Settlement, Return, and the Supersession Thesis

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In earlier articles, the author developed what is known as the "Supersession Thesis," asserting that historic injustice may be overtaken by changes in circumstances so that a situation that was unjust when it was brought about may coincide with what justice requires at a later time. The Supersession Thesis was developed initially as a tool for considering historic injustice suffered by indigenous peoples in the European settlement of countries like Australia, Canada, New Zealand, and the United States. In this paper, the author explores the application of the Supersession Thesis to issues about the Palestinian right of return and also to Israeli settlements in the Occupied Territories. The paper argues that, while it is not unthinkable that the Supersession Thesis might eventually legitimize the settlements and undermine the Palestinian right of return, there is no guarantee that this will happen. The application of the Supersession Thesis does not depend on the passage of time, but on changes in circumstances that a theory of justice makes relevant. Many of the circumstances that make the Supersession Thesis relevant to the post-colonial situations described (Australia, New Zealand, etc.) do not apply in the Israeli situation. Nevertheless, it is worth considering the possibility of applying the Supersession Thesis in this case, because

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it enables us to assess the merits of the Thesis more sharply in relation to injustice that is taking place now (or took place in living memory), as opposed to injustice that took place in the nineteenth century.

I.

It is a bit of a stretch, but I am, in a way, a child of settlement. My ancestors came from England and Ireland four generations ago and settled in New Zealand's South Island, in the dry mountainous region of Central Otago — a semi-desert area (anomalous in those latitudes) reminiscent of parts of Northern Israel. They were farm laborers, then rabbit-hunters, then gold prospectors, and, eventually, orchardists — growing apricots and peaches along the banks of the Clutha River.

The settlements that they and their fellow colonists established — scattered villages and homesteads, farms and orchards — were, of course, nowhere near as controversial, legally and politically, and certainly nowhere near as dangerous, as the settlements discussed in this volume. But they were not free of controversy. New Zealand became part of the British Empire in 1840 with the signing of the Treaty of Waitangi, whereby the assorted chiefs of the indigenous people — the Maori — ceded sovereignty and a right of preemption to the British Crown in return for certain assurances that their property, their chiefly authority, and their way of life would be protected.[1] In fact, the way in which the Crown acquired land in the 1840s and 1850s and its subsequent use for colonial settlement has been a longstanding grievance, and many Maori groups believe — probably quite rightly — that there were egregious violations of the spirit and, often, the letter of the Treaty. In the North Island, Maori resistance to settlement culminated in war with the British, in which, after several years of bitter fighting, Maori resistance was crushed. There was no war in the South, where my ancestors settled, but there are longstanding grievances there. The Waitangi Tribunal, established by the New Zealand government in 1975 to address all such grievances, found that the British had acted unconscionably in the South and in repeated breach of the Treaty when they acquired most of the South Island — 34 million acres, more than half the land mass of New Zealand (and many times the size of

1 For the English text of the Treaty, see Treaty of Cession between Great Britain and New Zealand, *signed at* Waitangi, Feb. 5-6, 1840, 89 Parry's Consol. T.S. 473 (1839-1840). An accessible version of both the English and Maori texts is available at http://www.govt.nz/en/aboutnz/?id=a32f7d70e71e9632aad1016cb343f900.

Israel) — from Ngai Tahu, the Maori tribe that inhabited the Island, for just over £14,750, leaving the Ngai Tahu just 35,000 acres for their own use.[2] These findings were sufficient to call into question the leasehold titles of the great sheep farming enterprises that had employed my great-grandfather as a laborer.

Though I live in New York, I remain a New Zealand citizen and travel regularly back and forth to New Zealand, to this land that I regard as mine, despite this history of injustice. And I have devoted a lot of scholarly energy to thinking through these issues of historic injustice and the rights and grievances of indigenous peoples. Over the years, I have become quite skeptical of the grievance industry, skeptical of the Waitangi Tribunal process and the settlements it has reached, skeptical of claims based on indigeneity, skeptical of culture and language rights, generally.[3] My own views tend in a more cosmopolitan direction, emphasizing the fluidity and porousness of cultural boundaries, the importance of mixture and fracture in cultural and national identities, the significance of movement and migration in the human story (we are all the descendants of settlers), the absurdity of claims based on prehistorical first occupancy, and the importance of focusing the concerns of justice on the here and now and the needs and deserts of whoever happens to be in a given territory irrespective of how they or their ancestors got there.[4] I am sure there is a significant relation between my personal background as a migrant, my ancestral background as the descendant of a settler family, and this skepticism about the moral significance of who was where first. I am sure, too, that it affects my views about settlements, both in general and, also, in the Israeli case. How exactly it affects them is what I shall now try to explain.

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2 The Ngai Tahu Rep. ch. 24, § 1 (1991). The report may be read at http://www.waitangi-tribunal.govt.nz/reports/ sichat/wai27/wai027l.asp.

3 *See* Jeremy Waldron, *Indigeneity — First Peoples and Last Occupancy*, 1 N.Z. J. Pub. L. 55 (2003).

4 *See especially* Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. Mich. J.L. Reform 751 (1992) [hereinafter Waldron, *Minority Cultures*]; Jeremy Waldron, *Multiculturalism and Melange, in* Public Education in a Multicultural Society 90 (Robert K. Fullinwider ed., 1996); Jeremy Waldron, *Teaching Cosmopolitan Right, in* Education and Citizenship in Liberal-Democratic Societies: Cosmopolitan Values and Cultural Identities 23 (Kevin McDonough & Walter Feinberg eds., 2003).

II.

In some recent writings, I have explored the proposition that certain things that were unjust when they occurred may be overtaken by events in a way that means their injustice has been superseded.[5] I call this the Supersession Thesis. In formulating this thesis, I have in mind historic injustices of the sort discussed in relation to indigenous peoples' rights in New Zealand, Australia, and North America. The idea is that even if wrongful acts (for example, in the course of land purchase, expropriation, and settlement) lead to an unjust situation, S_1, in (say) 1860 in which some indigenous people, P, stand deprived of resources to which they are at that time morally (and perhaps legally) entitled, the persistence of that deprivation for a long period of time, in the course of which circumstances change drastically, may result in an altogether different situation, S_2, which is no longer unjust — relative to contemporary needs, claims, and deserts — and in which no one, including the descendants of P, are deprived of resources to which they are legally or morally entitled. (Or, if in S_2, the descendants of P *are* deprived of resources to which they are entitled, the injustice of that deprivation is intelligible and remediable without any reference at all to the injustice that led to S_1.) The argument may be illustrated using a very simple model,[6] involving three scenarios.

(1) On a large bounded plain, a number of groups — the E's, the F's, the G's, etc. — appropriate waterholes — H_e, H_f, H_g, etc. — in conditions where it is known that there are enough waterholes for each group. So long as those conditions obtain, it seems reasonable for the members of a given group, G, to use the waterhole that they have appropriated (H_g) without asking permission of other groups with whom they share the plain; and it may also seem reasonable for them to exclude members of other groups, like the F's, from the casual use of H_g, saying to them, "You have your own waterhole. Go off and use that and leave ours alone." But suppose one year, there is an ecological disaster, and all the waterholes in the east of the territory dry up except the one that the members of G are using. Then

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5 *See* Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, *in* Justice, Ethics and New Zealand Society 139 (Graham Oddie & Roy Perrett eds., 1992) [hereinafter Waldron, *Historic Injustice*]; Jeremy Waldron, *Superseding Historic Injustice*, 103 Ethics 4 (1992) [hereinafter Waldron, *Superseding Historic Injustice*]; Jeremy Waldron, *Redressing Historic Injustice*, 52 U. Toronto L.J. 135 (2002) [hereinafter Waldron, *Redressing Historic Injustice*].

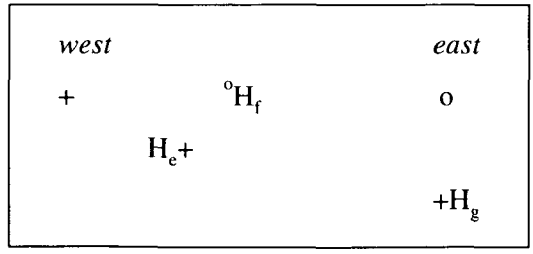
6 The example is drawn from Waldron, *Superseding Historic Injustice*, *supra* note 5.

in these changed circumstances, notwithstanding the legitimacy of their original appropriation, it is surely no longer permissible for G to exclude the F's from H_g. Indeed it may no longer be in order for members of G to casually use H_g as "their own" waterhole in the way they did before. In the new circumstances, it may be incumbent on them to draw up a rationing scheme that allows for the needs of everyone in the east of the territory to be satisfied from this one resource. Thus, changing circumstances can have an effect on ownership rights notwithstanding the legitimacy of the original appropriation.

