THE NEW INDIAN CLAIMS AND ORIGINAL RIGHTS TO LAND

1. The New Indian Claims

Most Americans take this country's possession of its territory for granted, even though we all know that a great deal of its land was wrested by force or fraud from those who occupied it before the Europeans came—from Native Americans, who were dispossessed and either massacred or subjugated, the survivors displaced from their homelands and in large part consigned to live on shrinking reservations. The monumental theft of land that was involved in the European conquest of America is regarded as a neutral fact about the past with little, if any, practical bearing on the present.

It is that attitude that I ask you now to suspend, if you have not done so already. I assume here not only that the socially weak and disadvantaged condition of Native Americans in our society represents a wrong it is incumbent on us to right, but also that their dispossession may call for significant rectification. I shall concentrate on the latter issue because the serious possibility of radical social surgery to correct it must now be contemplated. The unthinkable idea of giving the land back to the Indians has suddenly become thinkable.

Early in its constitutional career, in 1790, Congress passed the Indian Nonintercourse Act, which requires that all transfers of lands from Indians to others be approved by the federal government. The Act was modified from time to time over the next forty-odd years, but it was not changed in any relevant respect, and it remains in effect today.[1] Its purpose is clear. It was meant to guarantee security to Native Americans against fraudulent acquisition by others of the Indians' allotments of land. Such guarantees were plainly needed. By 1790, expropriation had been practiced by

Europeans for nearly two centuries. Fraudulent land acquisitions by colonists had been a source of friction between them and the British government, which occasionally leaned towards protecting Native Americans. Security for Indian land was an important bargaining point during the Revolutionary War, when Indian support or at least neutrality was desperately needed by the rebellious colonists. The Nonintercourse Act of 1790 pledged federal security for Indian land holdings. Under it, the federal government is bound to act as guardian or trustee, overseeing all transfers of Indian lands, including those to states and other branches of government as well as to private parties.

Several suits that have recently been initiated by American Indian tribes for recovery of lands held by them when the Nonintercourse Act took effect in 1790 invoke this law. It is alleged that certain transactions by which lands were subsequently lost to them are invalid because federal approval was neither sought nor obtained in those cases. Those historical facts have not been contested.

A great deal is at stake. Some of the suits concern hundreds, others thousands, of acres. The largest tract, claimed by the Penobscot and Passamaquoddy tribes, amounts to twelve and a half million acres in Maine, comprises more than half the state, and has a value estimated at twenty-five billion dollars.[2]

In some cases, recovery of the lands is being effected smoothly, as in Gay Head, on Martha's Vineyard, off Cape Cod, where voters have approved the transfer of about two hundred fifty acres back to the Wampanoag. But that is an atypical case, since the land is undeveloped and has always been reserved for public use, which is what the Gay Head branch of the Wampanoag wish to secure it for, and about half the voting residents are Wampanoag descendants. More typical, perhaps, is the claim in Mashpee, on Cape Cod, where another branch of the Wampanoag is seeking to recover jurisdiction over about seventeen thousand acres, comprising most of the town of Mashpee, in an area that is currently undergoing rapid commercial development. That suit has thrown a cloud over land titles, freezing real estate transactions and development. Since Indian lands are not subject to local taxation, it has also disrupted the sale of municipal bonds. The professed aim of the claimants is reportedly not to dispossess current homeowners or active businesses. A prime objective is to regain lost hunting and fishing rights; another is to reassert control over the portion of the land that remains undeveloped, in order to inhibit such development. Almost all of the undeveloped land at issue in these suits, however, has

passed into private hands. Consider the situation in Maine. Although the claims there embrace populated areas, including whole cities and towns, they chiefly concern, and the tribes appear chiefly interested in, vast tracts that are not only undeveloped but are, unlike the Mashpee claim, unlikely to undergo any ordinary commercial development. For these are mainly huge forest reserves that are owned by paper companies and related interests.

These lands will not be returned to the Indians without a bitter struggle. At first the claims were not taken seriously. But once they began to receive favorable attention in the federal courts, current owners—especially the large landed interests in Maine—began to mobilize a political campaign against recovery by the Indians.

Their concern and the subsequent political maneuvering is understandable. Federal court decisions have affirmed federal responsibility in such cases, whether or not the federal government has officially recognized the tribes in question,[3] and they have dismissed as inapplicable the various standard defenses, such as adverse possession (which invokes a statute of limitations on claims), laches (which invokes a similar doctrine in the law of equity), and estoppel by sale (which would use the prior transactions as a bar to recovery).[4] The law seems clear: any title to Indian land that has been obtained without explicit federal approval is null and void.

It does not follow—either legally or morally—that all of the land in question must be returned to the Indians. But an observer might well suppose that some, at least, of the lands should be restored to them. I wish to examine that idea, not only to help us in determining what justice requires, but also to evaluate some lines of reasoning in support of and in opposition to it. For the most natural arguments that might initially be advanced on both sides of the issue—arguments that appear to be implicit in the rhetoric already surrounding these cases—center on what we, following Robert Nozick,[5] might call "historical" considerations affecting social justice. These cases give us an opportunity to scrutinize Nozick's conception of justice and, more generally, the idea of a right to property.

2. The Historical Entitlement Arguments

Suppose that one is aware of the current plight of Native Americans and its background. This might understandably make one sympathetic to the new land claims. But it is incumbent on one to ask: What are the moral foundations of such claims? How can they be

defended, not so much in a court of law as in the court of conscience?

