# Context, Equality, and Aboriginal Compensation Claims

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*ABSTRACT: Jeremy Waldron argues that the historical ownership rights of Aboriginal peoples can be superseded, yet acknowledges that programs of historically grounded compensation are justifiable in the absence of widespread redistribution. This article argues that existing states lack social justice programs of the requisite kind, and that they will continue to do so in the foreseeable future. Moreover, even the best-designed programs will be far more ambiguous than Waldron encourages us to recognize, given the unavoidability of inheritance-based inequalities. The article argues that philosophers should pay special attention to political context when evaluating the claims of socially vulnerable populations such as Aboriginal peoples.*

*RÉSUMÉ: Jeremy Waldron défend l'idée que les droits historiques de propriété détenus par les peuples autochtones peuvent être supplantés, mais il reconnaît que les programmes de compensation fondés sur l'histoire sont justifiables en l'absence d'une redistribution répandue. Cet article soutient que les États en place n'ont pas suffisamment de programmes de justice sociale adéquats, et que cette situation continuera au cours des années à venir. De plus, même les programmes les mieux élaborés seront sans doute bien plus ambigus que ce que Waldron nous incite à reconnaître si l'on prend en compte que les inégalités qui découlent de l'héritage du passé sont inévitables. Dans cet article, j'estime que les philosophes doivent être attentifs au contexte politique lorsqu'ils évaluent les demandes sociales des populations telles que les peuples aborigènes.*

## Justice and Context

This essay investigates the relationship between abstract moral principles and complex political practices. In particular, it considers how one should evaluate

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Aboriginal claims for the return of historically expropriated lands or to compensation for their loss. These claims often appear to be based upon an insupportably strong conception of ownership, yet, as the essay argues, they look considerably different when understood within their broader social context. Given the particularistic nature of poverty and the enduring force of inheritance practices throughout non-Aboriginal society, the essay argues that existing programs of reparation are fully defensible, and that Aboriginal peoples behave appropriately when they pursue compensation through the legal and political channels currently available to them. The essay seeks to convey a deeper caution for our own philosophical practice about the dangers of moving too swiftly from abstractly appealing principles to evaluations of our actual political lives. These dangers are especially pressing, it argues, where the claims of politically vulnerable groups such as Aboriginal peoples are involved.

**Waldron on Supersession**

To frame this essay's concerns, consider a forceful argument about the expiration of historical ownership outlined by Jeremy Waldron.[1] Waldron has argued that Aboriginal claims for the return of historically expropriated lands cannot be morally justified in abstract terms because circumstances have changed too much since the original injustice occurred. He argues that there are multiple problems with such claims. At one level, changes in the way that properties are used in everyday life make it morally dangerous to expel living persons from lands stolen long ago, because doing so would involve excessive violence to established ways of life. The strongest argument for property rights, Waldron argues, will focus on the ways in which particular material resources are used in ongoing personal projects, and these linkages can expire when resources are no longer in fact used in this way:

> Historical entitlement theories are most impressive when moral entitlement is conjoined with present possession. Then it seems plausible to suggest that continued possession of the object might be indispensable to the possessor's autonomy. But when the conjunction is disrupted, particularly when, as in the cases we are considering, it is disrupted for a considerable period of time, the claim looks much shakier.[2]

While Waldron gestures at potential exceptions for sacred lands that are particularly important to Aboriginal groups,[3] his basic conclusion is that Aboriginal peoples no longer have moral claims to regain particular properties simply because their ancestors once owned them.[4]

This first argument applies only to claims for the actual return of land, however, and not to compensation for its historical loss. Something further is needed to argue against monetary compensation. In this regard, Waldron notes that an immense variety of people have suffered injustices in the past, and argues that particularized Aboriginal claims for reparation seem plausible only by ignoring these additional injustices. For example, slavery and segregation played

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foundational roles in creating the existing distribution of resources in the case of the United States, as did the legal disadvantages faced by other minority groups and by women in all democratic countries, along with all sorts of garden-variety thefts and defraudings. Additionally, each specific injustice caused further distortions to the price of goods available through the market, leading many enterprises or persons to succeed or fail based on injustices that took place elsewhere; historical injustices thus "infect" property holdings in places far removed from the original wrongdoings. Given these circumstances, it would seem arbitrary to compensate Aboriginal peoples for the specific injustices suffered by their ancestors when the results of historic injustices have been spread so far and wide. "Ultimately," Waldron suggests, "the question is whether it is possible to rectify particular injustices without undertaking a comprehensive redistribution that addresses all claims of justice that may be made."[5]

Waldron argues that it is far from obvious why a theory of justice should be concerned with sorting out past injustices in any case, rather than focusing on ensuring some tolerable form of distribution in the present: "Behind the thesis of supersession lies a determination to focus upon present and prospective costs – the suffering and deprivation over which we still have some control."[6] In his view, we are better off addressing poverty wherever we find it rather than trying to repair old wrongs that occurred in very different circumstances.[7] Since we cannot change what has happened in the past, we should focus on what can be done to aid those who are in poverty today, whatever the exact course of history may have been.

This, then, is Waldron's abstract case for the expiration of historic injustice. Importantly, however, he acknowledges that this abstract case may not apply directly to the world as it actually is, and that the pursuit of historical claims may be legitimate if there is no widespread effort being made to assist those who are in need: "What I have said applies only if an honest attempt is being made to arrange things justly for the future. If no such attempt is being made, there is nothing to overwhelm or supersede the enterprise of reparation."[8] Somewhat surprisingly, he seems to suggest that the pursuit of reparation for specific losses might be justified *even* if this takes time and energy away from pursuit of poverty reduction generally: "I claim only that [reducing poverty generally] has priority over reparation that might carry us in a direction contrary to that which is indicated by a prospective theory of justice"[9] While the reasons for this final claim are uncertain, it seems best read as a claim of achievability – in other words, that it is permissible for groups to pursue claims to reparation when they themselves are relatively poor, before they begin to worry about the condition of other poor groups.