(2) Here is the second scenario. Suppose, as before, that in circumstances of plenty, various groups on the savannah are legitimately in possession of their respective waterholes. One day, motivated purely by greed, members of group F descend on the waterhole H_g, which is used and possessed by group G, and (using violence) insist on sharing H_g with G. (What is more, they do not allow reciprocity; they do not allow members of G to share the waterhole H_f that was legitimately in possession of the F group.) That is an injustice. But then, as in scenario (1), circumstances change — see Figure 1 — and all the waterholes in the east of the territory dry up except the one that originally belonged to G. The members of group F are already sharing H_g on the basis of their earlier (unjust) incursion. But now that circumstances have changed, they are *entitled* to share that waterhole. Their use of H_g no longer counts as an injustice; it is, in fact, part of what justice now requires. The initial injustice by F against G has been superseded by circumstances.

Figure 1

o = dried-up waterhole + = working waterhole



I do not think this possibility — of the supersession of historic injustice — can be denied, except at the cost of making one's theory of historical entitlement utterly impervious to variations in the circumstances in which holdings are acquired and withheld from others. If circumstances make a difference to

what counts as a just acquisition, then they must make a difference also to what counts as an unjust incursion. And if they make a difference to that, then in principle we must concede that a change in circumstances can affect whether a particular continuation of adverse possession remains an injustice or not. In other words: what justice requires and what it condemns are not always stable over time. Justice is sometimes sensitive to circumstances, and if circumstances change, justice might require us to say of a distribution of resources that was just in, say, 1860 that it is (or would be) unjust in 2003; and justice might also require us to say of a state of affairs that was established unjustly in 1860 that the existence of that very same state of affairs in 2003 is not unjust. The injustice of that state of affairs may be *superseded* by circumstances.

Notice that this is not just a matter of a different remedy being appropriate, in respect of something that still counts as an injustice. The Supersession Thesis is about the substantive injustice itself: it holds that although the use of H_g by members of group F was an injustice when it initially occurred, it is no longer an injustice. It is now what justice requires. There may be a further question about whether group G deserves compensation for the initial injustice — and that is a matter of remedies. But it is a separate question from whether there is an ongoing injustice at the later time (when the other waterholes dry up). If group F's use of H_g still counts as an injustice at this later time, then there will be a question of remedy for that too. But if group F's use of H_g does not count as an injustice at the later time, then no question of remedy arises.[7]

(3) Now here is an additional complication. In the scenario we have just considered, the impact of the change in circumstances is entirely exogenous to the actions of the various parties: there is a climate change, and H_f dries up. But we can also imagine a scenario in which the impact of the change of circumstances is partly a result of the initial injustice. The Fs invade H_g and settle in its vicinity. Had they remained in the vicinity of H_f they might have been able to move to another waterhole, H_e, or other waterholes in the west, somewhat further away from H_f but reachable from there, when H_f dried up. But now that is not an option: after the ecological catastrophe, the Fs are stranded at H_g and the original Gs have no choice morally but to share their

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7 I am grateful to Michael Heller and Joseph Raz for pressing this point in discussion. I should add that the distinction between rights and remedies that I am using here may be blurred by some legal scholars — by Legal Realists, for example. But I do want to insist on it, especially against the (entirely non-Realist) view that we can use the distinction between rights and remedies to hold property rights constant even under changes of circumstances.

water resources with everyone in the vicinity, including the wicked Fs — at least until such time as it becomes practicable for the Fs to move elsewhere.

Now I think that in this case, the two issues — the wrongness of the original injustice and the appropriate distribution of the resources of H_g among those in its vicinity — are separable. Some theorists may balk at this, however, for they will say that distributional principles should be sensitive to moral desert, and the Fs became undeserving by virtue of their incursion. Fine, let us concede that. But let us assume now that we are talking not about the original perpetrators of the injustice but their infant children, many of whom will die for lack of water if they are forced to trek all the way west from H_g to H_e. The presence of these children in the vicinity of H_g, and their fatal distance from H_e, are certainly results of the original injustice; but they are not results that affect the moral deservingness of the infants. What this shows, I think, is that the change of circumstances referred to in the Supersession Thesis may include changes that are the immediate casual product of the very injustice originally complained of. The facts established by injustice — facts on the ground, to use a phrase that is commonly invoked — may be among the circumstances that make the state of affairs established by the original injustice *no longer unjust* at some later period in time.

I developed this argument initially in reference to the case of New Zealand.[8] Acknowledging that the early history of that country was marred by the injustice I have already referred to, still no one can deny that there have been massive changes in the circumstances of justice there in the last century or two.[9] The most striking change is in population: there is now a settled population — Maori, *pakeha*,[10] and mixed-ancestry (there has been very extensive intermarriage) — that is larger by a factor of about twenty than the population in (say) 1840. There is no question of the descendants of European settlers returning *en masse* to England or anywhere else. Moreover the resources with which justice has to concern itself have also changed. European technology and farming, mining, and fishing methods have transformed out of all recognition the amount and the productivity of land and other resources available for use. Agriculture now supplements horticulture; mountainous hill country has become farmable; new species

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8 *See* Waldron, *Historic Injustice*, *supra* note 5.

9 I use "circumstances of justice" here in a way that is loosely related to Rawls' use of it in John Rawls, A Theory of Justice 109-12 (rev. ed. 1999), so that it includes situations relating to scarcity and the extent and nature of the claims that are made on available resources, as well as changes in technology, attitudes, etc.

10 *Pakeha* is the Maori (and now commonly the New Zealand) word for persons of European extraction. I believe it originally meant something like "goblins."

have been introduced; modern road, rail, and other infrastructure have developed; cities have been built (and most New Zealanders — Maori and *pakeha* — live in cities); and the technology of a fully developed commercial society has replaced the Neolithic technology that characterized the thousand years or so of Maori occupation. In these different circumstances, it boggles belief to say that what justice requires in this territory now is anything like what justice required at the very beginning of European contact. To believe that, one would have to think that the requirements of justice are impervious to the point of oblivion to changes in circumstances.

I do not mean to say that we should forget about historic injustice. Apologies and acknowledgments are properly demanded, and at least symbolic compensation may be due to descendants of those who were originally treated unjustly.[11] But many demands made by or on behalf of indigenous peoples go well beyond this, and they amount to a demand that we respond now as though nothing had happened to supersede the historic injustice. I refer to the suggestion that is often heard about something like *reversion* as a remedy for injustice. The idea is that titles and jurisdictions unjustly appropriated in the mid-nineteenth century might simply revert now to their original possessors, who would then set the terms (or participate from a privileged position in setting the terms) on which the resources in question would continue to be used by present-day inhabitants of the territory.[12] And this, it is suggested, is not by way of compensation or reparation of

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11 *Cf.* Waldron, *Superseding Historic Injustice*, *supra* note 5, at 4-7.

12 An example of this argument is provided by Julie Cassidy, *Sovereignty of Aboriginal Peoples*, 9 Ind. Int'l & Comp. L. Rev. 65, 117 (1998), considering the possibility of reversion to aboriginal sovereignty in parts of Australia:

> The right of an ousted sovereign to have sovereignty restored under the laws governing belligerent occupation is derived from ultimate *de jure* title or territorial sovereignty. Sovereign rights do not inure in a belligerent occupant, much less an occupant whose entry was unlawful ... . The sovereignty of the dispossessed peoples continues, awaiting reversion, despite the loss of territory and even total illegal annexation.

Cassidy cites the reversion of Hong Kong to the People's Republic of China in 1997, the resurrection of Portugal's sovereignty after the invasion of Philip II of Spain, and then — as a rather more problematic example — she says (*id.* at 118) that

> [i]t is also believed the steps taken by the United Nations towards the establishment of the State of Israel only reinforced the legitimate claims of the Jews to their historical rights. Prior to Israel's re-entry into these territories, it has been suggested the occupants (i.e., Arabian and Jordanian States) were unlawful belligerents, who therefore acquired no legal title to the country, despite its annexation. In line with this suggestion, many in the international community

injustices that began and ended in the past, but, rather, as a way of putting a stop to *ongoing* injustice and restoring resources and power to those who have continued all along to be entitled to them.[13] Such a reversionary proposal evidently assumes that those who were entitled to the resources just before the injustice complained of began, say, in 1850 would — apart from that injustice — still have been entitled to them in 2003.[14] And that is what the supersession argument contests in denying that justice is impervious to changes in circumstances. It is a way of showing that, in certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice. And if the dispossession does not continue to count as an injustice, then reversion cannot be conceived as an appropriate remedy.

