Let Bygones Be Bygones?

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In 1995 Queen Elizabeth II went to New Zealand to sign a bill settling the restoration of land wrongfully taken from the Maori almost 150 years previously and to apologise solemnly for connected injustices. Possibly encouraged by this so-called Waikato-Raupatu Claims Settlement Bill, the Jamaican government demanded reparations from the British government in 2002 for damages incurred during the transatlantic slave trade in the nineteenth-century. This time, the demand was turned down by the British administration with the argument that “governments today cannot take responsibility for what happened 150 years ago”.

Two diverging points of view both seem to make sense. On the one hand, the passage of time does not lessen the cause for complaint. If someone stole your stamp collection the theft was not just a momentary injustice in the past; since you are deprived of what is yours the effect of the injustice is ongoing into the present; indeed, the elapse of ever more time may worsen the infringement for you. On the other hand, it is generally acknowledged that claims for redress have temporal bounds: most people would not hesitate to confirm that you have a right to get your stamp collection back; there is, however, less certainty, about the right to redress of your grandchildren against the thief’s grandchildren who now have the collection and are themselves perfectly honest people in good faith. At some point the entitlement fades out.

These diverging intuitions can inspire two different views about the status of rights in general and reparation-claims in particular. I would like to call the first the Eternity View (EV) for it contends that claims to redress have the same moral force at any given moment in time. Nozick seems to advocate something like EV in Anarchy, State, and Utopia when he compares justice-preserving to truth-preserving transformations. This suggests that information as to when an injustice occurred is irrelevant for the question of rectification, at least if it is assumed that claims to rectification are transferable according to Nozick’s principle of justice in transfer. On this account, the fact that certain legal rights expire is due to purely pragmatic difficulties such as tracing back causal chains and legal transactions over a long period. The second position may be called Expiry-Date View (EXV) since it assumes that there are moral grounds for allowing entitlements to end other than by rectification or remission. Jeremy Waldron has argued – in a tentative way – in favour of the latter viewpoint in his article ‘Superseding Historic Injustice’.

In order to keep things simple, I will focus in this paper on the rectification of land right violations. The first question to tackle is whether the passage of time as such makes a difference for claims of the wronged party. We know that the passage of time as such makes a difference for the way in which people evaluate consequences. Human beings (but also a lot of animals) discount events in the future, and this is a source of some puzzlement in rational choice theory. Time preferences can render our evaluations
of future events inconsistent. Therefore, rational choice theorists argue that it is wrong to let the passage of time as such influence our decisions. So what about discounting past events, or to be more precise, past injustices?

Let’s assume that A and B were ordinary human beings in all but one respect. They are quite long-lived and, naturally, not everything they did in their long-lasting lives was morally in order. For instance, some 350 years ago A had wrongfully occupied B’s land and built his castle on it. This is a considerable stretch of time even for them. Their memory of this time is extremely vague in general but both of them have a lively memory of what B refers to as A’s ‘unforgotten theft’ whereas A prefers to call it B’s ‘unpardonable nostalgia’. A doesn’t deny that it was wrong to take B’s land which – as they agree – was B’s by all reasonable standards of just ownership. But in A’s opinion, it is too late to claim rectification. It is too late because no significant connection exists between them now and the world 350 years ago except that particular memory. A sold the castle some 180 years ago during a period of financial distress. It changed hands several times since and is now part of a global chain of hotels; most of the land serves as a golf pitch for the guests. The fact that A made millions by going public with a biotech-company recently has nothing to do at all with what B keeps complaining about since ages, says A. But this is exactly B’s point. B argues that he demanded rectification of A’s unforgotten theft right from the start and that A simply failed to do what he was morally obliged to. There is a continuous connection between then and now, consisting in B’s regular complaints about A’s failure to correct the injustice.

