995. In the United States, the doctrine was rejected in colonial times. *See* Peter M. Smith, *Valediction to Market Overt*, 41 AM J. LEG. HIST. 225 (1997).

[2] German Civil Code (BGB) §932(1). *Compare* UCC §2-403(2).

[3] Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4-28, 6 (1992).

possessor, may lose her title through the working of limitation statutes that bar causes of action upon which the plaintiff has not acted within a stated period of time (say, 10 years). Hence, through the operation of these limitation statutes the present possessor of an object or parcel of land may acquire good legal title even though she may have acquired it from a thief.

The law gives considerable weight to the effect of time on the legitimate of property titles in this situation, and it does so for four reasons. The first is the difficulty of proof when claims have grown stale. Evidence disappears, records are lost, memories fade, and in general proof of title becomes less reliable the farther removed we get from the original dispossession. The second is reason is repose—we need to quiet titles, especially to land, in order to keep land records reliable. An efficient and well-functioning market in land depends upon reliable records to title. The third reason is to create incentives for owners periodically to give notice to the world that they are the owner by penalizing them for "sleeping on their rights," as is sometimes said. The fourth reason is Hegelian[4] but is also explainable in terms of modern cognitive psychology. Justice Holmes provided a good version of the reason, saying: "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."[5] The development in cognitive psychology known as prospect theory holds that people consider the loss of an object that they possess as more significant than forgoing the opportunity to realize an apparently equivalent gain.[6] Inadvertently perhaps, the law acts upon this insight in property law by settling title in a current possessor who has occupied land for an extended period of time and used it in ways that one would expect of the true owner. Interestingly, the law calls for no compensation from the new owner to the dispossessed owner.

My point in raising this legal doctrine, adverse possession, as it is called in the common law, is not to offer it as template for a solution to the more intransigent problem of claims for the return of land appropriated from entire peoples in the past and now stably settled by another people. The point rather is to establish both the fact of law's sensitivity to the effects of the passage of time on the strength of claims to land titles and the reasons for its sensitivity to time.

In the context of claims for specific restitution for land appropriation time poses two different sorts of problems. The first, which is less familiar in discussions of restorative justice, is that cognitive errors are likely to creep into assessments of causal attribution and resulting moral and legal entitlements. These cognitive errors result from the fact that causal attributions depend on counterfactual thinking. The second problem is based on the pragmatic need for repose.

## 1. Counterfactuals and Causal Attribution

### a. Two Bases of Claims for Reparations

We need to be clear at the outset about the exact basis of claims involved in cases where

[4] *See* G.W.F. HEGEL, THE PHILOSOPHY OF RIGHT, T.M. Knox trans. (1952).
[5] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).
[6] *See*, *e.g.*, Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986).

entire peoples seek return of land that was unjustly, at least arguably, taken from them in the past. There are two possible bases, and they are not always kept separate from each other.[7] The first is that reparation claims are "about ongoing injustice rooted in actions that took place in the past."[8] That is, the foundation of the argument for return of land is actually not compensation (or even reparations) for a past injustice that has gone unrectified but to correct an *ongoing* injustice whose origin lies in the past. Borrowing an example from Jeremy Waldron,[9] suppose someone stole a car from me six months ago. Once the car is gone from my possession, the injustice does not end. The injustice continues because I lack possession of a car which /I once owned. Even if I purchase a new car the injustice that originated in the theft of my former car continues. Suppose ten years later the thief and my car are found. What does return of the car to me represent? Its objective is not to compensate me for an injustice that was committed in the past, a discrete past event. Rather, it is, as Waldron states, "a way of remitting an injustice that is ongoing into the present."[10]

The second line of reasoning behind arguments for reparations is ***historically-focused.*** It views the justification of entitlements from a historical perspective rather than on the basis of present-minded arguments such as equality of distribution. For example, John Locke's theory of property justifies property in the original acquisition of the basis of the historical act of mixing one's labor with some resource in a commons.[11] Robert Nozick is the clearest and most forceful modern exponent of historic entitlement theories, and his principle of justice-in-rectification bears attention because many arguments for reparations often rely, implicitly if not openly, on it. Nozick explained the principle of rectification this way:

> This principle uses historical information about previous situations and injustices done in them [including unjustified expropriations of property], and information about the current course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of [property] holdings in the society. The principle of rectification presumably will make 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 not to be one of the descriptions yielded by the principle, then one of the descriptions must be realized.[12]

I shall have comments on both of these bases for reparation claims, finding them both problematic although for different reasons, but for now I wish to concentrate on the principle of rectification just described.

Before turning to that principle, I must note an important point regarding the example of the stolen car. In my discussion of that example, I supposed that I would purchase a new car to replace the one that was stolen. This is far from certain, however, as I may not be able to afford a new car. In that case, the real harm that the theft has perpetrated on me is a *distributional* harm.

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[7] On this distinction, see Waldron, *Superseding Historic Injustice*, *supra*, at 14-20.
[8] Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQ. IN LAW 237, 245 n.13 (2004).
[9] *See* Waldron, *Superseding Historic Injustice*, *supra*, at 14.
[10] *Ibid.*
[11] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT , Peter Laslett ed. (1988).
[12] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 152-53, 230-31 (1974).

As such, my claim is forward-looking rather than backward-looking. Even if I can afford a new car and do purchase one, the harm I have suffered is distributional, and the remedy I seek is forward-looking. This is an important difference from claims that are based on past injustices that are not ongoing. Such claims are not based on distributional harms and are backward-looking. As I will discuss in Part II, claims to land that are based on distributive grounds and are forward-looking are, generally speaking, and with some exceptions, stronger that those are based solely on restorative, i.e., backward-looking, grounds.

Philosophers have debated the moral soundness of the Nozickean principle, but let us accept it, at least in some version, for present purposes. Accepting the principle provision provisionally, the question then becomes, does the principle of rectification always require that new political regimes redress victims of wrongful (or at least arguably wrongful) wholesale deprivations of land? In particular, must the righting of such past wrongs take the form of specific restitution, meaning, the return of land? Examining this question requires that we first identify and understand the cognitive basis for acting upon the principle of rectification—counterfactual reasoning.

### b. Counterfactuals and the Attribution of Causes

Reparations in any form require that we act on the basis of counterfactual thinking. By "counterfactual thinking," I mean alternative (i.e., factually untrue) versions of past events. Such thinking is quite literally the mental undoing of the past. Counterfactual thinking is the necessary cognitive foundation for any attempt positively to act on the basis of the principle of rectification.

Counterfactual statements are usually conditional in form. A contrary-to-truth factual antecedent statement is followed by an alternative outcome. For example, the claim, "If President Kennedy had not been assassinated, then America would not have gotten into the Vietnam War," follows the classic counterfactual form.