I should add that the Supersession Thesis is not just a technical theorem in political philosophy. It expresses a certain attitude towards justice. The

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saw Israel's return to be a legitimate assertion of the State's right to exercise full sovereignty over its kindred lands.

In discussing — though not necessarily approving of — reversionary claims, Ben Kingsbury (in Ben Kingsbury, *Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law*, 52 U. Toronto L.J. 101, 118 (2002)), offers a different set of examples: "[W]hen Estonia, Latvia, and Lithuania broke away from the Soviet Union in 1991, they claimed simply to be restoring a pre-existing sovereignty that had been illegally interfered with by unlawful forcible incorporation into the USSR in 1940-1941, although the attitudes of other states to this juridical claim varied sharply."

13 For the difference between the Supersession Thesis and models that emphasize compensation and reparation, see Waldron, *Superseding Historic Injustice*, *supra* note 5, at 14-20. In that article, I also argue that the Supersession Thesis addresses claims about injustice somewhat differently from the way they are addressed in Robert Nozick's account of justice-in-rectification in Robert Nozick, Anarchy, State and Utopia 152-53, 230-31 (1974). The difference, in both cases, is that the Supersession Thesis addresses claims about ongoing injustice rooted in actions that took place in the past, whereas the compensation/reparation claims associated with justice-in-rectification do not assume that the injustice is ongoing.

14 The reversion argument also presupposes that the entities to whom injustice was done have survived into the present. This may seem easy, when we are talking about corporate entities like Maori tribes or *iwi*, a Maori word indicating major tribal groupings. In fact, it is quite problematic, since those entities have taken on an entirely different character from the character they had a century and a half ago, and many descendants of those who were members of the relevant *iwi* in 1860 now live in circumstances largely untouched by the same *iwi* in 2003. See the New Zealand case of Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission [2000] 1 N.Z.L.R. 285, and the discussion in Waldron, *Redressing Historic Injustice*, *supra* note 5.

spirit of the Supersession Thesis is that people who are thrown, in Kant's phrase, unavoidably side-by-side have no choice but to share the resources that surround them justly among themselves as though they were a new community, even if the presence of some of them in that situation is a result of injustice.[15] Justice may make reference to the past, through principles of desert and Lockean entitlement;[16] but its primary focus is on the present — present-day people, present-day resources — and on the circumstances of the present inasmuch as they affect who should get what.

III.

My main aim in the present paper is to consider whether the Supersession Thesis could apply to the Israeli settlements in the Occupied Territories. This is not the only issue about historic injustice and the possibilities for supersession that arise in the context of recent events in Israel/Palestine. Some say that the initial establishment of the State of Israel in 1948 was itself an injustice, and there is a question about whether those who think this should nevertheless concede that that injustice has been superseded by changes in circumstances along the lines set out in the previous section. (Of course, those who deny that the establishment of Israel was unjust will deny that there is any issue of supersession, for they will say there is nothing to supersede.) Some say that even if the establishment of the State of Israel was not unjust, still certain events associated with the establishment of the state were unjust, like the seizure of land and the ethnic cleansing of Palestinian populations; and again there is an issue about supersession that we can face. This question is particularly important for our consideration of Palestinian claims about a right of return for those who were driven into exile from their homes — first in 1948 and then in 1967. Suppose it was true in the months following their expulsion that these men and women had a right to return to the property they owned and to the country in which they were resident. Do those rights retain their moral force decades later? Or is it possible that they have been overtaken by events? May it not be that circumstances in Israel/Palestine have changed in the interim to such an extent that, in the new circumstances, these previously valid rights of return can no longer be upheld? (Once again these are not issues for anyone who thinks that

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15 *Cf.* Immanuel Kant, The Metaphysics of Morals at pt. 1, paras. 41-44 (1797), *in* Immanuel Kant, Practical Philosophy 450-56 (Mary Gregor ed., 1996).

16 *Cf.* Nozick, *supra* note 13, at 155.

Palestinian refugees never had a right of return; but they may be issues for those who believe that the initial ethnic cleansing involved injustice and who wonder whether the remedies for that injustice that would have been appropriate in its immediate aftermath are still appropriate now.)

I hope to address all three of these additional issues — establishment of the state, ethnic cleansing in 1948, and the right of return — at various points in the paper. But the bulk of my comments will address the issue of the application of the Supersession Thesis to the settlements that began after the war of 1967 and continue today. I acknowledge that many critics of the settlements believe that their illegitimacy is continuous with some of the settlement policies that began much earlier. But I have a particular reason for wanting to focus on these relatively recent events.

Asking about the application of the Supersession Thesis to settlements that have been established in recent decades, and are still being established, requires us to look at the possibility of the supersession from a perspective that is nearer to the front-end, as it were, than to the back-end of the injustice complained of. It requires us to consider the possibility of supersession from an *ex ante* perspective, rather than from an *ex post* perspective. In my previous discussions of the Supersession Thesis, I have concentrated on events that took place in North America, Australia, and New Zealand more than a century ago. From that *ex post* perspective, all our attention is focused on the remedial stage. In the Israeli case, by contrast, we are looking at relatively recent settlements and considering what the moral effect of their long-term establishment will be, rather than looking at settlements set up well in the past and considering what the moral effect of their long-term establishment has been.[17] That is actually a salutary change of perspective; it offers an opportunity to consider the Supersession Thesis in a somewhat different light as it applies to the situation of those who are actually perpetrating the injustice complained of — again, assuming (for the sake of argument) that we are right to regard it as an injustice.

The issue is particularly worth considering in the Israeli case, because I think some of those who live in the settlements and some of those who oppose them have in mind a possibility that is quite like the possibility envisaged by the Supersession Thesis. Those who live in the settlements

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17 However, we should bear in mind that some of the settlements in the Occupied Territories are actually quite long-established. The territories in question were occupied by the Israeli military in 1967, and some settlements were established quickly thereafter — i.e., long enough ago for two generations of descendants of the original settlers to have been born there. See Avishai Margalit, *Setting Scores*, N.Y. Rev. Books, Sept. 20, 2001, at 14, for a useful summary of the history.

look forward to the settlements becoming more legitimate with the passage of time, and those who oppose them do so most urgently because they, too, have this prospect in mind and they fear it. One side wants to take advantage of the fact that those who talk now about the illegitimacy of the settlements will eventually have to come to terms with established facts on the ground. And the other side wants to prevent the facts of settlement from becoming established and entrenched for more or less exactly the same reasons: they do not want them to be facts on the ground that people have to come to terms with. True, on both sides this talk of legitimacy may be a little distant from the abstract concerns of the moral philosopher. Legitimacy is not the same as justice. Both the settlers and their opponents are looking to legitimacy in the eyes of the world or legitimacy in the eyes of those who currently participate one way or another in the Israeli-Palestinian conflict. In other words, their notion of legitimacy may be empirical rather than moral.[18] However, the gap may not be as wide as it seems; descriptive talk of legitimacy conveys an empirical report of moral attitudes, and the moral attitudes it reports may be based (inter alia) on something like the Supersession Thesis. Moreover, no matter how legitimate the settlements become in the eyes of the world, each of us still has to form a view of his own on the subject, and I want to consider the extent to which the Supersession Thesis should affect one's view.

Here is how I plan to proceed. In Section V, I will discuss what kind of changes in circumstances are required for the Supersession Thesis to kick in and I will say something — I hope not too ill-informed — about whether those changes are occurring or are likely to occur in the case of the settlements in the Occupied Territories. Before that, however, I would like to say something general in Section IV about the character and implications of the Supersession Thesis when viewed from this temporal perspective — *ex ante* rather than *ex post*.

IV.

The objection that strikes many people when they consider the Supersession Thesis is that it creates a set of perverse incentives, a moral hazard in fact. It furnishes a reward for injustice, provided that the injustice can be sustained for long enough.

