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Righting Old Wrongs*

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> This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.
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> —WALTER BENJAMIN (1940): 257–58

The Burgeoning of Efforts to Right Old Wrongs

An urge to reform the past seems to be in the air. I cannot claim to have a representative sample of such undertakings, but my unsystematic canvass reveals a rising tide of interest in reforming the past. Indeed, it is a characteristic feature of our times.

In 1972, 167 black soldiers who had been dishonorably discharged in the 1906 Brownsville Affair were exonerated; only one of the discharged soldiers was alive at the time of the exoneration.[1] In 1974, a class action lawsuit compensated the participants in the infamous 1930s Tuskegee syphilis study in which black subjects were not informed that they were

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suffering from syphilis.[2] In 1980 the Sioux received compensation for the 1877 taking of the Black Hills, which were set aside in 1868 for their "absolute and undisturbed use and occupation." That same year Congress enacted the Maine Indian Claims Settlement Act, giving Passamaquoddy and Penobscot Indians $81.5 million as compensation for being cheated out of their lands in 1794.[3] In 1986, the State of Georgia pardoned Leo Frank (lynched in 1915) because of his unjust conviction in the 1913 murder of Mary Phagan.[4] Congress enacted the Civil Liberties Act of 1988, making formal apology to Japanese Americans interned during World War II and providing compensatory payments of $20,000 for about 60,000 surviving internees. (Four years earlier a Federal District Court in California had vacated the 1942 conviction of Fred Korematsu, in effect, reversing the case that upheld the validity of wartime internment of Japanese Americans.) In 1989 the State of Wisconsin apologized to the Sac and Fox for the 1832 Bad Axe Massacre.[5] The next year Congress enacted the Native American Grave Protection and Reparation Act, mandating return by governments of bones and cultural items to tribes.[6]

These examples, which might easily be multiplied, are all from the past thirty years. Earlier instances are not entirely lacking. In 1922, 285 years after Anne Hutchinson's 1637 banishment from Massachusetts because of her religious beliefs, a statue of her was erected in the State House in Boston.[7] In 1959, a statue of Mary Dyer, hanged on the Boston Common in 1660 for her Quaker beliefs, was placed in front of the State House.[8] Even earlier, in 1886, the State of Connecticut made an official apology (and granted a pension) to Prudence Crandall, who had been persecuted by official action when she started a school for black girls in the 1830s. These earlier instances foreshadow a striking feature of the list of contemporary American instances—the extent to which it centers around repudiation of hatred, prejudice, and violence inflicted on racial, ethnic, or religious grounds. The contemporary list adds the theme of group entitlements to that of victimized individuals.

The proliferation of efforts to reform the past is not a peculiarly American phenomenon. Claims for apology or recognition or compensation growing out of old wrongs are part of the common currency of political and cultural life. In recent years, the Vatican pardoned Galileo (1984); Canada apologized to its Japanese and Italian citizens for their 1940s internment (1988, 1990);[9] East Germany apologized to Jews for the Holocaust (1990); West German companies began paying World War II slave laborers (1990); Japan apologized to Korea for brutal colonial rule (1991);

and a series of accords culminated in the revocation of the 1492 Edict of Expulsion of the Jews from Spain on its five hundredth anniversary in 1992. Since then measures to return property and uncover and/or punish the crimes of earlier regimes have become familiar parts of the social landscape.

Apart from claims that have been granted in significant measure, there are also numerous claims that are pending, including some that have been around for many years (like Greece's claim for the return of the Elgin Marbles). Others are relatively new on the scene, like the claim for reparations for American slavery, which stands out for its scale and political salience, and also because it raises so abundantly the perplexities of righting old wrongs.[10] What does it mean to do justice in the face of such old and large wrongs? What can be done? What should be done? What are we obligated to do? Are there hidden costs or unexpected benefits that flow from such enterprises?

Ordinary Justice and Old Wrongs

I want to approach these questions by considering current and emergent practices of righting old wrongs as they spin off from our ordinary practices of remedy in cases of fresh wrongs. I emphasize that I do not regard these ordinary practices as constituting a regime suffused by exemplary justice disturbed by occasional eruptions of injustice.[11] Instead, they are part of a world in which injustice—undeserved human suffering, unrewarded virtue, and unpunished evil—is pervasive and institutionalized. These legal practices, our technology of remedial justice, are weak and flawed instruments of justice, but they are the best we have.

In addition to underfunding, poor design and management, corruption, bureaucratic torpor and all the other infirmities that beset public institutions, there are inherent constraints on the extent to which legal institutions can realize our ideals of justice. These inexpungeable limitations of human justice include at least three that are relevant to our inquiry:

1. Because it is accomplished piecemeal over time, remedial justice inevitably disturbs existing expectations: "Every social change, every new law, every forced alternation of public rules is unjust to someone. . . . To redress one injustice is to create another."[12] It is hoped, a lesser one.
2. Providing remedial justice consumes resources. As a consequence, the resulting distribution of benefits or entitlements cannot be

aligned with the underlying, substantive merits as suggested by the principles of compensation or punishment that animate the process. And since these costs are substantial, there is never enough remedial justice to answer all claims; justice has to be rationed, creating new disparities and deprivations.

