

Righting Old Wrongs

Our ordinary practices of justice are based on the notion that injustice and remedy should be closely associated in time. The commonplace, "justice delayed is justice denied," commands ready assent. True justice, this adage reminds us, is virtually instantaneous. Changing circumstances make adequate remedy more difficult as the victim's deprivations cumulate.

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 counselled to let justice take its course and cautioned against a precipitous "rush to judgment." Institutional expediencies induce us to tolerate delays of months or even a few years from event to resolution.

Suppose, though, that 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.

But increasingly, in the United States and other societies, there is an interest in righting old wrongs. The urge to reform the past is a characteristic feature of our time. Consider the varied examples displayed in the accompanying table.

In addition to these claims that have been granted in significant measure, numerous claims are "pending." Some have been around for many years and some are new on the scene: Greece's claim for the return of the Elgin marbles; the claims of Eastern Europeans for restoration of property confiscated by their late Communist governments; the effort to secure from the United States government reparations for American slavery.

These claims regarding old wrongs raise a series of troubling questions. Is it only the technical feasibility of remedy that declines with the passage of time, or does the appropriateness of a remedy decline as well? 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.

Why These? Selectivity and the Vehicles of Memory

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. While our contemporary standards lead us to harshly condemn the absence or inadequacy of remedial action in incidents like the Johnstown Flood, the Triangle Shirtwaist Fire, the Hawk's Nest Tunnel Disaster, we have not been moved to compensate their victims or otherwise redress the injustice. Wrongs that affected victims on the basis of class, residence, age, gender, sexual preference, or political group infrequently give rise to movements to right old wrongs. Wrongs that entail kin-like ascriptive groupings — family, caste, tribe, ethnicity, nation, 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 ascriptive groups we find a desire to vindicate. Of the various identities that each of us carry, these primordial identities may be easier to mobilize. They seem to be carriers of memory that can be organized around feelings of injustice and the possibility of redemption.

Righting Old Wrongs: Some Recent Instances:

1972: Exoneration of black soldiers dishonorably discharged in the 1906 Brownsville Affair

1980: Compensation of Sioux for 1877 taking of Black Hills

1980: Congress enacts Maine Indian Claims Settlement Act, giving Passamaquoddy and Penobscot Indians \$81.5 million compensation for being cheated out of their lands in 1794

1983: Restoration of Jim Thorpe's 1912 Olympic Medals

1984: Vatican pardon of Galileo

1986: Pardoning by State of Georgia of Leo Frank (lynched in 1915) for unjust conviction of 1913 murder of Mary Phagan

1988: Congress enacts 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

1988: Canada apologizes to Japanese for 1940s internment

1989: State of Wisconsin apologized to the Sac and Fox for the 1832 Bad Ax Massacre

1990: Enactment of Native American Grave Protection and Repatriation Act, mandating return by governments of bones and cultural items to tribes

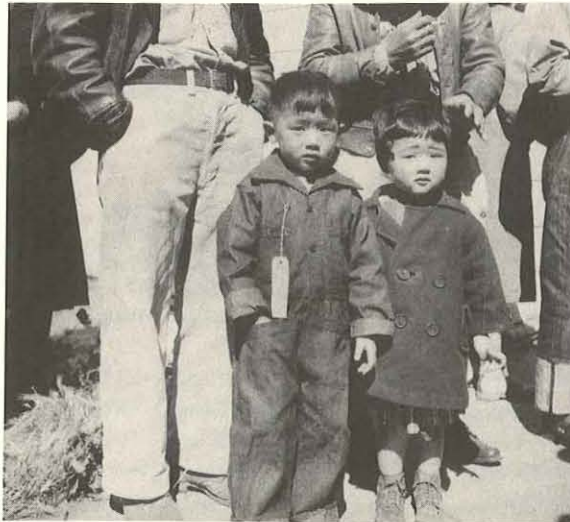
1990: East Germany returning property to West Germans

1990: Canada apologizes to Italians for 1940s internment

1991 Formal apology by Commissioner of Baseball at Reunion of Negro League players

1991: Japan apologizes to Korea for brutal colonial rule, 1915-45

1992: Series of Spanish initiatives "apologizing" to Jews for 1492 expulsion from Spain culminating in ceremony marking 500th Anniversary



Japanese American Internees - 1942

Victims/Claimants

A set of ramifying complexities are encountered in identifying the victims. In some cases there are living individual victims of the original injustice like the Japanese Americans who were interned forty-five years earlier. When the immediate victims are dead, can we find identifiable and credible surrogates? Again, biological descent is an insufficient test. Presumably only those are qualified who have maintained an identification with the original victims. This would exclude those many descendants of American slaves that have lived as white for generations and the male descendants of oppressed women. Presumably remedies are for only those descendants who themselves suffer from disabilities traceable to the original victimization. But if the 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.

Just how close a nexus is required between original victims and present claimants? And how is that to be established? The Congressionally-mandated restoration of aboriginal remains raises the question whether a contemporary claimant needs to be genetically or culturally continuous in identity with the original group. Or is it sufficient that they share the new composite identity of Native American?

The prevalence of primordial ascriptive groupings in stories about claims arising from old wrongs is understandable because where the victim group was defined by class or location, finding their social descendants is even more difficult. Imagine a belated attempt to compensate the victims of the 1889 Johnstown Flood, in which more than 2200 died and thousands of lives were disrupted. Are the current citizens of Johnstown the appropriate surrogates? Or the descendants of those who lived there in 1889?