This objection may look rather remote when the contemporary situation,

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18 See also the notion of legitimacy in 1 Max Weber, Economy and Society 31-33 (Guenther Roth & Claus Wittich eds., 1978).

S_2, that we are considering is separated from the original injustice, S_1, by 150 years. But it presses on us quite acutely when we are actually in or near S_1 — that is, when we are actually watching the establishment of a settlement by those who hope that any injustice in what they are doing right now will be washed out by time if their enterprise is successful. In this context, it may seem that our talk of the possibility of the supersession of injustice is irresponsible. The last thing that is needed — people will say — in the ongoing debate about the settlements policy is a moral argument that might encourage the settlers in their quest for eventual legitimacy. I think a number of points may be made in response to this objection.

(a) It is worth emphasizing, first, that the Supersession Thesis is not just about the passage of time. The thesis does not argue that *pakeha* settlements in New Zealand are now legitimate because they have been sustained for a certain number of years; nor, in the Israeli case, would the argument be that the settlements will become legitimate because a certain period of time has passed. Indeed, I am not aware of any arguments, even arguments about prescriptive title, that build anything on the passage of time per se.[19] They tend rather to rest on factors that are almost always *associated* with the passage of time — factors such as the growth and stabilizing of expectations or the declining availability of reliable evidence about original titles, etc. Or they are arguments about what time reveals: the extent of the original proprietor's failure to police his holding, for example, the stability of certain equilibria of forces, or the long-term viability of certain conventions. I will discuss these points in more detail in Section V.

In fact, the *changes in circumstances* to which the Supersession Thesis responds need not be associated with the passage of long periods of time at all. In our model-theoretic example about the waterholes, the change of circumstances is sudden: one year all but one of the waterholes in the east dry up. (We are familiar with this sort of thing in the way that the demands of justice change in relation to sudden catastrophes, like floods.) In the New Zealand case, by contrast, the changes are largely demographic — and that does depend on the passing of generations. So, in the Israeli case, everything would depend on whether the appropriate changes in circumstances occur, with or without the passage of time. We should bear in mind, moreover, that there is no guarantee that the changes, if any, wrought by the passage

19 I guess the principle of adverse possession comes close to being an exception, though even there the justifications of it tend to refer to factors associated with the passage of time rather than the passage of time *per se*. See, for example, Jeffrey Stake, *The Uneasy Case for Adverse Possession*, 89 Geo. L.J. 2419, 2434-55 (2001), for a list of arguments.

of time will work in the direction that the Supersession Thesis postulates. They may work in the opposite direction, intensifying the original injustice rather than superseding it. On my account there is nothing inevitable about the supersession of historic injustice. All that the Supersession Thesis holds is that it is *possible* for injustice to be overtaken by events in this way.

For the sake of argument, however, I will proceed in the remainder of this Section by assuming that it is quite plausible that circumstances are changing or will change over time in relation to the settlements in the Occupied Territories in a way that will trigger the Supersession Thesis. How credible that assumption is, is something we will consider in Section V. For now, we are supposed to be responding to the objection that even holding this out as a possibility creates a moral hazard.

(b) Let us assume, for the sake of our argument in this Section, that the action of establishing settlements right now really is unjust. (Formally, this is an assumption for the sake of argument. In fact I think it is undeniable.) Now we know that most settlers and supporters of the settlements will not concede that their actions are unjust. So — as I indicated earlier — the Supersession Thesis is not for them. The Thesis is for those to ponder who acknowledge the injustice of the settlements' initial establishment but who wonder whether that moral condemnation is bound to persist. To put it another way, the Supersession Thesis presents a sobering prospect for those who oppose and condemn the settlements on grounds of injustice and a frightening prospect for those to whom the initial injustice is done. On the other hand, it offers a measure of redemptive hope for those who participate in the settlements movement but who do so in spite of their awareness that they are doing something wrong.

What sorts of injustice are we talking about? First, unjust violations of international law: the seizure of land under cover of military occupation, during a period when the legal status of the territories (and, hence, jurisdiction over them as property) has yet to be resolved.[20] Second, expropriation, whether or not under the cover of some "legal trick," as an injustice to those Palestinians who have a claim to the land that is used for settlement.[21] This includes the imposition of arbitrary formal requirements for the establishment of Palestinian title recognized by the Israeli authorities. It also includes the requisitioning of land for military or security purposes and its subsequent distribution to settlers under cover of the claim that settlements promote security. Third, unjust distribution of the resources necessary for human life

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20 Article 49(6) of the Fourth Geneva Convention, Aug. 12, 1949.

21 For the legal trick, see Margalit, *supra* note 17.

and flourishing — ranging from water to roads to police protection — in the areas affected by settlement. Fourth, the unjust (or, as to justice, the reckless and criminally inconsiderate) imposition of costs on Arab inhabitants of the areas subject to settlement, ranging from radical constraints on their conditions of life (freedom of movement, etc.) by the measures necessary to protect the settlements through the establishment of something like apartheid to brutal initiatives that involve something approaching ethnic cleansing.

Many objections to the settlements are, of course, objections of political or geopolitical prudence: they make the prospect of peace in Israel/Palestine much more remote and they provide a flashpoint for conflict. They are crimes against peace rather than crimes against justice. But in a consequential sense they are also offences against justice, inasmuch as everyone has a natural duty to play his or her part in ensuring that just institutions can be established and that obstacles are not placed in the way of the just settlement of conflicts.[22]

In what follows, then, I shall assume — I think quite plausibly — that the actions of establishing settlements in the Occupied Territories in the period from 1967 until the present are or have been unjust in some or all of these ways. When we come to discuss the right of return (towards the end of Section V), I shall make a similar assumption about that: I shall assume that the ethnic cleansing and expulsion of Palestinian refugees was wrong. In neither case — the Palestinian right of return nor the post-1967 settlements — will I countenance any application of the Supersession Thesis that relies on the tacit or surreptitious repudiation of that assumption about initial injustice.

(c) With these assumptions granted, I turn now to more robust responses to the objection about moral hazard. The first and most important thing to bear in mind is the following. If an action, A (like ethnic cleansing or establishing settlements in the Occupied Territories), would be unjust and A is being contemplated right now, the only thing that the Supersession Thesis recommends is that A *not be undertaken now*. What I mean is that the Supersession Thesis does not in any way mitigate or detract from the ordinary normative implications of a theory of justice with regard to unjust actions presently being contemplated. If an action is unjust, *it should not be performed*. Moreover, if an attempt is made to perform A, *it should be stopped*. These are our primary and most urgent obligations with regard to

22 Whether one thinks that the natural duty of justice does all or most of the work done in traditional political philosophy by theories of political obligation, it is I think undeniable that we have some such natural duties. For arguments to this effect, see Kant, *supra* note 15, para. 44, at 455-56; Rawls, *supra* note 9, at 99, 293-96; Jeremy Waldron, *Special Ties and Natural Duties*, 22 Phil.& Pub. Aff. 3 (1993).

injustice, and the Supersession Thesis imposes no qualification upon them whatsoever. The prospect that A may lead many decades hence to a situation that is no longer unjust is not a reason for not stopping A now if A is unjust now. Also, if A has already taken place and it has led to a situation, S_1, that is (now) unjust, then everything possible should be done immediately to reverse the injustice. Again, this is not affected by the Supersession Thesis. The fact that, if left undisturbed, S_1 (which is unjust) might evolve over time into S_2 (which is not unjust) is not a reason — not even the scintilla of a reason — for leaving S_1 undisturbed.

(d) If anything, the prospect of supersession might heighten the case for stopping A or reversing the injustice of S_1. If it is reasonably foreseeable that an injustice will be superseded sometime in the future, then that may be a source of additional suffering and despair experienced by the victims of the injustice and may, in that sense, make the injustice worse at present.[23] True, the despair associated with the anticipated operation of the Supersession Thesis is not, in my view, a reason for blocking its application (once the relevant circumstances change). But it may heighten the case for blocking the injustice now, before it is superseded.

(e) So far, in responding to the moral hazard objection, I have given various reasons for thinking that the prospect of the operation (in due course) of the Supersession Thesis is not a reason now for failing to stop or reverse existing injustice. But suppose the injustice does become established and circumstances are changing in a way that — if the Supersession Thesis were accepted — might require us to describe the results of the injustice as no longer unjust. Should we at that point refrain from applying the Supersession Thesis in order to deter similar injustice in the future? Here is the argument someone might offer:

> If A would be unjust, surely everything possible should be done to prevent its occurrence. If the widespread repudiation of the Supersession Thesis would make it marginally less likely that A would occur, then surely we should repudiate it.