3. Remedies for injustice are typically administered by institutions. But these institutions embody a dilemma. As such a justice institution becomes differentiated, complex and maze-like in order to operate with increasing autonomy and precision, the justice institution itself becomes a source of new imbalances. Some users become adept in dealing with it; those with other advantages (like wealth, organization, or knowledge) find that these advantages can be translated into advantages in the legal arena. There arise new differences in access and competence—thus law itself may amplify the imbalances it set out to correct.[13] Even though these institutions are designed to secure justice, they are embedded in, permeable by, and responsive to features of social life, that reflect disparities of power, wealth, and knowledge.[14] The dilemma is that elimination of these linkages would isolate these institutions so that they would be less responsive to the changing needs and values of the society.

For all their imperfections, the law's familiar remedial practices offer us a place to start. We may ask whether they are useful in assessing and responding to claims arising out of old (and often very large) wrongs.[15] I am not urging that models drawn from private justice and current remedies are the most appropriate for old wrongs—or that they are the only kinds of redress that might be applied. But they are a repository of questions about doing justice that help us to think about justice on a large temporal scale.

For the most part, the ideas of vindication and compensation of old wrongs track legal notions of property, tort, contract, and criminal law. But in one important respect they depart from ordinary legal arrangements: they elevate the themes of memory, witness, and redemption over the closure and finality that are a major component of the law.

Our ordinary practices of justice are based on the notion that injustice and remedy should be closely associated in time. Indeed, the commonplace commands our ready assent: "Justice delayed is justice denied." True justice, this adage reminds us, is virtually instantaneous. For with the passage of time, evidence deteriorates, witnesses scatter and forget,

making it ever more difficult to recreate an accurate account of events. And changing circumstances make adequate remedy more difficult as the victim's deprivations accumulate. So promptness is viewed as a major element of the quality of justice and we devote resources to expediting cases.

Yet the ordinary administration of justice tolerates some passage of time. Claims are often not made immediately, especially where the claimant is weak or ignorant. We are committed to due process; we are counseled to let justice take its course and cautioned against a precipitous "rush to judgment." In the interest of having institutions that can administer justice on a routine and regular basis, we are solicitous of the convenience of judges, lawyers, and witnesses. (In the United States, a period of a year or two is considered normal for a case in our courts—appeals may stretch this by several more years.) Sometimes we try to make up to the victim for the delay by awarding interest or back pay. But the ordinary administration of justice assumes that some delay is unavoidable and lets the cost of it fall on the claimant/justice-seeker.[16] But suppose the claim and requested remedy are separated from the original violation not by months or years, but by decades or centuries? In the ordinary administration of justice, we have statutes of limitations that cut off old claims and rules of prescription that extinguish old rights. Difficulties of ascertaining the truth about ancient events reinforce a strong policy of securing current entitlements by closing issues, leaving things at rest (found in the doctrines of adverse possession, prescription, res judicata, collateral estoppel). The law formulates an authoritative, unchallengeable world of entitlements by writing over all prior claims. It is this impulse to accept present distributions and get on with things rather than revisiting old claims that is challenged by the project of righting old wrongs.

These claims regarding old wrongs raise a series of perplexities. Is it only the technical feasibility of remedy that declines with the passage of time, or does the deservingness of victims decline as well?[17] Does the notion of what is an appropriate remedy change as the time scale is lengthened? Addressing these brings us to basic questions about how much justice is possible, how much we want, and how much we can afford.

If we consider all the wrongs and injustices that have and can and will happen, would each of them deserve to be remedied in a world in which remedies are not costless? Remedies cost in time, expense, attention, and lost opportunities, so all injustices cannot be remedied. How do we

choose those deserving of remedy?[18] Is the passage of time a good basis for abandoning some candidates for remedy?

A Matrix of Old Wrongs

Rather than take up these questions in the abstract, I propose to construct a matrix for analyzing these questions, drawing on some of the cases of old wrongs that have appeared on the public agenda in recent years.

THE CONTOURS OF THE WRONG

Wrongs differ along many dimensions, including the following:

1. Was the injustice compressed into a well-defined time period—like the expulsion or the dismissal of the Brownsville soldiers? Or was it a continuing social practice like slavery or the exclusion of black players from organized baseball?
2. Was the injustice a single discrete event (stripping Jim Thorpe of his Olympic medals), a series of events, or a long, cumulative social process (e.g., the subordination and oppression of the untouchables in India, the oppression of women in many societies)?
3. Was it the doing of a specific agency or did it reflect a diffuse social process? Was there sponsorship or approval by government or other authorities that represented the whole society? (Or even several societies, as with the slave trade.)
4. Was the wrong the manifestation of a deliberate policy like the Holocaust or slaveholding regimes? Or was it an inadvertent result of carelessness, like the Johnstown flood?
5. What was the moral status of the act when it was done? Was it a violation of familiar norms? Was there an acknowledgment that it was wrong? Or was it done under a claim of rightness that seemed self-evident?

Obviously there are many intermediate points on each of these scales.

WRONGDOERS

In some cases the wrongdoers are still around (e.g., the International Olympic Committee that took away Jim Thorpe's honors). But in examining older and more diffuse wrongs, the question is whether there are identifiable and credible surrogates for the perpetrators. In the case of

the internment of Japanese Americans, the target was not the officials responsible, but the government that promulgated the unjust policy. But who are the contemporary representatives of the wrongdoers in the case of American slavery? Suppose we could identify a class of wrongdoers in the past (slave traders, slaveholders, officials who enforced the system, etc.). Who are their contemporary representatives? One possibility is all of their descendants. But presumably biological descent is not the relevant test. Injustice is often registered in the gene pool: among the descendants of American slaveholders are many American blacks. Only those descendants who inherited the social identities of the wrongdoers? How about descendants of whites who were not slaveholders? Or of those whites who came to America after slavery was abolished?