In recent years psychologists have extensively researched counterfactual thinking. They have researched for the factors underlying the generation of counterfactual thoughts and the consequences of these factors. One generative factor that is especially important for present purposes is motive. Motivational differences contribute substantially to both the quantity and quality of counterfactual thinking. Since counterfactual thought represents the undoing of past events, individuals are much more apt to engage in such thinking the more that the past events are painful and otherwise unpleasant to them. The counterfactual is an attempt to undo an undesired outcome cognitively. On this view, "outcome-based motivational factors constitute the engine driving counterfactual thinking."[13]

The second factor in the counterfactual process is some alterable factual antecedent, that is, a premise that enables the undesired outcome to be avoided. Factors affecting the alterability, or mutability, of the factual antecedent (i.e., the "if" clause) in turn influence the antecedent's specific content. The common mutability factors are *exceptionality*, the *action-inaction effect*,

[13] Neal J. Roese & James M. Olson, *Counterfactual Thinking: A Critical Overview*, in NEAL J. ROESE AND JAMES M. OLSON eds., WHAT MIGHT HAVE BEEN: THE SOCIAL PSYCHOLOGY OF COUNTERFACTUAL THINKING 1, 10 (1995).

and *controllability*. Exceptionality here means unexpected.[14] The more an antecedent is (or is regarded as being) exceptional rather than routine, the greater its mutability and, therefore, the greater its role in generating the counterfactual.[15] The action-inaction effect refers to whether the antecedent was a performed action as opposed to an omitted action.[16] Performed actions are more mutable than failures to act.[17] Finally, controllable events tend to be more mutable than uncontrollable ones.[18]

An important consequence of the counterfactual generation is the attribution of causality to events. All counterfactuals have causal implications.[19] They influence the way people assign causality and blame.[20] For example, mutability of antecedent conditions often lead people to confuse what *might* have been the case with what *ought* to have been the case, a phenomenon sometimes referred to as the "counterfactual fallacy."[21]

There is also evidence linking counterfactuals, causality, and ascriptions of blame together. Counterfactuals influence blame assignment by way of their attribution of causality. To be sure, ascriptions of cause and assignments of blame are distinct from each other, but there is evidence suggesting that causal ascriptions influence blame assignments.[22]

Counterfactual thinking can and does serve positive functions, but it can have harmful or negative consequences as well. Counterfactuals are similar to heuristics; they are ways of coping with actual experience, of solving problems by creating categories and stereotypes.[23] Like heuristics, they help us cope but often at the cost of biases that lead to mistaken judgment. The salient concern for my purposes is that counterfactual thinking, the mental undoing of past events, is apt to trigger responses that are more emotional than are reactions to actual events. Such responses are apt to influence our judgments about how to behave in the future, leading us to overreact and to overcompensate.

The link between counterfactual thought and overreaction has important consequences for the matter of land reparations. It poses serious questions as to whether our collective judgments about who gets what can be trusted. The link raises questions about the fairness of decisions concerning *who* gets relief and *what* that relief is.

These fairness concerns exist because unless current regimes are prepared to grant specific restitution to everyone who makes a colorable claim (a response that seems highly

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[14] *Id*. at 10.
[15] *Id*. at 28.
[16] Christopher G. Davis and Darrin R. Lehman, *Counterfactual Thinking and Coping With Traumatic Life Events*, in ROESE & OLSON, *supra*, at 353-354.
[17] Roese and Olson, *Counterfactual Thinking*, *supra*, at 29.
[18] *Id*. at 31.
[19] *Id.* at 11.
[20] *See*, *e.g.*, Daniel Kahneman and D.T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCH. REV. 136 (1982).
[21] Davis and Lehman, *Coping With Traumatic Life Events*, *supra*, at 363.
[22] *Id*. at 362-64.
[23] *See* Steven Sherman and Allen R. McConnell, *Dysfunctional Implications of Counterfactual Thinking: When Alternatives to Reality Fail Us*, in ROESE & OLSON, *supra*, at 199, 203.

unlikely in most such situations), they will have to distinguish among large numbers of claims, granting some while denying others, all on the basis of counterfactual thinking. Research of the psychological effects of counterfactual reasoning casts serious doubt that such distinctions can be drawn in a rational and consistent way. Decision makers are apt to overreact to some cases and underreact to others because of differences in mutable antecedent factors involved in the cases. People tend strongly to focus on more mutable factors, but those factors may not be rationally connected with either causation of the outcome or, consequently, the merits of the claims.[24]

Imagine, for example, two claimants demanding return of buildings expropriated by the former East German government, the GDR. The first claimant is a member of an old aristocratic Junker family. He claims return of a palace that had once been his house and which he inherited from his ancestors years before the Communists confiscated it. The second claimant is a former businessman who had acquired his modest house just months before the Communists seized it. He now wants its return.

Evidence from psychological research indicates that people are likely to react differently to the two cases. They will want the cases treated differently because of the difference in the time at which each claimant acquired his house. This research suggests that the temporal sequence of events is a strong factor that biases attributions of cause and implications about relative desert. Specifically, the evidence indicates that events that occur later in a sequential chain are more mutable than events occurring earlier in time.[25] Later events are seen as more causal and are given greater weight in making judgments about blame, desert, and implications for the future.

The temporal sequence influences the thinking of both the affected individual and others who are in a position to make judgments about that individual's claim. The two claimants in my hypotheticals are likely to experience different reactions to the expropriations of their property. The second claimant is apt to have a stronger, more exaggerated reaction than the first, based on the fact that he acquired his house shortly before the Communists took power. This fact will lead him to experience regret, thinking "If only I had waited a little while longer before buying that house" or "If only the Communists had taken power a few weeks earlier." Such regretful thoughts will in turn strengthen his affective reaction to the expropriation, producing a more intense feeling of the unfairness of that event and, consequently, how deserving he is of the building's return. The same reactions are likely to occur to the party who must evaluate the merits of the two claims. He, too, is apt to view the second claimant as worthier than the first, on the basis of the different temporal sequence of events in the two cases.

Yet such an analysis of the merits of the two claims is not rational. The temporal sequence had no bearing on the cause of the expropriation or on the merit of the two claims.[26] In all relevant respects the two cases are alike and should be treated similarly, either denying or allowing claims for restitution. In fact, though, they are likely to be treated differently.

The point can be stated more generally. Our sympathies and our responses to claims for

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[24] Sherman & McConnell, in ROESE AND OLSON, *supra*, at 204.
[25] D.T. Miller & S. Gunasegaram, *Temporal Order and the Perceived Mutability of Event: Implications for Blame Assignment*, 59 J. OF PERSONALITY & SOC. PSYCH. 1111 (1990).
[26] *See* Sherman & McConnell, in ROESE AND OLSON, *supra*, at 204.

land reparations are not going to map any single normative theory. Cognitive responses to counterfactual thinking are morally inconsistent and unprincipled. Our responses are quirky, based on factors that have no moral salience. Counterfactuals lead our responses to be based on more emotional content, having greater or lesser sympathy for individuals who are in all relevant respects similarly situated. This undermines the possibility that a policy based on counterfactual analysis will in fact effectuate any moral principle. Even from a moral point of view, then, counterfactual reasoning is self-defeating.

Counterfactual thinking has dysfunctional effects in a second respect as well. Apart from the problem of fairness just described, where the problem is with the comparative treatment of cases, counterfactual thinking has negative implications for analysis of the merits of claims standing alone. Even if the counterfactual accurately tells us (as more often than not it does not) how things would have turned out had the antecedent factor (i.e., the "if" clause) had been different, it does not tell us what our response should be today. That is, the counterfactual itself does not warrant any particular normative response. Yet counterfactual thinking strongly tends to lead us to believe that there is a correct response that follows from it.