One natural (one might almost say naive) way of reasoning about the claims is this. Native Americans were the first human occupants of this land. Before the European invasion of America, the land belonged to them. In the course of that invasion and its aftermath, the land was illicitly taken from them. The rightful owners of the land were dispossessed. The current owners lack a well-founded right to the land, which now lies illicitly in their hands. Ideally, the land should be restored to its rightful owners. This may be impractical; compromises might have to be made. But the original wrong can most easily be righted by returning the land to them—or by returning it wherever that is feasible.

This sort of argument turns upon the idea of original acquisition and, somewhat less directly, on the idea of legitimate transfer. Without original acquisition by the Indians, they might have had no rights to the land that dispossession was capable of violating. The argument concerns legitimate transfer by claiming that the transfers by which the Indians lost the lands were illegitimate.

The argument also assumes that rectification in these cases is, at least in principle, most straightforward. Injustice is corrected, justice is done, by restoring the land to its original and still rightful owners. That is a most important feature of the argument. For, if correct, it means that we can avoid getting bogged down in the uncharted territory of compensatory or reparative justice. Without that assumption, the problem has no easy solution, even in theory.

A frequent reply to the current claims is that one cannot simply ignore two hundred years of history. Those who now possess the land did not, in fact, secure it illicitly. They obtained it from others, by purchase, gift, and inheritance. To find illicit land transfers, we would have to trace the chain of transactions back several generations. But all of that is, by now, dead history. Somewhere along the line, custom and settled expectation generated new rights to the land. And it is these rights, not some long extinguished "original" right, that must now be enforced.

This line of reasoning has much in common with the usual defenses against claims whose foundations go far back into the past. The defense of adverse possession, for example, rests on the rule that one cannot validly reclaim property after a certain period of time has passed, during which one has registered no complaint about another's misappropriation. Such a defense has been ruled inapplicable to the current cases, as we have seen. But that is not

decisive here, when we are concerned with the moral foundations for such claims; it might simply amount to a legal technicality, which has only limited implications about what is right and what is wrong. If adverse possession is in general a reasonable defense against such claims, it might be legally inapplicable here only because of a strange quirk in the law. But I shall not pursue that complex matter now. Any defense against such claims is also likely to rely upon inheritance, and this issue will be more central to our concerns in this paper.

In what follows, my purpose will be to challenge these naive arguments, on both sides of the issue, by throwing doubt upon property rights as we usually think of them. I shall suggest that property rights, including rights to land, are thinner and much more flexible, or variable with circumstances, than these arguments allow. If that is so, our whole way of looking at such matters may require radical revision.

Let me relate this now to Nozick's theory of justice. We are dealing here with property, on which Nozick concentrates, and the particular issues in the case correspond to major aspects of his theory—acquisition and transfer. The two main elements of Nozick's theory are what he calls "the principle of justice in acquisition" and "the principle of justice in transfer." The former concerns the circumstances in which one can acquire rights to things by appropriating them. The latter concerns the ways in which one can receive rights from others, such as gifts, inheritance, and exchange.

Many textbook theories of justice ignore historical factors, especially those involving voluntary transfer. Some theories imply, for example, that I possess a thing unjustly unless I can be said to merit or deserve it. Nozick reminds us, however, that justice does not frown upon gifts and favors, charity and generosity, and fair bargains. One can obtain things by such means without meriting or deserving them—and yet without any injustice being done.

Historical factors are thus relevant to justice, and any adequate theory must accommodate them. It does not follow (nor is it true) that Nozick's theory alone is capable of accommodating them. In fact, Nozick goes to the opposite extreme, exaggerating the role of historical considerations.

Nozick defends the following thesis: to establish the moral foundations for one's ownership of a thing, it may not be necessary to show that one's ownership fits into some preferred social pattern, such as equality. It may suffice to show that one obtained the thing

in accordance with the principle of justice in acquisition or the principle of justice in transfer. This is significant because voluntary transfers can upset preexisting patterns of distribution, such as equality. If the results of such transfers are unobjectionable, then patterns cannot exhaust the important truths about social justice.

Nozick's examples tend to show that historical factors are relevant to matters of justice, independently of other factors. That is an important point; but Nozick tries to stretch it further. From the claim that historical factors are relevant he seems to infer that they are the only factors relevant to justice, that all other considerations are irrelevant, such as merit and desert and the relative distribution of benefits and burdens in society. But the latter simply does not follow from the former, and it may very well be false.

In this paper I shall argue that Nozick's theory incorporates another exaggeration—the notion that property rights, once legitimately acquired, are virtually unaffected by circumstances. I shall then show how this undermines the historical entitlement arguments concerning Indian land claims. But I argue, finally, that it does not defeat the current claims.

3. Original Acquisition

Let us first consider the idea of original rights to land. How are such rights to be understood? Locke is one of the few writers to discuss the subject, so it seems reasonable to begin with his view of it.[6]

Locke says that one acquires property, originally, by "mixing one's labor" with an unowned thing, or something that belongs to all humanity in common. (§27) Locke clearly means us to take this notion of "mixing one's labor" with a thing very loosely—to cover, for example, one's picking up an acorn with a view to eating it. (§28) But, as Nozick observes,[7] there are problems with this notion. The limits of what I can acquire in this way are radically indeterminate. If no one yet owns them, can I make the oceans my own property by simply stirring water at the shore? More fundamentally, it is not clear why mixing my labor with a thing that I do not own is a way of acquiring that thing rather than a way of losing my labor.