Presumably, we might regard those ancestors as themselves participants in the caste order of invidious exclusion of blacks and beneficiaries of that order (advancing more easily since blacks were excluded from desirable occupations). Are beneficiaries of unjust practices as liable to remedy them as active perpetrators? (Is failure to make such a distinction itself a new act of injustice?) What this discussion clarifies is that the relevant continuities are social rather than genetic. It is the inheritance of advantage or disadvantage (including advantaged/disadvantaged social identities) that should count, not the inheritance of protoplasm. How is such liability affected by the existence of other perpetrators—for example, African tribes that captured slaves and sold them to Europeans? Is the liability of those tribes dissipated by later colonization and failure to prosper? Is liability here "joint and several" so that the current representative of any wrongdoer should be responsible for the whole of this vast wrong? Would there be a right to have the burden shared by other wrongdoers (i.e., by their present representatives), analogous to the right of contribution enjoyed by parties liable for ordinary wrongs? How about relative culpability? In the Expulsion story, what about the even harsher treatment that Jews from Spain received after having resettled in Portugal?

VICTIMS/CLAIMANTS

A similar set of ramifying complexities are encountered in identifying the victims. In some instances, there are living individual victims of the original injustice—Japanese Americans who were interned forty-five years earlier; black baseball players who never made it to the major leagues; the surviving veterans of the Brownsville Affair, who had been discharged sixty-six years earlier.

But the effects of injustices are not confined to the immediate injury or to the persons of the victims: unjust discharge or taking of property may impair their future opportunities and constrict the life chances of their children. As these effects ramify over time they are particularly difficult to specify since there are so many intervening variables to confound the causal link between the original injustice and the deprivations of living individuals.

When the immediate victims are dead, can we find identifiable and credible surrogates for the victims? In a general way, we think of their descendants. Sometimes there are distinct, specific descendants—for example, the great-grandson of the black Civil War soldier slain serving in an all-black regiment, but not paid the $14 monthly received by white soldiers. The great-grandson seeks $237 (the difference in pay) plus interest—estimated as $345,000 at 6 percent compounded.[19] Presumably, whatever entitlement this great-grandson has is shared by all of the soldier's biological descendants. Are they more deserving than blacks in general? And is biological descent a sufficient test? Presumably, the only ones qualified are those who have maintained an identification with the original victims. This would exclude the many descendants of American slaves who have lived as white for generations (and the male descendants of oppressed women). Are remedies only for those descendants who themselves suffer from disabilities traceable to the original victimization?[20] But that may include others than descendants—for example, blacks who have come to the United States from Africa in this generation suffer from current discrimination—they may find it difficult to get a job, housing, or a taxi. Is the victim group defined in terms of current invidious treatment or the cumulative effects of the original injustice?

The problems of representation are exemplified in disputes about the recovery from museums of Native American remains and artifacts. In 1990, Congress enacted the Native American Grave Protection and Reparation Act, which requires that institutions identify lineal descendants or tribes in cases where any remains, burial goods, or sacred or culturally important artifacts appeared to be affiliated with that individual or tribal group.

Just how close a nexus is required between original victims and present claimants? And how is that to be established? Although they may share some larger social identity, all Native Americans are not surrogates for one another. There may be questions about which of the competing present claimants is an appropriate representative of the original vic-

tims;[21] or there may be a question of whether a claimant group is sufficiently continuous in identity with the original group. Thus the governor of Illinois refused to turn over skeletons from a 900-year-old burial mound to current tribes because the Mississippian tribes ceased to exist hundreds of years ago. The claimants contended that "All tribes have a common ancestry and history and . . . the display disrespects their religious beliefs."[22]

Identities are not fixed and natural, but socially constructed. Identities like "Native American" or "Hispanic" are not biological categories, nor are they natural facts like geological formations or rainfall, impervious to fiat and uninfluenced by understanding. But neither are they the artificial products of policy, like courts, legislatures, or corporations, that can be readily dismantled or altered by human design. Like language usages, they have an intermediate character, combining natural givenness with some malleability. Social identities are not innate qualities that inhere in or emanate from the group or individual; instead, they are asserted to, imposed by, and negotiated with various other components of the society.[23] As this shows, claims are put forward in terms of identities that may have emerged subsequent to the historical injustice in question. That is, new "composite" identities like "Native American" or "Hispanic" may be created in the claiming process. Since identities can be projected backward as well as forward, contemporary accounts of old wrongs may not only turn on standards unknown at the time, but involve identities that had not yet emerged.

Are we content with a claimant who is the material or cultural legatee of the victim or do we require that the claimant is being victimized presently as a result of that earlier victimization? If we are looking for injury now as well as injury then, we come to the question of ascertaining the causal connection between the original violation and any present injury. As time goes on, there are more intervening events that can diffuse, deflect, or mitigate the effects of the original injustice, so that the extent to which present conditions can be attributed to the original violation diminishes.