This, in the final analysis, is where I think the moral hazard objection is leading us. It is a claim that deserves to be taken seriously, because it rests on the importance of discouraging injustice by all means necessary, including (if necessary) pretending that the Supersession Thesis is false.

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23 See also the argument in Jeremy Waldron, *Property, Honesty and Normative Resilience*, *in* New Essays in the Legal and Political Theory of Property 34-35 (Stephen Munzer ed., 2001).

But I cannot accept the argument. For I think it is not in fact true that if A is unjust, everything possible should be done to prevent it. Suppose the best way to prevent a particularly hideous injustice would be to perpetrate another injustice, which we calculate might deter the would-be performer of A. We hang an innocent man, as the old story goes, to deter other wrongdoers whose crimes would be even worse than ours. Most theorists of justice repudiate this sort of consequentialism of injustice.[24] Now, blocking the operation of the Supersession Thesis would be more or less exactly like that. The Supersession Thesis holds that we should do what justice requires in the circumstances of S_2. To fail to do what justice requires in S_2 because we think this a good way of deterring actions like A (which might bring about unjust situations like S_1) is an offensive use of injustice as a means. The claims of justice in S_2 press upon us categorically, in a way that leaves no room for any consideration of strategy, incentives, deterrence, etc. We have no choice but to do justice in and for that situation and let the incentives fall out as they may. If there is a moral hazard here, it is something justice simply requires us to accept.[25]

The upshot of all this is that we are required to take seriously *both* of the judgments that are involved in any application (or in the prospect of any application) of the Supersession Thesis to the case of the Israeli settlements in the Occupied Territories. If such settlements are unjust, then they should be stopped and dismantled. But it is not out of the question that if they are not stopped and dismantled, then over time and with the appropriate changes in circumstances, justice may require their maintenance and support. If that is what justice requires at that time, then its demands must be taken as seriously then, as I am saying they should be taken now, while the settlements are still young. The benefit of justice — including the benefit of the Supersession Thesis — is not to be withheld from the settlements just because of the folly and wrongness that surrounded their initial establishment.

The same two propositions would be true concerning any injustice attaching to the initial establishment of the state of Israel and the ethnic

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24 But see Amartya Sen, *Rights and Agency*, *in* Consequentialism and Its Critics 186 (Samuel Scheffler ed., 1988), for something like a consequentialism of justice.

25 I think there is perhaps more to be said here. The argument I make depends on viewing the demands of justice in a non-constructivist way: We are to regard the demands of justice in S_2 as uncompromising. We are not to think of them as something we might tinker with to get a more satisfactory system of justice overall. For the case against constructivism, see G.A. Cohen, If You're an Egalitarian, How Come You're So Rich? (2000); for a response, see Joshua Cohen, *Taking People as They Are*, 30 Phil. & Pub. Aff. 363 (2002).

cleansing of Palestinian villages. The proposition — call it P_1 — that those actions were unjust at the time they occurred is a claim that there was a reason for not performing them and a reason for opposing and stopping them, if possible at the time that an attempt was being made to perform them. The proposition — call it P_2 — that circumstances have changed since then and that, in the new circumstances, the existence of Israel and the exile of some of the previous inhabitants of Palestine are not unjust is not incompatible with that. Of course either or both propositions may be false: it may be false that the events of, say, 1948 involved an initial injustice (in which case the application of the Supersession Thesis is moot), or it may be false that circumstances have changed since then in a way that makes just what was previously unjust (in which case the Supersession Thesis has no effect). My point now is about whether the two propositions can be true, given the way the situations they refer to are related to one another. Though P_1 and P_2 refer to stages of what is arguably the same historical process, they refer to different actions or situations attended by different circumstances. And I want to say that the fact that the two propositions refer to stages of the *same process* should not blind us to the difference that the different circumstances make to the respective claims about justice that they involve. I do not want to deny that historical processes are morally relevant entities. But it is a mistake to think that their moral significance requires constancy of moral judgment concerning all the stages in a given process.

V.

In my discussion in Section IV of Israeli settlements in the Occupied Territories, I explored some of the moral implications of the Supersession Thesis, assuming (1) that the original establishment of some or all of the settlements was unjust, but (2) that it is possible that circumstances have changed or might change in the future in a way that supersedes that injustice.

Now we must ask: How plausible is the second assumption? Even if the Israeli government does not act immediately to block or reverse the injustice of recently established settlements, how likely is it that circumstances might change in such a way that would make long-established settlements turn out to be just sometime in the future? Is there a genuine prospect of supersession? The issue is not the sheer passage of time. As I said in point (a) above, the passage of time establishes nothing; it is changes in circumstances that go along with the passage of time that may make a difference. And, as I also said in point (a), there is no guarantee that this effect will accrue: circumstances may change in a way that heightens the injustice or leaves it undisturbed.

What kind of changes in circumstance are we talking about? What kind of changes might trigger the Supersession Thesis? It is impossible to deal with this in any way except enumeration, and therefore the brief discussion that follows will be inconclusive. We cannot rule out the possibility that circumstances may change in unforeseen ways that reconcile unjustly established settlements with the latter-day demands of justice. But we can explore some of the more obvious candidates. In what follows I shall refer to three kinds of possible changes in circumstance: (a) demographic, economic, and geographical changes, of the sort that were prominent in my presentation of the New Zealand example; (b) changes in patterns of expectation; and (c) changes in the equilibrium of forces.

(a) Both in the waterholes model and in my presentation of the New Zealand case, the key change is the presence (in the vicinity of the resources in question) of large numbers of people who had no practicable choice but to remain in the vicinity and make a living using those resources. In Section II, the descendants of Fs could not return to their ancestral waterhole because it had dried up, and they could not reasonably be expected to make the trek west to H_e because most of them would die on the way. In the New Zealand case, there might have been a point at which it would have been reasonable to expect the *pakeha* to return to Great Britain: some colonies did fail in the nineteenth century, and the bedraggled colonists did return home (or move on to some other colony).[26] But that time has long passed: individual New Zealanders do leave their country in disturbingly large numbers, but there is no place where the millions of New Zealanders of non-Maori descent could reasonably be expected to move *en masse*. Their "ancestral homeland" (the UK) is about as far away as it is possible to be on a globe like Earth, and anyway the government of their ancestral homeland has long since made it clear that they would not be welcome. My ancestors might have thought of themselves as British, but we — their great-grandchildren — have no right of return.[27]

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26 I believe the British colony in Patagonia is one such example.

27 Commonwealth citizens with a grandparent born in the UK have a limited right of return; but the UK has shown a remarkable adeptness in abolishing such rights whenever it becomes apparent that large numbers of people might seek to exercise them. (The passage of the Immigration Act, 1971, partly in response to the desperate need of British Commonwealth citizens of Asian descent to leave Uganda at the time of Idi Amin is a disgraceful example of Britain's alacrity in abandoning those people for whom it had taken on an imperial responsibility.)

Obviously, nothing remotely like this is true — or is likely to become true — of the inhabitants of the Israeli settlements in the Occupied Territories. The demography, such as it is, works in the opposite direction. And so does the geography: all of the settlements are within a day's walking distance of the state to which the settlers have a constitutionally established right of return. If the State of Israel were to accept the view that the settlements are illegitimate, it would no doubt do everything in its power to enable (probably it would use force to compel) the settlers to return to within whatever boundaries it were willing to defend. Even if all the land presently designated as Occupied Territories were to be ceded to a new Palestinian state, it is inconceivable that Israel would abandon its present settler occupants to the extent of denying them a right to return to Israel. So there is a first set of important differences.

There is a difference, too, in what the settlers are hoping time will accomplish in the Occupied Territories. It is the express aim of many of the settlers to expand — or to be the cause or occasion of the expansion — of the *de jure* boundaries of the State of Israel to include areas currently occupied by their settlements. If they succeed in this, they will have the same practicable choice as to whether to go on living in, say, the Jordan Valley or move to Tel Aviv as present-day Israelis have as to living in Tel Aviv or Haifa. They are looking to expand their options, rather than responding sadly to a radical contraction of them.