When Locke applies his general theory to the acquisition of land he obtains a doctrine that is at least much clearer. He says that one must cultivate the soil, make it productive agriculturally, and be able to consume its products. (§32) Mixing one's labor with a parcel of land in this way removes it from the common stock of land

that has been provided for all humanity and gives one original title to it.

This cultivation test seems natural enough—so long as we assume that cultivation is the only proper way of using land. But a moment's reflection reminds us that, even for the purpose of obtaining food, land can effectively be used in other ways—hunting, gathering, and herding, for example. And, of course, land can be used in ways unrelated to food production. Locke was aware of this. How, then, did he justify his narrow cultivation test?

His reasoning is suggested by the following passage which Locke had added to the collected edition of his works:

> [H]e who appropriates land to himself by his labor does not lessen but increase the common stock of mankind; for the provisions serving to the support of human life produced by one acre of enclosed and cultivated land are—to speak much within compass—ten times more than those which are yielded by an acre of land of equal richness lying waste in common. And therefore he that encloses land, and has a greater plenty of the conveniences of life from ten acres than he could have from a hundred left to nature, may truly be said to give ninety acres to mankind; for his labor now supplies him with provisions out of ten acres which were by the product of a hundred lying in common. (§37)

Locke maintains, moreover, that "there is land enough in the world to suffice double the inhabitants," provided it be cultivated. (§36) By his reckoning, there is not a fifth enough land for all the people of the world if none of it is cultivated. The argument therefore seems to be that, by enclosing and cultivating land, one actually performs a service to others. If I appropriate and cultivate only so much land as I require for my own subsistence, I thereby release land to others that I would have needed to support myself by hunting on it or gathering food from it. Cultivation involves the far more efficient use of land, from which all benefit. Most important, the failure to cultivate suitable land results in privation for a corresponding number of people.

Nozick appears to reject Locke's theory about the original acquisition of land. The argument suggests a utilitarian rationale for property rights, which Nozick regards as unacceptable. And, even within its utilitarian framework, the argument is not very promising as a way of showing that cultivation is the only legitimate basis for acquiring unowned land. The empirical premises of the argument

are dubious, and alternative grounds of appropriation seem possible. More importantly, Nozick, as we have seen, raises skeptical doubts about Locke's general theory of property acquisition.

Nozick's alternative account appears to be that appropriation alone is sufficient for the legitimate acquisition of property, provided that a certain condition is satisfied. Nozick calls this the "Lockean proviso"; this is a requirement Locke included in his own theory, that "enough and as good" of whatever is being appropriated be left for others. (§27) If enough and as good land is left for others when one appropriates land, the appropriation is legitimate, justice is done, and one acquires a right to the land. Otherwise the appropriation is illegitimate and one acquires no right to the land.

Let us suppose, for the sake of argument, that some sort of right to land can be established, and also that Native Americans established original rights to land in the Americas before the European invasion, land that was later taken illicitly by some of the invaders. The question we must face is, what difference that can make today.

The argument invoking original rights to land in support of the current Indian land claims assumes that original rights are very stable. They are unaffected by changes in circumstances, because they are still valid today despite the passage of history. They are also largely independent of the institutions that are internal to a society. That is to say, they do not merely regulate relations within a community, but also relations between the community and the outside world. For these original rights are supposed to set limits on the conduct of persons outside Indian society; they are supposed to be valid claims relative to nonassimilating Europeans.

It may be useful here to distinguish between two different kinds of moral rights to property. There may be morally defensible property rights within a given social system, taking into account the laws and other social rules governing property and the general circumstances of the community. The moral justification of claims couched in terms of such rights makes essential reference to social rules and circumstances. For the reasons just given, it is doubtful that original rights to land can be of this type. At least, the arguments invoking them ignore radical shifts in circumstances and fail to explain how ancient Indian institutions have a direct bearing on current claims to land. The original rights to land that are invoked would seem to be strictly nonconventional and inherently stable rights, which are not relative to social rules or circumstances.

I shall argue here that moral rights to property are not so stable.

4. Inheritance

I can best begin by considering the inheritability of rights. This is an appropriate point of departure because Nozick takes for granted that property rights are inheritable, and inheritance would seem to be involved in the argument concerning the current claims. After discussing inheritance, I shall go on to consider other common features of property rights.

Inheritance may appear to be a factor in the naive argument supporting the Indian claims because the current members of the tribes that are suing for recovery of lands once held by them are not the same individuals who belonged to those tribes when the land was acquired or when the contested transfers were made. The current members are descendents of those individuals. If the current members have valid claims to the land, claims deriving from their ancestors' original rights, it would seem that those rights must have been passed down through the generations by means of inheritance.

That is, interestingly, not the case. The current claims are being made, not on behalf of individual Native Americans who are supposed to have inherited ordinary property rights in land (or shares in a land-owning company) from their ancestors, but rather on behalf of entire tribes collectively. The land was originally held in common by the tribes, and that is how the land would be recovered. A tribe is a continuously existing entity, like a nation, that spans the relevant generations of human beings. Its ownership of land is like the possession by a nation of its territory. Its ownership need not be thought of as involving transfer from one individual to another by inheritance or any other means.