Finally, suppose we find more than one set of qualified victims? Suppose there are layers of violations and victims? That is, victim A seeks restoration of the situation at time T1 when he possessed some good; victim B seeks restoration of the situation at time T2 when he was in possession of that same good. This situation is pointedly present in contemporary Hungary, where a commitment to compensate people who

were deprived of their property by the communist regime led to questions about earlier layers of expropriation. The following hypothetical case was raised in Parliamentary debate: "A Jewish shopkeeper lost his store in 1939, when Hungary's quasifascist Government began to curtail Jewish property rights. The store was then owned by a German, who in turn lost it shortly after World War II, when many ethnic Germans, held collectively accountable for the Nazi occupation in 1944, were driven from Hungary. The next owner, an ethnic Hungarian, lost the shop in the late 1940s, when the Communist Government embarked on successive nationalization campaigns."[24] The layered quality of wrongs and claims figures prominently in the claims for the restoration of lost nations. Such claims seek to restore the status quo ante a conquest, massacre, or expulsion.[25] They seek restoration of an earlier status quo rather than, as in the case of the Japanese internees, a resolution or reconciliation that does not involve undoing or reversing the original dislocation/displacement.

Layers remind us that claims to remedy the past are not necessarily compatible; not all can be granted. Nor are they necessarily deserving. In response to passage in 1996 of a controversial U.S. law permitting sanctions against those who trade with Cuba, two Canadian MPs proposed a bill to enable descendants of Tories to claim compensation for lands seized from their ancestors during the American revolution.[26] This tongue-in-cheek claim is a prototype for the endless number of historic grievances that match the formal requirements of a "righting old wrongs" claim, but that have so far not attracted organized and sustained support.

FORUM

For the most part the forum in which these claims are put forward are governmental rather than private,[27] political rather than judicial.[28] The making of such a claim frequently acknowledges the remedies and standards of the "majority"—the group that prevailed, the historical winners (often the "wrongdoer"). That is, the wrongdoer is being asked to live up to its standards—to standards that affirm its best view of itself. So in a curious way claims about old wrongs can be an act of affiliation, joining. Such claims can say, "Since our lot is with you, we ask that you apply your avowed standards to your own actions."[29] This relinquishes or downplays any claim to independent jurisdiction, unlike nationalist claims for separation, where the standards invoked are those of the "international community" or a third party.

STANDARDS

A claim must be deserving according to contemporary standards. Claims that fail this test, even though based on solid legal entitlements of the earlier time, attract little support. Few would support the claims of colonial powers to repossess colonies wrested from them. Or the property claims of slaveholders. Some rewritings of entitlements are based on a broad agreement that they are a move toward higher standards that justify disappointing what were once considered "reasonable" expectations.

By what standard is the determination of wrong or injustice to be made? Some instances of righting old wrongs involve acts that were clearly regarded as wrong at the earlier time. Take, for example, the murderer apprehended many years later after leading an exemplary life. Has the passage of time weakened the claim to punish him? Frequently we think not. But in many of these cases, what is now regarded as wrong was at the time done under a claim that it was right—sometimes a secure claim confirmed by central social institutions, other times a more debatable and controverted claim. The new judgment on old acts may turn on a reassessment of the facts (as in the Japanese internment case) or it may involve a reversal in the moral valance of the original act, so that what was viewed as good is now seen as bad (e.g., the exclusion of blacks from major league baseball). Or consider the turnabout that is involved in the restoration of Native American skeletons. In the nineteenth century these were collected as scientific specimens; now they are restored as "ancestral remains." Behavior that was once commendable scientific collection is now viewed as desecration and grave-robbing.

Often doing justice involves emergence or clarification of a new standard. Acts may be evaluated by criteria that were not accepted or authoritative when the acts took place. Thus, the advent of religious tolerance led to Anne Hutchinson and Mary Dyer being redefined as heroic victims of persecution rather than obnoxious heretics. Those who condemned them, something that seemed entirely acceptable at the time, were themselves condemned for intolerance. When we raise (i.e., change) standards, we face a dilemma of choosing between ex post facto imposition and affirming the unreformed past.[30]

In most cases we do the latter. Consider the Johnstown Flood, in which a poorly designed dam constructed at a private vacation resort burst and flooded the city, at a cost of over 2,200 lives. Our contemporary notions of care and accountability are clearly violated, although ef-

forts at the time to obtain a civil remedy were unavailing.[31] The "visitation of providence" of a century ago would be perceived as an injustice today.

PROPOSED REMEDY

Typically, campaigns to right old wrongs are mounted with a specific remedy in mind. Various sorts of remedies may be thought to be feasible or appropriate. In many instances what is sought is historical vindication: some form of acknowledgment of the wrong (or recognition of the underlying entitlement that it erased) and apology for the injustice. This can take various forms:

Doing the right thing belatedly (e.g., inducting black players into the Baseball Hall of Fame). This leaves unremedied the loss suffered in the interval. It also diminishes in effect after the lifespan of the victim.

Setting the record straight (e.g., the posthumous pardon of Leo Frank, the various campaigns for revision of history books).[32]

Apology: Formal ceremonies of apology may be employed to acknowledge the wrong, as in the State of Wisconsin's apology to the Cherokee for the 1832 Bad Axe Massacre. Apologies have to be seen as sincere and adequate. In 1984 the President of South Korea, seeking an apology for the brutal Japanese occupation of his country, was told by Emperor Hirohito of Japan that it was "regrettable that there was an unfortunate past between us," a formulation spurned as inadequate. In 1990, his son, Emperor Akihito, expressed his "deepest regret" for the sufferings that Japan had brought about in Korea.

Vindication may take a palpable form of public commemoration—a public holiday (e.g., the Martin Luther King birthday holiday) or, more commonly, naming of streets and schools, historical markers on highways or in national parks,[33] erection of statues. Thus statues of religious dissenters Anne Hutchinson and Mary Dyer were erected at the Massachusetts State House. We see many instances of the decommemoration of villains by removal of statues of Stalin, Lenin—as a mark of respect for their victims. Where those who are heroes to some are villains (or at least representatives of villainy) to

others, the politics of memorials and symbols can be heated, as with Confederate monuments and flags throughout the American South.[34]

All of these redistribute blame and honor, but involve no material transfer to victims. But in other instances there are important material as well as symbolic transfers.