In the context of claims for land reparations, the counterfactual line of thinking that inevitably precedes our conclusion distorts our judgments about what justice requires of us now. It leads us to want to undo the antecedent event to which we attribute causal responsibility for the injustice. The brute fact, though, is that we simply cannot undo the past. What makes specific restitution seem so appealing is that it appears to be the way to return us to the status quo ante, but specific restitution does not and cannot do that. Even if the confiscated land is returned to its original owner, so much else has changed over time. The land was possessed, used, and enjoyed by someone else in the intervening years, and other people may have benefitted from that person's ownership. Specific restitution does not reverse the clock ─ it does not return all of these people to *their* original positions, that is, the situations they occupied prior to the time of the land's confiscation. These individuals may have made different choices in their lives but for the land's confiscation. We cannot know that. The clock simply cannot be turned back. We are, then, in a zero-sum situation or possibly something worse. Returning the land to *A* means taking it away from *B* (and possibly *C*, *D*, and *E*). Such a solution may not be what justice requires of us at all, or indeed even what it permits. Counterfactual thinking clouds out ability to reason through what justice, rather than emotion, demands of us.

## 2. Time, Life Plans, and Selves

"[T]ime seems to mitigate, or at least to muddy injustice."[27]

"Our intuitions are that [reparatory] claims generally weaken over time."[28]

Several commentators have viewed the effect of time on claims for land reparations as

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[27] Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY (G.E. van Maanen and A.J. van der Walt eds. 1996) 417 (ital. omitted).

[28] RUTI TEITEL, TRANSITIONAL JUSTICE 2000) 138 (footnote omitted).

problematic.[29] There are good reasons for these qualms. Both the common law and civil law are replete with examples of rules and doctrines reflecting the insight that at least certain property rights fade over time. The law of prescription and the cognate doctrine of adverse possession are but two examples.[30] Many legal entitlements that were fully cognizable in the past do not survive today. In considering whether reparations to land should fall into this category, we need to understand why the law often treats time as corrosive of past entitlement.

One reason refers to the principle of rectification to which I referred previously. The substantive foundation of that principle is the idea that the moral justification for protecting a person's entitlement originally lies in the role that the entitlement plays in that person's life. If I own a piece of land and use it in some way, the land becomes an important element in how I shape my life, both now and in the future. So, if someone confiscates that land, the act disrupts my life in important ways, rupturing my plans. The principle of rectification constitutes both an attempt to remedy that disruption so that my life course is restored to its original path. The difficulty with this justification is the fact that "[i]f something was taken from me decades ago, the claim that it now forms the centre of my life and that it is still indispensable to the exercise of my autonomy is much less credible."[31] If the thing has been gone from me for a long time, it can no longer, in any meaningful sense, be said to be essential to my life plans. As circumstances change, whatever the reason, people move on with their lives. They change their plans. Things that were once essential in their lives fade in significance and are replaced by other things.

Nor can it be said to be essential to my personal identity. Indeed, the changes may become so great that they have effected a fundamental change in the identities of the individuals involved. The very selfhood of the former owners may have been fundamentally altered, so altered, in fact, that they may echo the words of Dicken's Scrooge, "I am not the man I once was."[32]

This is the core insight behind the multiple-selves theory, to which such otherwise disparate scholars as Derek Parfit and Richard Posner subscribe.[33] In its strong version, the multiple-selves theory posits that the differences between our selves at different stages of our lives can be so great that these selves at different stages are most fruitfully understood in terms of different persons rather than the same person at different points in time.[34] Posner points out that there is big difference in degree between many adjacent successive selves, on the one hand, and, on the other hand, selves that are separated by so many years and experiences that they have gone through so many successive selves that there is real discontinuity. He give the illuminating example of his mother who, while still vigorous at age 65, notice a frail elderly woman in a wheelchair and said to Posner's wife, " 'If I ever become like that, shoot me.'"[35] Twenty years later, his mother had become just like that woman, but, as Posner says, "[S]he did not express

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[29] *See* notes 27 and 28 *supra*; *see also* Jeremy Waldron, *Superseding Historic Injustice*, *supra;* Waldron, *Settlement, Return, and the Supersession Thesis, supra.*

[30] *See generally* the essays published in the symposium entitled "Time, Property Rights, and the Common Law," in 64 WASH. U. L.Q. 667 (1986).

[31] Waldron, *Historic Injustice*, *supra*, at 158.

[32] Charles Dickens, A Christmas Carol.

[33] RICHARD A. POSNER, AGING AND OLD AGE (1995); DEREK PARFIT, REASONS AND PERSONS 199-351 (1984).

[34] *See* POSNER, *supra*, at 8-9.

[35] *Id.* at 87.

any desire to die."[36] The conclusion that Posner draws from this anecdote indicates how selves change over significant periods of time. He states, "Aging changed my mother so much that she acquired a totally different outlook, *becoming a stranger to her younger self*."[37]

The multiple-selves theory has important consequences for the Hegelian notion of the importance of property to the self.[38] If time and the experiences that go with it create new identities, then it cannot be said that a thing that I once possessed years ago but lost is essential to the self I now am. Rather, my present self must be based on other things, of which I have present possession. It is those things that are truly constitute of my present self, not things that I once owned. Those are memories, and while memories may be vivid, they do not constitute our present living selves, the selves that experience the here-and-now.

## B. Land

### 1. Land's Memory

The second source of complexity in land reparation claims is *land*. As my colleague Eduardo Peñalver has stated, "[L]and has memory."[39] Land's memory has several dimensions.[40] One is physical. As Peñalver observes, physical changes that humans make to land tend to remain in place unless they are affirmatively removed.[41] Sometimes these changes cannot be removed. Whether for good or ill, human activities sometimes mark land in irreversible ways.

A second dimension of land's memory is psychological. Land's psychological memory is closely related to the point made earlier about the strong psychological ties that develop between land and its users.[42] Joseph Singer has argued that such ties develop to the point that a "reliance interest" develops in the current users of land, an interest that merits legal protection.[43]

A third dimension of land's memory is social. There is a path dependency of land uses that results from their interlocking character. One use relies on another, and so on, creating a network of interdependent uses. Once in place, a given land use is difficult to undo. The stability of neighborhoods, for example, results, at least in part, from expectations, sometimes rooted in legal devices such as covenants, that the use of the neighboring land will remain strictly residential. Stability increases if this expectation is coupled with a network of thick social relationships.

Land's memory has powerful effects, a fact that has not gone unnoticed. It may explain policies that involve expropriations of contested land, for example. Nomi Stolzenberg argues that

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[36] *Ibid.*
[37] *Ibid.*
[38] *See* note 4 *supra*.
[39] Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 829 (2009).
[40] The analysis in this and the next several paragraphs draws on *id.* at 829-831.
[41] *Id.* at 830.
[42] *See* text accompanying notes 4-5, 30 *supra*.
[43] *See* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

the Jewish settlements on the West Bank are an example of this.[44] In her view the settlements constitute an attempt to establish "facts on the ground" that will prove difficult to undo. Less controversial examples are provided from land invasions that result in the establishment of so-called "informal settlements." This is a familiar phenomenon in many parts of the world, including Latin America and South Africa. The politics may be different from that involved in the West Bank settlements, but the core concept is the same ─ land's memory.

Land's memory has obvious consequences for the problem of land reparations. But the direction of those consequences is unclear. We are perhaps inclined to say that land's memory favors existing owners. After all, if land use is path dependent, this suggests existing land uses cannot be undone or changed without incurring extremely high costs, if at all. The present users, many of whom have been have used their land for a very long time indeed, have already made their mark on the land. The land has been stamped, as it were, and the stamp is very durable.