So inheritance would not seem to be an element in the Indian claims based on original rights. That gives us one way of distinguishing between the opposing arguments—for inheritance is almost certainly an element in the arguments on the other side. Most of the land in question has long been in private hands. It is virtually certain that inheritance has been involved in transfers from one generation to another since the contested transfers took place. It is, admittedly, conceivable that land (or shares in a land-owning company) should be transferred from one individual to another over an indefinite period without inheritance entering the picture. But it is extremely unlikely in the current cases. So, if inheritance is suspect, then some of the objections to the current claims—those based upon inheritance—are suspect too.

I wish to throw some moral doubt on claims based upon inheri-

tance; but that is a secondary purpose. What I mainly wish to show is that inheritability cannot be an essential feature of moral rights to property. This is because the moral acceptability of inheritance is relative to circumstances. And I wish to do this, not by rejecting historical factors affecting justice, but rather by developing them beyond the point at which Nozick stopped. My argument will not be that inheritance is morally objectionable from a nonhistorical point of view (that may well be true, but will not be considered here). My argument will be that inheritance can undermine justice in transfer, and thus can be objectionable from an *historical* point of view.

Nozick's idea is that transfers are legitimate and their outcomes are consequently morally unobjectionable when they are voluntary and do not violate the Lockean proviso. The theoretical model for this idea has been provided by John Rawls, who distinguishes between "perfect" and "imperfect" procedural justice, on the one hand, and "pure" procedural justice on the other.[8] Perfect and imperfect procedural justice are virtues of transactions based upon the real or likely outcomes of the transactions. Pure procedural justice is a virtue of transactions that derives from the character of the processes themselves. Thus, the results of a lottery are morally unobjectionable when the lottery itself has certain characteristics and is consequently fair. Bargains and agreements can be judged in this way too. Their outcomes are morally unobjectionable when the bargains and agreements themselves are fair. I am not sure whether the applicable notion of fairness is captured by Nozick's requirement that transfers be voluntary and not violate the Lockean proviso; but I doubt it. At any rate, bargains and agreements are not fair unless fraud as well as force is absent and the parties are (roughly speaking) equal and informed as well as free.

Now, one trouble with inheritance is that it often promotes concentrations of wealth and power. This is *not* an egalitarian objection. My point is, rather, that concentrated wealth and power is able to impose its will on smaller and weaker parties, thus creating bargains, agreements, exchanges, and social arrangements generally that are unfair. Extremes of power undermine the legitimacy of social processes, and the outcomes cannot be assumed to be morally unobjectionable. (If they are unobjectionable that will be so by virtue of nonhistorical considerations.) In such circumstances, inheritance promotes injustice in transfer. Embedding inheritance into property rights would therefore create internal difficulties for historical principles.

I do not mean to suggest that inheritance is intrinsically objectionable. The effects to which I refer are clearly relative to social conditions. Inheritance will have such consequences in some circumstances and not in others. Specific rules governing inheritance may thus be justified in some circumstances. But it is implausible to suppose that inheritance is morally fundamental. Specific rules governing inheritance could not be incorporated into a basic principle of justice in transfer.

Nozick appears to assume that inheritance is an indispensable feature of private property. He discusses original acquisition in such terms, as if one could not acquire property that was not permanent and inheritable. The alternative possibility is never considered. But that is surely a mistake. The idea of a right to property does not entail that it be inheritable. That is simply one possible form that property rights can take.

And, of course, inheritance as we know it is a straightforwardly conventional arrangement, a certain type of economic institution. Its moral justification is the justification of an institution, which must take social circumstances into account. An heir can morally defend his claim to some (conventionally) inherited thing only by appealing to the rules of such an institution. His claim is morally successful, so to speak, only if the institution itself is morally defensible. Nozick does not seem to look at inheritance in this way. He seems to assume that an heir could defend his claim to some inherited thing without making any reference to laws and other social rules. He appears to assume, more generally, that the morally supportable property rights that we have correspond precisely to moral rights that do not presuppose any laws or other social rules. That is another mistake, based perhaps on a failure to distinguish between morally defensible property rights within a given social system, the justification of which is relative to social rules and circumstances, and moral rights to property that are not relative to social rules or circumstances.

We can conclude, then, that moral rights to property are not necessarily inheritable. We should accordingly observe (although this seems to have no direct bearing on the current Indian claims, for reasons already noted) that original rights to land or other property cannot be assumed to be inheritable. Furthermore, the given defenses against the current Indian claims are suspect so far as they rely upon inheritance. For our society contains concentrated wealth and power, which does impose its will on others, and inheritance contributes to those conditions.[9] Property rights affected by inheritance are thus subject to further moral scrutiny.

5. The Lockean Proviso

What I wish to suggest now is that other typical features of property rights as we know them are morally defensible only relative to circumstances and therefore cannot be assumed parts of stable rights to land or other property, and cannot be morally fundamental.

Nozick himself, surprisingly, appears to admit as much. The contents, at least, of a property right are relative to circumstances. How I may transfer or use, or deal with others' use of, a thing that I have previously acquired depends on how my behavior would affect others. Nozick develops this point in terms of the Lockean proviso, which was introduced to regulate original acquisition and now is extended to regulate property rights much more extensively.