In general, the logic of the settlement movement seems quite at odds with what I referred to at the end of Section II as the spirit of the Supersession Thesis. The settlers do not regard themselves as stranded colonists, or the descendants of stranded colonists, abandoned by their homeland or abandoned by circumstances, who are now seeking to make the best of a bad situation and who are willing to share resources on a new and just basis with those who were in the territories when they arrived. Instead, many of the settlers see themselves as pioneers, spearheads of a movement that is one of conquest (or reconquest), a movement that may well involve the expulsion or ethnic cleansing of Palestinians in their vicinity.

I do not mean to suggest, however, that the element of ethnic cleansing automatically disqualifies a settler movement so far as the application of the Supersession Thesis is concerned. It is one of the challenging and perhaps distressing aspects of the supersession of injustice that it may validate situations that are the result of successful ethnic cleansing. Of course ethnic cleansing should be condemned, opposed, and blocked at the time that it is being attempted, and those who incite or perpetrate it should be tried and punished for crimes against humanity. But if the enterprise of forcibly moving one population out of a territory actually succeeds and if there is

no real-world prospect of that population's return, then the demographics of the situation will actually have changed, and justice must respond to those changes in roughly the way that is envisaged in the Supersession Thesis. It is not out of the question that the settlements movement might succeed to that extent, which is at least one of the reasons Palestinian militants oppose and attack the settlements so furiously.

There is a strong difference in this regard between the possibility of the supersession of the injustice of post-1967 settlements and the possible supersession of whatever injustice was associated with the establishment of the State of Israel in 1948. In regard to the 1948 case, someone who was convinced that the initial establishment of Israel was unjust might have associated that conviction with the belief that those who established the state and who came to settle in Palestine in the years following had other choices. They could have remained in Europe where they were; or they could have gone elsewhere. Such a claim may or may not be plausible with regard to 1948, but it is clearly implausible *now* with regard to those settlers and their descendants, and with regard to many others who have come to Israel since. They have nowhere to return to, and any attempt to drive them out of Israel would be catastrophically unjust. So far as the presence of generations of Jewish settlers in the land that we now call Israel is concerned, it is, I think, undeniable that either their settlement there was not unjust to begin with or the injustice of their settlement there has long since been superseded.

However this does not dispose of the issue of the Palestinians who were displaced as a result of the events of 1948 and in subsequent years. To say that the presence of large numbers of Jewish settlers in the land we call Israel cannot now be regarded as unjust does not imply that those who were wrongly driven from the land at the time of that settlement have no right of return. (The two issues are separable because it is not immediately clear — though it might perhaps be established by argument — that the Jewish settlers' remaining in Israel is incompatible with the Palestinian refugees' returning to live there too.) To apply the Supersession Thesis to the Palestinian right of return, we should have to show that the injustice of not allowing them to return, say, in 1948 or 1949 (shortly after they were driven out) has been superseded by changes in circumstances since, so that it is no longer unjust (as it was then) to prohibit their return.

Now the alleged right to return involves a complex tangle of claims to property and claims to residence (perhaps even citizenship). For the purposes of my argument, I shall concentrate on the right to return as a resident (leaving property issues aside). What sort of changes in demographic or similar circumstances could make it just, at the present time, to deny

Palestinian refugees the right to return to reside in the land from which they were driven?

As I understand it, the principal objection has to do with the impact that a return *en masse* of Palestinian refugees would have on the demographics of Israeli society. For many Israelis, the right of the State of Israel to exist is inseparable from its claim to exist *as a Jewish state* and its status as the embodiment of the right to self-determination of the Jewish people. If as many as a million Palestinian refugees were to return to reside in Israel, there would be a considerable impact on the demographics of Israeli society, not enough perhaps to alter its majoritarian Jewish character at least in the medium term but certainly enough to make it more like a modern multi-ethnic state than it is at present with its relatively small minority of Arab citizens.[28] The question of principle, then, is whether the integrity of Israel as a Jewish state is sufficiently compelling as a matter of justice to afford a basis for the supersession of what would otherwise be — as a matter of justice — a compelling right on the part of the Palestinian refugees to return to the land from which they were driven. (If we were to answer this in the affirmative, then, we would have to turn to the empirical issue of the impact that such a return would actually have on Israeli society.) I have nothing to offer in the way of an answer to the question of principle, though it seems clear that any adequate answer will have to navigate adeptly among three crucial considerations.

First, we would have to consider how much weight to attach to the general principle of national or ethnic self-determination and to the general issue of whether each distinct people is entitled to a state of its own. Though defenses of national self-determination abound in modern political philosophy, they are not without their critics, many of whom deny that, even under the most favorable circumstances, a shared culture and ethnicity are as important, ethically and politically, as the defenders of self-determination say they are.[29]

Second, we would have to come to terms with the fact that whatever we profess to believe about nationalism, the nation-state, and the right of self-determination, most modern societies are multi-national and multi-ethnic and their members are required as a matter of justice to come to terms

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28 For a discussion of the numbers, see Andrei Marmor, Entitlement to Land and Right of Return 24 n.25 (2003) (unpublished paper, on file with author).

29 For recent defenses, see Will Kymlicka, Liberalism, Community, and Culture 162-81 (1989); Yael Tamir, Liberal Nationalism 13-77 (1993); Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. Phil. 439 (1990). For some criticisms, particularly of Kymlicka's argument, see Waldron, *Minority Cultures*, *supra* note 4.

with what may be the uncomfortable fact of living side-by-side with large numbers of people they regard as other. From this point of view, critics would say that the philosophical defenses of national or ethnic self-determination are not just wrong-headed but politically incendiary and irresponsible.[30]

But third, we would have to pay attention to the special character of Israel and the particular claims of the Jewish people. A people may argue for a right of self-determination and for a homeland and state of their own because they would rather like to live together under the auspices of a shared pervasive culture. Or: a people may argue for a right of self-determination and for a homeland and state of their own because they have had the experience of attempting to live side-by-side with others in communities that were not their own and have come close to perishing as a result. I do not mean that their shared culture has faced a threat of assimilation, though that may also be true. I mean that we have to factor into this discussion of demographic anxiety the historic reality of the Holocaust and the murderous history of anti-Semitism in the Middle East as well as in the West. Whatever we believe about the first two points I mentioned — the debate about a background right of national self-determination and the multi-ethnic character of most modern liberal states — still it may be said that if ever a people had a right to do what is necessary to maintain a secure homeland for themselves, the Jewish people have that right. That does not settle the issue of supersession, but it maps out, I think, the historic as well as the philosophical terrain on which the case must be argued.

(b) I have concentrated for a while — for the case of the right of return and for our initial question about settlements — on the issue of changes in demographic circumstances. But there are other kinds of changes that must also be taken into account. Consider now the possibility that people's sentiments, affections, and expectations may change over time in relation to a given set of resources. People who are in possession of certain resources become accustomed to their possessions, while people who have been dispossessed may find their sentimental attachment to what they have lost gradually dissipating. The point was well put by David Hume:

> Such is the effect of custom, that it not only reconciles us to anything we have long enjoy'd, but even gives us an affection for it, and makes us prefer it to other objects, which may be more valuable, but are less known to us. What has long lain under our eye, and has often been

30 *See also* Jeremy Waldron, *Cultural Identity and Civic Responsibility*, *in* Citizenship in Diverse Societies (Will Kymlicka & Wayne Norman eds., 2000).

> employ'd to our advantage, that we are always the most unwilling to part with; but can easily live without possessions, which we never have enjoy'd, and are not accustom'd to.[31]

This continues to be an important theme in modern property theory. In a number of interesting essays, Margaret Radin has explored the implications of the proposition that "[m]ost people possess certain objects they feel are almost part of themselves,"[32] and she argues that the trajectory of those feelings may affect the way we resolve disputes about property and distributive justice. For her, as for Hume, these sentiments are not just interesting psychological corollaries of possession; after a certain amount of time they figure among the moral grounds that there are for ratifying possession as just, for they are part of the relation between person and resource that justice may pay attention to. The point can be extrapolated from more traditional theories of property. Traditional theories of property often attribute moral importance to the fact that the producer or laborer has invested something of himself in the resources that he appropriates.[33] They say that this personal or emotional investment — "mixing one's labor," to use Locke's phrase[34] — establishes a relation between person and resource that justice must pay attention to. These accounts are particularly convincing when, as in Locke's account, they are associated with First Occupancy, for in a case of First Occupancy, the sentimental investment of the appropriator in the particular resource does not accrue at the expense of anyone else's sentimental investment in that resource. However, though that connection is very important, still the significance of the sentimental investment cannot simply evaporate when we are dealing with something other than First Occupancy. Even when the possessor is not the first occupier — or even when he has actually dispossessed someone else — the attachment to the resource that he develops must still have (or in time acquire) some moral importance of its own. (Otherwise the element of attachment

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31 David Hume, A Treatise of Human Nature 503 (L.A. Selby-Bigge & P.H. Nidditch eds., 1978). For discussion, see Stephen R. Munzer, A Theory of Property 194-95 (1990); Waldron, *supra* note 23, at 21-31.