Yet, no matter how much the current users have molded the character of the land in their own image, they likely have not entirely erased all prior memories of the land. I need not tell this audience how memories of the past lurk just beneath virtually every road we trod. Sometimes these memories push their way into our present consciousness, forcing us to take cognizance of, even to honor, former uses whose traces we cannot entirely erase. Even in my young country we must periodically ─ and painfully ─ confront the past. In many parts of the country it is not uncommon to find vestiges of our native past not far beneath the surface. In Hawai'i, confrontations between land's past and its present occur on a regular basis as land developers dig up ancient Native Hawaiian grave sites, which are legally protected under Hawaiian law.[45] Memories of less ancient past land uses are even more ubiquitous, challenging the legitimacy of current land uses. Even if we decide that current land uses must be protected, we must acknowledge the past and honor it in appropriate ways. Failing to do creates a cloud on the legitimacy of the present.

### 2. Improvements

Land involves another problem in addition to its memory. Any land that is returned to former occupants will almost certainly include improvements, and many, perhaps most, of these will have been constructed since the time of the initial appropriation. The improvements may be privately-owned, such as residences and businesses, while others will be public improvements , *e.g.,* hospitals, schools, parks, etc. Are present-day owners of these improvements entitled to compensation for the loss of the improvements, apart from the land? Would monetary compensation make them whole, assuming that they are entitled to be made whole?

Post-appropriation improvements are distinguishable from structures that existed at the time of the appropriation. Improvements that were already there when the land was unjustly appropriated are in theory indistinguishable from the land itself. They, too, were unjustly taken from their former occupants, and if justice requires returning the land to its former owner-occupant without compensation it also requires returning the improvements without

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[44] Nomi Stolzenberg, *Facts on the Ground*, in GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER eds., PROPERTY AND COMMUNITY 107 (2009)

[45] *See* HAWAII REV. STAT. § 6E-1 ─ 43 (2009).

compensation. Questions regarding psychological attachments to and financial and social dependency upon improvements are, at least in theory, the same as those that occur in the context of land. Nothing fundamentally distinguishes the improvements from the land on which they sit.

Post-appropriation improvements are different. The former owner-occupant of the land did not construct the improvement and was not its occupant or owner. If the improvement is transferred to the former owner of the land on which it sits and no compensation is paid, the person to whom it is transferred seemingly is unjustly enriched at the expense of the former owner. But is this in fact the case? After all, the improvement was constructed on land that we have supposed was unjustly appropriated. We might draw an analogy, perhaps not too fanciful, to common law doctrine known as the improving trespasser.[46] Under American law, ordinarily buildings and similar structures constructed on land are fixtures attached to the land and treated as part of the land.[47] Title to the improvement follows title to the land. But where someone constructs a building or other structure entirely on land belonging to another, the matter is more complicated. Generally, American law distinguishes between mistaken and intentional improving trespassers. The mistaken improver, because he acted in good faith, is protected against unjust enrichment through one or another remedy (such as a forced sale to the mew owner). However, the intentional improver is denied all relief and, in fact, the new owner may force the improver to remove the structure regardless of the degree of hardship.[48]

Which rule would apply in cases where the land was unjustly appropriated and is now being returned? Surprisingly perhaps, the answer is not obvious. On the one hand, the bad-faith improver seems to apply. Cases of mistaken improvements that are entirely on another person's land usually involve situations such as where the improver in good faith relied on the error of a surveyor who incorrectly read a deed description and mistook one lot for the neighboring (and correct) lot.[49] No such mistake occurred here. The improvements were located exactly where they were supposed to be located. Nor is it plausible to suppose that any mistake of law occurred. The improvers surely realized and were aware of the political circumstances that led to the change in possession of the land, and we must attribute to them knowledge of the law, including international law, regarding ownership of the land that results from such an act of political occupation of land and its distribution to citizens, just as we ordinarily attribute knowledge of the law to individuals regardless of their actual ignorance. Moreover, we may be inclined to say that because the original occupation was injustice, as we have supposed it was, then that injustice continues and any material change made upon that land without the original owner's consent must itself be unjust. Unless we say that the original injustice has since been erased or ended somehow, such as under Jeremy Waldron's supersession theory,[50] all subsequent acts done upon the land are tainted by that original injustice, and improvers upon that land cannot be considered to be innocent.

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[46] *See* JESSE DUKEMINIER et al., PROPERTY, 7th ed. 141 (2010). *See generally* Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. REV. 37 (1985); John Henry Merryman, *Improving the Lot of the Trespassing Improver*, 11 STAN. L. REV. 456 (1959).

[47] *See* RAY A. BROWN, THE LAW OF PERSONAL PROPERTY, 3d ed. § 16.1, at 514 (1975).

[48] *E.g.*, Hollified v. Monte Vista Biblical Gardens, 553 S.E.2d 662 (Ga. Ct. App. 2001); Goulding v. Cook, 661 N.E.2d 1322 (Mass. 1996).

[49] *E.g.*, Howard v. Kunto, 477 P.2d 210 (Wash. Ct. App. 1970).

[50] *See* Waldron, *Superseding*, *supra*; Waldron, *Historic Injustice: Its Remembrance and Supersession*, in JUSTICE, ETHICS AND NEW ZEALAND SOCIETY, Graham Odde & Roy Perrett eds. 139 (1992).

On the other hand, the improvers were not scofflaws. They thought the land was theirs, and arguably they had good reasons for their belief. The land was acquired as the result of an act of state, and the state in turn either affirmatively transferred apparent title to the improvers or at least tolerated their acts of possession. They relied on the state's representation, implicit if not explicit, that the state had good title to transfer. These circumstances make an arguable case for good faith.

The proper resolution is not entirely clear, although I am inclined to think that it is difficult to characterize the improvers as engaging in bad faith. That is really beside the point, however. What matters for my purposes is to demonstrate why the case of land restoration, where substantial improvements are involved, is so much more complex than monetary reparations alone. All of the difficult questions that I have raised go away, obviously, if we decide that the land need not be returned to its former occupants or their descendants.

## C. Peoples

The third source of complexity for land reparations is the involvement of entire *peoples*. Unlike ordinary restitution cases, land reparations involve whole cultures and collective identities. Land reparation claims commonly raise issues of indigeneity, culture, even language rights. Despite the diversity of the contexts in which such claims have been raised, they all are premised on the supposition that land, specifically, the land of the ancestors of the current claimants, is essential to the preservation (and in some cases, a recreation) of a particular culture. No other remedy ─ not monetary compensation, not even substitute land ─ is adequate to satisfy the core premise of these claims, that particular land, the land initially appropriated, is constitutive of a peoples, a group identity. Closely related to this premise is the further, and more controversial, premise that the land initially appropriated is indispensable to the autonomy of that group of people *and each member of it* such that unless possession of that land is restored to the group neither it nor any of its members will be genuinely autonomous.[51] This is why it is a mistake to view land reparation disputes as involving merely an aggregation of individual claims and, so, capable of being treated like ordinary restitution claims. The whole is greater than the sum of the parts.

The fact that claims for the return of land involves entire peoples and cultures mitigates the counterfactual complexity somewhat. We do not have face the problem involved in individual claims that the original owner is no longer around and that giving the land to literally anyone but that person takes us down the counterfactual path. For peoples and cultures are durable; they persist over long periods of time. In the United States, some of the Indian nations who have filed claims are the same nations that existed at the time when their lands were originally dispossessed. There are limits to the duration of peoples and tribes, however. Many of the New England tribes who were the original occupants at the time when southern New England

[51] Nozick himself recognized the possibility of extending his libertarian theory to the group level, linking autonomy, property, and group claims. *See* NOZICK, ANARCHY, STATE AND UTOPIA, *supra*, at 178.

was settled no longer exist.[52] Where this occurs and the present occupants are moved to provide some sort of remedy, then the counterfactual difficulty rears its head again.