This principled argument for the expiration of historical expropriations thus comes with some important caveats. While Waldron does make note of these caveats,[10] however, they are by no means given central attention. His seminal article on the subject, in fact, was titled "Superseding Historic Injustice," and included discussion of the caveats in only two paragraphs of the twenty-four

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pages, making the article's apparently negative conclusions about Aboriginal property claims easy to recall. Clearly the abstract claims were being awarded pride of place.[11]

Unfortunately, this is an instance in which considerably higher standards of care are required, because such care demonstrates complexities of practical implication that can too easily be missed. Although it is something of a truism that one must exercise caution in moving from abstract principles to claims about actual politics, we do not always spell out the linkages between principles and practice as fully as we might. A failure to do so can sometimes lead us astray in dangerous ways.[12] This seems particularly important where the claims of Aboriginal peoples are involved, since it was often precisely this overly rapid shift between abstracted principles and actual applications that was implicated in the original historical injustices. For the remainder of the paper, I want to focus on these linkages between principles and context. Accepting the principled case that Waldron offers for the expiration of historical injustices, I want to demonstrate the degree to which contextual political considerations continue to override the abstracted conclusion in foundational ways. Worldly egalitarianism, I will argue, suggests that we should be far more eager to uphold historically grounded Aboriginal compensation claims than we might believe. More broadly, where our own philosophical practice is involved, it suggests that we should be wary of structuring our arguments in ways that might ultimately work against our own long-term moral goals.

## Abstraction, Law, and Social Action

There are a number of reasons to be wary about drawing real-world conclusions from Waldron's argument even if we are fully convinced of its logical soundness. As may be obvious, an argument like Waldron's does not and cannot engage with anything like the full range of justifications that Aboriginal peoples offer where claims over historical lands are concerned.[13] Aboriginal arguments about the importance of expropriated lands are often multi-faceted, and some of these other concerns pose complicated challenges to the political and normative status quo. There are thus multiple moral issues at stake in any given Aboriginal claim, and an investigation of one cannot stand in for an investigation of all.

At their most inclusive, Aboriginal arguments often draw linkages between non-instrumental views of the natural world and the character of a humane and ethical life.[14] These claims are usually far less concerned with expelling non-Aboriginal property-holders than Waldron's portrayal suggests, since they usually involve claims for joint usage and management rather than rights to exclusive control, goals that often make sense in light of other ways of understanding what is at stake. In fact, one cannot conclude from the use of the language of ownership in Aboriginal arguments that the terminology captures *any* of the issues the claimants themselves believe to be at stake. When Aboriginal peoples pursue "land claims," they are engaging in a specific kind of action

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within a state's legal systems and must phrase their claims in particular ways if those claims are to seem plausible or even intelligible. Someone who pursues legal claims in this sense does not need to believe that the legal system has framed the issue correctly, nor that the system of law is the best possible, nor even that the state against which the claim is made is legitimate. All one has to believe is that this aspect of the legal system provides strategic leverage for pursuing *some* goal, whatever it may be. Some of these goals may map well onto the law's conception, others will do so only tangentially, and some will not overlap at all. Since the law is a particularly powerful resource, Aboriginal spokesmen and academics will frequently be careful to defend the importance of their legal claims within the law's own logic, even if they would prefer to argue for some more nuanced view, for fear of working against their own long-term goals. This is not to say that Aboriginal actors never present the more complex case – they often do – but that their strategic circumstances lead them to be understandably cautious about how they do so. One should therefore remember that debates within the language of ownership may be an awkward proxy for other arguments, and draw no full conclusion about Aboriginal political actions until one has evaluated the further considerations that are involved as well.[15]

Even if we accept Waldron's abstract case against historical ownership without qualification, then, it does not follow that anything about existing land claims arrangements within real states should be changed, because these laws may serve other morally valuable purposes. It is likely to be the case that reforms of the law in some matters will be legitimate only if they are coupled with reforms in other matters, and it is essential to know the nature of those conjunctions. Specific legal principles always accomplish multiple tasks, whatever they are envisioned to do by their creators, and it is important to give this complexity the intellectual centrality that it merits. Since professional philosophical analysis and legal decisions often interpenetrate one another (in legal training if nowhere else), it is important to remember that attempts to limit our own work to determinate political implications often will escape our intentions. Since law and general analytic discourse are not discrete intellectual fields, it is essential to be aware not only of what our analysis is intended to do, but also of what it may in fact do in the world. Saying that we are concerned with the abstract moral issue rather than with actual legal debates may often be insufficient bulwark. If we as professional philosophers often proceed as if the distinctions between law and philosophical analysis were clear, Aboriginal scholars often assume (for good historical reasons) that they overlap, and their arguments are often impossible to understand without keeping the multi-faceted nature of law and legal leverage constantly in view.

An awareness of this complexity should thus serve as a general caution about the practice of normative analysis and its social ramifications. It obviously would be impossible to work through the range of this complexity in this essay, however. Instead, I want to show something more easily delimited: that Waldron understates the importance of contextual factors even if we proceed

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only within the perspective of economic egalitarianism. For the remainder of the paper, I will assume that Waldron is correct to reject any claims to historical lands that would result in the displacement of current residents (although the case for such bracketing may seem less intuitive by the essay's end). Moreover, I will focus on the distribution of goods narrowly construed. Assume that Aboriginal groups are pursuing compensation only for the sake of the wealth involved, and nothing further. Even with these limits in place – reducing the argument tightly to one about the receipt of material compensation, despite the complexity of the actual laws involved – I will argue that Aboriginal groups seem to be justified in pursuing the return of historical lands when they can. I will also argue that there are strong reasons for morally concerned third parties to support Aboriginal actors in these attempts.

