

When we speak of historic injustice and the need for redress of those injustices, we tend to speak about land. After all, so the common narrative goes, what was taken from the Indigenous nations was land, and so to redress past wrongs, land must be returned to present day Indigenous people. In this essay, I argue that talking about land as the sole, or even as the primary form of redress misses the point because while settler governments did in fact organize a wholesale theft of Indigenous lands, that is not all that was taken and so is not all that needs to be returned to Indigenous nations to redress past wrongs. I make my argument within the framework of corrective justice, and I reason that the first thing you need to do in thinking about corrective justice is to identify the precise wrong that you are attempting to remedy. In the case of Indigenous nations, I argue that the single greatest wrong committed against Indigenous peoples has been the historical and ongoing suppression of institutions in Indigenous communities that positively affirm Indigenous values, cultures, and identities. The suppression of these institutions means that contemporary Indigenous people cannot flourish as Indigenous people because they do not have access to the social, cultural, and political resources that affirm their identity as Indigenous people. To redress past and present-day wrongs against Indigenous people in a framework of corrective justice is to return to Indigenous communities modern and contemporary institutions that affirm ancient Indigenous values and practices.

Keywords: Indigenous people, historic injustice, redress, corrective justice

The existence of past injustice (previous violations of the first two principles of justice in holding) raises the third major topic under justice in holdings. If past injustice has shaped present holdings in various ways, some identifiable and some not, what now, if anything, ought to be done to rectify these injustices? What obligations do the performers of injustice have toward those whose position is worse than it would have been had the

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injustice not been done? Or, than it would have been had compensation been paid promptly? How, if at all, do things change if the beneficiaries and those made worse off are not the direct parties in the act of injustice, but for example, their descendants? Is an injustice done to someone whose holding was itself based upon an unrectified injustice? How far back must one go in wiping clean the historical slate of injustices? What may victims of injustice permissibly do in order to rectify the injustices being done to them, including the many injustices done by persons acting through their government?¹

I Introduction

It has been more than thirty years since Robert Nozick asked these questions. In this article, I will advance a reply, not to Nozick's specific questions outlined above, but to the more general question of what it is that settler people might owe Indigenous people in light of the fact of historic injustices. Throughout this article, I will use the term 'settler' to mean non-Indigenous. I do so because I wish to establish a useful contrast between settler and Indigenous people. For greater clarity, by 'settler' I do not mean only those non-Indigenous people who came to Canada or the Americas centuries ago; by settler I mean non-Indigenous persons and governments, historical and present day.²

In a previous publication,³ I took issue with the view that the theft of Indigenous land by the settler people was a wrong that could not be addressed in the present day. In the present article, I will argue that the wrong committed against Indigenous people was a wrong that was much larger than a theft of land: it was, and continues to be, a wrong that was committed against the very notion of what it is to be an Indigenous person, and this, too, is a wrong that can be addressed in the present day.

I begin in Part II by laying out some context for my thinking about the nature of the relationship between Indigenous and settler people. I lay out the nature of the legislative relationship, as characterized by the *Indian Act*, and set out a number of different kinds of wrongs that have been committed in acts of historic and contemporary injustice. I think it is important to note that, over the years, federal and provincial

1 Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 152.

2 As I conceive of 'Indian-ness' as being primarily a cultural rather than a legal definition, I have cast all Indigenous people together under one net. I am less certain that the concepts developed in this article can be easily extended to Métis and rights-bearing Métis people. I should add here that I am myself Indigenous. I am a Cree man who grew up thinking of himself as 'an Indian' and not as First Nations or Aboriginal.

3 Douglas Sanderson, 'Against Supersession' (2011) 24 Can JL & Jur 155 [Sanderson].

governments have initiated a wide range of programs and services aimed at Indigenous people, and each year, a great deal of taxpayer money is spent on Indigenous issues; and so it is clear that this and previous governments really do want to do something with respect to Indigenous people, but it is by no means clear what that something is. I argue that the point of all of our policies and programs and spending should be to get right the relationship between settler and Indigenous people; and further, I argue that the way to get the relationship right is to focus on redressing the historic and contemporary wrongs committed against Indigenous people. In the present article, I will lay out what I take to be a constructive way of conceiving of past wrongs, contemporary redress, and the nature of a just relationship between settler and Indigenous people.

In Part III of this article, I outline a conception of what it is to wrong someone based on a model of corrective justice. Part of the problem in thinking clearly about redress for historic injustices committed against Indigenous people has been a general failure by the courts and academics to see that historic wrongs are not special kinds of wrongs but rather are wrongs like any other, and their remedy is not especially difficult to articulate because they are wrongs that can be fitted into the familiar framework of corrective justice. The goal of redressing historic injustices, I argue, should be just the same as that of redressing common and contemporary wrongs; the objective should be to put the injured parties into the position they would have been in had the injustice not occurred.⁴

In Part IV, I outline two common conceptions of redress for historic injustices committed against Indigenous people. The first, I term the “land transfer solution,” where it is supposed that the right way to redress ancient wrongs is to return lands to Indigenous people. A second conception is one I term the “subsistence theory,” wherein it is supposed that to redress wrongs committed against Indigenous people is to assert and protect rights that allow contemporary Indigenous people to engage in the practices that their ancestors once did. I reject both of these conceptions of redress in favour of a model I call the “institutional approach.” The institutional approach asserts that, in order to redress historic wrongs, the settler people must assist Indigenous people in building and maintaining institutions that positively affirm Indigenous values and life-ways.

4 George Sher states the issue this way: ‘Fully to compensate a victim of injustice is to “make him whole again”; and to do that is to make him as well off as he would have been had no injustice occurred’; George Sher, *Approximate Justice: Studies in Non-ideal Legal Theory* (Lanham, MD: Rowan & Littlefield, 1997) at 3.

In Part v, I demonstrate how the institutional approach to redressing historic wrongs fits with redressing historic injustices on a model of corrective justice. I argue that the denial of social, cultural, and political institutions that positively affirm a conception of Indigenous identity is the wrong committed against Indigenous people, and so to put the Indigenous parties in the position they would have been in had the injustice not occurred is to build and maintain contemporary Indigenous institutions.

II *The context of the problem*

As a starting point, it is necessary to set out what I mean by ‘historic injustices.’ Typically, when we speak of historic injustices suffered by Indigenous people in Canada, we talk about the theft of Indigenous land by the settler people. There is good reason for the conversation to tilt in this direction because the facts are unequivocal: Indigenous people lived on their lands for thousands of years; they were self-governing people with land laws, complex philosophies and inter societal structures; and they were, at the time of contact with the Europeans, distinctly modern people, though their philosophical and technological outlooks varied considerably from those of the newcomers.⁵ In the decades and

5 Just how different settler and Indigenous people were in their technological and philosophical outlooks is debatable. Upon arriving in what is now Mexico, the Portuguese soldier Cortez and his men were stunned by what they deemed to be the most advanced city they had ever seen; see Bernal Díaz, *The Conquest of New Spain*, translated by JM Cohen (Baltimore: Penguin Classics, 1963). The British, Dutch, and French traders on the East Coast of what is now the Americas found smaller cities that they termed ‘castles’ due to the log palisades that surrounded these villages, which contained several long houses that each housed several families. The interior of the ‘castles’ held vast gardens in addition to gardens that surrounded the village sites. Remember, too, that at the time of the earliest meetings of settler and Indigenous people, Europe had just survived several waves of the plague, was ripped by civil and religious wars, and the most advanced form of government then practised in Europe was absolute monarchy. Europe was peopled by what was, by any standard, a dirty, divided, and illiterate rabble just emerging (given the 10 000 to 40 000 year history of Indigenous occupation of our homelands, I take a rather long view of history) from what even European scholars term the ‘dark ages.’ At the same time, we must also remember that early Indigenous-settler relations were based largely on trade, and that no matter what their differences, Indigenous and settler people were able to set as between them common goals of trade, politics, and war. As Donald Davidson has pointed out, if we are to think that it is possible to communicate with others – and all kinds of successful communication permeated the early settler-Indigenous landscape – we must presume the other party to be rational; see Donald Davidson, ‘Truth and Meaning’ in *Inquiries into Truth and Interpretation* (Oxford: Oxford University Press, 2001) 17. On the need for shared goals and understandings in the context of trade, see Harold A Innis, *The Fur Trade in Canada: An Introduction to Canadian*

centuries after contact, the settler people used unfair bargains, broken promises, military might, legislation, economic coercion, the police, the courts, and the Parliament as well as the effects of disease and social disruption to overpower, outmanoeuvre, and otherwise obtain for themselves the lands that once belonged to Indigenous peoples.⁶ And so, when we talk about historic injustice, the return of lands to Indigenous peoples is a natural target for our philosophic and jurisprudential efforts. Indeed, a great deal of time and money is spent either negotiating new land claims, or trying to make adjustments to existing treaty claims based on some alleged violation of a treaty or other agreement, or trying to sort through other Indigenous-settler issues that are not treaty claims but rather go to distributive or other jurisdictional issues. Add to this, the fact that the most prominent legal theories about redressing past wrongs focus precisely on the land question, and in particular, on why it is that such lands cannot, by their accounts, be justly returned to Indigenous peoples.⁷ So it is no wonder that when we talk about 'historic injustice' we tend to talk about lands.

However natural such a view, it is, I argue, mistaken. Lands were stolen; that is a fact. But the wrongs committed against Indigenous peoples by the settler governments have not been limited to the denial of traditional lands but rather go to the very core of what it is to be an Indigenous person and how it is that Indigenous people can choose to live their lives as Indigenous people. In Canada, since the passage of the *Indian Act*⁸ in 1876, virtually every aspect of Indigenous life has, at one time or another, been governed by a settler statute designed to deny meaningful choices to Indigenous people about how they choose to live their lives. The Act has at various times dictated, for example, that Indians could not hire a lawyer to defend or advocate their land claims without the approval of the Crown;⁹ could not organize in groups to

Economic History (Toronto: University of Toronto Press, 1970); see generally Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: Norton, 1976).