It will be recalled that Locke's proviso was that "enough and as good" of whatever is being appropriated be left for others. Nozick does not regard this formulation as satisfactory, perhaps because it does not cover certain sorts of cases. "The crucial point," he says, "is whether appropriation of an unowned object worsens the situation of others."[10] That is the sufficient condition, Nozick thinks, to place upon legitimate appropriation. If one does not worsen the situation of others, one acquires the right to a thing one has appropriated.

But, in Nozick's view, the Lockean proviso has an "historical shadow,"[11] making arguments like the following possible. Suppose that I am landless in a world with much land that has already been appropriated but little that remains unowned. Suppose further that I cannot appropriate land for my own use and enjoyment without leaving enough and as good for others, that is, without worsening others' situation, because there is simply not that much to go around. If that were so, then it might be argued that the last persons to appropriate land worsened the situation of others, me in particular, and by similar reasoning that *all* prior acts of land appropriation are now illicit because they worsened the situation of others. For scarce resources, such reasoning might seem to show that private acquisition is simply illegitimate.[12]

Nozick wishes to meet this objection apparently because he wishes to defend private acquisition, even of scarce resources. He seems so preoccupied with that objective that he fails to draw attention to the odd, retrospective character of these lines of reasoning. The objection is supposed to show that *past* acts of appropriation are *now* to be regarded as illicit because acts of appropriation now would violate the Lockean proviso. But the problem now

might result entirely from changes in circumstances, such as a decrease in the amount of usable land or an increase in the population. In such a case, the prior acts of *appropriation* could not plausibly be said to have violated the Lockean proviso.

Nozick's treatment of the "historical shadow" of the Lockean proviso, here and elsewhere, makes clear that his concern is not just with acquisition but more generally with the effects of continuing private ownership on others. It is not that *acquiring* the land violated the Lockean proviso but that *keeping* it appears to do so. Even if the original acquisition was perfectly legitimate, retention of the property might worsen others' situation in the same kind of way that the Lockean proviso is intended to prevent. The underlying idea is that property arrangements must accommodate the basic needs and interests (Nozick would probably say the rights) of others.

Nozick then seems to reason as follows. The argument against original acquisition or retention of scarce resources goes through only if we assume that property rights entail the right to exclusive use and enjoyment. But others' situation is not worsened by appropriation or retention if that assumption is rejected. In order to protect his assumption that property rights should be permanent and bequeathable, Nozick is prepared to modify the contents of such rights, or rather to make their contents variable with circumstances. This comes out most clearly in the following passage:

> Each owner's title to his holding includes the historical shadow of the Lockean proviso in appropriation. This excludes his transferring it into an agglomeration that does violate the Lockean proviso, and excludes his using it in a way, in coordination with others or independently of them, so as to violate the proviso by making the situation of others worse than their baseline situation. Once it is known that someone's ownership runs afoul of the Lockean proviso, there are stringent limits on what he may do with (what it is difficult any longer unreservedly to call) "his property." Thus a person may not appropriate the only water hole in a desert and charge what he will. Nor may he charge what he will if he possesses one, and unfortunately it chances that all the water holes in the desert dry up, except for his. This unfortunate circumstance, admittedly no fault of his, brings into operation the Lockean proviso and limits his property rights. Similarly, an owner's property right in the only island in the area does not allow him to order a castaway from a shipwreck off his

island as a trespasser, for this would violate the Lockean proviso.[13]

This passage indicates that, while Nozick places a great deal of weight upon the notion that a prior claim is a superior claim, he does not wish to ignore the valid claims of those who might suffer merely because their needs arise later. It should be noted now that similar considerations apply to inheritance, though Nozick does not make the connection. Inheritance can work so as to worsen the situation of others, and then property rights must be modified accordingly.

But my objection to inheritance was more far-reaching. Nozick wishes to retain rights and let them be passed down through inheritance by eliminating exclusive use and restricting other forms of transfer. This segregation of inheritance from other forms of transfer seems arbitrary: if the other forms of transfer can be restricted, then so can inheritance. Inheritance is not an *essential* feature of property rights. Similar reasoning shows the same thing about other normal features of property rights, such as transfer by gift or exchange and exclusive use and enjoyment: these are not *essential* features of property rights. Or, if they are essential features of property rights, then property rights are inherently unstable. One cannot have it both ways—not, at least, if one thinks that justice must accommodate the basic needs and interests of others.

6. The Instability of Property Rights

Now I wish to suggest that property rights may be even more unstable than has so far been argued. Let us expand on an example that Nozick uses. Suppose that we are occupants of an isolated island. We have arranged to use the land and all its other resources among ourselves, and we live comfortably, with some less perishable goods set aside for rainless seasons. One day, a party of castaways from a shipwreck are washed up on our shore. They are uninvited but also involuntary guests. There is no prospect for their safe removal, and they have no resources beyond their capacity to work. But they are also unaggressive. What are we to do? Nozick would agree that we may not drive them back into the sea just because they come with no rights to anything on our island. Nor may we merely allow them to stay without sharing our resources with them. It is incumbent on us to share with them—whether we

like the idea or not—even if that means that we enjoy a lowered standard of living as a consequence.

Do the new islanders acquire any rights to things on the island? Nozick seems to imply that they acquire only such rights as is required to meet their minimal needs.[14] And they acquire no property rights—except, say, what they might acquire through our charity or in exchange for their labor. We retain all our original rights, though our exercise of them, or their contents, has become restricted.