**Egalitarianism, Poverty, and Complexity**

The contextual egalitarian argument will be easiest to follow if we proceed in stages. Consider first what is likely to be the least controversial question: Are existing legal arrangements that allow for the return of land or the receipt of compensation by relatively *poor* Aboriginal groups morally praiseworthy? (Imagine for the moment that only poor Aboriginal groups are eligible.) The answer seems obvious: Yes. Such programs constitute assistance to the poor, and are therefore one method of providing them with that to which they are entitled. Yet why not simply advocate assistance to the poor generally and directly, rather than through this awkward and particularistic method? The obvious answer is that programs to assist the poor are extraordinarily difficult to construct in practice, since powerful economic and social actors routinely stand in their way. Destroying such programs where they already exist is rarely a wise practice. Even if one might wish for broader programs of assistance, one should not thereby impugn those that already exist.

Moreover, these programs are not in any obvious ways *competitors* to more satisfactory policies where the poor are concerned. Rather, they are one strategy among a necessary array of them. Programs of assisting the poor must always be carefully particularized if they are to be effective, and focusing them on Aboriginal groups specifically seems fully appropriate given these requirements. The necessity of particularity may seem counterintuitive, because egalitarians have worked hard to build generalized social safety nets open to all individuals without distinction. Yet those safety nets function as they are intended only when individuals are able to serve as economic agents in their own right over the long term. Directly distributing resources to those in need can make an obvious difference in improving the lives of those who are in extreme poverty, particularly to the point of starvation or homelessness, yet it is far less able to actually propel persons above this low baseline. Although it is probably false that welfare is inherently disempowering, it surely does have this effect if it is one's only long-term option, not least because it leaves one subject to the pronouncements of whichever governmental agency actually administers the

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assistance. (We should not imagine that some ideal bureaucracy will do so. Governments are always staffed by humans, with all the failings thereby entailed.)

If we want people to escape from deep poverty and to avoid being captured by the unpredictable dictates of governmental agencies, we need to pay attention to what can be done to spur the growth of businesses and other kinds of economic activities around them or in locations easily accessible to them. Ideally, these should be activities that will allow something better than entrapment in low-wage jobs with no chance for advancement. Since the basic justifications for seeking to reduce poverty lie in the blockades it poses for individuals and groups in pursuing their visions of the good, we should if possible seek a kind of economic development that reflects the wishes of those involved, so that the social changes associated with "escaping poverty" do not become a net loss all things considered. Reducing poverty in the right way thus necessarily requires sensitivity to particular circumstances, and to the specific challenges that have led persons to be poor. Pockets of poverty remain in particular geographical and social spaces because a whole set of circumstances come together badly, and they are difficult to cure for the same reason. Creating the relevant conditions for effective economic agency requires close attention to the specificity of these circumstances.

Raising standards of living also is extremely difficult in the absence of effective governance, because such governance allows security for business ventures and gives individuals substantial confidence in planning for their futures. Even the best-designed institutions will not work effectively if those who live under them lack trust in their performance, and are unwilling to work through their channels in difficult circumstances.[16] There are obvious historically grounded reasons for Aboriginal populations to be distrustful in this way. Escaping poverty thus requires not only economic opportunities and well-designed governmental institutions, but also institutions with substantial acceptance among those ruled. Given the inherent particularism of poverty, a preference for "generalized" social packages for assisting the poor becomes less obvious and indeed less coherent. Because the causes of poverty are various, the cures will likewise have to be multiple, even they should function alongside of a universal safety net intended to provide assistance without distinction.[17] Importantly, the partial dependence of economic agency and activity on the effectiveness and perceived legitimacy of institutions suggests that programs that can both redistribute wealth *and* build institutional competence should be preferred over those that can achieve only one of those at a time.

For Aboriginal groups, land claims coupled with self-government arrangements constitute one obvious mechanism through which both can be pursued. Pursuing land claims through legal channels requires substantial institutional development, both while they are in adjudication and after, when any proceeds must be managed or distributed. These processes are commonly a tacit form of capacity-building, both in intent and in effect.[18] Financial compensation or the return of land obviously will not lead to automatic reductions in poverty,

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because the capacities built often remain profoundly insufficient (and sometimes inappropriate). But there are no magical ways to build economic or governmental capacities overnight in any circumstances. All programs of poverty reduction are unpredictable and uneven in their effects. The return of land or the receipt of financial compensation is at a minimum a direct form of assistance akin to normal transfer payments, and therefore favourable in egalitarian terms, but it is always potentially much more: if the control of the additional resources is actual rather than nominal, such policies have the capacity to foster or radically strengthen precisely the kinds of economic agency that is missing.[19] Even if self-government for Aboriginal groups were not already justified on several other grounds, then, it would be justified as part of a strategy for combatting poverty in some of the social locations where it is most severe.

There are thus good reasons to believe that historically based compensation, whether in the form of actual land transfers or simply as monetary compensation, can be helpful in reducing poverty for those Aboriginal groups that remain extremely poor, as most do. These arguments are not inconsistent with Waldron's caveats, of course, but they are not obviously subsumed within them either. Given the ways in which philosophical arguments function both socially and cognitively, this is obviously cause for concern: Waldron's portrayal calls our attention away from the very important function that these programs play in the political world as we actually know it. It thus suggests that egalitarians should be opposed in principle to policies that they should in fact support after contextual examination.