6 James Wilson, *The Earth Shall Weep: A History of Native America* (New York: Atlantic Monthly Press, 1998); Thomas R Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas* (Vancouver: Douglas & McIntyre, 1991) [Berger]; Victoria Freeman, *Distant Relations: How My Ancestors Colonized North America* (Toronto: McClelland & Stewart, 2000).

7 In Sanderson, *supra* note 3, I take issue with Jeremy Waldron's writings on historic injustice, as he is the foremost thinker and writer in this area.

8 *An Act to amend and consolidate the laws respecting Indians*, SC 1876, c 18 [*The Indian Act*].

9 *An Act to amend the Indian Act*, SC 1927, c 32, s 6 amending *The Indian Act*, RSC 1906, c 81, s 149A. I am not aware of any legal claim that was advanced with the required permission of the Superintendent of Indian Affairs.

lobby the government;¹⁰ could not participate in the Potlatch and Sundance or other ceremonies precisely because these ceremonies were central to the customary and spiritual life of Indigenous peoples;¹¹ could not leave their reservations without a written pass;¹² could not legally draft a will;¹³ could not obtain a university degree without becoming *ipso facto* enfranchised,¹⁴ or vote in an election,¹⁵ or join the armed forces without risking removal from the treaty rolls and denial of their treaty heritage in order to obtain veterans' benefits;¹⁶ could not properly raise and educate their children¹⁷ and so for more than one-hundred years

10 *An Act further to amend 'the Indian Act, 1880,'* SC 1884, c 27, s 1 amending *The Indian Act, 1880*, SC 1880, c 28. The precise language of the Act prohibited making demands of the government in a disorderly manner, or in a manner calculated to breach the peace, the effect of which was to prohibit outright assembly for the purpose of lobbying the Crown.

11 *Ibid.*, s 3.

12 Canada, *Royal Commission Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 296–7 [*Royal Commission*]. The Pass System was never legally authorized through legislation. It was simply the policy of the Superintendent of Indian Affairs. I once asked a research assistant to find the legislative basis for the pass system, and after much hard work, she reported back that there was no such legislation. I mentioned my surprise and frustration about this state of affairs to an elder from northern BC whose community was only brought into the reservation system in the 1930s, and he replied, 'You don't understand. They never needed legislation. They just did what they wanted. That was always how it was.'

13 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6, s 9 [*Gradual Enfranchisement*].

14 *The Indian Act*, supra note 8, s 86(1). It might be odd to think that enfranchisement was something to be feared, or considered a price to be paid, especially given the long struggle of civil rights and the suffragette movement whose members sought enfranchisement. But it must be remembered that in Canada until the 1950s, status Indians were not generally able both to be a legally recognized Indian and to vote in federal elections: *Royal Commission*, supra note 12 at 286–8. This, in turn, meant that Indians, generally speaking, had no right to vote until they became enfranchised and that, at the very moment of enfranchisement, they legally stopped being Indians.

15 It was only once an Indian became enfranchised that 'any distinction between the legal rights and liabilities of Indians and Her Majesty's other subjects shall cease to apply'; *Gradual Enfranchisement*, supra note 13, s 16. All men and women in Canada were given the right to vote in a federal election, save for any 'Indian ordinarily resident on an Indian reservation'; *Dominion Elections Act*, SC 1920, c 46, s 29(1).

16 *Royal Commission*, vol 1, c 12, supra note 12 at 545–8.

17 *The Indian Act, 1880*, SC 1880, c 28, s 20. This amendment empowered the Superintendent-General to 'appoint a fit and proper person to take charge of [minor] children and their property, and remove such person and appoint another, and so on as occasion may require.' This provision aimed to provide the Superintendent extraordinary powers over children after the death of the father of an Indian child. Under this section of the Act, children could be taken even from their mother

nearly every Indian child was swept up at the age of five and taken to distant communities for ten or more years of isolation, fear, and a program of learning designed to ‘kill the Indian’ in the child.¹⁸ As part of that legacy, it is estimated that thousands of children simply never came home and remain today in unmarked graves in the cold Canadian ground, miles and miles from anyone who ever loved them.¹⁹ I should add, here,

and ‘reassigned’ by the Indian Agent if he (Indian Agents were all male) thought it in the best interest of the child.

18 *An Act further to amend ‘The Indian Act,’* SC 1894, c 32, s 11 amending *The Indian Act*, SC 1886, c 43, ss 137–8. It is both shocking and appalling that the legislation that enabled the residential-school system is still on the books, firmly entrenched in today’s *Indian Act*; see *Indian Act*, RSC 1985, c I-5, ss 114–22 [*Indian Act*]. The phrase ‘Kill the Indian . . . and save the man’ was coined by Captain Richard Henry Pratt – the principal advocate in the United States for the forced education and ‘civilization’ of Indian children; Donald A Grinde, Jr., ‘Taking the Indian out of the Indian: US Policies of Ethnocide through Education’ (2004) 19(2) *Wicazo Sa Review* 25 at 27. Similarly, Duncan Campbell Scott, Deputy Superintendent-General of Indian Affairs from 1913 to 1932 and deeply involved in the management of Indian schools, viewed the accelerated enfranchisement of Indians as the ultimate aim of his department. On 30 March 1920, advocating for amendments to the *Indian Act* to advance this aim, he made the following remarks to a Special Committee of the House of Commons: ‘I want to get rid of the Indian problem . . . Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian Department, that is the whole object of this Bill’; cited in Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1988) at 22, 50, 83–93; Canada, *The Historical Development of the Indian Act*, 2d ed (Ottawa: Indian and Northern Affairs, Treaties and Historical Research Centre, 1978) at 114.

19 The numbers are always up for debate. No one really knows how many children attended residential schools. The documents are scattered, many are missing, and they have never been carefully compiled. What we do know as a fact is that tuberculosis rates in residential schools caused many deaths because sick children were, as a matter of course, not separated from those who were not infected. The resulting deaths were not only tragic, they were criminal. See John S Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879–1986* (Winnipeg, MB: University of Manitoba Press, 1999). Prosecutions were and are virtually non-existent. My own mother was, for example, assaulted while in a residential school. Once, for reasons she still does not comprehend, she was struck in the head with a cast iron fire stoker (she still bears the scar 65 years later), and then, while recovering in the infirmary, the same man who struck her returned to try and smother her. When I asked her who did this to her, she said that she knew who the man was – he was familiar to her in the residential school context – but at the time, she could not explain to anyone what had happened because she did not speak English and she was forbidden, upon pain of beating, from speaking Cree, the only language she knew. It never occurred to anyone to get a translator. Today, six decades later, her memory of the event is vivid, but her memory of who that man was has faded, and she could not today say with certainty who he was or what was his relationship to her or to the residential school she attended. She was, at the time of her beating and smothering, a brave young girl, five years of age, a thousand miles from home, and desperately, and to my mind,

that despite the lack of a piece of legislation as comprehensive in scope as Canada's *Indian Act*, Indigenous people in Australia, New Zealand, and the United States have had their rights denied and their options limited by a wide variety of statutes.²⁰ Canada is unique only in the breadth of its legislation. Given the long history and wide variety of wrongs committed against Indigenous people, the business of historic injustice is a complex morass of overlapping and legally distinct claims for redress of all kinds. The battles are being fought in all levels of the nation's courts, from family courts to the Supreme Court. Despite this, there has never been a national dialogue on the complex issue of redress for historic wrongs. The Canadian nation has come close to initiating such a dialogue: the *Royal Commission Report on Aboriginal Peoples* reported in 1996²¹ and included a full accounting of historic and contemporary grievances and policy recommendations to address the difficult relationship between Indigenous people and the Crown. On 11 June 2008, Prime Minister Stephen Harper rose in the House of Commons, as did the leader of the Opposition and the leader of the Third Party, to apologize to Indigenous people for the wrongs committed by the Crown through the residential-school system.²² Sadly, neither the *Report* nor the apology

incomprehensibly alone. Under these circumstances, we should not expect successful prosecutions. Recently, the court-mandated Truth and Reconciliation Commission has made some efforts to begin mapping out at least some of the many – possibly hundreds – of unmarked mass grave sites of Indian children who died while attending residential schools; Truth and Reconciliation Commission of Canada, News Release, 'Truth and Reconciliation Commission of Canada Research Opportunities' (6 July 2010) online: TRC <[http://www.trc.ca/websites/trcinstitution/File/pdfs/Research%20opportunities_EN\(1\)_July6](http://www.trc.ca/websites/trcinstitution/File/pdfs/Research%20opportunities_EN(1)_July6)>.

²⁰ See Henry Reynolds, 'New Frontiers: Australia' in Paul Havemann, ed, *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland, New Zealand: Oxford University Press, 1999) 129; MPK Sorrenson, 'The Settlement of New Zealand from 1835' in Paul Havemann, ed, *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) 162; Berger, *supra* note 6 at 100–4. See also Australia, Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney, NSW: Sterling Press, 1997).

²¹ *Royal Commission*, *supra* note 12.