32 Margaret Jane Radin, Property and Personhood, *reprinted in* Reinterpreting Property 35, 36 (1993).

33 *See* John Locke, Two Treatises of Government 285 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); G.W.F. Hegel, Elements of the Philosophy of Right 73-102 (Allen Wood ed., 1991). *See generally* Jeremy Waldron, The Right to Private Property 171-207, 351-77 (1988). *See also* Tamar Meisels, The Ethical Significance of Settlement (2003) (unpublished paper, on file with author).

34 Locke, *supra* note 33, 287-88.

could not be thought to *add* anything in the cases that do involve First Occupancy.)

The argument about sentimental investment may affect both the perpetrators and the victims of the original injustice (and their respective descendants). On the one hand, a settlement that exists for several generations will almost certainly become a focus for the sentiments and affections of those who live there. And it is plausible to suggest that the case for sustaining the settlements grows stronger in proportion to the strength of the affection that the settlers and their descendants develop for the land. On the other hand, the particular attachment of those who were dispossessed to the resources of which they were dispossessed (or of those who were driven out of a country to the land from which they were driven) may well become weaker over time. If something was taken from me decades ago, any claim that it now forms the emotional center of my economic life becomes less credible. For I must have found some way to live in the meantime; I must have developed some structure of subsistence. And *that* will be where my efforts have gone, and where my sentiments have been focused.[35] I may, of course, yearn for the lost resource and spend a lot of time wishing that I had it back. I may even organize my life around the campaign for its restoration. But over time that will become somewhat different from a Humean attachment to "[w]hat has long lain under our eye, and has often been employ'd to our advantage." So we have the growth of an attachment on the one hand and the decline of an attachment on the other; and this is exactly the sort of change that may trigger the Supersession Thesis.[36]

The point about the decline of an attachment is particularly important in the context of the alleged Palestinian right of return. Earlier, I discussed this in terms of the threat that such return might pose for the demographic make-up of Israel. But we may also consider the other side of the balance — i.e., the application of the Supersession Thesis in assessing the extent to which those who were made refugees in (say) 1948 remain attached now, more than fifty years later, in a morally significant sense, to the land from which they were driven. The ethnic cleansing of 1948 — if that is what it was — is a particular injustice, and no amount of discussion about supersession can make the character of that injustice evaporate,

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35 This may seem harsh, and it may excite, once again, the worry about moral hazard. But I do not see any way of avoiding this conclusion. We cannot pretend that a long-stolen resource continues to play a part in its original owner's life when in fact it does not, or that subjective attachment has a certain quality when in fact that quality has faded, merely in order to avoid a moral hazard.

36 For a powerful argument to the contrary, see Marmor, *supra* note 28, at 16-19.

nor remove the right of those who suffered it to some sort of remedy. But the question is whether, fifty years later, their being denied entry to Israel to settle there counts as a continuing injustice on anything like the same scale. Not everyone has the right — even the moral right — to settle in any country to which they claim a connection, and the effect of the Supersession Thesis might be that the particular connection of the Palestinian refugees to this country rooted in the fact that they used to live there may have less and less force, as a matter of justice, as the character of their attachment changes. Certainly the Palestinian leadership has done all that it could to maintain that sense of attachment, including making it difficult for many Palestinians to establish new lives for themselves outside the refugee camps in the lands where they currently live. The fact that this is a deliberate effort does not in itself detract from the significance of the sense of attachment that results (any more than the fact that ethnic cleansing was a deliberate effort detracts from the effect of the Supersession Thesis). But in our assessment of whether there is a continuing issue of justice here, sufficiently strong to stand up to the demographic considerations mentioned earlier, we must pay attention to the place that the expectation of being able to reside (once again) in the land where they once resided actually occupies in the lives of the refugees. It is not enough that they continue strenuously to demand the right to return; we must consider whether there is anything in their current attachment to the land to support such a demand. Needless to say, the most that can be done in a paper like this is to identify rather than to settle this issue.

I said earlier — in point (c) in Section IV — that our primary obligation in respect of injustice is to condemn it and stop it at the time that its perpetration is being attempted and, if that does not succeed, to reverse it as soon as possible thereafter. And that continues to be true in general respect of the account I have just given: we are not permitted to qualify this primary obligation by anticipating the changes in affectionate attachment that I have suggested might accrue from an injustice over time (in respect of settlements or in respect of ethnic cleansing). What I have called the primary obligation is particularly incumbent upon government; and it should be the particular task of law. After all, law promises justice, and people are entitled to take their lead from the law as to what is just and unjust, particularly in issues as complex — and involving the solution of as many coordination problems — as issues of property, justice, and distribution.[37] And law

37 *Cf.* Jeremy Waldron, *Does Law Promise Justice?*, 17 Ga. St. U. L. Rev. 759 (2001). For the importance of authority in resolving the complex coordination problems

monopolizes the force that might legitimately be used to oppose injustice. Now, it goes without saying that government and law sometimes neglect or betray these obligations. (Successive Israeli governments have certainly neglected and betrayed their responsibilities in regard to the settlements in the Occupied Territories.) When they do, their neglect and betrayal may have long-term effects that actually aggravate the changes in circumstances I have been talking about. We owe to Jeremy Bentham the point that law — on account of both the factors we have mentioned (the promise law makes with regard to justice and the force that it monopolizes, allegedly in the service of that promise) — is the most important source of the expectations that might matter in this account: "In matters of property ... *hardship* depends upon *disappointment*; *disappointment* upon *expectation*; *expectation* upon the dispensations, meaning the *known* dispensations of the law."[38] We need not agree with Bentham's view that possessory expectations unsupported by law are not worth considering, to see the force of his insistence that expectations that *are* supported by law may make all the difference. If law begins (wrongly) by supporting unjust possession, then law may find that it has no choice but to go on supporting it, to the extent that lending its support becomes the only right thing to do.[39] As I suggested — in point (d) in Section IV — this prospect makes it all the more important for the government to start off on the right foot and not lend its support to settlements whose justice or illegitimacy may be problematic.

(c) A third set of possibilities that might trigger the Supersession Thesis concerns the equilibrium of forces that, some theorists have conjectured, lies behind any talk about justice. By seizing and holding land in the Occupied Territories, it may be thought that the Israeli settlers are changing the forces that are in play in the Territories and thereby making a difference to what must eventually be regarded as a just distribution of land in that region. The seizure itself may be objectionable on grounds of justice. But if successful, it means that the forces that will eventually determine what counts as just will

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associated with justice, see John Finnis, Natural Law and Natural Rights 231-33 (1980).

38 Jeremy Bentham, *Supply without Burthen, in* Jeremy Bentham's Economic Writings 291 (W. Stark ed., 1952). I have discussed this in Waldron, *supra* note 23, at 23-26, and in Jeremy Waldron, *Supply Without Burthen Revisited*, 82 Iowa L. Rev. 1467 (1997).

39 Hence the conservatism of Bentham's claim that the legislator owes the greatest respect to the expectations that he himself has encouraged. (See the extract from Jeremy Bentham, *Principles of the Civil Code, excerpted in* Property: Mainstream and Critical Positions 41-58 (C.B. Macpherson ed., 1978)).

be different from those that would have determined this had the settlements not taken place.

Once again, David Hume's work is seminal in the philosophical background of this line of argument. Hume argued that institutions of property and justice take their origin from a convention to respect de facto defensible holdings. We start from an assumption of conflict: people grab things and use them; they argue and fight over them; they try and defend what they have and take as much as they can from others. Over time, the holdings determined in this way are going to be largely arbitrary. Nevertheless if any sort of stable pattern of possession emerges, then something like a peace dividend may be available. It may be possible for everyone to gain, both in terms of the diminution of conflict and in terms of the prospects for market exchange, by an agreement not to fight anymore over possessions. I agree to respect what you have managed to hang on to, and you agree to respect what I have managed to hang on to: "By this means, every one knows what he may safely possess."[40]

> I observe, that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common sense of interest is mutually express'd, and is known to both, it produces a suitable resolution and behaviour; since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part.[41]

Such an agreement, if it lasts, may amount over time to a ratification of de facto holdings as de jure property.