The fact that B registered permanent protests which it was morally wrong to neglect has certainly some weight. But A could object that continuity of complaints is not the right kind of continuity. He may argue that what matters is a continuity of his being violated. What really matters is a continuous link between B and some state of affairs the preservation of which is an essential interest of B’s. And this, A may say, cannot be true after 350 years. It is extremely unlikely that the land of which he was deprived so incredibly long ago is still among the things he takes a vital interest in. This is one of the points that Waldron makes in his ‘Superseding Historic Injustice’.

According to Waldron, moral rights are essential interests of individuals.¹ For instance, by appropriating an object, a person makes that object “a pivotal point in her thinking, planning, and action”.² Each individual has a substantial interest in a reasonable stability of these pivotal points. The need for reliability of pivotal points is so important that it is a basis for holding others to be under a duty to respect that interest. This is why we think that our possessions are – under appropriate circumstances – our rightful property. Let us call this the Essential Interest Theory of Historical Entitlement or simply the Essential Interest Theory.

The justification of the Essential Interest Theory for the Expiry-Date View goes something like this: Property rights have the function of protecting pivotal points in our “thinking, planning, and action”. What matters is the connection between an object and

¹ Waldron 1988
² Waldron 1992, 118
a life plan, and the continuity of this relationship. If this continuity had been interrupted by theft, for instance, the property right gradually loses its function. It would be infeasible to make property rights scalar items; therefore, standardised thresholds have to be defined, like the statute of limitations and rules of adverse possession. When this threshold is reached, the right to rectification is nullified.

It is easy to see how the Essential Interest Theory might be (ab)used to turn down reparation-claims of immediate victims of historic injustice. The claims of dispossessed persons get weaker in the passage of time since they will adapt to the loss at some point and, thereby, loosen the moral strings that once attached the stolen things to their lives. According to Waldron, this holds true even if they invest considerable time and effort in getting back what was wrongfully taken from them.

The original entitlement is based on the idea that I have organised my life around the use of this object, not that I have organised my life around the specific project of hanging on to it or getting it back.3

One of the problems with this version of the Essential Interest Theory is that it has an odd implication. If it were correct, a person could even lose the property right in things under her control. Assume, you had neglected the stamp collection in your side-board for decades. Would you gradually lose your property right to the collection? On the face of it, the Essential Interest Theory has to answer in the affirmative. But according to the Ordinary Conception of Property (OC) neglecting your stamp collection for decades does not weaken your property right; on the contrary, the opportunity to neglect the stamp collection is part of what your property right is.

According to A.M. Honoré, full ownership includes not only the right to possess, to manage or to use things. A person who enjoys full ownership is also free to consume, waste, modify or destroy what is hers.

Over and above, full ownership is characterised by the absence of term, that is, the indeterminate length of one’s ownership. Some of the moral claims, duties, obligations, powers, and immunities that constitute ownership can be weakened. But the absence of term is an indispensable part of the bundle of property rights.

Waldron’s proposal does not combine well with what Honoré has to say about the characteristics of ownership. In order to avoid this conflict with the Ordinary Conception of Property, a proponent of the Essential Interest Theory may say that there is a chance of your regaining interest in the collection sometime and that this opportunity should be protected. Even if a particular object is no “pivotal point in the thinking, planning, and action” of a person at the moment, she may well have an essential interest of keeping the chance to give it a more significant role later. But a similar argument could be made against temporal bounds of rectification-claims. Even if someone had adapted to some loss, she might reverse this adaptation after the loss had been corrected. Why should this opportunity not be protected? In other words, if the Essential Interest Theory

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3 Waldron 1992, 19
Theory is reconciled with the Ordinary Conception of Property in the way we just considered then it does not justify Expiry-Date View anymore. The fact that someone who has been wrongfully deprived of her property may adapt to the loss is no reason to nullify her claim to rectification; or, to be more precise, the fact provides no reason to nullify her claim if one wants to stick to the Ordinary Conception of Property.