²² The legislation that authorizes the residential-school system, however, remains the law of Canada, *supra* note 18 and accompanying text. I have often heard people remark that the creation and mandate of the TRC is itself a sort of reconciliation and thus is itself a form of redress. The pain and difficult legacy of the residential-school system is emblematic of the kind of hurt that remains after a deeply troubling wrong that is not acknowledged for many years; it is a wrong that requires some form of redress, and the TRC is probably a good start down the road of reconciliation, but the TRC is not *the* answer to historic wrongs. The TRC's mandate is outlined in Truth and Reconciliation Commission of Canada, 'Schedule N of the Indian Residential School Settlement' [nd], online: TRC <<http://www.trc.ca/websites/trcinstitution/index.php?p=7>>. The

sparked a national dialogue. Despite this, there is no question that Canada as a nation (and its successive governments) is trying to do *something* with respect to Indigenous people, but there does not appear to be any kind of coordinated master plan that the government has come up with on its own, and certainly there is no master plan resulting from ongoing negotiations between the settler people and Canada's Indigenous people. And yet, Indian and Northern Affairs Canada,²³ the federal ministry charged with administering policy and resources with respect to Indian people, has an annual budget in excess of nine billion dollars.²⁴ To this sum must be added the myriad provincial expenditures on Aboriginal issues, the cost of multiple decade-long lawsuits about treaties or other rights, and the cost of the long-term negotiations over lands or rights that populate the Indigenous-settler landscape. This landscape of litigation and negotiation and transfer payments has not resulted in self-sufficiency or even improved living conditions for Indigenous people;²⁵

mandate focuses very narrowly on acknowledging 'Residential school experiences, impacts and consequences' and so has nothing to say about the broader political and legal wrongs that I am concerned with in this essay.

- 23 On 18 May 2011, the Harper government changed the name of this ministry from 'Indian Affairs and Northern Development' to 'Aboriginal Affairs and Northern Development.' A prior version of the name was 'Indian and Northern Affairs Canada,' with the acronym 'INAC.' INAC (or more formally 'Indian Affairs') is the name that has been used by non-government persons for many many years (despite the previous name change) and will likely continue to be used in the future, despite the Ministry's official name change.
- 24 However, the Assembly of First Nations has produced credible documents demonstrating that nearly one half of that 9-billion-dollar budget goes to servicing the department itself: salaries, office space, travel, technology infrastructure, and so forth. This is a remarkable figure, demonstrating, as it does, that the Department of Indian Affairs spends nearly one dollar for every one dollar actually transferred to First Nations. The more remarkable figure produced by the Assembly of First Nations is not the total number of dollars transferred but rather the degree of inequality at the level of individuals. The AFN reports that the combined federal, provincial, and municipal spending on a citizen of Ottawa comes in at around \$14 900, whereas the federal government (the only level of government that spends on Indigenous communities) spends only \$7 200 per person on Indigenous communities; 'Federal Government Funding to First Nations: The Facts, the Myths, and the Way Forward, Assembly of First Nations' (29 July 2010) at 6, nn 2–12, online: Assembly of First Nations <<http://www.csfv.org/Files/Public/Index/Archive/Federal-Government-Funding-to-First-Nations.pdf>>.
- 25 Indian and Northern Affairs Canada, *Community Well-Being: A Comparable Communities Analysis* by Jerry P White & Paul S Maxim (Ottawa: Minister of Public Works and Government Services Canada, 2007); Indian and Northern Affairs Canada, *Measuring the Well-Being of Aboriginal People: An Application of the United Nations' Human Development Index to Registered Indians in Canada, 1981–2001* by Martin Cooke, Daniel Beavon, & Mindy McHardy (Ottawa: Minister of Public Works and Government Services Canada, 2004); Andrew Binkley, 'Improving the Effectiveness of Transfer Payment Programs

nor has it resulted in strong Indigenous communities or a vibrant fabric of Canadian–Indigenous relations. Whatever it is that successive governments have tried to do with respect to bringing closure to historic injustices or the contemporary symptoms of those injustices, nothing has worked, and we seem no closer to a resolution of any kind.

Examining the many government programs directed at Indigenous people, the litigation and negotiations initiated by Indigenous people themselves, the policies and structures and institutions that define Indigenous settler relations, it is easy to lose sight of a single, yet key fact: whatever it is that the state is trying to do with respect to Indigenous people, that something should be directed toward some specific goal, and to my mind, that goal should be to get the relationship right between settler and Indigenous governments by redressing past and current wrongs. This is just to say that we need to recognize that a series of wrongs were committed against Indigenous people, and the point of policies and programs and resource expenditures should be to redress those wrongs. We cannot change the past, but we can apply our resources and policies in the present with the aim of redressing past wrongs; and in so doing, we can move from a patchwork of policies and programs that together offer no unified objective, to the more just, focused, and morally coherent objective of redressing historic wrongs. To put this another way, my objective is, in some sense, to lay out a model of redress that is capable of moving Indigenous and settler parties to the point where they can look at one another across a table and honestly say to one another ‘okay, we’re even.’ This will be difficult to achieve, sacrifices of all kinds will need to be made, but the fact that the goal is difficult to achieve is no reason to end its pursuit and instead to pursue some other, morally irrelevant, but more achievable goal.

Corrective justice is an appropriate framework for thinking about redress of wrongs committed against Indigenous people because what happened in the past, and what is continuing to occur, is that the settler people, acting through their governments, committed and continue to commit acts that are wrong, for which justice demands redress. Because of the broad range of wrongs committed, the time frame over which they happened, and the range of possible responses, it is sometimes easy to think about the wrongs as abstract wrongs committed against abstracted

on Canadian Reserves: Lessons from International Aid’ (2009) 7:2 *Indigenous LJ* 123. There is some evidence that living conditions in First Nations communities are improving, however slightly, in recent years. But given the vast disparity in living conditions between most reserve communities and non-reserve communities, this marginal gain is more depressing than it is noteworthy.

persons. But my point is precisely the opposite: the settler people committed actual wrongs against actual persons, and even where those wrongs occurred a long time ago, they continue to affect – that is, they continue as wrongs against – present-day persons. These wrongs include wrongs of possession (the taking and holding of lands that are properly the property of Indigenous people); wrongs that go to the deprivation of cultural (loss of language) and political authority (denial of meaningful governance structures) in Indigenous communities; and wrongs against specific individuals such as those who were forced into residential schools, or whose communities lack potable water, or who suffer from the denial of other kinds basic community infrastructure. What draws these wrongs together is the fact that they were wrongs committed by settler governments against Indigenous people, and it is the fact of the wrongs that demands redress. As an anonymous commentator pointed out to me, the settler people’s presence in North America could be construed as a wrong because their presence alone was sufficient to spread disease through Indigenous communities, disease that, even without acts of violence or malfeasance, would have caused great loss of life and severe upheaval to Indigenous communities. But this sort of wrong is not what I am addressing in this article. My focus here is on intentional wrongs committed by settler governments against Indigenous people. There is no wrong in the mere arrival of the settler people – even if that arrival triggered an accidental wave of disease and upheaval among the Indigenous nations – the wrong was the failure of settler governments to create a just political association with the Indigenous people who, of course, had their governments and political systems. That wrong remains, and in this article, I consider how we might address this wrong (among others) in the framework of corrective justice. One of the most important reasons to think about redress for these wrongs in the context of corrective justice is that corrective justice analyses wrongs with respect to the parties and then seeks to fashion a remedy appropriate to those wrongs and the parties as they currently exist. As it turns out, this feature of corrective justice channels remedies into formulae that are somewhat forward looking because the object is to put present-day parties into the position that they would have been in and not into the position that their ancestors would have been in had the injustice never occurred. In other words, corrective justice does not provide a formula to approximate setting back the clock; corrective justice provides a formula that is attentive to the fact that contemporary remedies must put present-day parties into situations of redress; and this, in turn, means dealing with the current situation as it is. In Part v, I provide an example of just such a remedy in the context of modern day child welfare.

III *Wrongs and corrective justice*

Aristotle's account of corrective justice is seminal, mathematical, and bare bones. Corrective justice is one of two forms of justice outlined by Aristotle, but together with a similarly mathematical and general account of distributive justice, Aristotle's account is, by his reckoning, a complete account of justice.²⁶ I will leave aside distributive justice in this article, and take up the issue in a subsequent essay.

The basic proposition of Aristotle's account of corrective justice can be paraphrased like this: where A wrongfully²⁷ takes X from B, an injustice has been done. Correcting that injustice requires A to return X to B. The account is arithmetic because the magnitude of the loss suffered by B is precisely the amount of X that A must return to B. In other words, corrective justice aims to put the injured party in the position that he or she would have been in had the injustice not occurred. In the case of historic wrongs, the basic formula does not change; that which was wrongfully taken must be returned. Professor Ernest Weinrib summarizes this view: 'Once perpetrated, the wrong is no longer only the breach of the norm, the doing of an act that should not have been

²⁶ Aristotle lays out his account in Book V of the *Nicomachean Ethics*; Aristotle, *Nicomachean Ethics*, translated by Christopher Rowe (Oxford: Oxford University Press, 2002).

²⁷ The devil, here, is of course in the details. What is considered wrong today may not have been so in the past, and as Jeremy Waldron purports to demonstrate, circumstances may change the contours of justice and injustice; Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4 [Waldron, 'Superseding']. However, with respect to taking of Indian lands and the assumption of sovereignty by Crown entities across the Western world, Brian Slattery points out that there are only four means by which the state can justify the acquisition of new territories: first, conquest or military subjugation on a permanent basis; second, cession or formal transfer (by treaty); third, annexation without military intervention; and fourth, settlement of previously unoccupied lands; Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's acquisition of the Territory* (D Phil Thesis, University of Oxford, 1979) [unpublished], cited in Michael Asch, 'From Terra Nullius to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution' (2002) 17:2 *CJLS* 23 at 23-4. Despite military campaigns in the United States, most of North America was not conquered by the settler people. Treaties were signed but never honoured. Occupation and the Crown's assertion of sovereignty in North America rests uncomfortably on the *Terra Nullius* doctrine, which asserts that the continents of North and South America, Australia, and New Zealand were 'uninhabited'; See Asch, *ibid*, and John Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*' (1999) 37:3 *Osgoode Hall LJ* 537. Conquest is no longer regarded as a legitimate means of acquiring territory. For a history of the idea of conquest in the acquisition of territory, see Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996).

done; it is now also an injury that the defendant must undo to the extent possible.²⁸

Corrective justice conceives of the parties to a transaction as equals, and ‘justice consists in vindicating their equality.’²⁹ Because Indigenous and settler people must be understood as equals, they must be treated as equals, and this, in turn, means respecting Indigenous claims to have historic wrongs redressed. It is not enough to say ‘those claims are too old,’ or that it is too hard to sort through all that past business, or that what is done is done and we should focus on today and tomorrow and let by-gones be by-gones.³⁰ Doing or saying those kinds of things fails to treat Indigenous people as equal parties whose claims are worthy of respect. After all, it is not the case that Indigenous people have failed to make claims to redress,³¹ or that Indigenous people have allowed so much time to pass such that the issues are more complex; rather, it is the settler people who have failed to redress Indigenous claims and upon whom the burden of redress still falls.