### 1. *Indigeneity*

The congeries of concepts that includes peoples, indigeneity, and collective identity, face its own problems of complexity, however. Take indigeneity, a term that is now very much a part of the *lingua franca* of the cultural rights movement and movements for the rights of First Peoples. Both the term and the concept are actually quite ambiguous. At least two meanings are possible, and the difference between them has important implications for the basis of the argument for the return of property associated with each.[53] One meaning refers to the original occupants of the land in question or the descendants of those occupants. We can call this meaning "absolute indigeneity," for it refers to the root inhabitants, if you will. The other meaning is relative in the sense that it refers to the original occupants of the land in question relative to a particular point in time or other group of people. In this case it is the original occupants relative to the time of the land's appropriation (or the descendants of those occupants).

The distinction between these two possible meaning matters for our purposes because the claims that the two different two groups of "indigenous people" make for return of the land will rest on two different legal principles.[54] The argument that corresponds to the claim asserted by the first group, the first human occupants of the land ─ let us call this group Group 1─ will rest on the well-known legal principle of First Possession. The argument asserted by the second group, the original inhabitants at the time of the dispossession ─ let us call this group Group 2 ─ will rest on the equally well-established legal principle known as Prior Possession. Let us briefly examine the distinction between these two principles and the arguments that they generate in this context. We will then consider some problems with both arguments.

The principle of First Occupancy provides that the first person (or people) to take possession of some resource or land acquires property rights in the thing or land possessed. The principle has a long history and is recognized by many legal systems. In the Anglo-American tradition it is perhaps most intimately identified with Locke, who used a version of it as the basis for original acquisition of individual property rights in his famous theory of property.[55] As applied to peoples, First Occupancy is not simply a matter of property rights but sovereignty: the first people who take possession of land thereby gain sovereignty over it.[56] So close is the relationship between property and sovereignty that, in fact, the two concepts are sometimes conflated.[57]

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[52] *See* Roberta Estes, *Where Have All the Indians Gone? Native American Eastern Seaboard Dispersal, Geneology and DNA in Relation to Sir Walter Raleigh's Lost Colony of Roanoke*, in http://www.dnaexplain.com/Publications/PDFs/WhereHaveAlltheIndiansGone8-30-09JoggV3.2.pdf (last visited Nov. 2, 2012).

[53] *See* Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 N.Z. J. OF PUB. & INT'L L. 55 (2003).

[54] The analysis that follows draws from *id*. at 66-75.

[55] *See* LOCKE, TWO TREATISES, *supra*, at 287-88.

[56] *See* Benjamin Ederington, *Property as a Natural Institution: The Separation of Property from Sovereignty in International Law*, 13 AM. U. INT'L L. REV. 263 (1997).

[57] *See, e.g.*, Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

The principle of Prior Occupancy has an equally ancient and established pedigree. It holds that as between two claimants to a resource or land, the one who was the earlier possessor acquires rights superior to the other claimant. So, in the context of land return claims, the group or people whose land was appropriated has superior rights to the present possessors, at least prima facie, whether or not they were the aboriginal inhabitants.

Jeremy Waldron points out that the difference between the two principles, First Possession and Prior Possession, is not solely a matter of time and relativity.[58] The difference is more fundamental. Prior Possession is, as Waldron aptly characterizes it,[59] a conservative principle. Its purpose is to maintain stability and order by preserving the existing status quo.[60] It is unconcerned with the historical questions that First Possession poses, for it recognizes that the costs of answering those questions will often be insuperably high. At the same time there is a very real danger in making the legitimacy of the extant order contingent upon proof of a highly contestable and murky past. The values expressed by the principle of Prior Possession are peace, order, stability, security, and certainty.[61]

Let us consider the application of Prior Possession to the land return context more closely. As indicated earlier, the apparent consequence of Prior Possession does not favor the dispossessed claimants. Prior possession does not question their assertions that injustices were committed when they were dispossessed, but its concern is not with correcting that injustice. Its concerns are with protecting a stable order. Now, dispossessed claimants might use the very same principle to the opposite effect by pointing out that prior to their dispossession *they* had a stable order and property regime which is at least equally entitled to recognition and respect. The Prior Possession principle, they point out, in itself is a double-edged sword. They might try to break the tie, as it were, by adding to this argument that on account of their indigeneity, their order was entitled to greater respect and recognition, if indigeneity is to have any role to play at all.

What are we to make of that argument? Which way does the principle of Prior Possession cut, in favor of the dispossessed former occupants or the current possessors? Is it truly a double-edged sword? Recall that the principle is aptly characterized as conservative. Prior Possession is concerned with a form of justice, but the justice of order, stability, and security, rather than restorative justice. It opposes upsetting existing regimes, however they came about (with exceptions for extreme cases, such as slavery). It is with the peace, stability, and security of the *existing* order that the Prior Possession principle is concerned. So, it turns out Prior Possession is not a double-edged sword, after all. It favors the currently existing order, at least prima facie. As I said, the presumption can be rebutted in exceptional cases, but indigeneity is not in itself a basis for such an exception. Indigeneity involves invoking reasons of historical pedigree in the analysis, and the historical pedigrees of competing claims are precisely what the principle of Prior Possession, at its fundamental level, seeks to avoid for reasons I have already indicated.

Let us now consider what, if anything, changes if we suppose that the dispossessed

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[58] *See* Waldron, *Indigeneity*, *supra*, at 71-72.
[59] *Id*. at 71.
[60] *See* JESSE DUKEMINIER et al., PROPERTY, 7th ed. 24 (2010).
[61] *See* Pierson v. Post, 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1895).

claimants are all members of Group 1, first human occupants of the land ─ the aboriginal occupants ─ and their present-day descendants. Up to this point we have analyzed the effect of applying the Prior Possession principle to land return claims. Because the timing of possession under that principle is relative just to the two groups of claimants immediately involved, it is possible that the dispossessed claimants are members of either Group 1, Group 2 ─ i.e., the original inhabitants at the time of the dispossession and their present-day descendants ─ or both. But if the dispossessed claimants are members of Group 1 only, then the operative principle on which their claim rests may be either Prior Possession *or* First Possession.

First Possession introduces complication of its own. To begin with, the very task of establishing the fact of first possession will in some cases be exceedingly difficult, perhaps insuperably so, if taken seriously. Consider the case of Native Americans. Relative to non-Native Americans (a very heterogeneous population that includes not only European descendants, but Latinos, Asians, and other groups), Native Americans clearly had prior possession, but did they have *first* possession? Were they the first human inhabitants of North America? The question is not as simple as it sounds. After all, Native Americans include many different tribes or nations, and their pasts are quite varied. Perhaps it is the case that one or more of these tribes are not literally indigenous but is the result of intermarriage among members of other, older tribes. Moreover, evidence suggests that human inhabitation of North America began as a result of migration from Asian across the Bering Sea. If that is correct, then perhaps it more accurate to say that the aboriginal North Americans were Asian. My point is not to resolve the question but rather to indicate why the historical questions that the First Possession principle raises are so difficult and fraught with controversy.