There is a second argument against Waldron’s view of corrective justice. As we have seen, Waldron denies some claims of corrective justice even if a person has an ongoing interest in getting something back. The fact that B complains about A’s unforgotten theft since 350 years appears irrelevant to him. Says Waldron:

The original entitlement is based on the idea that I have organised my life around the use of this object, not that I have organised my life around the specific project of hanging on to it or getting it back.4

Waldron avers that a claim to rectification loses its base when the thing which a person had been wrongfully deprived of is no longer central to her life. It is certainly true that – as Waldron argues – the original entitlement to a plot of land cannot be based on the idea of organising one’s life around the project of getting that plot back. But the status of claims to rectification seems to be a different matter altogether. Claims of corrective justice are derivative. It is irrelevant for the validity of a derivative entitlement whether the conditions for a valid original entitlement still prevail. This must be clearly so when the original entitlement is assumed to be based on the idea of ‘pivotal points’. If A wrongfully occupies B’s land and builds his castle on it then B simply cannot organise his life around the use of that land anymore. Waldron may argue that the land can be still essential to B’s interest. For instance, this might be said when he tries hard to get it back. But Waldron seems to think that hanging on for too long to a blocked life plan is somewhat ‘unhealthy’. There comes a moment when it is better for a victim to reorient and let bygones be bygones.

Letting bygones be bygones may well be a prudent way of coping with losses in many a situation. However, it is hard to see how the increasing imprudence of hanging on to something which might be irretrievably lost could possibly be conducive to the annihilation of a moral claim to correction.

Surprisingly, Waldron gives no weight at all to the Aristotelian idea that corrective justice is bound to restore the moral order which had been disturbed by an unjust act. From this point of view, the refusal to make recompense adds to the initial injustice. It denies the violated party the status of an equal member of the moral order. The more time elapses without rectification the worse it is from an Aristotelian viewpoint. Thus, the Aristotelian conception of corrective justice is closely connected with the Eternity View.

One may suppose that Waldron’s position gives a better account of the existence of statutes of limitations than the Aristotelian conception. Statutes of limitations set temporal limits to the legal restoration of the moral order. But what precisely does this boil

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4 Waldron 1992, 19
down to? Does it mean that the legal system adopts the Expiry-Date View? Not quite. It is important to note that statutes of limitations do not imply that the injustice ends to exist after a specified temporal limit had been crossed. All what is implied is that a certain claim cannot be legally enforced anymore. In other words, statutes of limitations are not based on the idea that claims to rectification lose their moral standing by the pure passage of time. Quite the reverse, they leave this moral standing untouched. For this reason, the legal system is in this regard closer to the Eternity View than to Expiry-Date View. Claims to redress have the same moral force at any given moment in time.

One important problem of the Eternity View concerns the question whether a claim to rectification persists even when the claim holder dies. Those who take an Aristotelian stance insist on the restitution of the moral order. As long as no recompense had been made the moral universe is not in order. Therefore, the claim continues to exist even when the initial claimant died. But what is the answer of the Aristotelian if both – victim and victimizer – deceased.

Imagine that $A$ and $B$ would have had an ordinary life span and died some fifty years after $A$ had occupied $B$’s land. Let us assume that the family lines of $A$ and $B$ are well documented and rather stable. $X$ and $Y$, the last two descendants of $A$ and $B$ respectively, still live in the same valley as their ancestors. Social status and relative wealth of the two families remained more or less the same over the last three hundred years. Ever since his initial injustice $A$’s family line is prosperous and enjoys an agreeable life whereas $B$’s family line is impoverished and suffers many a hardship.

Does $Y$ have a morally valid claim against $X$?