Because corrective justice conceives parties to a transaction as equals, injured parties are entitled to be made whole, and the party who has committed the wrong is the party who must make whole the injured party. The two parties stand in direct relation to one another because the wrong draws the two parties together and vindication of their equality with respect to one another means that the injured party must be put

²⁸ Ernest J Weinrib, ‘The Gains and Losses of Corrective Justice’ (1994) 44:2 Duke LJ 277 at 288.

²⁹ *Ibid* at 280.

³⁰ This is, in many ways, the view in Waldron, ‘Superseding,’ *supra* note 27, which pans the idea of righting historic wrongs in favour of a forward-looking approach to justice. Tamara Meisels is particularly critical of Waldron’s view. She writes, ‘Whatever we might think of the merits of [Waldron’s supersession thesis], describing the situation as “the supersession of past injustice” does not render Aboriginal grievances the respect they deserve . . . Whether or not we believe that past wrongs committed toward the Aboriginal people of Australia and North America warrant restitution in the present, we should continue to regard their occurrence in the past as a crying injustice, and we would therefore do better to express ourselves accordingly’; Tamara Meisels, ‘Can Corrective Justice Ground Claims to Territory’ (2003) 11:1 *Journal of Political Philosophy* 65 at 86.

³¹ Consider the Gitksan. In the period between 1905 and 1925, the Gitksan met *twice* with and petitioned Prime Minister Laurier. In 1908 and 1909, community members forcibly prevented surveyors and road builders from entering Gitksan territory. In 1910, Gitksan chiefs travelled to England and met with King George to discuss their land grievances. In 1920, the Gitksan hired their first lawyer to advance their land claims, but the *Indian Act* made this kind of advocacy illegal in 1927 (see notes 8 *supra* and accompanying text). For more, see Wendy Wickwire, “‘We shall drink from the Stream, and so shall you’”: James A Teit and Native Resistance in British Columbia, 1908–22’ (1998) 79:2 *Canadian Historical Review* 199.

by the wrongdoer into the position the injured party would have been in had the injustice not occurred. A whole host of issues arise from this, but the foremost of these is that corrective justice must be understood as being correlative and relational and the second is that the question of what it is to put the parties into the position they would have been in must be elaborated. I will address the latter of these two issues first.

A THE POSITION THE PARTIES WOULD HAVE BEEN IN HAD THERE BEEN NO INJUSTICE

What does it mean to put a person into a position that they would have been in had there been no injustice? The most straightforward case of putting a party into the position they would have been in is a situation involving a piece of property that one person takes wrongfully from another. Alicia steals Bartholomew's xylophone. In this example, Alicia is enriched by the magnitude of one xylophone, and Bartholomew suffers a loss of precisely the same magnitude; namely, one xylophone. If Alicia returns the xylophone, Bartholomew is put back into the position he would have been in had there been no injustice. A second version of this issue arises when Carla negligently injures Daniel. In that situation, Daniel cannot be made whole by the return of his arm, even though Carla's negligence injured Daniel such that his arm had to be amputated. There is, in corrective justice, no 'eye for an eye' and no 'pound of flesh' unless eyes and pounds of flesh are taken to be metaphors of equivalence. To make Daniel whole and to put him in the position he would have been in had there been no injustice, Carla must pay Daniel a sum of money that the courts deem to be an amount equivalent to Daniel's loss. Through monetary payment, Daniel is put in the position he would have been in because this is the best the law can do; it is the closest approximation of Daniel's loss, and so Daniel's loss is quantified and he is made as whole as possible through a substitution of money in an amount deemed equivalent to his arm.

But what of ancient wrongs? How are we to understand 'putting the parties in the position they would have been in had there been no injustice' when the wrong occurred many generations ago? In general, the principle works in the same manner: losses are identified, and where things like lands or cultural objects stored in museum basements can be returned, they should be returned; and where things cannot be returned, damages are appropriate. What requires special attention, however, is identifying the loss. I take this issue up in great detail in sections III and IV, so here I will only say this: to return to the Indigenous nations what was wrongfully taken many generations ago, and therefore to put the Indigenous nations in the position they would have been had the injustice not

occurred, is *not* to make everything the way it once was. That is, to put contemporary Indigenous people in the position they would have been in is to recognize and affirm that Indigenous people are contemporaries of the settler people – Indigenous people are just as modern as their settler counterparts – so the goal is not to go back in time and figure out how many deerskin leggings a people might have been deprived of and then provide that same number of deerskin leggings. The fact is that today's Indigenous people do not typically wear deerskin leggings, and so, returning deerskin leggings doesn't put people into the position they would have been in; it puts them in a position that their ancestors would have been in, and that is a very different project from redressing historic wrongs on a corrective justice model.³² Redressing historic wrongs cannot mean making everything the way it was; instead, we need to make things the way they would have been and that means trafficking in contemporary norms of redress, not ancient items of possession.

Let me also reiterate, here, that the wrongs I am focusing on are the wrongs committed by settler governments in their relationship with Indigenous people. No wrongs necessarily flowed from the mere arrival of the settler people, even though, as I have said, the spread of disease to which Indigenous people were not immune had disastrous consequences. To put Indigenous parties in the position they would have been in had there been no injustice means thinking about what today might look like had there been a just political union between the settler and Indigenous people, perhaps along the lines laid out in *Kaswentha*, the two-row wampum belt³³ that encodes, within its thin lines of coloured beads, a specific view of the relationship between Indigenous people and the settler governments. *Kaswentha's* parallel lines of beads illustrate the laws, cultures, and traditions of the settler people and the Haudenosaunee people, each travelling together in the River of Life, yet neither able to reach across to steer the other's canoe. This separation

³² Putting a plaintiff in the position she or he would have been in at the time of the redress rather than at the time of the injury is a concept familiar to private law in the context of corrective justice. At common law, consequential damages account for the losses a plaintiff suffers as a result of his or her inability to use property damaged by a negligent defendant. If I have a specialized piece of equipment that I routinely employ in the course of my work and you damage that equipment, you are liable not only for its replacement cost but also for the income I would have earned had I been able to continue working. Simply replacing my equipment puts me in the position I would have been in at the time of loss; but this is an inappropriate measure of damages if my losses continue because of the length of time it takes to replace my specialized equipment.

³³ For a history of the two-row wampum belt, see Kathryn V Muller, 'The Two 'Mystery' Belts of Grand River: A Biography of the Two Row Wampum and the Friendship Belt' (2007) 31:1 *American Indian Quarterly* 129.

of laws and cultures has never precluded an exchange of ideas, technologies, or even individuals who might weave themselves between cultures and communities. It is insufficient, today, to simply return to *Kaswentha's* vision of separate canoes on the River of Life: wrongs were committed, and these must be redressed. *Kaswentha* remains valid as political ideology but there is much work to do in juridical terms to set right the relationship within a framework of corrective justice.

B THE CORRELATIVE AND RELATIONAL ASPECT OF CORRECTIVE JUSTICE

Corrective justice is correlative and relational. It is correlative because the loss suffered by one party is precisely the quantum of damages that must be provided to the party that suffered the loss. Corrective justice is relational because the party who must compensate is the party who wronged another. He who suffered the loss must be compensated by she who inflicted the wrong.

The correlative part of the relationship can be misunderstood because it can appear that the wrongdoer must have been enriched in some way. Consider the example of Alicia's taking Bartholomew's xylophone. There, it is easily shown that Alicia is enriched by precisely the amount that Bartholomew is deprived of: one xylophone. Alicia's unjust gain is exactly Bartholomew's loss, and this gain and loss point to two separate and distinct wrongs. First, Bartholomew is deprived of his xylophone, and second, Alicia wrongly appropriates something for her own use. In this example, Bart's deprivation happens to be in an amount equivalent to Alicia's unjust enrichment, but we can imagine a second kind of case where Alicia does not *take* Bartholomew's xylophone, but rather, accidentally destroys it. In this case, Bartholomew is deprived of his instrument, but Alicia is not enriched. Nevertheless, the correlative structure of corrective justice means that Alicia's liability is just the same whether she unjustly enriches herself by the amount of the xylophone by stealing it or whether she damages the instrument: the measure of damages is Bartholomew's deprivation. In thinking about historic wrongs committed against the Indigenous nations, some wrongs like theft of land seem more like the first example (stealing the xylophone), while other wrongs, like taking children from their parents and putting them in residential school, are more like the second example – the Canadian state was not enriched by any children at all, even though Indigenous families were deprived of their children and the children deprived of their parents. These are admittedly simple comparisons, and where they fail to capture the dynamic that I am interested in pursuing here is with regard to the question of what is an appropriate measure of damages. In each case, Bartholomew is deprived of his xylophone, and so where it is

possible to return the xylophone, Alicia must do so, and balance is once again restored to the relationship. The same result obtains where Alicia destroys the xylophone but is able to pay Bartholomew enough money for him to purchase a new instrument. But we can imagine a case where what Alicia destroys is a unique kind of tool that Bartholomew requires for his work, and without it he cannot complete a number of jobs, and because the instrument is so special, it cannot be replaced for a long period of time. In this case, the level of damages is still equivalent to Bartholomew's deprivation, but his deprivation consists of more than the instrument itself and includes the consequential damages that attach to his deprivation. In the case of Indigenous people and their losses, the basic structure of the problem remains the same, but one must be careful to include in one's calculations not just the original deprivation but the consequential damages as well. For example, in the case of loss of land, it may not be sufficient simply to return the land that was taken because other damages may attach themselves to this original loss. In the case of the state's taking children from their parents and sending them to residential schools, no return of things to the way they were is possible: you cannot replace a lost childhood, nor can you undo the terrible things that happened to many children while in residential schools. Money damages may be appropriate in some of these instances,³⁴ but as I will argue in the next section, the right remedy is one that returns to people what was lost to them, and identifying the nature of that loss is the first proper step in developing a systematic account of remedy on the basis of corrective justice.