A further complication with the First Possession principle is its questionable normative weight. Why should we give priority to a claim based solely on the fact that the claimants (or their ancestors) happened to have gotten there first? First-come/first-served may be an adequate system for establishing priority when the supply of ice cream is running out, but not necessarily for resolving disputes involving the return of large amounts of land between entire peoples. Both in legal doctrine and in property theory, First Possession has always had to be qualified in some way to take account of considerations of others' needs and welfare. In American property law, for example, First Possession, operating under the label of the Rule of Capture,[62] has proved not to be a workable principle without further qualification. It generates perverse incentives that have led to overconsumption of natural resources and loss of social welfare ─ the familiar Tragedy of the Commons.[63] So, it has been refined and qualified in ways that deny the first possessor an absolute right to exclude all others.[64] In property theory, too, an unqualified version of the First Occupancy principle has never been accepted, even proponents of historical entitlement theories such as Robert Nozick.[65] Something like John Locke's famous sufficiency proviso, which stipulated that the first person to appropriate some resources from the commons gained an exclusive property right in that resource so long as there be "enough and as good left for

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[62] *See* DUKEMINIER et al., *supra*, at 18-22, 36-39.

[63] *See, e.g.*, Barnard v. Monongahela Natural Gas Co., 65 A. 801 (Pa. 1907). On the Tragedy of the Commons, see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[64] *See* DUKEMINIER et al., *supra*, at 37-38.

[65] *See* NOZICK, ANARCHY, STATE AND UTOPIA, *supra*, at 174-82.

others"[66] after the appropriation, has always been seen as necessary to accommodate other considerations of justice.

There is more to justice in claims for the return of dispossessed land than simply looking at the original injustice perpetrated upon the prior (or first, as the case may be) possessors and restoring them to the status quo ante. However strongly our initial instincts may lead us to think that is what justice requires, a full accounting of justice must give us pause. After all, full restoration of the status quo ante means committing a second act of radical dispossession. The current possessors, who may have been in possession of the land for generations and have come to be dependent upon that land, are now to be summarily removed without any consideration given to their needs or the substantial changes in circumstances, for both sides, that may well have occurred in the intervening years since the original act of injustice was perpetrated. And what is to happen to the newly dispossessed people? Shall the new occupant have the right to exclude them altogether? After all, the property right that the First Possession principle confers is usually understood to be a robust sort of right that includes the right to exclude. So, presumably this means that the new occupants may banish their predecessors from the land entirely. Is that not an injustice as well? Can it be justified by the mere fact that one group was there first? I will not purport to answer these questions, but I suggest that it is difficult to justify failing to give adequate weight to the others' interests, particularly their needs, when assessing what justice requires. At a minimum, I insist that these questions raise very serious complications in the case for any attempt to resolve the issue of return of land solely on the basis of the fact of first possession.

### 2. *Peoples*

Let us briefly consider the concept of peoples itself. That concept is another source of complexity in the sort of land return claims under discussion. Although it is now a term of common currency in international law,[67] "peoples" is hardly unproblematic. In the context of international law it is closely associated with the concept of the right of group self-determination,[68] which itself is notoriously ambiguous.[69]

The ambiguity of the concept of peoples stems from several sources. The first is a frequent failure to keep straight whether the term is being used as a political concept or a sociological one. This is important because differences sometimes exist between the group to whom political rights are given (or who seek such rights) and their sociological composition. This is a point that is often made with respect to post-colonial "people." Anna Michalska observes, for example, "One cannot ignore that colonial states were often artificially created: they were composed of different national, ethnic and religious groups (which sometimes remained markedly different). . . . Can such an exercise of the right to self-determination of

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[66] LOCKE, TWO TREATISES, *supra*, at II, ch. V, par. 33.
[67] *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 2d ed. 59-61 2004); ZELIM SKURBATY, AS IF PEOPLES MATTERED 55-57 (2000).
[68] *See* ANAYA, *supra*, at 60.
[69] *See* JAMES SUMMERS, THE IDEA OF THE PEOPLE: THE RIGHT OF SELF-DETERMINATION, NATIONALISM AND LEGITIMACY IN INTERNATIONAL LAW (doctoral dissertation, University of Helsinki, 2004), available at http://ethesis.helsinki.fi/julkaisut/oik/julki/vk/summers/theideao.pdf (last visited Aug. 15, 2012).

colonial and dependent peoples fully satisfy [such] peoples?"[70] Moreover, a strictly sociological perspective cannot account for the fact that in some cases (e.g., Estonia) large minorities have joined in demands for national self-determination yet in other cases (e.g., Bohemia) sociologically cohesive populations have failed to unite in self-determination movements. A further problem with sociological definitions is that it is quickly losing traction as the world's population becomes increasingly heterogeneous. My own country may be an extreme example, but the rest of the world is catching up as the pace of migration and intermarriage quickens. Hitler once called the United States "a mongrel nation, and for once he was right."[71] We *are* a mongrel population, and we consider it one of our strengths (at least most of us do). It will not be many more years before much of the world's population catches up with us and becomes itself mongrelized.

So, it seems that the sociological approach to defining the concept of people is unlikely to prove very fruitful. We ought not to give up on the concept so quickly, however, because whatever its flaws it has proved to be a powerful trope in both legal and political discourse about not only self-determination but, concomitantly, return of land. So, let us pursue the concept a bit further to see if we can make any headway.

One possibility is to limit *peoples* to populations located in territories that either are or in the reasonably near past were under conditions of colonialism.[72] Support for such a restrictive view might be taken from the very fact that the context in which peoples is usually employed in international law these days is precisely on behest of the asserted right of group self-determination in post-colonial (or colonial-like) environments. But that approach seems unduly restrictive or artificial. Putting aside questions about what counts as a post-colonial environment (can the current situation of the Palestinians be so characterized?), if land reversion is the (or a) legitimate means of correcting a historic injustice, this is the case whether that injustice occurred as a result of colonial domination or some other form of oppression.

Another possibility takes its lead from the opposite instinct: to broaden rather than to restrict. Some analysts have developed capacious conceptions of peoples in their efforts to avoid the sorts of defects we have just seen with conceptions that define peoples in terms of some objective standard. James Anaya, for example, offers this definition: "The term *peoples* . . . should be understood to refer to all those spheres of community, marked by elements of identity and collective consciousness, within which people's lives unfold ─ independently of considerations of historical or postulated sovereignty." [73] This approach, while avoiding problems of restricting peoples by under-inclusive objective standards such as ethnicity or shared colonial experience, risks being over-inclusive. Shorn of historical identification or "postulated

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[70] Anna Michalska, *Rights of Peoples to Self-Determination in International Law*, in ISSUES OF SELF-DETERMINATION, William Twining ed. 71, 82 (1991).

[71] *See* Geoffrey C. Ward, *Mongrel Nation*, SMITHSONIAN (Nov. 2001).

[72] Something like this seems to have been the view taken in India's reservation to article 1 of the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(XXI), art. 1(1), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), made at the time it ratified the Covenant: "[T]he Government of the Republic of India declares that the words 'the right of self-determination' appearing in this article apply only to the peoples under foreign domination and that these words do not apply to . . . a section of a . . . nation ─ which is the essence of national integrity."