On Hume's account it is inappropriate to talk of justice or injustice in advance of such a convention, and it would be unwise to anticipate such a convention until we see how the forces that determine de facto possession actually play out. It is, he says, "impossible there can be naturally any such thing as a fix'd right or property, while the opposite passions of men impel them in contrary directions, and are not restrain'd by any convention or agreement."[42] So, we can say that the settlements take place initially in

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40 Hume, *supra* note 31, at 489. *See also* James M. Buchanan, The Limits of Liberty: Between Anarchy and Leviathan 1-52 (1975). For a discussion, see Jeremy Waldron, *The Advantages and Difficulties of the Humean Theory of Property*, 11 Soc. Phil. & Pol'y 85 (1994).

41 Hume, *supra* note 31, at 490 (emphasis in original).

42 *Id.* at 491.

a domain of conflict unregulated by justice; but they help to establish the facts — the equilibria, the stand-offs, the prospects of peace dividends, the viability of conventions — that will eventually determine what is just and unjust in this domain. Now, in theory, this sort of account falls slightly outside the ambit of the Supersession Thesis, since it does not concede the injustice of the settlements to begin with. (Their initial justice or injustice is moot, on this approach, until the situation stabilizes.) Still, it is close enough to the Supersession Thesis to be of interest to us here. And we can work up a version of it that may conform more rigidly to our model, in the following way.

Suppose a Humean convention, C_0, had established itself between 1949 and 1966 in the region we now call the Occupied Territories — a convention that ratified various people's possession as legitimate property.[43] This convention, C_0, would have established itself on the basis of the equilibrium of forces that then obtained. In 1967, however, there was a massive change: the forces that had governed the region (and thus sponsored C_0) were defeated, and the region was occupied by Israeli forces. Now in principle, an occupying power has an obligation to respect existing property arrangements and not effect any major change until the occupation is regularized. But, given the cavalier attitude of successive Israeli governments, clearly C_0 was now very fragile and vulnerable either to the imposition of a new property regime or to the reemergence of conflict over resources (a state of nature), in which case, a new equilibrium would have to be worked out. In this unstable situation, a group of settlers might make a play for control of certain resources in this region. Formally speaking, their move is unjust by reference to C_0. And it may also be unjust with respect to whatever indeterminate, unstable, and unreliable version of C_0 — we will call it C_1 — prevails during the Occupation. Still, the settlers may make their move with a view to affecting and constraining the interplay of forces that will eventually lead — some years hence — to a new and stable convention, C_2, concerning property in the region. When C_2 emerges, it is likely to ratify some of the settlers' holdings as just, even though they might have been unjust with reference to C_1 and C_0. Of course there is nothing inevitable about this. But it is not out of the question that something like this would occur, and it is a version of the supersession effect.

Notice once again what this argument offers and what it does not offer. It

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43 Some of these possessions were built upon the dispossession of an earlier generation of Jewish settlers. *See* Greg Myre, *Israel's Outpost Settlements Face a Moment of Truth*, N.Y. Times, May 26, 2003, at 6 (one settler noted that "his outpost is built on the site of a Jewish kibbutz overrun by Arab troops in the 1948-49 war at Israel's independence").

offers an account of what may happen in the course of time, as the conflict continues and eventually draws to its end. It does not offer an account of what ought to happen now, nor does it legitimize what the settlers are currently doing. At best, what it shows (on Humean grounds) is that their present actions cannot be condemned as unjust so long as "the opposite passions of men impel them in contrary directions, and are not restrain'd by any convention or agreement." More importantly, the frank acknowledgment of the role of force in this line of argument leaves the settlers with no ground for complaint about attacks on the settlements by Palestinian militants. Palestinian militants presumably also want to contribute to the interplay of forces that will eventually determine a stable Humean distribution of resources in this arena of conflict. Their force, too, will have to be reckoned with in the vector that eventually determines an equilibrium of forces in the Occupied Territories. The Humean argument is notoriously noncommittal on the means that are used to establish de facto possession, and it has to be noncommittal also on the means that are used to oppose it. So the argument gives the settlers no right to be protected from Palestinian attacks. (No doubt the attacks can be condemned on other grounds, but not by virtue of this argument.) Their proposal to establish and maintain settlements at the point of a sword, in the hope that this will affect the way that justice is eventually established, means that they must expect to be opposed at the point of a sword. Their justice-based argument assumes or hopes that they may prevail; but it does not give them any right to prevail.

Notice finally that this argument is a little different from the others. Arguments (a) and (b) assumed that the same theory of justice that condemned S_1 might ratify S_2 and that it is only the circumstances that have changed. Argument (c), however, looks to the application of different principles in S_1 and S_2, for among the changes in circumstances that it envisages are changes relating to the genealogy of justice. However, in a broader sense, it is an argument of the same general type. Though it looks behind justice to the considerations under which it becomes worth talking about justice, still it assumes that the genealogy of justice is an intelligible process, governed by values and principles that are more or less constant.[44]

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44 Thus Hume builds up his account of the artificial virtue of justice, using material from a constant set of natural virtues. For a much more chaotic account of the genealogy of justice, which could not be used in this way, see Friedrich Nietzsche, On the Genealogy of Morality 38-71 (Keith Ansell-Pearson ed., 1994). See also Waldron, *supra* note 33, at 258-59, for further discussion on this point.

VI.

The possibilities I have been discussing might seem more like *realpolitik* than moral philosophy. Interplay of forces, redefining the arena of conflict — what do these have to do with justice and injustice, right and wrong? Nobody has ever denied that, in time, the settlements might be made "legitimate" by sustained application of violence against those who oppose them and those who have been dispossessed or otherwise adversely affected by them. But we are supposed to be considering the *morality* of settlements. This is the final objection to the Supersession Thesis that I shall consider.

Here are two responses. First, the application of the Supersession Thesis even in the extreme case of (c) is not just a submission to power, nor is it simply the prostitution of morality and justice to the claims of the tank, the bullet, and the bulldozer. It is, rather, a recognition that facts that are established by violence do not, on that account, cease to be worth considering from the point of view of justice. A principle of justice may hold categorically that anyone who is A has a right to B. Now, the fact that X is A by virtue of X's wrongdoing or the wrongdoing of someone else may be the basis of an exception to the principle (in which case the principle ought to have been stated more carefully). If it is not an exception, however, we are required simply to deal with the fact that X came to be A, irrespective of our distaste at the events in question. Likewise, a principle of justice may be applicable in a situation only when condition C is satisfied. Unless there is some specific exception to this, the fact that C is satisfied as a result of someone's unjust action is neither here nor there. Whether such principles are sensitive to issues about violence and injustice is something to be established by reasoning about their particular content. It is not something we can assume wholesale on the basis of our general distaste for violence or our general opposition to injustice.

Second — and maybe this is just another way of putting the same point — although the Supersession Thesis responds to facts established by violence, it responds to those facts inasmuch as they present features that are made relevant by the principles of justice themselves. Think back to our second and third waterhole scenarios. Though the presence of the Fs at waterhole H_g is a product of violence, it is not their violence that the theory of justice responds to when the waterholes are drying up. It is the presence of thirsty human beings in the vicinity of available water, and the principles of justice applied by the Supersession Thesis in the resulting situation are simply principles about the proper distribution of water to the thirsty. The same would be true of anything that the Supersession Thesis would command

in relation to long-established settlements in the Occupied Territories. The Supersession Thesis would respond not to the influence of force, but to the presence of people in a region who have nowhere else to go (if, indeed, they do have nowhere else to go) or it would respond to their attachments and expectations (in the event that such sentiments really had grown up around the land they settled). I guess that what offends many critics of the Supersession Thesis is that *it refuses to be distracted from these concerns* by a preoccupation with the violence that brought about these states of affairs. And maybe the critics are right to be appalled by that: I am far from adamant that the analysis behind the Supersession Thesis is correct. Still, it is worth noting that it is these critics — and not the defenders of the Supersession Thesis — who are fixated on force. For the critics, the unjust force that led to S_2 is the most important thing about S_2. But for those of us who are toying with the Supersession Thesis, the most important things about S_2 may be the occurrent human realities, to which in the end a theory of justice is obliged to pay the closest attention.