One frequent pattern is the claim for the return of the property object in dispute (land, ancestral remains), typically without compensation for the intervening time. (Most nationalist claims are of this kind—give us back sovereignty, forget about the interval.)

Token payment: Another frequent pattern involves distribution to victims of a non-equivalent but more than trivial sum as partial compensation for material losses (thus the $20,000 payments to Japanese-American internees). Such material transfers may act as a seal of seriousness, significantly enhancing the apology. As a Japanese-American spokesman said, "The checks are simply a token" warranting the sincerity of the admission of wrongdoing.

Programmatic reconstruction: Occasionally there are attempts to devise a program of beneficial treatment for what are now perceived as victim groups. The most elaborate example of this is India's policy of compensatory discrimination, which affords preferential treatment to the untouchable and tribal peoples.[35] Affirmative action programs in the United States contain unacknowledged reparative elements.

Full reparations: There are rare cases in which proposals are advanced to provide a remedy that fully compensates the victim, "makes whole" the injury, including all intervening and cumulative losses. This raises prodigious questions of calculating compound interest, evaluating nonmaterial claims, and assessing possible offsets for mitigating benefits.[36]

Symbolic remedies preclude the tough questions of identifying victims and wrongdoers for distribution of tangible benefits. They also avoid measuring injuries and wrongs. So symbolic remedies not only provoke less conflict between claimants and others, but also among claimants and among the others. This is less so to the extent that the honor implicated by the symbols is a zero-sum thing, so that something is taken away from those labeled wrongdoers that is not offset by the credit they receive for generosity, fairmindedness, and the like.

When righting an old wrong involves some material transfer, the question arises whether the remedy should be distributive or collective. Should payments be given to individual recipients or to an institution, association, or government as their representative? To the extent that remedies are distributive, should they be individualized (proportionate to the injury or suffering undergone by each individual recipient) or should distribution be formulaic (with all members of the victim group given a fixed amount, as in the Japanese-American internment case)? An intermediate solution, sometimes used in disaster settlements and in class action litigation, creates several layers of beneficiaries, but makes no attempt to match compensation to individual loss or suffering within these broad classes.

The Significance of Righting Old Wrongs

WHY NOW?

If, as I believe, there is more righting old wrongs than there used to be, the question arises, why? The industrialized world is more affluent; we can afford to salve out consciences without reducing our level of amenity. But why do our consciences point in this direction? The answer is surely complex, but let me mention three features of the current scene that strike me as importantly implicated in the popularity of reforming the past.

First, there is the general extension of the frontiers of empathy in late twentieth-century society. Although the pattern of response toward suffering is very mixed,[37] there has been a general softening of manners and enlargement of empathy, marked by the decline in suffering as entertainment and the virtual elimination from public discourse of pejorative expressions about ascriptive groups.[38]

Second, people are more critical. There has been a decline of confidence in established authorities, in government and business and religion[39]—a willingness to concede that they may have done wrong.

Third, critical views are combined with optimism about institutions, including institutions of remedy. The success of science and technology in eliminating many perils and unpleasantnesses has generated expectations that more of life's unfairnesses and undeserved troubles could be remedied.[40] The decline in resignation and the spread of a sense that matters can be made right is dramatized by the succession of "civil rights" campaigns. This optimism about justice, buoyed by a sense of

progress, combines with high expectations of institutional performance to inspire projects to redeem the past.

This optimism about the possibilities of corrective justice may conceal a strain of pessimism about comprehensive distributive justice. It is a swing away from the "enlightenment project" of universalistic planning for a just future. (As David Luban says, we seem to find more resonance in our oppressed ancestors than in our happy grandchildren.)[41] Distributive justice is forward looking, but cool, reflective, detached; corrective justice is warm but retrospective, emphasizing continuity and identity—not only the damaged identity of the victim, but the identity of the wrongdoer stained by the injustice. The righting old wrongs project is a conservative utopia. It holds out the hope that if we can right old wrongs we can arrive at a harmonious resting place. But stopping the flow of history is as illusory as fixing up the past. The best we can do is allow ourselves to be sensitized by contemplation of the past to the traces of past wrongs that infect the present according to our own standards.

WHY THIS? SELECTIVITY AND THE VEHICLES OF MEMORY

As claims to reform the past become a familiar part of public discourse, we can discern some patterns of selectivity. Some of the injustices of the past attract an interest in redress; others do not. Among the claims put forward, we find a heavy emphasis on instances of invidious treatment of ascriptive or descent groups. The injuries of class, on the other hand, do not inspire campaigns to reform the past. Our contemporary standards lead us to harsh condemnation of the absence (or inadequacy) of the remedial action in incidents like the Johnstown Flood, the Triangle Shirtwaist Fire, and the Hawk's Nest Tunnel Disaster, whose victims have gone unvindicated and uncompensated (or egregiously undercompensated).[42] Such incidents sometimes inspire writers and historians to set the record straight, but none has inspired a campaign to apply contemporary standards in a new remedial process. Wrongs that affected victims on the basis of class, residence, age, gender, sexual preference, or political group rarely give rise to movements to right old wrongs. On the other hand, wrongs that entail kin-like ascriptive groupings, such as family, caste, tribe, ethnicity, nation, and religion, seem to get carried into the present more vigorously, charged with a sense of injustice and a thrust for redemption.