[73] ANAYA, INDIGENOUS PEOPLES, *supra*, at 103 (footnote omitted).

sovereignty," peoples are "spheres of community," the defining characteristics of which are "identity" and "collective consciousness." Consider which groups this conception might be interpreted as including: in some parts of the West, including the U.S., skinheads and neo-Nazis would qualify as "peoples" under this definition. These groups exhibit strong feelings of identity, to such a degree in fact that they experience alienation from the mainstream of their societies. And there is little doubt that they share a "collective consciousness," a consciousness that has been developed to such an extent that it may accurately be called an ideology. Yet surely we will hesitate to place skinheads alongside the Maori as groups who may justly be considered entitled to a right of self-determination, assuming for the moment that we wish to recognize such a right. Of course, Anaya might respond that even if he conceded that skinheads and neo-Nazis are peoples under his definition, it does not follow that they should be recognized as bearing all of the same political and legal rights as other peoples. We may draw rational and legitimate distinctions between certain groups as peoples, recognizing that some are entitled to self-determination while others are not. The response, although sensible itself, must acknowledge two counterpoints. First, there is in the literature on human rights and international law a stubborn tendency to couple peoples with a cluster of rights, particularly self-determination. Peoples is a kind of adhesive concept ─ other concepts tend to stick to it, and it is difficult to pry them apart. Second, resolving the problem of the implications of labeling a group as a people by leaving open the possibility of rational distinctions among different groups simply substitutes one difficult problem for another. It pushes the problem around rather than resolves it, once and for all.

So, what are we to make of all this? Although I have no definitive resolution, I am skeptical that the concept of peoples is capable of doing much analytical work in the context of the land return disputes we are discussing. Conceding for the moment that a coherent conception of peoples is possible and conceding further for the moment that peoples has analytical traction with respect to questions about the right to self-determination, it does not at all follow that peoples is a useful concept in debates over whether land that was unjustly appropriated many years ago should revert to its original occupants or their descendants. Self-determination is one thing; reversion of land to people who have been out of possession of their original land for many decades is another. It is far from clear, indeed, it is rather questionable whether self-determination requires returning those people (or more likely their descendants) to their former place of inhabitation. At a minimum, we have to conclude, I think, that the case for land reversion rights on the basis of the asserted rights of peoples is not at all easy to make.

## II. Distributive Justice

Thus far the conception of justice under which the analysis has proceeded is backward-looking, focused on a state of affairs that existed in the past and seeking to restore that state. But justice is not always backward-looking. In fact, most theories of justice are concerned with the here-and-now and with the future. This is where we live. Our decisions have consequences for the lives of real people, and this is especially so with respect to our responses to claims for the return of appropriated land. The justice considerations that those claims implicate surely include distributive concerns about the effects of returning land upon the large numbers of people who would be affected, one way or the other, by returning land unjustly (as I shall assume) appropriated many years earlier to the descendants to the original occupants. In this section I

discuss, albeit too briefly to analyze fully all aspects, the distributive justice considerations that inevitably will weigh in to any discussion about such claims.

### A. The Illusion of Reversion

Distributive considerations gain weight when we clarify what a decision to return land does and does not involve. I mentioned earlier that land return claims are sometimes argued in terms that set them apart from compensatory claims.[74] The argument is that the return of unjustly appropriated land constitutes an act of the reversion of land rights.[75] On this view, title to land that was unjustly appropriated many years ago simply reverts now to the original possessors or their descendants, who thereby acquire jurisdiction to set the terms on the future use of the land. This is not a matter of compensation or reparation, but of restoration ─ a simple return to the status quo ante.

But there is nothing simple about the return of land taken decades, perhaps even hundreds, of years ago. The reversionary argument is based on a chimera, the notion that is possible to restore matters to their original status. But there is no going back. That is the point of the quote from the late H.R. (Bob) Haldeman[76] with which this paper begins: "Once the toothpaste is out of the tube, it's hard to get it back in." There is no true reversion to the status quo ante, for irreversible changes of circumstances have occurred since the time of initial appropriation of land. The reversion argument asserts that return of appropriated land is a matter of a restoration of pre-existing entitlement that continued to exist de jure even though de facto it was not enforced.[77] The error is this argument is that it supposes that the entitlement that the act of land return is meant to enforce is the *identical* entitlement to the one that existed prior to the land's appropriation. But this cannot be. Even if we suppose that *some* entitlement survives during the time since appropriation to the present, it does not necessarily follow that the present entitlement is identical to the pre-appropriation entitlement. In fact, unless the intervening time period is short, it seems highly unlikely that it is identical. The entitlement we are talking about is not like the abstract and formal sort of property right that property lawyers have in mind when they discuss reversions. Rather, it is highly contextual and substantive. It is subject to change as material changes in the conditions from which it takes its stance change, much in the way that the human self changes over time. Its identity is affected by changes in its holders, reliance by the new occupants and others, forms of adaptation by former occupation, expectations on the part of both present and former occupants. As the identity of the holders of the entitlement change, and the new occupants and those depend upon them come to rely upon the land for their livelihood and develop other forms of attachment to the land, the more the identity of the entitlement itself changes, putting to the lie any notion of a simple reversion of property.

### B. Redistributive Complications

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[74] *See* text accompanying notes 8-9 *supra*.
[75] *See*, *e.g.*, Julie Cassady, *Sovereignty of Aboriginal Peoples*, 9 IND. INT'L & COMP. L. REV. 65, 117 (1998).
[76] H.R. Haldeman was White House Chief of Staff under President Richard Nixon. He spent 18 months in prison for his role in the Watergate conspiracy. *See Revisiting Watergate*, *available at* http://www.http://www.washingtonpost.com/wp-srv/onpolitics/watergate/haldeman.html.
[77] *See* Ben Kingsbury, *Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law*, 52 U. TORONTO L.J. 101, 118 (1992).

Land return claims involve redistribution, and there are serious problems associated with this redistributive dimension. There are two concerns here.

1. Restitution to Whom? The Identity Problem

The first problem results from the fact that the current owner-possessor of the asset may not be the person or entity who expropriated the asset. Specific restitution involves literally taking asset *x,* now in *B*'s hands, and giving it to *A*, the original owner. (I am assuming away here the quite substantial complication that *A* may not be the original owner but her heir or some other successor of the original owner's rights.)

This redistribution is easiest to justify, both as a matter of corrective justice and distributive justice, if *B* is the person or entity who wrongfully took the asset from *A* in the first place. Suppose, for example, that the original owner of a farm now seeks its return from a government that expropriated the land sometime in the past but later changed its policy and now permits restitution of expropriated property. Here the redistribution from *B* to *A* seems, all else being equal, seems fair. But this scenario will be rare. More commonly, the current owner-possessor of the farm or other expropriated asset will be a person or entity other than the one who perpetrated the original wrongful act. In the typical case, where the expropriation was committed by a government, the current owner-possessor is likely to be either a successor government, one that followed a radical rupture from the preceding government, or a person or institution to whom the expropriating government transferred the asset. In either case the current owner-possessor is an innocent party, someone who had no part in the expropriation. Under these circumstances, correction of a past injustice through specific restitution is a redistribution that itself constitutes government expropriation that can reasonably be considered wrongful. This restitutionary expropriation is not inherently or categorically less wrongful than the original expropriation. The argument that it is not wrongful rests on the contention that it undoes a past wrong. But the original expropriation may likewise have been committed for the purpose of undoing past wrongs, i.e., the then-existing distribution of assets was, in the expropriator's view, unjust. That is, the original expropriation was committed as an act of justice. The difference between the justifications for the two acts of expropriations, of course, is that one (the second) was done in the interest of *corrective* justice while the original act was based on *distributive* justice. Any argument that seeks to legitimate one but not the other, then, must establish that one form of justice is morally privileged over the other, and that will not a very difficult task, one that is inherently contestable. The point is not that the case cannot be made but rather that it is far more difficult than many proponents of specific restitution recognize.[78]