IV *Three views of remedy*

I want to canvass, in this section, some avenues for thinking about the wrongs done to Indigenous people by the unjust acts of settler people and their governments. The first of these I call the 'land transfer solution.' On this view, what was taken from Indigenous people was land and what must now be done is return these lands in whole or in part and to provide financial compensation for those lands taken up by settlers who are today innocent bystanders. A second view I term 'the subsistence theory,' and on this view, what was taken from Indigenous people was

³⁴ Money damages are appropriate where you cannot return to a person the very thing of which they have been deprived. In the remainder of this article, I will argue that money damages may form part of the remedy to which Indigenous people are entitled because money will provide the resources that allow Indigenous communities to set out particular ends for themselves, but it is the capacity to pursue these ends that is the remedy and not the money itself; see Part III above and Part V below.

the capacity to sustain themselves through traditional means. On this view, to right ancient wrongs is to provide access to traditional resources so that Indigenous people can continue to live as they once did. The third view I canvass is the ‘institutional approach.’ This view contends that what Indigenous people lost, what was taken from them and what needs to be returned, was the capacity to live their lives as Indigenous people in whatever way Indigenous people find meaningful, provided that this particularly Indigenous life was consistent with everyone else’s setting and pursuing their own ends. This is not a view rooted in lands and resources, though access to these goods is necessary. The institutional approach posits that to right past wrongs is to create contemporary institutions that make life meaningful for Indigenous people as Indigenous people. I will demonstrate how the first two approaches, land transfer and subsistence, fail to capture the nature of the loss suffered by Indigenous people adequately. The institutional approach, I will argue, is the right way to think about redress because it does a much better job of identifying the nature of historic and contemporary wrongs committed against Indigenous people and making that identification is a necessary first step in redressing wrongs on a model of corrective justice.

A THE LAND-TRANSFER SOLUTION

This view of historic injustice asserts that what was taken from Indigenous people by settlers and their governments was land and that to right these ancient wrongs, that same land must be returned. As a theory, the land transfer solution has the distinct advantage of identifying the precise wrong to be righted: if land was stolen, land must be returned. Of course, there are practical problems, most notably that much of the land in question has been taken up by settler people and their descendants, all of whom can say, ‘I did nothing wrong.’³⁵ Whatever taint such titles might have is recessed deep within the title itself, back to the point of first acquisition from Indigenous people and likely now recessed some hundreds of years in the past. It is, of course, not fair to uproot such persons; doing so

³⁵ This caveat, of course, only applies to individuals who purchased their lands from other individuals who purchased from others, and so on, such that the original injustice is pushed deeply into the past; see *Chippewas of Sarnia Band v Canada (AG)*, [2000] 51 OR (3d) 641, 195 DLR (4th) 135 (Ont CA), leave to appeal to SCC refused [2001] SCCA No 63, 158 OAC 199. Where persons purchase land from the Crown and where the Crown is well aware of land claims over the said land, then the issue is essentially one of Crown liability. The lines become murkier in places like Caledonia, Ontario or most of British Columbia, where there are currently very active protests and very well-publicized claims that much of the area is, properly, Indian land. It is less clear what liability should fall to owners who, in spite of knowledge of these claims, choose to purchase land even from other owners (as opposed to purchasing from the Crown).

would perpetrate a fresh injustice in the name of righting an old one.³⁶ If we add compensation to the mix, then we end up with a formula that looks like this: where land was taken, land must be returned; but where that land is already occupied by *bona fide* purchasers for value without notice, compensation should be paid instead of the return of lands.

This view of rectification places too heavy a burden upon land as the only legitimate source and resource for life and culture. Land is of central importance to Indigenous people, but it was not the only source of good or meaning in the life of pre-contact Indigenous people. It is true that if people are to exist, they must exist somewhere, and if they are to eat traditional³⁷ foods and use traditional medicines then these must be harvested from somewhere. There is no doubt that land is, in this way, central to the notion of what was lost to Indigenous people. But to focus on land alone is to focus on the wrong level of abstraction. An example will help illuminate my point.

Imagine a farmer, Farmer John. Farmer John has worked his land for his entire life, and he inherited the family farm from his father, just as his father inherited the farm from his father. Farmer John's grandfather came from elsewhere, but with the sweat and toil of his muscles, he fenced the land. With the help of beasts of burden, he cleared and tilled the soil. He planted it and homesteaded. He had children and then grandchildren, and these young men and their families in turn work the fields, repair the fences and homes, and meet the neighbours. Along the way, more neighbours come, and with them, roads, and electricity, and new farming technology like tractors and combines and new genetically modified grains and telephones and the like. Then, one day, a kindly civil servant shows up and says 'We need this land for a new hydro project, the whole area is going to be flooded. You will have to move.' Now, this comes as a shock to John, who does not want to leave. He, like his father and grandfather, has invested his self and his family's sense of their selves in this particular land. John is a farmer and this is his farm.

³⁶ *Contra* Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge, UK: Polity Press, 2002). Thompson argues that the need for redress of historic wrongs is a problem of national concern and thus that the righting of such wrongs must transcend the rights of individual owners in much the same way as the construction of a dam may require the removal of individual land owners and even entire communities.

³⁷ I want to clarify, here, my use of the word 'traditional.' By traditional, I mean to describe activities or resources that have been relied upon for a long, long time. But I do not mean to carve these activities off as being somehow 'in the past.' Traditional activities are contemporary activities, just as 'traditional people' are our present-day contemporaries. When I use the term 'traditional,' I mean to indicate continuity with the past, not the settling of that term within a historical and now unreachable past.

Lawsuits are brought, and farmer John is eventually compensated for his loss. His land value is calculated, his improvements are factored in, and there's even some compensation for the inconvenience of his move. Farmer John is distraught; but with time, he can find new land, and get the electricity hooked back up, and buy new equipment, and build a new house with the help of his neighbours, and replace his crops and beasts, and carry on more or less as before. The continuity available to Farmer John is facilitated by a whole host of institutions that make Farmer John's life comprehensible and meaningful to him. He is being asked to leave, he turns to the courts, he is being forced to leave, he arranges for compensation, he finds new land via a land registry and real estate system, and he drives along existing roads to get to his new home. His electricity and high speed Internet are reconnected, and his children attend a different but essentially similar school. He sells his crops to the same farming cooperative and powers his vehicles with gas from the local Shell service station instead of the Chevron, but otherwise, everything else is more or less the same. To say that what was taken from John was his land is correct; but now imagine that John is not asked to leave – he is forced from his land and placed on a bus. The bus sets out and returns the next day. When Farmer John and his family step off the bus, they are back where they started, but the house is gone. The fence is gone. There are no cattle, no roads, no electricity, not here, not anywhere. They just don't exist. Everything that Farmer John and his family once knew is gone. There is no Internet, no one to call, and no phones with which to do it. There are no co-ops to buy his grain, and no one from whom to purchase new seed. The only beasts of burden are small prairie dogs, and to Farmer John these are starting to look like food, if only he had a gun or some way to hunt. Can we, at this point, say that Farmer John just needs to get his land back? Well, no. He has his land back; he's standing right on it. So Farmer John has nothing to worry about. Everyone is even, right? Well, clearly not. Farmer John's whole life has been turned upside down; all of the institutions that gave his life meaning and direction are gone, and the whole notion of being a farmer is gone: Farmer John has nothing to grow, no one to sell what he does grow, and no technology appropriate to the task of farming. Farmer John, like the Indigenous nations, feels that focusing on land is a pretty thin vision of what he and they have lost.

Another way of thinking about this is to consider the work of Jonathan Lear. In *Radical Hope: Ethics in the Face of Cultural Devastation*,³⁸ Lear's

³⁸ Jonathan Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (Cambridge, MA: Harvard University Press, 2006) [Lear, *Radical Hope*].

subject matter is not institutions but sources of meaning and how it is possible for both the sources of meaning and the people to whom those sources have meaning to be deeply impaired when a culture undergoes massive upheaval. Lear's account focuses on Crow life as told by one of the last Crow chiefs who remembers, and who actually participated in, the pre-contact culture and community of the Crow people. The chief's name is Plenty Coup, and in telling his life story, he reaches the point at which the buffalo had been decimated and his people agree to be confined to a reservation. The interviewer keeps asking Plenty Coup what happened next and Plenty Coup refuses to answer, distracting the interviewer by again and again offering instead another story of his youth. Once, in an unguarded moment, Plenty Coup meets the interviewer's question about life on the reservation by saying, '[Y]ou know that part of my story as well as anyone, you tell what it was like on the reservation.' Then, later, again in an unguarded moment, Plenty Coup says, '[W]hen the buffalo went away the hearts of my people fell to the ground, and they could not lift them up again. After this nothing happened.'³⁹ This seemed an odd response, even to the interviewer, who noted that as the years went by lots of things happened: Plenty Coup had gone to Washington to represent the Crow people before the Senate, he had become a great farmer, winning several top spots at agricultural fairs, and he had even represented the Indian nations at the dedication of the Tomb of the Unknown Soldier.