The need for contextual evaluation becomes even more acute when we shift ground to a rather different kind case, one that is currently of the hypothetical variety. The ultimate fear that leads Waldron and others to resist programs of reparation is that they will transfer resources to those who are already well off rather than to those in need. Surely it would be better simply to support correctly targeted programs of poverty reduction, rather than leaving in place historically based policies that allow these kinds of possibilities? While it is tempting to answer this question in the affirmative, there are powerful reasons for caution in the circumstances as we know them. Most obviously, abolishing programs of historically grounded compensation where they exist would not automatically replace them with the broad programs of assistance that we would prefer, so that some unintended spillovers are surely worth accepting given difficulties of political practice. Yet there is a more subtle problem at work as well, one that may be less appetizing when faced directly. We in fact already occupy pervasively inegalitarian economic systems, in which persons of all social classes routinely receive unearned wealth on the basis of past events in the form of ordinary inheritance. If foundational elements of our societies are based on the receipt of unearned wealth from forebears, why should such inheritance by Aboriginal groups be problematic, even if the temporal delay in the inheriting is somewhat unfamiliar? Cases of relevantly similar nature, it seems, should be treated alike.

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A likely egalitarian response would be that inheritance in all forms is in fact a moral blight that should be opposed wherever it exists. Historically based compensation for already-wealthy Aboriginal peoples should thus be dissolved as part of this larger project.[20] Yet this is by no means a powerful response to the specific issue at hand. Do we have reasons to believe that these larger patterns of inheritance can be altered? There are obvious grounds for doubt given the strength with which they currently structure our existing social world. It is surely possible politically for *Aboriginal* claims to be dissolved, but this would not undo structures of inheritance more broadly. A question about Aboriginal claims in particular cannot be answered in such a general way. It must be answered more contextually instead, on the basis of whether claims by relatively well off Aboriginal groups are morally beneficial (or at least morally permissible) in conditions as they actually are.

Or indeed, in conditions as they are likely ever to be, even in the most favourable of circumstances.[21] The prospects for the abolition of inheritance in even the best conditions appear dim on careful examination. The problem is easiest to recognize when we conceive of "inheritance" in appropriately broad ways. The only kinds of functional economic systems that we know how to create are market-based, and market-based systems necessarily create pockets of relative wealth and poverty based on patterns of investment, skill distribution, and numerous other factors. These are the very problems that make reducing poverty so difficult. In these circumstances, individuals born into different geographical and social arenas would receive different kinds of advantages based on no merit of their own even if we were able to prevent anyone from inheriting material property directly. Moreover, it is hard to imagine how we would entirely prevent such transfers of material goods without severe disruptions of long-term planning and the creation of a bureaucracy of counterproductive proportions. Would children who received resources from their parents before their deaths have to give up whatever advantages they derived from those resources, for example, including whatever wealth they may have created from investing them? Would there be any way to monitor all of the relevant transactions given the inherent mobility of goods and cash, without excessively burdening essential forms of individual choice and important family bonds? It is hard to see how this could be achieved, particularly when we envision real states administering the system rather than the perfect ones that sometimes exist in our imaginations. Multiple questions of similar nature could reasonably be asked.

This does not mean that inherited inequalities cannot be greatly reduced by a broad variety of means where there is political will to do so, of course. But it does mean that we have no clear pathway to entirely overcoming the differentials created by inherited advantages, certainly not without merely shifting them into the political realm, where directly analogous problems hold.[22] To my knowledge, no one has ever proposed a plausible model for how an inheritance-free economy and society would function, and there are powerful

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reasons to doubt that such a model will be forthcoming. Pending such a blueprint and a realistic hope that we might actually be able to move toward it, our proximate goals must be more modest, more piecemeal, and more particularized toward the goal of overcoming especially troubling inequalities. The simple if unwelcome truth is that we live in class societies and do not have a template for escaping them. We merely can mediate some of their features under certain conditions. Once we make this concession, it becomes incumbent that we think seriously about the kinds of patterns that exist in these distributions, and about how they might reasonably be altered in more favourable directions.

Given background structures of inheritance as we know them and as they are likely to be in the future, could there be anything especially troubling if a few already-wealthy Aboriginal groups managed to use compensation processes to become wealthier still? Imagine for the moment that the Aboriginal group were simply to switch economic places with a wealthier set of non-Aboriginal actors who had inherited their own advantages. Would the non-Aboriginal actors have legitimate grounds for complaint in these circumstances? It seems clear that they would have at best weak grounds, since their advantages were in no way the product of their own actions. There are obvious reasons not to engage in wholesale rearrangements of existing property holdings, of course, given the consequences this would entail for the economic system as a whole. Even leaving obvious errors in execution aside, such alterations would often create important inefficiencies through mismatches in relevant skill-sets (skills that in part are inherited in the broader sense), and rapid social dislocations might play havoc with lives among both rich *and* poor, given the human tendency toward adaptive preferences. But non-Aboriginal people who simply had inherited wealth would themselves have only limited grounds for objecting to such a rearrangement, and these might easily be outweighed if there positive benefits to inheritance by some already-wealthy Aboriginal groups.

What about the status of those who had become wealthy through their own efforts? It seems obvious such people could not reasonably claim to be, for example, disheartened by the kinds of rearrangements suggested above – they will already be aware that they live in structurally inegalitarian societies, and will have no basis for protesting against inheritance in one form rather than another, however unusual it may appear to them. Nor, in the more realistic case, could they claim to be burdened in unusual or especially acute ways if they are taxed to help fund Aboriginal compensation claims, since all practices of inheritance already impose burdens of this type on them. Such people have already been required to undertake more effort to overcome the effects of their poor birth (e.g., in working harder for training, connections, jobs, etc.), which is difficult to see as anything but an in-kind subsidy for the non-merited inheritances of others. Whatever complaints they may have against Aboriginal inheritance claims they should thus have against inheritance practices in general, and they should respond to both in the same way, presumably by supporting a

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more limited role for inheritance on all counts. Insofar as they fail to do so, they seem to have few complaints of any sort.