[78] Martha Minow argues that subsequent owners of unjustly expropriated property cannot be regarded as innocent because they have benefitted from the expropriation. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 108 (1998). I find this argument too quick. Why should one person's enrichment be regarded as unjust simply because it is the result of another person's unjust act? Unless the current owner has in some way participated in the injustice (and, in my judgment, participation in the injustice require more than the passive state of holding the fruit of the injustice), it is not at all clear why, from the moral point of view, that person should share responsibility for the injustice with the perpetrator. This is not too say that cogent arguments for responsibility cannot be made. It is to say that

## 2. Second-Order Redistributive Concerns

The second concern is with second-order redistributive effects. In addition to the current owner herself, other people may well be affected by the shift in the asset's ownership and possession. Even if *B* is not innocent, other innocent people may be adversely affected by the redistribution. It is not only land itself that is subject to redistribution but buildings and other fixtures upon that land as well. What is to be done about the many homes that are subject to being lost as a result of a land return award? Even if the owners are compensated for their loss, the upheaval in the lives of many innocent people will certainly be great. Some portion of the losses inflicted cannot be compensated by any monetary payment because they are subjective in nature and defy objective measurement.

The problem is even more acute with respect to public institutions such as hospitals and schools. To see this, suppose that in return for returning land, the state, which previously owned hospitals, schools, and other public institutions upon the land, receives monetary compensation that Christopher Kutz calls "maximalist."[79] Cash compensation claims are maximalist when they represent "the total monetarized value of the loss suffered by the former property owner."[80] Such a claim includes at least the fair market value of the property at the time of return, plus, for any commercial assets, lost income from the property since the time of return, plus lost income on that income.[81]

How feasible is a program of maximalist compensation for the loss of public buildings? Not very, it seems. To begin with, it may be necessary to discount, perhaps steeply, the market value of the property in question to take into account any political instability surrounding the return of land and accompanying compensation.[82] Knowing just how much discounting is warranted will be quite difficult. Moreover, assessing any income on the property, and income on the income, leads us back into the counterfactual dilemma discussed earlier. We would need counterfactually to posit imagined rates of interest and levels of taxation in order to calculate the entitled amounts of income.[83]

A more fundamental problem is that the state that is obligated to pay such compensation may be fiscally unable to carry out its obligation. The state may be financially strapped, especially if it is newly established. Its resources already stretched too thin, it simply will not be able to pay monetary compensation at the levels likely to exist in most cases where large amounts of land have been redistributed.

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the case for attributing responsibility to that individual is difficult to sustain.

[79] Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277, 292 (2004).
[80] *Ibid.*
[81] *Ibid.* (footnote omitted). As I have already indicated, and as Kutz points out, such claims are not truly maximalist because the valuation does not include the subjective value of the property to the former occupant.
[82] *See id.* at 292-93.
[83] *See id.* at 293.

Even if the new state's fisc is able to absorb the costs of compensation there is a deeper normative issue to consider. Why should the victims of land redistribution be given priority over other possible claimants on public resources whose needs may well be greater than those who lose through land redistribution? Stated differently, why should restorative justice trump distributive justice? The apparently simple redistributive act of transferring title from *B* to *A*'s successors in fact has much more complex redistributive consequences. It inevitably involves trade-offs between the victims of unjust land appropriation (or, more likely, their descendants) and other persons who suffer from lack of adequate housing, medical care, education, and other basic needs. From the perspective of distributive justice these other persons may well have far stronger claims than the victims of past land appropriations. Under Rawls' maximin principle, for example, the just distribution of the state's scarce resources would favor these others persons over the victims of land appropriation if, as is quite possible, those persons are the least well-off in terms of welfare-conferring resources.[84]

But this analysis is too quick. It overlooks the possibility that the two perspectives, restorative justice and distributive justice, may co-exist. Indeed, a simple version of Lockean theory would consider their relationship in just that way. There is no conflict between the two perspectives because they perform different tasks: Distributive justice fixes entitlements and restorative (or corrective) justice protects those entitlements against unjustified encroachments.[85] Under ideal background conditions, in which the former occupants' holdings were all legitimate, restorative justice would take over and demand a return of holding to the status quo ante. But the Lockean scenario seldom works out that way because we live in a non-ideal world in which background holdings commonly are tainted by one or another form of injustice. Under such circumstances the land appropriations of the past do not trigger restorative justice because there is no Lockean injustice to begin with. As Christopher Kutz has observed, the difficulty that the Lockean perspective has in generating a coherent normative framework in the messy world in which we live "is one among many reasons for preferring a more robust conception of distributive justice."[86]

A robust conception of distributive justice need not demand that we ignore restorative justice considerations altogether. Broadly egalitarian theories, for example, can leave room for restorative justice claims. Despite the fact that, from the perspective of most theories of distributive justice, some people in the U.S. have more than their fair share of holdings, even very wealthy individuals are entitled, as a matter of justice, to some form of compensation when others injure them.[87] The reason the two forms of justice ─ distributive and restorative ─ are compatible with each other is that they regulate different sets of relationships. Distributive justice regulates the relationship between the state and its citizens. Its subject is, as Rawls noted, the "basic structure" of society.[88] Restorative, or corrective, justice, on the other hand, regulates relationships among citizens themselves. Stated differently, restorative, or corrective justice, is horizontally-focused, while distributive justice is vertically-focused.

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[84] *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).
[85] *See* Kutz, *Justice in Reparations*, *supra*, at 298.
[86] *Id.* at 298-99.
[87] *See* JULES COLEMAN, RISKS AND WRONGS 350-54 (1992).
[88] *See* RAWLS, A THEORY OF JUSTICE, *supra*, at 6.

Yet, although distributive and restorative justice are distinct from each other in the way just described, they are not entirely independent of each other. The justness of restorative justice claims must be evaluated in light of the justness of the underlying pattern of distribution of actual holdings. Stated differently, a restorative justice scheme that we take to be just presupposes and rests upon a just and adequate distribution of holdings.[89] A society whose existing distributive scheme of basic resources is fundamentally unjust or inadequate cannot justify satisfying historically-grounded claims on resources. This means, for example, that if a state that is contemplating returning land is one marked by high levels of poverty through its citizenry, then a basic precondition for restorative justice has not been satisfied. The state's first obligation is to attend to the fundamental needs, including land distribution, of its own members. The same holds true if the state's aggregate level of wealth is sufficient to meet its citizens' basic needs but land and other resources are so maldistributed that extreme levels of poverty prevail throughout a significant segment of the population. A state is justified in meeting its restorative justice obligations only if doing so will not jeopardize its ability to meet its distributive justice obligations to its own members.

## CONCLUSION

It is time to wrap things up. I do so by stressing that it will not do simply to say "What's past is past" or "Let sleeping dogs lie." The dogs may not really be sleeping, only pretending to sleep, and in any case dogs wake up eventually. The point is that an injustice was done, and it needs to be acknowledged and dealt with. Of course, how we should deal with it is precisely the question before us. My objective here has not been to provide a definitive answer to that question but rather to point out some reasons to hesitate before leaping to a solution that seems superficially appealing. Land reparations ─ returning land that we consider to have been unjustly taken from peoples in the past ─ may appeal to our instincts for justice, but as I have tried to show, it is far from clear that this is what justice requires in order to acknowledge past injustice and to make amends. Here, as elsewhere, justice turns out to be a very complex matter.

[89] *See* Kutz, *Justice in Reparations*, *supra*, at 301.