What matters seems to be the causal connection. Most people acknowledge that those closely connected to the immediate victim have a right to rectification against the victimiser because of the effect which the injustice had on them. For instance, it makes a huge difference whether you grow up in a castle being the offspring of self-assured and socially respected parents or in a hut being the kid of angry, poor, and humiliated people. Thus, the injustice done to the owner $B$ does clearly affect detrimentally not only his own situation but also that of his loved ones. It makes, therefore, good sense to say that the close family members are morally entitled to uphold $B$’s claim after his death against $A$. Even if the injustice has had no dramatic impact on the life of the descendants most people agree that close family members, like spouses and dependants, have a right to rectification. The theft of works of art is a case in point. It is not likely that $P$’s childhood had been spoiled by her mother’s $M$ loss of a worthy painting. But $P$ would certainly be morally entitled to claim it back if she sees it hanging in the thief’s living room after her mother’s $M$ death. One may say that $P$’s welfare had been worsened by the thief since she would possess the painting if the normal course of events would have prevailed.

What does ‘the normal course of events’ mean here?

(a) The term could be understood as a counterfactual. It has to be asked how the world would look like without a particular injustice. If it can be made plausible
that some worse aspect of your situation had been brought about by the injustice then you are entitled to demand redress. This I call the *counterfactual understanding of an indirect claim*.

(b) The term could also be understood as a statement about a morally relevant relation between people. According to this approach, a close relative of a victim, for instance, has a moral claim against the victimiser irrespective of considerations about probabilities in a particular case. No information about the relation of the mother *M* and the daughter *P* is required in order to determine *P*’s claim to restitution. This I call the *relational understanding of an indirect claim*.

The relational understanding seems to me more appropriate than the counterfactual understanding. The problem with the counterfactual understanding is this: The more time elapses the harder it gets to determine what the normal course of events would have been like. For instance, what would have happened if *A* hadn’t stolen *B*’s land? It is far from sure that *Y* would now enjoy all the wealth, status, and comfort which *X* enjoys. His ancestors might have been less wise than those of *X* proved to be.

Do imponderables as these render *Y*’s claim invalid? Most people tend to answer this question in the affirmative when it comes to intergenerational cases. They argue that people like *Y* have no claim since no-one can tell where they would be now without some past injustice. It isn’t even certain whether they would exist at all. No-one is able to tell whether *Y* can really be said to suffer from the ‘unforgotten theft’. Maybe his situation would be even worse without it having happened.

But if we allow the annihilation of claims in intergenerational cases because of such imponderables then we should also allow the annihilation of claims in ordinary cases. If it were to count as a reason to say that *Y*’s situation would maybe even be worse without *A*’s injustice why would anyone ever be under a duty of corrective justice? It would far too frequent be possible to argue that no-one knows what the world would look like without a particular unjust act. A thief could refuse to give your car back because he – maybe – saved you from being involved in a serious accident.

There is another complication in the case of *X* and *Y* which deserves attention. Let’s assume, the family of *B* suffers from the effects of *A*’s injustice over many generations so that *Y* can be considered an indirect victim. But what is the significance of the connection between *A*’s injustice and *Y*’s situation in regard to *Y*’s claim against *X*? A lot of people are convinced that *Y* has no claim against *X* because *X* has done nothing wrong himself. According to them, it would be *unfair* to hold him accountable for an injustice that had been committed centuries ago. Moreover, they argue that *our sense of security* would be deeply disturbed if – in principle – we were obliged to correct all the injustices of history from which we profited. Past injustices – some of them out in the open and some of them not – would be like a sword of Damocles over many of our heads. The question when and how much will I have to pay for past injustices would plague too many people. Maybe this is the reason why the New York Times once wrote: “There is neither wealth nor wisdom enough in the world to compensate in money for
all the wrongs in history”. But no matter whether we prefer to plan our lives without such a sword of Damocles above our heads we have no reason to reject clear cases of injustices which are out in the open and a continuous source of complaint; this is even the case for injustices that took place in the distant past.

The crucial point is that X clearly profited from the ‘unforgotten theft’. He is unjustly enriched by his ancestor’s theft and, therefore, under a duty to return some of his ill-gotten advantages.

References