There thus seems to be limited reason so far for morally concerned people to be particularly bothered by already-wealthy Aboriginal groups who might use policies of historical compensation to become wealthier than they already are. The primary reasons for concern would be those of overall economic efficiency, particularly as it indirectly affects the condition of the worst off. Yet the efficiency losses of transferring property to Aboriginal groups that are already relatively wealthy seem likely to be limited – Aboriginal groups that have already managed to escape poverty will have substantial experience in using money to make money. Presumably they will do no worse than others of similar economic level who might also inherit. Are there positive moral reasons to support the efforts of already-wealthy Aboriginal groups? Here the arguments in favour are familiar ones, if too rarely taken seriously. If we are concerned about larger notions of fairness in society, whether those be racial or cultural, increasing the numbers of the relatively wealthy among members of traditionally impoverished minorities seems to be a necessary target. If we are concerned with fairness within an unavoidably class-structured society, we should want that society to fairly reflect the makeup of the persons within it as fully as possible. Perhaps most importantly, political power is always linked in part to relative levels of wealth, and surely we should care about creating conditions under which a more complete spectrum of persons will be represented. There are obviously a number of other benefits as well – such relative wealth shows that members of such groups will be allowed to succeed, for example, by providing specific kinds of role-models for those seeking to improve their conditions, and so on. It is uncontroversial that Aboriginal peoples remain radically under-represented in all areas of Canadian business and government. Steps that would rectify this long-term absence seem obviously to be welcomed.

Taken together, there are thus good reasons for morally concerned persons to support attempts by Aboriginal groups (including their own, if they are Aboriginal) to gain compensation for historical losses of land and wealth so long as we live within an imperfectly egalitarian world, as it seems likely that we will for a very long time. While (very) few Aboriginal groups might rise into the ranks of the rich through such processes, this would not represent a stark rupture from practices that already structure our social lives, and it would help to bring the society closer toward equal treatment along the non-monetary axes that inevitably help to shape economic and other outcomes. So long as even a few Aboriginal groups remain poor, or Aboriginal populations as a whole remain under-represented, it seems to make obvious sense for parties concerned with behaving morally to support the continued existence of the laws and other social structures that make the pursuit of compensation socially possible and meaningful.

This is not to say that one ought to endorse all programs of compensation for historical losses to all persons everywhere and at all times, of course. The

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argument made here does not entail this kind of absolutism. The point is rather that, so long as we live within unequal societies dominated by inheritance, there are no special moral harms that can come from such policies, and in many cases (such as the Aboriginal one) there are moral goods. An abstract argument about what egalitarianism demands is thus only awkwardly translated into a political claim about what actual persons ought to do, both now and in any future with features similar to those of the present, and it is to this translation that we must give careful attention. For the present and likely future, Waldron's caveats are something much more than caveats – they are basic principles for thinking about what we should support and advocate in our everyday political lives.

**Social Division and Coalition-Building**

A different sort of objection to the pursuit of compensation claims by Aboriginal groups might be raised at this point, one that asks us to take still deeper account of the imperfect nature of our existing social world. There are reasons to doubt that powerful social actors will stand for practices that visibly compensate already-wealthy Aboriginal groups, in part because this would begin to expose the arbitrariness of the principles by which their societies are already organized – they want their already-existing advantages, and the fewer questions asked the better. Thus one might object that powerful non-Aboriginal actors eventually will abolish the laws making such compensation possible in any case. In the meantime, however, these claims will create indefensible social divisions between poor Aboriginal and poor non-Aboriginal populations. Thus the objection would be that, given expectations of continued *moral failure* among those who currently hold the reins of social power, particularized programs of compensation illegitimately hinder the growth of broader anti-poverty programs that would otherwise develop.

While Waldron's concerns about the divisive effects of Aboriginal claims are mostly implicit, his position seems consistent with that of Brian Barry. Speaking of "identity politics" in general, Barry argues that

> [t]he proliferation of special interests fostered by multiculturalism is . . . conducive to a politics of 'divide and rule' that can only benefit those who benefit from the status quo. There is no better way to head off the nightmare of unified political action by the economically disadvantaged that might issue in common demands than to set different groups of the disadvantaged against one another. . . . If political effort is dissipated in pressing for and defending special group privileges, it will not be available for mobilization on the basis of broader shared interests.[23]

Although there are plausible grounds to wonder about the accuracy of this portrayal,[24] it is based in a reasonable set of concerns. To succeed, large populations will have to make it clear that broader programs of assistance are their priority, and they will have to be willing to pursue them over time despite

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resistance from social actors holding disproportionate resources – particularly since, as noted above, it is impossible to ever banish such inequalities entirely. It is not absurd to believe that particularized programs, whether historically grounded or otherwise, will play some causal role in slowing down the arrival of the necessary broad coalitions.

Even if one accepts Barry's empirical suppositions, however, there are at least two problems in objecting to particularized Aboriginal claims as illegitimately divisive, which are most powerful in conjunction. The first is that such objections presume mistaken trade-offs between the interests of specific poor groups, and between the needs of present persons and our hopes for future possibilities. The simple fact is that no such social coalition simply lies in wait to be revealed once corrupting influences are peeled away; instead, if it is to exist, it will have to be *built*. In all modern democracies, many people, including many poor people, are reasonably wary of transferring to government the capacity to pursue purportedly egalitarian goals in strong ways, in the plausible belief that governing institutions will make poor choices in practice. In the best of circumstances, creating a wide social coalition for change would have to overcome these kinds of rational fears, and then would require the creation or alteration of a variety of laws, some of which would succeed in reducing poverty while others would prove ineffective. If this kind of wide coalition is going to emerge – and the possibility is very much of an open question – it certainly is not going to do so quickly, in any circumstances.

In the meantime, it seems clear that Aboriginal groups behave permissibly in pursuing their claims where they have such options. Otherwise, they seem held hostage to larger projects that may or may not succeed, and that will at best do so only over the longer term most strongly for people other than themselves. In present circumstances most Aboriginal groups remain profoundly impoverished, and some of them have potentially effectual legal and political routes through which they can receive additional resources as compensation for historical losses – in other words, by which they can become less poor. Such opportunities are not easy to come by, and may not last long. The behaviour of states toward Aboriginal populations has been historically erratic, and capable of extremely swift reversals. Where Aboriginal peoples remain poor, and the future unpredictable, it is hard to fault them for taking the opportunities they have, even if one has hopes that we might ultimately reach a world in which this will no longer be necessary.