But this is not entirely satisfactory, for reasons we have considered before in connection with inheritance. How are the new islanders supposed to live for the indefinite future on our island? Unless they have equal access to its resources, they may well be condemned to an economically and socially subordinate position. In some circumstances, at least, justice would not smile gladly on such a prospect—even justice within an historical theory like Nozick's. For they might then be cheated and exploited because of their poor bargaining position and lack of social power. Justice requires the establishment and maintenance of background conditions for fair bargains and agreements and for fair social arrangements generally. This may well require that we share with them more radically than Nozick might envisage.

One cannot say, a priori, what form such sharing would have to take. One possibility is this. Suppose that we original islanders held our resources in private parcels. If we all agreed to this arrangement, and it served us well, no one suffering as a consequence, then it may have been beyond reproach. But, once the newcomers are present, economic arrangements must be adjusted to accommodate the increased demand upon our resources, the complications arising from a changed population, and so forth. It is not beyond the realm of possibility that, under the new conditions, a system of private property will serve us very badly, while shared property, with carefully managed use and enjoyment, would serve us well. Such a change might be accomplished voluntarily, in which case Nozick would presumably have no objection. But it is conceivable that a private property holdout among the original islanders would properly be obliged to cooperate, against his will, and be required to place his resouces, along with everyone else's, in a common pool. This suggests that property rights themselves, and not just their exercise or contents, are relative to circumstances.

But that inference is not irresistible, and for all practical purposes it might make no difference which way we describe the situation—

as a modification of our original rights or as a redistribution of property. The question is whether the original islanders retain some latent, prior claim to their original holdings, which entitles them to recover their original property (so far as that might be possible) when conditions change again.

To explore this possibility, suppose that our island is volcanic and occasionally rises from the sea with the consequence that a greater land surface becomes available to its inhabitants. Suppose that, after the arrival of the new islanders, we eliminated private property in land and managed its exploitation collectively. Then, one day, during our current generation, the land rises due to volcanic activity, providing a new doughnut-shaped area available for settlement and exploitation. It might be the case that under these circumstances private ownership of land would once again be satisfactory and that everyone elects to adopt that system. The question then is whether we original islanders have a superior claim to property within the portion of the island that we originally occupied. If so, it looks as if there is a definite point in Nozick's suggestion that we continue ascribing the original property rights to their original holders, so long as they have not relinquished them of their own free will.

Now, I do not wish to deny that our original occupation of the center of the island might provide good and sufficient reasons for returning that part to us when redistribution is effected once again. It may be assumed that we grew up in that part of the island and regard it as our home, that we would be less happy elsewhere, which is not true of the later arrivals on the islands. Such factors are undoubtedly relevant to a *humane* as well as fair redistribution of the land. But it is not clear that they amount to *rights*.

To see this, consider a case in which such sentimental attachments are missing and in which the idea of a prior claim consequently appears pointless and absurd. Suppose (expanding on another example of Nozick's) that the sole source of fresh water on the island is a set of virtually identical water holes at some distance from our dwellings. Through custom each family had exclusive use of its own water hole. One day all of the water holes but one dry up. As a consequence, the water from this hole must be shared by all the islanders. If this condition continued indefinitely, the water hole might amount, in effect, to common property. But is that mere appearance? Suppose that after a while the other water holes are unexpectedly replenished and become good natural sources of water once again. It is reasonably concluded that each family

should once again have exclusive use of its own water hole. Suppose, however, that the water holes are literally indistinguishable without some conventional signs indicating their respective family assignments. When all the holes but one dried up, the signs were not maintained, and now that all the water holes are flourishing once more, we find that they are almost indistinguishable. Since all the water holes are equidistant to each person's home, all are equally usable, and they have no distinguishing features, there is no point in any family invoking a prior claim to recover its original water hole. No one, presumably, has sentimental attachment to a water hole. If one somehow acquired such an attachment, then our humanity might require that the person's feelings be respected. But that seems a far cry from a claim of right.

Examples of this sort suggest that property rights are not stable even within a single generation. They can be extinguished without being voluntarily transferred. The very persistence of a right to property such as land, and not just its content, is relative to circumstances.

If we wish to identify a right to property such as land that is not relative to circumstances, then we must make the right itself inherently more flexible and responsive to circumstances. Locke's proviso suggests a possible model for beginning to construct such a right. Its core would be conduct that is not harmful or dangerous to others (or, as Nozick might prefer, conduct that does not encroach upon or violate others' rights). To this we add an obligation upon others not to interfere with such conduct. This yields a full right of action, composed of what jurists have called "liberty-rights," to do certain things, which are protected by "claim-rights," not to be treated by others in certain ways, the latter correlating with others' obligations not to interfere. A minimal right to land may be seen, initially at least, as a special case of such a right of action, so long as Locke's proviso is satisfied. For, if enough and as good is left for others—or, more generally, others' situation is not worsened by one's appropriation of a parcel for, say, use and occupation—then one may be said to have the liberty-right to use and occupy the land and others the obligation not to interfere with such use and occupation. As conditions change, of course, the *concrete implications* of such a right can vary. Most important, such a right would *not* imply a permanent *title* to the parcel of land.

