

**Philos 117AC, Fall 2017**

Setting the Stage:

Ronald Takaki, *A Different Mirror*, Ch. 4, “Toward ‘the Stony Mountains’”

Main text:

David Lyons, “The New Indian Claims and Original Rights to Land”

*Naïve argument:*

- Native Americans owned the land.
- It was wrongfully taken from them.
- In general, things wrongfully taken must be returned.
- So the land should be returned to the Native Americans.

*Naïve reply:*

- The present-day owners of the land didn’t themselves take it from Native Americans.
- Granted, someone in the past may have wrongfully taken it from Native Americans.
- But “somewhere along the line, custom and settled expectation generated new rights to the land.”

*Lyons’s response:* Both naïve views exaggerate property rights. Property rights are “thinner and much more flexible, or variable with circumstances.”

Consider inheritance as an example. It isn’t somehow built into property rights that you can always bequeath them to your descendants no matter what. Whether inheriting property is acceptable now depends on the circumstances now. Inheritance can lead to “concentrations of wealth and power,” which in turn leads to “bargains, agreements, exchanges, and social arrangements generally that are unfair.” This makes justice in transfer no longer possible. So assuming that there are no limits to inheritance, which is itself a kind of transfer, leads to an internal contradiction in justice in transfer. (Compare Rawls’s “first reason” for treating the “basic structure as primary subject of justice.”)

Suppose that *before* the arrival of Europeans, Native Americans owned the land. It doesn’t follow that they own it *after*. Suppose the Europeans were forced overseas by famine and meant no harm, although they needed to make use of the natural resources of the New World. Then the arrival of the Europeans changes the situation.

- Native Americans must share resources with them, on terms that make justice in transfer possible.
- Or perhaps Native Americans must cede private property in land to Europeans.
- Or perhaps Native Americans must abandon the system of private property in land altogether.

Now consider a more realistic case: Europeans wrongfully took the land, and present-day descendants of Native Americans continue to be mistreated. Descendants have:

- not only a claim to a fair share of the island’s land (like everyone else),
- but also a claim to compensation for being wrongly deprived of that fair share during their own lifetimes.
- However, these claims are not “normatively derived from [ancestors], that they inherited [ancestors’] original rights, or that their claims for compensation are claims for correction of wrongs that were done to [ancestors], as distinct from wrongs that have been done to them.”

“I suggest, therefore, that the current Indian land claims be viewed, not as invoking an original right to the land, a right that has been passed down to current Native Americans and that now needs to be enforced, but rather as an occasion for rectifying current inequities (some of which, of course, may trace back causally to the dispossession of Native Americans and the aftermath).”

Contrast a less realistic case: Present-day descendants have not themselves been mistreated, and they

enjoy a fair share. Lyons concludes that they have no further claim for compensation.

If the generation in question has been deprived of no part of its own fair share of the island's resources, if they suffer no continuing disadvantage owing to the legacy of the former system on the island, what relevant matter might have been overlooked? The wrong that was done to [their ancestors], the wrong that was never rectified, cannot now be corrected. That part of history is irrelevant to their current claims.

The problem seems to be that you can't compensate for wrongdoing when the victim of the wrongdoing no longer exists. And the individuals whose land was taken no longer exist. Later Lyons writes:

Some past wrongs can no longer be corrected, but some can. It may be impossible to compensate the ancestors of current Native Americans for wrongs that they suffered long ago, but it may be possible to compensate tribes for past wrongs done them.

So if the land belonged to the tribe, and if the land was wrongly taken from the tribe at  $t_1$ , then compensation at  $t_2$  may still be possible, since the tribe may still exist at  $t_2$ . Moreover, there may be a valid claim to compensation *even if the property rights of the tribe at  $t_1$  did not survive until  $t_2$*  (e.g., even if in the next generation the tribe had no property right in what was taken). For that doesn't change the fact that the tribe's *property rights in the land were violated at  $t_1$* , which is what the tribe is claiming compensation for.