Why does memory work so differently, so that old "class" injuries lead to resignation, but in descent groups we find a desire to vindicate past

wrongs? The latter groups inspire moral entrepreneurs, organizers who devote themselves to investigating, publicizing and campaigning about old wrongs. But that only restates the question: why is it that such entrepreneurs can recruit supporters? Of the various identities that each of us carry, these primordial identities are easier to mobilize. They seem to be carriers of memory that can be organized around feelings of injustice and the possibility of redemption.[43]

Most "righting old wrongs" claims are put forward on behalf of minorities who are asserting their versions of the past against the hegemonic stories of the majority. They call on the majority for acknowledgment and for forebearence from taking advantage of its dominance. In many cases a period of noblesse oblige by the majority is followed by resentment from majorities that demand "parity" with minorities. Compact and dominant majorities, too, may be aggrieved and seek restoration of the past (Hindus in India, proponents of school prayer in the United States, anti-immigrant and nationalist movements in Europe). Once we proceed down the "righting old wrongs" path and confirm that government is the impresario of the drama of group honor and standing, the vistas of victimization open before moral entrepreneurs among majorities as well as among minorities.

THE CLAIMS OF HISTORY

The fashion for righting old wrongs tells us something about ourselves and the way we view our relation to history. To devote ourselves to these claims represents an impulse to confront and undo the injustice of history, to retrospectively and retroactively move the line separating misfortune and injustice so that all human depredations are seen as remedial injustice. It attempts to make history yield up a morally satisfying result that it did not the first time around.[44] It is as if we feel called to supply in our small way the providential character that we would like history to display.

But history contains an endless supply of injustices. We want to feel that we are sensitive to the claims that arise from them without committing ourselves entirely to the enterprise of retro-justification. Which old wrongs will secure remedies is a question about the future, not the past. In part, it is a question of which claims will be articulated and organized. This requires not only entrepreneurs, but supporters. But which claims will be granted depends on the response of the larger society, in many cases cast as the wrongdoer. A positive response is more likely to be

forthcoming when the claim can be addressed by symbolic recognition or token payments rather than requiring major allocations of resources that arouse resistance from other groups. So the process can secure symbolic vindication for victim groups that are otherwise flourishing while it gives the majority a welcome sense of absolution (for example, the Sephardic Jews and Spain).[45] But where the symbolic claims are fused with material claims for massive re-allocation of resources, as in the campaign for reparations for American slavery, the outlook seems less hopeful. Could the majority secure absolution and closure at what they consider an affordable price?[46] Prospects are even dimmer in situations where remedy would impose a stigma of criminality on powerful groups (e.g., Latin American generals). So in many societies we find a powerful counterimpulse to let bygones be bygones, close the book, make a fresh start. This counterimpulse often draws on ideological bases similar to those of the movement for reparations (e.g., the claim for a "color-blind" fresh start in race relations in the United States invokes the same "equality principle" that animates the reparations claim).

The controversies about affirmative action programs in India and in the United States suggest the difficulties of using historic wrongs as a basis for distributing reparative entitlements and especially the perplexities of allocating responsibility to pay for these. If there is to be preferential treatment for a distinct set of historically victimized groups, who is to bear the cost? Whose resources and life chances should be diminished in the short run to increase those of the beneficiaries?[47] In some cases, the costs are spread widely among the taxpayers, for example, or among consumers of "diluted" public services. But in other cases major costs are imposed on specific individuals. Differences in public acceptance seem to turn on this distinction: publics in India and in the United States have been broadly supportive of preferential programs where the "cost" of inclusion is diffused broadly. Resentment has been focused on programs where the life chances of specific others are perceived to be diminished in a palpable way. Such remedial exactions may be seen as the conscription of an arbitrarily selected group of citizens to discharge an obligation from which equally culpable debtors are excused.

If our efforts to remedy old wrongs are inevitably selective, incomplete, and flawed—and much the same can be said about righting fresh wrongs—should they be abandoned? In toting up the costs and benefits, we should be careful not to ignore the human value in these sometimes quixotic, often ineffectual, always incomplete efforts to secure justice. As flawed as these efforts are, unreflecting acquiescence in past injustice is

worse. A patched and leaky vase may be less desirable than an unbroken vase, but it is better than a pile of shards. When it comes to justice, we don't have the choice of the unbroken vase. A patched and blemished world is the only one we can attain. The effort to do justice may inspire or teach or multiply or just keep us from giving up on the possibility. It is imperative for us, as a commentator on Levinas puts it, "to recognize the absence of justice where justice is postponed or deformed, without succumbing . . . to a belief in its non-existence."[48]

Notes

1. A group of 167 black soldiers were summarily discharged when they failed to identify those responsible for an armed raid on the city of Brownsville, Texas. On the affair, see Lane 1971; Weaver 1970. On the exoneration in 1972, see Jackson 1988.

2. Starting in 1932, the U.S. Public Health Service studied some 400 syphilitic men in Macon County, Alabama, without telling them that they had syphilis, that it was treatable, and that the tests administered to them were not treatment. When a reporter broke the story in 1972, there were Senate Committee hearings that led to "a complete revamping of HEW regulations on human experimentation" (Jones 1981: 214). No official apology or compensation was enacted legislatively. In December 1974, a class action suit was settled for approximately $10 million, giving $37,500 to each of the "living syphilitics" who were still alive and lesser amounts to other classes of victims (Jones 1981: 216–17).