There is a general problem at work here, and it seems worthwhile to outline it in somewhat more detail. The unfortunate truth is that the moral interests of different sets of poor persons can sometimes come into conflict, and that it will not always easy to determine what should be done in these circumstances. These conflicts will not always have the same structure, however, and some typological considerations are helpful for clear evaluation. The most difficult kinds of conflicts to resolve in any circumstances are those that are *direct*, where the object of contention is *indivisible*. In these circumstances, groups

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find themselves in competition for some resource which for each is a real need, but which only one can have. Two people in a falling airplane with only one parachute are obviously in this condition. In such circumstances, it seems clear that neither could be obligated to give way to the other. If the competition between poor Aboriginal groups and non-poor Aboriginal groups had this direct and indivisible character, arguments about social divisions between them would be simply irrelevant, because no amount of exhortation would change the unpleasant background conditions. It would be possible for only one party to improve its condition at all, and each would be permitted to struggle to win. Thankfully, these are not the conditions that hold in the present case.

The second category of conflict puts obligations on competing groups to pursue fair bargains, but nonetheless leaves awkward questions if these bargains fail to emerge. These are conflicts where the competition is *direct*, but the resources for which the parties contend are *divisible* – in the present case, a set pool of economic resources that can be distributed so that each party's condition is meaningfully improved. In these circumstances, fairness requires that the parties work to reach the appropriate division, but each can surely seek to improve its own condition if it can do so unilaterally without disrupting the efforts of others. This is true even if changes for all could occur faster through coordinated action – duties to assist others are necessarily weaker than duties to take only one's share. Moreover, there are undoubtedly conditions in which claiming more than one's share of the divisible resources is appropriate as a remedial measure. If competing sides are consistently unable to reach an agreement on fair division, it would be hard to fault one side for claiming even the entire resource if this is the only way to secure improvement to its own circumstances. This would be a move of last resort, of course, requiring continued efforts to negotiate a fair division. But the possibility of unilateral action remains, nonetheless, and becomes increasingly defensible if the other side displays continual and unreasonable intransigence (e.g., in refusing a fair division when offered). The latter is to some degree a description of the relationship between the Aboriginal poor and the non-Aboriginal poor – historically the non-Aboriginal poor were quick to call for the dispersal of Aboriginal lands, and inveighing against the "excessive" funds spent on assisting Aboriginal groups remains a ready political tactic among many elements of non-Aboriginal society in the present day.

This category of competition can only partially describe current circumstances, however. While both the Aboriginal and non-Aboriginal poor recognize that current levels of assistance have sharp limits that are not likely to be overcome any time soon, this pool remains considerably shallower than it would be in a more energetically egalitarian society. Much of the inequality in Canada and elsewhere stems from the simple unwillingness of powerful social actors to behave appropriately where assistance to the poor is concerned. For this reason, the conflicts between existing poor groups should be more strongly characterized as *indirect*, the consequence of moral failure among the powerful.

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Since the causal responsibility for this condition lies in the choices of powerful social actors, the primary moral responsibility to change them obviously does as well. If it is permissible for groups to help themselves first in the case of direct competition for resources, it is unambiguously so when the competition is artificially created (or deepened) by others. In such cases each would obviously have grounds for overthrowing the circumstances limiting their mutual claims if they could, but it seems clear that each also has a right to improve its own condition unilaterally so long as it does not actively block the efforts of other groups to do the same. This does not mean that Aboriginal groups should not make common cause with other poor groups, of course – they clearly should where they can. But it does mean that they need not do this *first of all*, nor that they need to construct their entire political strategy around achieving this goal. In situations where opportunities to improve one's circumstances are rare and easily destroyed by changing political tides, groups seem permitted to make use of the leverage available to them here and now, even if they should remain open to deeper changes that would remove the obstacles more generally.

Given this background, it should be easier to recognize the second difficulty in the objection that that particularized cultural claims occlude common interests. In fact, these interests can be common only if they entail the recognition that individuals reasonably care about more than simply their economic status. Poverty matters because it prevents individuals and groups from pursuing other things of importance to them. Even if Aboriginal claims for reparation were dissolved, this would not do away with the particularized kinds of cultural and aesthetic valuations held by Aboriginal groups, nor with their desires to speak different kinds of languages or to pursue different forms of social organization (e.g., in giving deep weight to kinship relations). It seems likely that the desires of Aboriginal peoples will remain a point of social difficulty until they stop seeking to remain distinctive, or until surrounding populations become willing to accept their differences. The second solution is obviously the required one, by long-standing principles of toleration and individual choice – it is hard to see how individuals could reasonably be called upon to abandon such basic moral interests in the name of something purporting to be justice. Will such toleration of difference in fact occur over the long term? An examination of history, at least, is not particularly promising.

In combination, what do these arguments tell us about how one should behave politically in a world where the hoped-for broad coalitions do not yet exist? The implications are most straightforward where the political decisions of Aboriginal peoples themselves are concerned: they can in good conscience seek to improve their current status without fear that they are illegitimately blockading other poor groups. They are not in fact engaging in any sort of blockade at all, and the blame for any disruptions created by the particularities of their claims cannot rest with them. It rests instead with the powerful parties who actually bring about current conditions. For those parties, the conclusions of this examination are clear as well: they should work to change the circumstances

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that pit groups of the poor against one another, by making greater levels of assistance available to all sides through mechanisms appropriate to each.