I am uncertain whether one can have any fuller right to property, such as land, independently of laws and other social rules. Within a given social setting, one might acquire morally defensible rights to

land and other property, but only so long as the institutions involved are themselves morally defensible.

7. Applications

Let us now consider a variant of our original example. Suppose that the castaways who arrive upon our shore are not friendly and cooperative but aggressive and domineering. We try to be hospitable but they do not reciprocate. They cheat us, kill many of us, and force the survivors to reside in a small area of the island, away from our homes, while they appropriate a disproportionately large part, including the most desirable sectors, for themselves.

What does justice call for in such a case? It cannot require less for us than it would have done in our original example, when it required that we share with the newcomers. We too have a right to a fair share of the island's resources. If justice requires more, then it may well include compensation from the piratical invaders for the wrongs we have suffered at their hands. We may be too weak to secure our rights; but that does not invalidate our claims.

Suppose that we are too weak and that we pass from the scene without justice being done. Once we are dead, it is impossible to compensate *us* for the wrongs *we* have suffered. Likewise, once the invaders die away, the wrongdoers cannot contribute to any rectification that justice may require.

Consider now the claims of our descendents, and for this purpose imagine two alternative (or possibly successive) historical developments. In the first continuation of our island's story we imagine that our descendants continue to be subjugated, cheated, and denied a fair share of the island's resources, and continue to reside in that portion of the island that was earlier assigned to us, their departed ancestors. They too have valid claims, analogous to those we had that were never respected. For justice requires that they receive not only a fair share of the island's resources but also, we may assume, compensation for the wrongs they themselves have suffered in being deprived during their lifetime of that fair share.

In the second continuation of our island's history, we imagine that enlightenment finally spreads across the island. The descendants of the piratical invaders come to live in harmony with our own descendants, so that no one is deprived of a fair share of the island's resources. Can we assume that any of our descendants, in this happy sequel to our unhappy history, have additional claims

against the others on the island, the descendants of the piratical invaders? I do not see how we can. 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 us, the wrong that was never rectified, cannot now be corrected. That part of history is irrelevant to their current claims.

It is important to see now that similar considerations apply to the former case, the first and less happy continuation of our current example. Our subjugated descendants have claims to a fair share of the island's resources and to compensation for wrongs done them by a system on the island that deprives them of that fair share. That system and thus their deprivation and their claims are rooted, *causally and historically,* in the wrongs that we, their ancestors, suffered at the hands of the invaders. But this is not to say that their claims are *normatively* derived from ours, that they inherited our original rights, or that their claims for compensation are claims for correction of wrongs that were done to us, as distinct from wrongs that have been done to them.

My metaphor and its moral may by now by obvious. Let the island be America and the original islanders Native Americans, to whom all the land may be said initially to belong. If those who had landed on these shores had been impoverished outcasts from Europe, unaggressive and cooperative, with no resources save their labor power and no place else to go, it would have been incumbent on their hosts not only to share their resources with them but also to reshape their social arrangements to accommodate the new members of their universe. For the purpose of this general point, it makes no difference how the original occupants of the land had used it, how they had divided it up, how they conceived of property rights, whether they held it individually or collectively, and so on.

That is not, of course, the way things happened, and so history developed much more like the unhappy history in the example of this section and its first, unhappy continuation. Native Americans by and large tried to be hospitable to their uninvited and unexpected guests, but the guests did not generally reciprocate. To be sure, some of the guests were impoverished, some were outcasts, some were unable to leave once they had arrived, and some, perhaps, would have been prepared to form an integrated society or to settle contentedly on limited tracts set aside for them by their hosts. But too many acted rather as invaders, slavers, and conquerors, who

proceeded by force and by fraud to appropriate the land and to eliminate or drive out the people living here.

I do not wish to deny any of this or to minimize the wrongs that were done. I most especially do not mean to deny or to minimize the valid claims of Native Americans living today. My point is that their claims are unlikely to derive normatively from their ancestors' original rights. The original rights of Native Americans were no more sacrosanct than anyone else's. From the fact that they had morally defensible claims two hundred or four hundred years ago it cannot be inferred that those claims persist. But the initial argument assumes just that; it assumes that circumstances had no effect on those rights.

8. The New Indian Claims Reconsidered

Native Americans have systematically been discriminated against in our society. They have a valid claim to a fair share of its resources as well as to social and economic opportunities. They also have a valid claim to compensation for unjust deprivation that the *current* generation has suffered from past injustices. But it is highly doubtful that they have any special claims based upon their distant ancestors' original occupation of the land. For circumstances have significantly changed. After the European dispossession of the Indians, waves of impoverished immigrants arrived on these shores in little better shape than castaways from a shipwreck. Most of the occupants of America today have had little, if anything, to do with dispossession of Native Americans. This does *not* mean that they have no complicity in a pattern of unjust deprivation of *current* Native Americans, for which compensation is required. But that is another matter entirely, and a much more complex matter too.

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).

Now that I have made my major points, I must try to note some complications.