For many years, Lear was 'haunted' by Plenty Coup's words.⁴⁰ How was it that someone else could possibly know 'that part of my story' as well as anyone else? We assume that individuals have a sort of pre-eminence when it comes to their own life stories and experiences; but here is Plenty Coup telling his interviewer that the interviewer knows Plenty Coup's story of his life on the reserve as well as Plenty Coup does. Much of *Radical Hope* is an examination of what it could possibly mean for Plenty Coup to say that after moving to the reservation 'nothing happened.' Lear wants to understand what this really means and to differentiate that meaning from, as Lear puts it, 'an aging rock star that emerges from the wood work and remarks "I don't know what it is to be cool anymore."⁴¹ Plenty Coup lived in a warrior society whose highest aims were to be achieved in acts of warfare, and in particular, in counting coup. To do this, a Crow warrior would, during battle, tap his enemy on the chest

³⁹ Ibid at 23.

⁴⁰ Jonathan Lear, 'What Is It to Be Deprived of a World?' (World Philosophy Day Lecture, delivered at the Department of Philosophy, University of Toronto, 15 November 2007) [unpublished].

⁴¹ Ibid.

but not otherwise harm him. Or, a Crow warrior might plant his coup stick in the ground, and to the Crow warrior and his contemporaries, the meaning of this action was perfectly clear: there would be no retreat, and no enemy would cross the line just placed in the ground – it was a signal that the warrior would die rather than retreat, would rather be killed than cede an inch of ground. Lear points out that the military orientation of Crow society pervaded every aspect of Crow life, so that in 1820, if you were to ask a wife who was preparing a meal for her husband what she was doing, she would respond, ‘I am preparing my husband for war.’ But in 1880 or 1920, if you were to ask what she was doing, her response would be she was ‘preparing a meal.’ One woman, Pretty Shield, remarks at one point in Lear’s book, ‘I am living a life I don’t know how to live.’⁴² To Lear, ‘living a life you don’t know how to live,’ and living a life where ‘nothing happens’ are not hyperbole; they are real possibilities because meaning is not fixed – it is culturally determined and therefore vulnerable to upheaval. For example, in *Radical Hope*, Lear tells of a war party that is formed after the Crow are placed on the reservation. Young men gather together their horses and strike out across the plains. They raid their traditional enemy’s camp and steal their horses. In 1820, this would have been cause for celebration; it would have counted as counting coup, an act of war and of significant bravery. But by the 1880s, when this incident actually took place, the same actions amounted to nothing more than theft; and to the settler people, the stirrings of an insurrection. The military was called, young men were jailed, and no one counted coup because, even for the Crow themselves, counting coup had, by 1880, ceased to have any meaning because the social and cultural signifiers of the Crow warrior life were now so depleted that counting coup could no longer mean what it once did.⁴³

What Lear’s account demonstrates is that to be Crow, or an Indigenous person, is to live in a world that is meaningful to Crow or Indigenous people. Meaning is derived through social practices and the way those practices are contextualized. Where the cultural signifiers that give meaning to one’s life are gone, just as they disappeared in my example of poor Farmer John, then something very deep has been lost, something much more significant than mere land. To focus on land and its

⁴² Lear, *Radical Hope*, supra note 38 at 61.

⁴³ Ibid at 28–9. Later in his account, Lear acknowledges that counting coup has continued to have meaning, but its meaning is now rooted in new contexts; ibid at 153–4. Young Crow warriors who served in the two world wars, Korea, Vietnam, and now in Iraq do count coup, and they are reminded of what it means to count coup by their elders, who recontextualize the counting of coup for a contemporary military setting.

return as the primary goal of righting historic injustices for Indigenous people is just the same as returning to Farmer John his empty farm lands or to organize a war party to steal horses in 2011. In our contemporary world, actions such as these are meaningless.

We must bear in mind that the loss of Indigenous lands and the subsequent and ongoing suppression of Indigenous institutions, values, and modes of living was not the result of some sort of catastrophic cosmological upheaval of the sort suffered by Farmer John. Lear's account of the Crow is, in some ways, axiomatic of Indigenous loss across the Americas. There can be no recourse to a line of argument that suggests that the Indigenous way of life in the Americas was simply doomed, that the buffalo might have died out on their own, or that Indigenous people would have voluntarily assimilated themselves into settler society; even if all that is true, the fact remains that that settler people acted in ways that were designed to deprive Indigenous people of their lands and their ability to live the lives that they had lived for millennia. Legislation deprived Indigenous people of opportunities to work, to farm, and to participate in the capitalist economy, and these actions further eroded Indigenous sense self-worth and self-sufficiency. These were and are wrongs suffered by actual persons, and they were and are wrongs that go beyond the loss of land, and so any attempt at redress that focuses exclusively, or even primarily, on the return of lands is a theory of redress that should be rejected because it fails to account for the full range of losses suffered by Indigenous people.

B THE SUBSISTENCE THEORY

On this view, what was lost to Indigenous people and what, if anything, must be returned was the capacity of Indigenous people to live the same kinds of lives as they once did with respect to the harvesting of resources traditionally relied upon. The subsistence theory is popular among the judiciary and, I think, the public at large. What this view really posits is that Indigenous people, independent and free, once lived off the land and that to right ancient wrongs is to provide contemporary Indigenous people the same opportunity. Under existing Canadian jurisprudence, contemporary Indigenous people, to exercise their rights, must shape those rights to conform to the Court's vision of what Indigenous people once used to do. This view is embedded in the *Van der Peet*⁴⁴ test for

⁴⁴ *R v Van der Peet*, [1996] 2 SCR 507 at para 44, 1996 SCJ No 77 [*Van der Peet*]. Chief Justice Lamer writes, *ibid*, 'In order to fulfil the purpose underlying s. 35(1) – i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions – the test for

determining whether an Aboriginal right or practice has survived to the present day and is protected under section 35 of the *Constitution Act, 1982*.⁴⁵ The Court states that ‘in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.’⁴⁶ By requiring that Aboriginal rights be ‘integral to the distinctive culture’ the Court makes clear its intention to protect only those rights that were integral to the distinctive cultures that existed prior to the arrival of the settler people. After all, from the Court’s point of view, what it is protecting are not universal rights or rights that depend on liberal values, but *Aboriginal* rights, which are *sui generis* and go to the core of making Indigenous cultures what they are, or rather were, since Aboriginal rights are seen to have crystallized in their purest form in the moments just before Indigenous contact with the settler people.⁴⁷ The treatment of Aboriginal rights by the Courts and governments is a perfect example of how institutions can be conceived and implemented so as to eviscerate Indigenous values, and it is a matter to which I shall return in Part III of

identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.’ The activity must, therefore, be one that the Court accepts was practised by Indigenous people prior to contact with settler people. It is hard to see how this could result in anything but a ‘frozen Indian’ conception of Indigenous rights.

⁴⁵ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴⁶ *Van der Peet*, supra note 44.

⁴⁷ In her dissent in *Van der Peet*, ibid at paras 165–75, Justice L’Heureux-Dubé observes, ‘Defining existing aboriginal rights by referring to pre-contact or pre-sovereignty practices, traditions and customs implies that aboriginal culture was crystallized in some sort of “aboriginal time” prior to the arrival of Europeans.’ She then goes on to advocate for a ‘dynamic rights’ approach where, in order for an Aboriginal right to be recognized and affirmed under s 35(1), ‘it is not imperative for the practices, traditions and customs to have existed prior to British sovereignty and, *a fortiori*, prior to European contact, which is the cut-off date favoured by the Chief Justice. Rather, the determining factor should only be that the aboriginal activity has formed an integral part of a distinctive Aboriginal culture – *i.e.*, to have been sufficiently significant and fundamental to the culture and social organization of the Aboriginal group – for a substantial continuous period of time . . .’ [emphasis in the original]. See also Samuel Scheffler, ‘Immigration and the Significance of Culture’ (2007) 35 *Philosophy and Public Affairs* 93 at 108. Scheffler argues that it is not possible for cultures to remain static: they must change or they will die out; the idea that a culture can remain static over a long period of time is an absurd notion. He asks whether America would look the same a century from now if we closed the borders and stopped all immigration. Of course it wouldn’t: the changes would be massive even without immigration, just as present-day Japan, a country that permits very little immigration, would be unrecognizable to a Kyoto resident of 1908.

this article. For now, it is enough to note that current Canadian law firmly regards Indigenous rights as subsistence rights.

Subsistence theory recreates the past by discounting contemporary land uses as ‘non-traditional’⁴⁸ and, therefore, not part of traditional subsistence. Subsistence theory does not even require that lands be transferred to Indigenous people because what matters under subsistence theory is not the right to exclude others but merely the right to access particular resources.⁴⁹ This form of righting historic wrongs is particularly attractive to the judiciary and to citizens in general because it does not typically mean that anyone will be asked to leave. Instead, we will be able to share the current land base, with settlers farming and ranching while Indigenous people hunt and gather, since that, on the subsistence view, is pretty much all Indigenous people did, and we need not even bother to inquire why Indigenous people behaved the way we believe they did centuries ago; the answer is obvious: to subsist.

Now, it may be the case that a group of peoples wishes to live a life free from modern distraction. Consider the Amish: they have chosen to reject modernity, to live in enclosed groups that face inwards and rarely look out, and to live a life of few creature comforts. In a mercantile sense, the Amish practise a kind of subsistence living; they farm and

⁴⁸ It must be noted that, under existing Canadian constitutional jurisprudence, the Court can make a finding of ‘Aboriginal title’ and this *sui generis* form of title can be put to contemporary uses that are not tied to, or continuations of, forms of use that predate the arrival of the settler people. The test for a finding of Aboriginal title requires pre-contact use and occupation of the lands by the Indigenous people making the claim and can sometimes require continuity of use between ancestral use and contemporary use; see *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 143, [1997] SCJ No 108. However, while this test appears to side-step the test for ‘integral to the distinctive culture’ as elucidated in *Van der Peet*, supra note 44 at para 46, the notion of ‘use’ is still irrevocably tied to common-law conceptions of ‘use and occupation.’ Thus, contemporary Indigenous people find themselves in a position of having to demonstrate that their use and occupation was exclusive to the point of being able to demonstrate not only that no other Indigenous people used the land at issue for any reason at all but that the group making the claim demonstrated an intention to keep out all others; see *R v Marshall*; *R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 at paras 55–70 [*Bernard and Marshall*]. The result is that Aboriginal title claims are framed as ‘use rights’ rather than right to title because Indigenous forms of use do not sufficiently accord with common-law standards of occupation and intention for that occupation to remain exclusive.