3. Brodeur 1985.

4. A campaign by Jewish organizations to secure a pardon that would repudiate the anti-Semitic lynching culminated in a pardon that did not address the question of Frank's innocence but pardoned him because of "blatant due process violations" and because "the lynching aborted the legal process, thus foreclosing further attempts to prove Frank's innocence. It resulted from the State of Georgia's failure to protect Frank." (Dinnerstein 1987; Frey and Thompson-Frey 1988; Phagan 1987).

5. In October 1989, the Wisconsin Assembly passed a resolution, apologizing for the killing of hundreds of unarmed Indians perpetrated by U.S. soldiers, state militia, and armed settlers (Haas 1989). A ceremony of apology and reconciliation was held at the site in May, 1990 (Ball 1990; Nepper 1990).

6. Federal and state regulation is analyzed in Price 1991.

7. "Ask the Globe," *Boston Globe* (September 16, 1992): 82.

8. Koetke 1985.

9. When the issue of apology and reparations for the wartime internment and confiscation of property of Japanese Canadians was broached in the early 1980s, Prime Minister Pierre Trudeau rejected it because "I don't believe in attempting

to rewrite history in this way." He told Parliament: "I find it more important to be just in our time, for instance by giving jobs with the money to the people who are unemployed now rather than try to use money to compensate people whose ancestors in some way have been deprived." In 1988 Prime Minister Brian Mulroney formally apologized. Prime Minister Trudeau was apprehensive about an infinite regression of competing claims. There was a claim by Italians for their wartime internment; and claims by Ukrainian Canadians for internment during the First World War.

10. In 1990, Representative John Conyers introduced a bill to create a commission to study the effect of slavery on American blacks and to recommend remedies. (At the time, Conyers observed that reparations "may prove too complicated, and we may be too late.") A less cautious view is presented in Robinson 2000. The roots of this recurring claim go back much further. It became visible in the "contemporary" political scene at a Conference on Black Economic Development held at Wayne State University in April 1969, which produced a Black Manifesto dramatically presented at Riverside Church in New York a week later with a demand for the congregation's share of reparations to be paid by the white religious community. See Lecky and Wright 1969; Schuchter 1970.

11. Cf. Shklar 1990: 19.

12. Shklar 1990: 120, 121.

13. Galanter 1974.

14. Cf. Abel 1973.

15. And, we may ask, can we learn something from the problems of addressing those wrongs that might help us to modify everyday practices?

16. Ordinary justice embodies another familiar maxim, "Better late than never," which is a temporal version of "Half a loaf is better than none." It is a counsel of compromise that reminds us that effectuation of a principle comes only at the price of its partial abandonment. Cf. On the paradox of compromise, see Luban 1985.

17. Or does wrongdoers' deservingness of punishment decline with the passage of time? Consider the eighty-year-old war criminal who has been living peacefully as a good citizen for forty years. Should the past come to haunt him now? Or the murderer who escaped and led an exemplary life?

18. Society does not choose in a comprehensive, ordered way. The choices are posed by moral entrepreneurs who provide us with options in a figurative marketplace for justice.

19. United Press International, April 11, 1990.

20. In addition to those who carry the social identity of the original victim, there may be those (like Jewish *conversos* in Spain) who maintained an attenuated identity as descendants of the original victims, although it is less than full identification with the victim group.

21. Thus the Smithsonian awarded a collection of skeletons to a native Hawaiian group and refused to consider the claim of another group that "lacked suffi-

cient documentation to consider a truly competing claim that would be subject to review by the repatriation committee" (Andrews 1991).

22. Ayers 1991. The governor's successor announced plans to close the exhibit of 234 skeletons at a museum but refused to order the reburial of the skeletons and the building of a replica of the burial mound. "[T]he main negotiator for the Indians . . . called the compromise fair. But he said he was not sure if it met all religious requirements. Details of burial requirements vary from tribe to tribe, he said, and exactly how the Dickson Mound skeletons would be entombed has not been worked out" (*New York Times*, 1991a).

23. See Galanter 1984, chap. 10.

24. Bohlen 1991a: A-1.

25. Take, for example, the Baltic states. Similar claims may be made to establish a sovereignty that was never previously exercised, as in the case of Quebec, Palestine, or Pakistan.

26. Schneider 1996; Dale 1996.

27. But cf. Baseball Hall of Fame, International Olympic Committee. In the latter case, IOC responded to congressional resolution. See also the Bell (1987), particularly chap. 5 (pp. 123–39), titled "The Racial Barrier to Reparations," chronicling a fictional private foundation's reparations for blacks.

28. But cf. the role of judiciary as a catalyst and administrator in Native American land claims.

29. Disputes in which one of the parties is also the "judge" (like parent/child, boss/worker, etc.) are actually a very frequent configuration in the world of dispute resolution. Galanter 1986: 163.

30. If we resolve that from time *T* forward, we will prevent or correct *X*, then those who suffered from *X* before time *T* may complain that they are worse off than those who came later. We tell the pre-*T* victims they were "born too soon" (and the post-*T* violators that they were "born too late"). To avoid such invidious distinctions, we may make our new rule retroactive. But then people who innocently relied on the old rule will complain that they are being penalized while their similarly situated predecessors were not.