Wrongdoers

In some cases the wrongdoers are still around (e.g., the International Olympic Committee that took away Jim Thorpe's honors). But in 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? One possibility is all of the descendants of the original wrongdoers. But biological descent cannot be the relevant test, for among the descendants of American slaveholders are American blacks. Perhaps only those descendants who inherited the social identities of the wrongdoers ought to be liable? How about descendants of whites who were not slaveholders? Or of those whites who came to America after slavery was abolished? Are beneficiaries of unjust practices as liable to remedy them as active perpetrators? But what this discussion clarifies is that the relevant continuities are social rather than genetic. It is the inheritance of advantage or disadvantage that should count, as much or more than the inheritance of genes.

How is such liability affected by the existence of other perpetrators — for example, African tribes that captured slaves and sold them to Europeans? Or is their liability 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? Should there be a right to contribution from the present representatives of other wrongdoers?

Remedies

Typically campaigns to right old wrongs are mounted with a specific remedy in mind. Often, what is sought is historical vindication: setting the record straight, acknowledging the wrong (or recognizing the underlying entitlement that it erased), apologizing for the injustice, restoring lost honors. Formal ceremonies of apology may be employed to acknowledge the wrong, as in the State of Wisconsin's apology to the Cherokee for the 1932 Bad Ax 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.

In other instances there are important material transfers to the victims. This can involve the return of the disputed property (land, ancestral remains). Or it can involve payment of a non-trivial sum as partial compensation for material losses (thus the \$20,000 payments for Japanese American internees). Such payment may serve as a seal of the seriousness of the apology. As a Japanese American spokesman said, "the checks are simply a token" warranting the sincerity of the admission of wrongdoing.

Symbolic remedies avoid the tough questions of measuring injuries and specifying victims that are raised by the distribution of material benefits. Should reparations be paid distributively to individuals or collectively to an institution, association, or government as their representative? Should remedies be proportionate to the injury or suffering undergone by each individual recipient, or formulaic, with all members of the victim group given a fixed amount, as in the Japanese American internment case?

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 found in India's policy of compensatory discrimination which affords preferential treatment to the untouchables and tribal peoples. Affirmative action programs in the United States contain an admixture, often unacknowledged, of this reparative theme.

Why Now?

Why has righting old wrongs emerged as such a prominent feature of our time? The Western industrialized world is more affluent; we can afford to salve our consciences without reducing our living standards. But why do our consciences point in this direction? Let me mention some features of the current scene that strike me as importantly implicated in the popularity of refo-

ming the past. First, there is the general extension of the frontiers of empathy in late twentieth-century society. Second, people are more critical. There has been a decline of confidence in established authorities, in government, business and religion, and a willingness to concede that our institutions may have inflicted great wrongs. 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 can be remedied.

This optimism about justice, buoyed by a sense of progress, combines with high expectations of institutional performance to inspire projects to redeem the past. As more things can be done by human institutions, the line between unavoidable misfortune and injustice shifts. Once, having an incurable disease was an inalterable misfortune; now a perception of insufficient vigor in pursuing a cure can give rise to a claim of injustice. Famine is no longer seen as an inalterable fate, but as a consequence of inappropriate policy.

Standards

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. But in most 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. In the 19th century, Native American skeletons were collected as scientific specimens; now they are restored as "ancestral remains." Behavior that was once scientific collection is now desecration and grave-robbing.

When we raise (i.e., change) standards, we face a dilemma of choosing between ex post facto imposition and affirming the unreformed past. In most cases we do the latter. Consider the Johnstown Flood, in which a poorly designed dam for a private vacation resort burst and flooded the city, at a cost of over 2200 lives. Our contemporary notions of care and accountability are clearly violated, although efforts at the time to obtain a civil remedy were unavailing. The "visitation of providence" of a century ago would be perceived as an injustice today.



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. 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.

But which claims will be granted depends on the larger society, often thought to represent the wrongdoer. A 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.

Where the symbolic claims are fused with material claims for immense 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?

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 accounting 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 injustice is worse. Common sense tells us that a patched vase may be worse than an unbroken vase, but it is better than a pile of shards. But 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.

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Hill, Thomas and the Politics of Race

I was deeply moved by Anita Hill's testimony before the Senate Judiciary Committee. I do not doubt her veracity. I will not say why here, except to say that I heard in her voice no hint of vindictiveness, no trace of rage, no signs of suppressed zealotry. I heard only the quiet, forceful eloquence of one determined, however belatedly, to speak a painful truth too long denied. And I found Thomas's vehement denials nothing more than cynical attempts to adopt the self-righteous rage of the wronged black buck, thereby hiding from view even the slightest hint of his own culpability.

It is worth considering the deeper sources of the resonance that Thomas's defiance had in the black community, how the Hill-Thomas controversy turned into the occasion of that resonance, and what the fact of that resonance says about the current status of black political consciousness. Superficially, the pattern of black response

to the Hill-Thomas hearing may seem to mirror the pattern of white response. Whites and blacks found Hill less believable than Thomas by a large margin. And whites and blacks generally thought that Thomas should be confirmed, despite Hill's allegations. But the similarity stops there.

Most whites appear, in the end, to have found Hill largely credible. But they thought that the benefit of the doubt should go to Thomas, reasoning that involved a rather curious way of thinking about the stakes in the case. That reasoning took no account of the fact that what was at issue was not a charge, the outcome of which would put one party at risk of losing life, liberty or property. No clear-thinking person could suppose that Thomas was *entitled* to a seat on the court just so long as it was not proven "beyond a reasonable doubt" that he committed sexual harassment (or perjury). The