⁴⁹ See my previous commentary regarding *Bernard and Marshall* in Sanderson, ‘Against Supersession,’ supra note 3. Of particular relevance here is the Chief Justice’s holding that because the Mi’kmaq moved in a seasonal fashion ‘the land could be traversed and used by anyone. These facts give rise not to aboriginal title, but to aboriginal hunting and fishing rights’; *Bernard and Marshall*, supra note 48 at para 58. And thus, with the stroke of a pen, property rights become mere subsistence rights.

participate in local economies to the point, but only to the point, necessary to secure the economic life blood of the community: to buy supplies, to prepare for disasters, to grow the community and plan another one, to ensure that everyone in the community is clothed and fed and schooled, and little else. There is nothing wrong with choosing to live life as an Amish person; it is a choice that Amish persons make and it is a fine choice for those who make it. But there is something deeply wrong with the idea that a government can Amishize a group of citizens because the government believes that doing so returns them to a state of self-sufficiency. To Amishize Indigenous people, which is what the 'integral to a distinctive culture' test must do, is to enforce a stereotyped vision of Indianness on a people who are not stereotypes but rather are the inheritors of a complex cultural life, a complete cosmology, and a vision of themselves that is every bit as contemporary as that of the settler culture. There is, too, something notably perverse in the idea that because the settler people denied Indigenous people the capacity to live a particular way of life beginning a couple of hundred years ago, the solution is to force contemporary Indigenous people to pursue a stereotyped view of that ancient way of life as a means of redressing the original wrong.

Subsistence theory neatly side-steps any sense that Indigenous people acted for reasons that were more complex than survival.⁵⁰ The particular political associations and social networks that are central to Indigenous people's views of themselves cannot be accounted for in subsistence theory. For these reasons, subsistence theory must be rejected as failing to account for what was actually lost to Indigenous people.

C THE INSTITUTIONAL APPROACH

i *Theoretical Overview*

This view regards the historic injustices perpetrated against Indigenous people at the level of institutions. Rather than seeing what was lost to Indigenous people as being land or the resources derived from lands, the Institutional approach sees the losses of Indigenous people as being primarily institutional. By institutions, I mean the organizational threads such as political arrangements, education, language, spiritual practices, traditional medicines, clan arrangements, and other cultural values of Indigenous people. This is similar to Will Kymlicka's idea of 'societal culture,' which he sets in the context of an individual's freedoms and choices. Drawing on Ronald Dworkin's language of culture, Kymlicka

⁵⁰ See Gordon Christie, 'Law, Theory and Aboriginal People' (2003) 2 Indigenous LJ 67 at 85.

writes, '[O]ur culture not only provides us with options, it also "provides the spectacles through which we identify experiences as valuable."' ⁵¹

Kymlicka's view, at least insofar as his view is taken to mean that the fabric of our socio-cultural experience renders certain options more appealing and makes other choices less likely, is not controversial.⁵² Turning now to consider the nature of choices made available to Canada's Indigenous people, one cannot help but be struck by the legislative denial of meaningful choices that can be made by Indigenous people when it comes to shaping, forming, and weaving the fabric of their socio-cultural world. The *Indian Act* denies Indigenous people in Canada the right to make fundamental choices about how Indigenous people form and shape the very notion of community, identity, and value in the places that they live. Because of the *Indian Act*, Indigenous communities lack meaningful powers of taxation and so have no fiscal capacity to set and pursue ends without asking for Federal money – that means no meaningful choices in education, in health and child care, in policing and housing, and virtually no choice as to the economic, social, or environmental world around them. The *Indian Act* denies Indigenous people the ability to choose their form of governance⁵³, and virtually all forms

⁵¹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1997) at 83; see also, Ronald Dworkin, 'Liberal Community' (1989) 77 Cal L Rev 479. Kymlicka calls this socio-cultural world 'societal culture.' A similar concept is deployed by Dworkin, which he simply terms 'culture,' and, in the Cree language, this idea has its own term: *nēhiyawīwin*, which means 'Cree-ness.'

⁵² There is controversy around some aspects of Kymlicka's view. The main thrust of these critics turns on Kymlicka's notion of differential treatment of *ethnic* and *national* minorities – if one group requires secure access to their own culture there is, the argument goes, no principled reason to deny the same protections to other groups; see e.g. Lawrence Rosen, 'The Right to be Different: Indigenous Peoples and the Quest for a Unified Theory,' Book Review of *Multicultural Citizenship: A Liberal Theory of Minority Rights* by Will Kymlicka, (1997) 10 Yale LJ 227; Sujit Choudhry, 'National Minorities and Ethnic Immigrants: Liberalism's Political Sociology' (2002) 10 Journal of Political Philosophy 54. Another line of argument, notably advanced by Charles Taylor, 'Can Liberalism be Communitarian?' (1994) 8 Critical Review 257, claims that Kymlicka's theory is essentially paternalistic in that it looks to protect some cultures and values, but only for reasons found within liberalism itself, and not with reference to any motivations that come from the cultural agents themselves. Still other scholars take issue with the need for diverse cultures to have access to their own particular cultures when access to a culture is available within the majority group; see e.g. Jeremy Waldron 'Minority Cultures and the Cosmopolitan Alternative' (1992) 25 U Mich JL Ref 751.

⁵³ *Indian Act*, supra note 18, s 74(1): 'Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act'; s 78(1) determines that, '[s]ubject to this section, the chief and councillors of a band hold office for two years'; s 79 provides that the Governor in Council may set aside an election.

of law making and regulatory oversight are determined by other orders of government.⁵⁴

Indigenous communities are thus given virtually no freedom or capacity to shape their socio-cultural world meaningfully. The ability to develop and maintain political, social, and cultural institutions matters because identity is constructed and maintained, at least in part, through precisely these kinds of institutions. Social, cultural, and political institutions together create a web of meaning that works to reflect and enforce certain values, values that have meaning to the persons in those cultures. These values are often expressed tangentially, through practices that may conceal the practice's actual cultural value. For example, the Nisga'a people fish for eulachon⁵⁵ every spring at the headwaters of the Naas River. To outsiders, this looks like spring fishing and fishing means food, and food means survival, and so, looking at the Nisga'a eulachon fishery, one might easily conclude that the Nisga'a return to this spot because it is a good place for them to catch fish. But to the Nisga'a a lot more is going on than meets the eye.⁵⁶ The eulachon, the Nisga'a believe, are partaking in an ancient ritual that serves several purposes: first, it feeds the people – the people do not fish so much as accept the gift of the eulachon who sacrifice themselves to feed the Nisga'a; second, the timing of the run is itself part of an ancient story of pride and possession played out as between the salmon and the eulachon: both of them

⁵⁴ Ibid, s 81 outlines the powers of a government formed under the *Indian Act*. These powers include (b) the regulation of traffic; (j) the destruction of noxious weeds; (k) the regulation of poultry and bee keeping; (p) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve. However, section 82(2) of the Act provides that the Minister may disallow any by-law within a forty-day period.

⁵⁵ Eulachon are 'anadromous,' meaning that, like salmon, they live most of their lives in the ocean and return to spawn in river systems. They are a small fish measuring fifteen to twenty centimetres in length and weighing forty to sixty grams. Eulachon are uniquely endowed with a body fat content in the range of 15–20 per cent of their total body mass, so much so that European explorers named them candlefish because a eulachon could be dried, stitched with a wick, and then burned like a candle. Indigenous people all along the West Coast caught large quantities of eulachon during the spawning season, put the fish into large pits for several days to allow them to begin decomposing, and then added boiling water to the mix. This process freed the oil from the fish so that eulachon oil, or grease, could be skimmed from the surface of the pits. The grease was one of the most prized trade items in the pre-contact trading world and not only was used as valuable food stuff but, in the right hands, was also considered a potent medicine; see Megan Felicity Moody & Tony J Pitcher, 'Eulachon (*Thaleichthys Pacificus*): Past and Present' (2010) 18:2 Fisheries Centre Research Reports 1.

⁵⁶ Hugh Brody, *The Other Side of Eden: Hunters, Farmers, and the Shaping of the World* (New York: North Point Press, 2001) at 161–72.

desire to feed the people, but because of the teasing of the eulachon by the salmon about the eulachon's size (eulachon are a very small fish), the two fish never travel the river at the same time, and the spring fishery is a time for all Nisga'a to be reminded of this episode from their ancient past; and third, the story and the fishery itself affirm Nisga'a territory and their identity as a distinct Indigenous people. A similar encoding of the cultural world occurs beneath the surface of many events in Indigenous cultures. During a Gitksan feast, the seating arrangements of the chiefs and other attendees is highly structured and ritualized. Although it is not apparent to an outsider, the chiefs are seated according to ancient custom, with the most important chiefs along a central line in the centre of the feast hall and the lower chiefs seated to the left and the right. The seating arrangement is meant to reflect a salmon that has just been cut down the middle, with the highest chiefs representing the 'inner rich meat' of the salmon.⁵⁷

It is through institutions and rituals that individuals are inculcated into a group, and through institutions that group identity is fostered, shared history is taught, and cultural encoding is made apparent. In this way, institutions both impart and reflect ways of seeing and understanding one's place in the world. Identity, of course, can be a very slippery thing. There is something I will term 'thin identity' – a sort of self-ascribed, self-directed positioning of one's self. I am thinking, here, of someone who discovers through genetic testing that he or she is 7 per cent Jewish. Such a person may suddenly feel more Jewish, or may feel that some aspect of their identity, say their aversion to lobster, suddenly makes sense in the context of their newly found 'Jewish identity.'⁵⁸ But these are very thin instances of identity because they do not delve deeply into 'Jewishness' – one's feelings about oneself do not require the approval or even the notice of others, and if there's one thing to being a religious Jew, it's that you need other Jews to form a community because, without that community, crucially important religious rituals simply cannot be performed.⁵⁹ A lone Jewish person is still Jewish, even without the

⁵⁷ Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at 46.