One set of complications turns upon the fact that the current Indian claims are being made on behalf of tribes rather than private

persons. Tribes originally held the land, and a tribe, like a nation, can hold a right over generations. This has some bearing on the current claims. It does not affect my main point, which was not just that inheritance is suspect but more generally that moral rights to land are inherently unstable or variable with circumstances. We cannot assume that rights held generations ago, even if they were held by tribes, have persisted to this day. But this aspect of the cases is relevant to claims invoking the notion of *compensation* for wrongs done. 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. If the *tribes* were wronged, those wrongs may well have involved violations of original rights, even if those rights did not survive the changing circumstances and did not persist into the current generation. If tribes can indeed be wronged, and such wrongs are subject to compensation, then the current claims can be supported by related considerations: this sort of argument transcends the valid claims of current Native Americans for compensation in view of wrongs done to them as individual human beings. I do not wish to deny such possibilities here. They require careful and systematic examination.

The tribal character of the current claims is relevant in other respects too, which raise complex and difficult issues. I have noted, for example, that one aim of the current suits appears to be not mere ownership of the land but control over its development. There is the prospect of conflict between the interests of Native Americans in preserving undeveloped land and others who wish to develop it, build on it, live and work on it. This is not like the conflict between conservationists and developers. For the Native Americans involved are seeking to rebuild a way of life that turns upon certain ways of dealing with the land, and an issue here is the right to inhibit development (which may involve sorely needed jobs, and not just profits) based on the right to secure a culture.

That brings us to a central argument favoring the current claims. And it is important to support the current claims, since radical steps have been threatened to undermine them, including retrospective legislation.

One thing that makes the claims under the Nonintercourse Act so important is that they appear to be legally well-founded. Unlike past calls for reparations for black Americans, in view of the legacy of slavery and discrimination, the current claims under the Non-

intercourse Act turn upon existing law. Radical new legislation or executive action is not needed to sustain them.

But it may reasonably be urged that these cases test the sincerity of our historical commitments. The federal government long ago assumed "fiduciary" responsibility for securing Indian lands and protecting Native American interests. It has however adhered to the law chiefly when that worked to the Indians' disadvantage. Now, when at last Native Americans have marshalled the legal resources to secure some lost benefits, the threat is that the law will not be followed. Even handed fairness would seem to require that the federal government live up to its past commitments and not retroactively change the rules just when it would undermine Indian interests to do so.

Beyond this, it may dutifully be observed that justice would not be done by simply returning all the lands in question to the tribes now claiming them. This would impose enormous burdens on small home owners and small businesses without sufficient reason. It seems, in any case, that undeveloped land is the primary target of the tribes, the other land being unavoidably blanketed in under the legal claims. The federal government should work to negotiate a satisfactory settlement. This is what the tribes have been seeking for some time.

If a settlement results in burdens on individuals or states, it would seem reasonable for the federal government to assume responsibility for compensation too. For the federal government not only has greater resources than the several states, some of which are hardly affluent; it was also negligent, under its own law, in failing to oversee the transfers of land and in thus failing to discharge its legal responsibilities as trustee. The responsibility for righting such wrongs and for paying what it costs to do so should not be allowed to fall on the nearest and perhaps most vulnerable parties, but should be shared by society at large.

These costs will be of two types. First, cash payments are being sought, in addition to the lands, for back rents and damages. (These claims, incidentally, appear immune to attack by retroactive legislation.) Second, cash settlements will undoubtedly be made in lieu of some land that might otherwise be recovered. That seems a sensible solution for much developed land within the tracts in question, and a solution that the Indian tribes are quite willing to achieve. Such costs should be borne by the federal rather than by individual state governments.

Claims under the Indian Nonintercourse Act are different from

some other claims that Native Americans may make for recovery of land, since the former turn upon plainly illegal transactions while the latter may involve marginally legal but unjustifiable acts by the federal government. The rhetoric that I have anatomized in this paper does not distinguish between these cases. I do not mean to suggest that the claims are unsupportable because the rhetoric is unilluminating. The point is rather that the claims are stronger then the rhetoric may suggest. My purpose here has been to challenge certain ways of thinking about moral rights to property—ways that are typically invoked to secure unjust holdings. Property rights are not sacrosanct. They must bend to the needs and interests of human beings.[15]

NOTES

1. 25 U.S.C.A. §177.
2. On the Maine cases in particular see Robert McLaughlin, "Giving it back to the Indians," *Atlantic Monthly* (February 1977): 70–85; more generally see *Akwesasne Notes* 9 (early Spring 1977): 18–21.
3. Joint Tribal Council of the Passamoquoddy Tribe v. Rogers C. B. Morton, 528 F. 2d 370 (1975).
4. Narragansett Tribe of Indians v. Southern Rhode Island Development Corporation, 418 F. Supp. 798 (1976).
5. See his "Distributive Justice," *Philosophy and Public Affairs* 3 (Fall 1973): 45–126, especially Section I, 46–78. This essay was later published as Chapter 7 of Nozick's *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
6. John Locke, *The Second Treatise on Government,* Chapter V ("Of Property"). (Citations in the text are to numbered sections of the work.)
7. On Locke's theory, see Nozick, "Distributive Justice," 70ff.
8. See *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 85–87.
9. For example, by helping to fix vast wealth within a very limited number of families, and thus helping to establish permanent power elites.
10. "Distributive Justice," 72.
11. "Distributive Justice," 76.
12. "Distributive Justice," 72.
13. "Distributive Justice," 76.
14. "Distributive Justice," 75–77.
15. Earlier versions of this paper were read at The Catholic University of America, Hamilton College, and the University of Vermont. I would like to thank those who commented on those occasions for their helpful criticisms and suggestions. I would also like to thank John

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