What about those of us who are not in positions of power, or are in only limited positions? One perverse political response, suggested by Barry's view, might be to seek the destruction of the legal arrangements allowing Aboriginal claims, in hopes that this would force Aboriginal groups to join a grand coalition with the non-Aboriginal poor at some future point. The implausibility of such a strategy should be obvious, however. Not only would it deprive the Aboriginal poor of existing political leverage while replacing it with nothing in particular, but Aboriginal groups would have legitimate grounds for refusing to join such a coalition until their own moral interests were respected in appropriate ways. Abolishing existing laws for compensation would, in fact, do little more than add a small and legitimately dissatisfied population to a larger number of the poor, on the basis of little more than speculation about what would follow.

It is worth imagining possible outcomes here. In one scenario, other members of the coalition of the poor would recognize the particularity of Aboriginal poverty and take appropriate steps in relation to it, in which case the whole exercise of abolishing existing laws will have been needless. In another, Aboriginal populations would remain disaffected and ill-served by "generalized" programs of poverty relief, while legitimately seeking to recapture political instruments that will provide assistance in appropriate forms. Neither possibility makes a good case for the abolition of existing laws. The appropriate response by morally concerned third parties is thus the obvious one: they should seek to demonstrate that programs of historical reparation for Aboriginal groups are one form of assistance to those in need, and therefore worthy of being supported by both poor and wealthy where they already exist. Given the complexity of all human societies, and of poverty itself, it is hard to see how any long-term movement for social justice could survive without coming to terms with its own internal diversity in any case. The insistence on an artificial uniformity is rarely likely to be a viable strategy, either morally or politically. It certainly does not seem to be one in this case.

Before concluding, one should revisit the apparently troubling possibility discussed earlier. What about an Aboriginal group that is already wealthy, and that pursues historically based compensation anyway? It should be clear that they would behave appropriately in pursuing a more demographically fair distribution of social positions – egalitarianism along this axis matters as well, particularly given the degree to which it impacts political outcomes. Such a group would of course bear responsibility similar to that borne by other wealthy groups if it failed to support programs of assistance to the poor broadly speaking, but it seems clear that it could bear no *more* responsibility. The prospect of already-wealthy Aboriginal groups gaining compensation is socially inflammatory only because of the awkward questions it raises about the justifications for inequality in the wider society. What is divisive is not the actions of such groups, but rather the way that their actions are perceived by populations who

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have learned to overlook some ways of getting wealth without earning it (direct inheritance) and not others (temporally delayed inheritance). There may be reasons to hope that relatively wealthy groups would choose not to pursue the options open to them – and third parties need not support every such effort without qualification – but they surely cannot be singled out as irresponsible where they choose to do so given the character of the world in which we live.[25] The responsibility for the transition to a more satisfactory form of social order cannot rest so heavily on them – it must rest instead on those who actually control the levers of power, and who refuse to use them differently.

In any case, such a discussion is mostly hypothetical. In real cases, the concern with already-wealthy Aboriginal nations using historically based claims to become even wealthier rarely holds, and claims for reparation are one of the relatively limited tools available to the many Aboriginal groups that remain staggeringly poor – tools that must be made to serve a great many other uses as well. To suggest that, in such circumstances, impoverished groups should be willing to give up their own moral interests both economically and culturally in the name of a potentially illusory long-term movement toward greater equality for everyone seems profoundly mistaken. In the world as it is, specific legal and political tools can be extremely important for poor and relatively marginalized groups, and these are the tools that now exist. For that reason, they deserve continued defense.

## Argument, Context, and Power

In this essay, I have accepted the position that historical ownership rights can in principle expire, and have tried to demonstrate why this abstract finding does not lead to the conclusions that we might expect given current circumstances. My intention has not been to impugn the motives of Waldron or anyone else who focuses primarily upon the principled argument. Waldron at least acknowledges caveats, even if they are given insufficient attention. The problems I have sought to outline occur when we fail to work with sufficient detail through the gap between abstracted principles and the complexities of our own concrete circumstances. Where Aboriginal rights are concerned, a failure to navigate this gap can become actively dangerous in its actual political effects.

There is a reasonable tendency in moral philosophy to proceed in stages, isolating out different kinds of justificatory grounds for careful evaluation without conflating factors present. The problem is that these conflating factors often matter a great deal for our real political lives. Where our analysis is unlikely to have much social impact, this may not be much of a concern. The histories of states such as Canada and the United States, however, make it clear that philosophical arguments about Aboriginal land rights and self-government make a political difference. It is in fact relatively easy for Aboriginal economic and political arrangements to be dissolved through changes in legislation if enough people wish to achieve this. This is a danger of which Aboriginal actors are constantly and acutely aware. But arguments against the property holdings

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of persons elsewhere in society are much less likely to have meaningful political impacts. The substantial danger, then, is that the principled arguments will be applied where it is easy and convenient for powerful social forces to do so – toward Aboriginal claims – and nowhere else. An awareness of the context in which Aboriginal claims are being made suggests that this would be both unfair and unwise if we are concerned, as Waldron is, with achieving something close to fairness in society.

Does this mean that one should not make such arguments in the first place? Perhaps not. But it does suggest that the specific implications of our principles must be considered especially carefully where the rights of relatively marginalized social groups are concerned. It would be desirable to live in a political world in which our arguments did not sometimes lead us astray in their practical implications, and where they did not have potentially unintended social implications if taken seriously by others. But that world is not our own, and making moral arguments while acting morally ourselves may sometimes require careful consideration of our broader political context, no matter how disheartening such close examination may sometimes become to our hopes for profound social change.[26]

## Notes

1 Jeremy Waldron, "Superseding Historic Injustice," *Ethics* 103 (1992): 4-28. Waldron published an extended version of the essay as "Historic Injustice: Its Remembrance and Supersession," in *Justice, Ethics, and New Zealand Society*, ed. Graham Oddie and Roy Pettit (Auckland: Oxford University Press, 1992). Since the version published in *Ethics* has been far more widely distributed, I have focused on it here. More recently, Waldron has published slightly altered versions which replicate these conclusions. See, e.g., Jeremy Waldron, "Redressing Historic Injustice," *University of Toronto Law Journal* 52 (2002): 135-60.