An example is provided by the practice of New York state legislators to use state employees in their political campaigns. In time, this practice, which was once acceptable, became regarded as unethical. A respected state senator was accused of having engaged in this practice in the past. In a letter to the *New York Times*, a retired legislator pointed out that "Senator Ohrenstein is being charged for actions that took place before the present view of what is right and wrong. The standards have been tightened and all to the good. But Fred Ohrenstein should not be hung in the marketplace as a symbol or even a deterrent" (Stanley H. Lowell, Letter to the Editor, *New York Times*, October 8, 1987, p. 26). Eventually, most of the charges in the 564-count indictment were dismissed by the Court of Appeals, which ruled that the legislature had a right to regulate its own

affairs; the remaining counts were dropped in the interests of justice" in 1991 (Sullivan 1991).

31. McCollough 1968: 258. "Not a nickel was ever collected through damage suits from the South Fork Fishing and Hunting Club or from any of its members." But Johnstown illustrates the difficulty of identifying the social descendants of such a victim group. Are the current citizens of Johnstown (or those living in the low-lying parts of the city) the appropriate surrogates? Or the descendants of those who lived there in 1889?

32. Vindication may be substantive or it may be confined to condemnation of earlier procedure. On the basis of a report finding that there was a "real possibility of miscarriage of justice," the governor of Massachusetts issued a carefully worded proclamation on the fiftieth anniversary of the execution of Sacco and Vanzetti, designed to remove "any stigma and disgrace" from their names, declaring, in part, that their "trial and execution . . . should serve to remind all civilized people of the constant need to guard against our susceptibility to prejudice, our intolerance of unorthodox ideas, and our failure to defend the rights of persons who are looked upon as strangers in our midst."

33. *New York Times* 1991a details the conflict over the proposed renaming of the Custer Battlefield National Monument to the Little Bighorn Battlefield National Monument. To proponents, this was the correction of an anomaly; to opponents it was an exercise in politically motivated historical revisionism.

34. These controversies are sensitively traced in Levinson 1998. (An instance at a remove from identity politics is the dispute about the removal of a statue of Senator Joseph McCarthy from the Outagamie County [Wisconsin] Courthouse to the County Historical Museum.)

35. Galanter 1984.

36. The notion of full compensation is itself morally ambiguous. The notion that justice is satisfied by the exaction from the wrongdoer of something equivalent to the loss inflicted by the undeserved injury of the victim (an eye for an eye, measure for measure, paid back, getting even) is flawed by the following paradox. Suppose our remedial process inflicts on *Y* a loss equal to the undeserved loss that *Y* inflicted on the innocent *X*. *Y* is losing because he deserved to lose, while *X* lost in spite of the fact that he did not deserve to. In some sense *Y* is ahead in this exchange, for his well-deserved loss is equated with the undeserved loss of *X*. By this equation, *X* is devalued—his loss without fault (victimization) is made morally equivalent to *Y*'s loss with fault. That is, *Y* gets the same "penalty" for doing something bad that *X* got without doing anything bad. To assert the equal value of *X* requires that the punishment/loss of *Y* be enhanced so that *Y*'s relatively greater loss reflects his greater culpability. Cf. Miller 1990: 301–2. But this is obviated when there is a transfer to the victim that makes him "whole." Thus civil compensation overcomes the paradox of equivalence that plagues the criminal law. However, factors like delay and insurance and compro-

mise because of transaction costs, often decouple the compensation from the judgment about wrongdoing. Law becomes "de-moralized." This is the basic argument for punitive damages (see Galanter and Luban 1993), which reflect a recognition of this paradox of equivalence in cases where there are gross or aggravated moral failings by *Y*.

37. For example, we begrudge anything to the poor while there have been major efforts to include the disabled. And cf. the recent movement to recognition of animal rights.

38. The enlargement of empathy does not mean more individualized, face-to-face dealings with such others; it has happened at the same time that more of our dealings with others are through media transmission, impersonal markets, and associations that span immense distances.

39. Lipset and Schneider 1987.

40. Friedman 1985.

41. Walter Benjamin, *Illuminations* (New York: Schocken Books, 1968). I am grateful to David Luban for directing me to this phrase.

42. On the inadequate remedies in these and other disasters, see Galanter 1990.

43. Is this is a permanent feature of these identities or a reflection of the way identities are organized at this moment in history—and here in America? To Americans, at least, class and residence seem to be accidental features, not intrinsic to the self. No one supposes that contemporary children deserve to be compensated for the victimization imposed by child labor a century ago. But, being a woman, or gay, or disabled—these are not transitional conditions, but are seen as intrinsic and permanent identities. They inspire campaigns for justice, but they do not mobilize claims for wrongs done to predecessors.

44. Ironically, it implies an extended responsibility to avoid acting toward others as an external force, but rather to recognize the humanity of the other and take responsibility for him. This occurs against the background of a long historical movement away from face-to-face relationships where we have to take the other into account in impersonal specialized relationships, through markets and administrative structures.

45. Interestingly, Spain's willingness to revisit the remote and symbolic question of the Expulsion contrasts with its decision after the restoration of democratic government to destroy the files of Franco's secret police and make a fresh start.

46. Cf. appeal of Charles Krauthammer 1990 that "[i]t is time for a historic compromise: monetary reparations to blacks for centuries of oppression in return for the total abolition of all programs of racial preference. A one-time cash payment in return for a new era of irrevocable color blindness."

47. In the long run, successful affirmative action may be an investment in human capital that provides net benefits for nonbeneficiaries as well as for beneficiaries. But in a society where standing vis-à-vis others is part of what people possess, such programs involve some taking.

48. Sugarman 1978: 220–21.

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