2 Waldron, "Superseding Historic Injustice," p. 19.

3 Ibid., p. 19.

4 Notice that Waldron's argument applies only weakly to public lands, something that is of obvious relevance to the Canadian case. See Burke A. Hendrix, *Ownership, Authority, and Self-Determination: Moral Principles and Indigenous Rights Claims* (University Park: Penn State University Press, 2008), pp. 48-50.

5 Waldron, "Superseding Historic Injustice," p. 13.

6 Ibid., p. 26.

7 It would do Waldron a disservice to suggest that he ignores the ways in which these historical injustices are remembered, or the potential symbolic importance of reparations in some form; he is acutely aware of both. Ibid., pp. 5-6.

8 Ibid., p. 27.

9 Ibid.

10 "I want to end by emphasizing two points"; ibid. These in fact are not the final paragraphs of the article, which instead summarize the article's central conclusions about how injustices can fade.

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11 I regard Waldron's decision to excise the following line from the version published in *Ethics* ("Superseding Historic Injustice") as deeply mistaken: "Failing that determination to do justice now, there is nothing with which one can resist aboriginal claims of reparation except the shabby apparatus of the title deed and the police barricade" (Waldron, "Remembrance and Supersession," p. 167).

12 For a more polemical explication, see Burke A. Hendrix, "Political Theorists as Dangerous Social Actors," *Critical Review of Social and Political Philosophy* 15 (2012): 41-61.

13 This is especially true given the relative paucity of Aboriginal academics well-placed to challenge these claims, and the difficulty they have in being heard on their own terms. See Dale A. Turner, *This is Not a Peace Pipe* (Toronto: University of Toronto Press, 2006), chaps. 4-5.

14 See, e.g., the copious discussions of land in the *Report of the Royal Commission on Aboriginal Affairs* (Canada: Canada Publishing Group, 1996).

15 See further Hendrix, "Dangerous Social Actors."

16 For an explanation of broader social requirements essential to the rule of law, see, e.g., Martin Krygier, "The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule of Law," in *Australia Reshaped: 200 Years of Institutional Transformation*, ed. Geoffrey Brennan and Francis G. Castles (Cambridge: Cambridge University Press, 2002).

17 It is of course an open question whether any actual programs of assistance apply "without distinction" in the relevant sense for those who administer and experience them. In the American case, see, for example, Anna Marie Smith, *Welfare and Sexual Regulation* (Cambridge: Cambridge University Press, 2007).

18 Institutional development can obviously come in more or less effective forms. See, e.g., Harvard Project on American Indian Economic Development, *The State of Native Nations: Conditions under US Policies of Self-Determination* (New York: Oxford University Press, 2007); Stephen Cornell and Joseph Kalt, eds., *What Can Tribes Do? Strategies and Institutions in American Indian Economic Development* (Los Angeles: UCLA American Indian Studies Center, 1992).

19 So long as Aboriginal groups are allowed the real control necessary to reap the economic benefits. See, e.g., Tom Flanagan, Christopher Alcantara, and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal and Kingston: McGill-Queens University Press, 2010), part 3.

20 Waldron's rather ambiguous caveats suggest that this may be his view. If so, it is perplexing that he has chosen to focus so much attention on Aboriginal claims, especially without emphasizing this larger framework in his writings on the expiration of historical injustice. See his more generalized arguments in Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988), especially pp. 431-9.

21 It is obvious that inheritance is an ongoing social practice that stretches far beyond the bounds of the law in any formal sense. While it is sometimes said that property rights are the creatures of the state, this is so only in the most attenuated way – practices of inheritance existed long before there were social forms that could easily be

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described by the term "state," and these practices have many associated social institutions that make attempts to change the laws accordingly difficult.

22 Although this essay is not focused primarily on political distributions, it should be obvious that parallel arguments can be offered where political power and territorial boundaries are concerned. States like Canada and the United States claim historical justifications for their current territorial configurations, meaning that patterns of inheritance are even more foundationally structuring here. The appropriate responses are likewise roughly the same.

23 Brian Barry, *Culture and Equality* (Cambridge, MA: Harvard University Press, 2001), pp. 11-2.

24 For an overview of the debate in this regard, see, e.g., Will Kymlicka and Keith Banting, eds., *Multiculturalism and the Welfare State: Recognition and Redistribution in Contemporary Democracies* (New York: Oxford University Press, 2007).

25 It is not only non-Aboriginal populations who may be made uneasy by apparent profit-seeking by already well off groups, of course. Many members of Aboriginal groups also seem likely to regard such possibilities as a dangerous rupture with egalitarian and co-operative traditions. One appropriate response would be for already-wealthy Aboriginal groups to distribute special assistance to Aboriginal groups that remain poor. Another potentially more transformative option toward broad coalition-building would be for well off Aboriginal groups to make arrangements for aiding poor persons who are not Aboriginal; for example, by offering academic scholarships to children of any background raised in persistent poverty. Given the importance of egalitarianism along other axes, however, it seems fully permissible for Aboriginal groups to forgo such options if they so choose.

26 I would like to thank Sepeyeonkqua Myles, Duncan Ivison, Robert Mayer, Joel Olson, Xavier Landes, Chris Alcantara, Loren King, Anna Marie Smith, Jacob Hannan, Jimmy Casas Klausen, Dan O'Neill, Larry Dodd, Dennis McKerlie, Jeff Spinner-Halev, an anonymous reviewer, and audiences at Cornell University, Wilfred Laurier University, and the Universities of Alberta, Florida, Wisconsin, and Nebraska for comments on this work in various stages of development.

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