⁵⁸ The availability of genetic testing and its becoming less and less expensive means that these sorts of discoveries about the Jewish or Irish or Igbo strands in our genetic heritages are likely to become increasingly common; see e.g. Henry Louis Gates, Jr, 'My Yiddishe Mama' *Wall Street Journal* (1 February 2006).

⁵⁹ Ten is the minimum number of people required by Jewish law to form a community capable of conducting community or group-based prayer. The Hebrew term for this quorum is *Minyan*. Of course, there is an important distinction between being a religious Jew and simply being Jewish. To be Jewish is to identify as such, to have been brought by blood and ceremony into the family of Jews and to be, in that sense, at

nine other Jews required to form a community, but there is something missing from that experience of Jewishness. That *something* is what constitutes thick, as opposed to thin, identity. ‘Thick identity’ engages not just one’s own experience of being Jewish, or Cree, or Hindu; thick identity engages a community experience, a sense of being self-rooted in a relationship with others. It is this community experience – perhaps most intensely realized during ritual ceremonies of great spiritual import – that creates the environment in which values, traditions, laws, practices, and the cultural coding of a people reside, and this thick cultural identity is actualized only through the existence of certain kinds of institutions that affirm that thick identity.

So what do identity-affirming Indigenous institutions look like? There is no one answer. The Indigenous nations are too varied in their histories, geographies, and languages to have a single overriding set of institutions and institutional values. But what we can generalize is that Indigenous communities, like all communities, will have primary institutions such as a system of government, specific and particular property rights, systems of education, and language.⁶⁰ Among my own people, the Opaskwayak Cree, these institutions would include traditional ceremonies such as naming ceremonies, coming-of-age ceremonies, a wide variety of spiritual practices, adoption ceremonies, a specific form of community decision making and dispute resolution, wedding rituals, and specific ways of preparing and honouring the dead, among many, many others. It is these systems and practices – these institutions, for lack of a better word – that make being Cree what it is, and not something else, like being Ojibway, or Sikh, or Japanese, or Irish.

Now, there is nothing stopping my people, the Opaskwayak Cree, from holding naming or coming-of-age ceremonies. These ceremonies take place all the time, in accordance with Cree tradition and law. But what *is* missing is the sense, and the practical reality, that these ceremonies have meaning in a modern context. The Naming ceremony is important to Cree people because the name that one is given is carefully chosen after much prayer and fasting by a chosen elder. More than that though, the name that is given is the name by which the Spirit World will know the child, and without that name, the child does not have a full

least part of a Jewish identity. Being a religious Jew requires more; it requires immersion in the thick world of Judaism – its ritual, its beliefs – and participation in a particular Jewish community.

⁶⁰ A few words on language: Indigenous languages are deeply tied to place. The words and ideas that are capable of being expressed in, for example, the Cree language, derive their meaning in relation to places in the Cree world. The English phrase, ‘where are you from?’ translates directly into Cree (*ki-ti-ni-ka-son*) as meaning ‘to where does your umbilical cord attach?’ Origins and place names merge into one.

Cree identity because he or she is not known to the Spirit World. At the Naming ceremony, the name is given and the child is then introduced to the Spirit World and to friends, family, and neighbours. A feast is held. There is a giveaway ceremony to honour everyone who takes part in the ceremony. In a world of strong, modern, Indigenous institutions, the Naming ceremony could be made to have significance beyond its ceremonial and spiritual meaning. For example, a modernized version of this practice, one that validated and enforced Indigenous values, would be to say that no one can become a member of an Indigenous community – you can't be adopted or married in – until you are given your name, because having one's name is part of what is central to being Cree.

Similarly, the Coming-of-Age ceremony marks that time in a young man or woman's life when he or she ceases to be regarded as a child. A modern, integrated form of this practice may be not to permit voting in community elections until such time as one has had one's Coming-of-Age ceremony – the responsibility of coming of age can be made manifest in actual practice. These are just examples of the ways in which traditional Indigenous ceremonies and practices can affirm Indigenous identity in a modern context, provided that Indigenous governments are given the regulatory and law-making authority to make such practices count for more than ceremony. These are, in other words, ways in which the institution of Indigenous government can make cultural traditions and practices a vibrant and meaningful part of the modern life of Indigenous people, just as these traditions, laws, and practices have guided Indigenous self-identity for generations.

I think it important here to note that Naming and Coming-of-Age ceremonies do, in fact, still occur, and they are significant waypoints in the life of an Indigenous person. In one sense, it is enough that these practices still continue – by continuing the traditions of our elders, we contemporary Cree people are taking our place in a long line of Cree citizens and we are inheriting traditions and passing them on to our children, and so, in some important sense, this aspect of what it is to be a Cree person is maintained. But, because today's Naming and Coming-of-Age ceremonies are merely ceremonial – that is, they are important to the ceremonial and spiritual life of a Cree person – they fail to reflect a significant part of the ceremonies' larger purpose, which is about taking part in the governance⁶¹ and political life of a Cree community. It is this

61 There is not space, here, to develop this idea more fully, other than to note that, through ceremonies and rituals, Indigenous people interact with one another not simply as 'persons' but as clan persons. It is through one's clan identity that one's social and political role is, in part, prescribed. Thus, these traditional activities help to

larger sense – the notion that what we today regard as ‘ceremonial’ was once integral to the social and political world of Cree citizenry – that has been so deeply impaired by the laws and policies of the settler people and that reflects the manner in which thin (merely ceremonial) activities can be made into thick institutions that give substance to the very idea of being ‘a Cree person’ living in a ‘Cree community’ and experiencing a rich life of *nêhiyâwiwin* or Cree-ness.

Another way to think about what contemporary Indigenous institutions might look like is to imagine that there was some group of Indigenous people who, for whatever reason, were not over run by the settler people. This Indigenous group would not be unknown like some ‘lost tribe’; they would interact with the settler people and with other Indigenous groups around them, but because of some strange quirk of history, they were not forced to submit to the *Indian Act*, and the community governs itself according to its laws. The group remains part of Canada, but like the Nisga'a living under the Nisga'a treaty, this group has its own territory and laws. We can imagine that this group would have access to roads and modern technologies, and they would use these technologies to further strengthen their own traditions in just the same way as Indigenous people readily adopted guns for hunting and chainsaws for forestry work – because these tools made it easier to do the things they had always done.⁶² We can imagine that this group would have schools, but their curriculum would be driven by culturally based concerns rather than by standardized provincial testing. It might be the case that boys and girls would be taught separately and that much learning would be done out on the land. English and French would be taught as second languages. But it might also be the case that the school ran from 8:30 to 3:30, just like other schools, because parents worked day jobs and needed some form of regular and daily child care for their children. This group would mix Indigenous custom and values with modern realities, and while we can't imagine in detail precisely what would constitute such a community, we can imagine at a general level of conception that there is nothing contradictory or impossible about conceiving of such a life. Indeed, to return to Lear's account of Plenty Coup and the Crow, *Radical Hope* ends with a visit to the Veteran's Memorial at the Crow Agency where there is a list of Crow veterans who have served in wars and military engagements, from the Sioux wars against the United States to Iraq. On the wall, there is also a plaque which describes the manner

impart an understanding of governance that is based in community, in clan families, and in ancient life ways.

⁶² See Ronald Niezen, *Defending the Land: Sovereignty and Forest Life in James Bay Cree Society* (Boston: Allyn and Bacon, 1998).

in which contemporary Warrior Home Coming ceremonies are conducted. Lear writes, '[T]hus a direct link is made between the ancient warrior values and the new and available role of combat veterans.'⁶³ This goes some way to demonstrating that the values and traditions of a social and cultural world, even a world as war-oriented as that of the historical Crow society, can find meaningful expression for those values in contemporary institutions. There is, in other words, hope even for people whose upheaval has been utter and complete because the social and cultural institutions that give meaning to a people can grow and change while still maintaining their unique character.

Indeed, this sort of community knowledge is very much alive just below the surface in contemporary Indigenous communities. It is not that Indigenous people do not know how to govern themselves according to their cultural norms and ancient laws, or that they no longer understand the value of their lands or the traditions of their ancestors: this knowledge lies just below the surface of many communities in the hands of elders and knowledge keepers who, despite all that is said to the contrary, pass this knowledge on from one generation to the next as they have always done, just as the Crow have found a way to keep alive their militaristic traditions in a contemporary setting. So the problem is not that no one knows how to engage with traditional values, or that the values themselves are those of the dead and the dying; the problem is, and has always been, that settler laws impair the full surfacing of these kinds of knowledge because knowledge of these sorts can only be realized in practice; that is, in their application to living institutions such as governments, laws, education systems, and – as I will demonstrate shortly – systems of child welfare.

i *The example of child welfare*

Whereas theft of land is an example of historic wrongs committed against Indigenous people, the current child-welfare system as it is practised in Indigenous communities is an example of contemporary and ongoing wrongs that are wrong because they continue to deny Indigenous people the ability to develop and maintain institutions that affirm Indigenous values.⁶⁴ I take it as a given that no people are immune to

⁶³ Lear, *Radical Hope*, supra note 38 at 154.

⁶⁴ Though this does not add or take away from my general argument that Indigenous institutions must be affirmed in order to restore to Indigenous people what was taken from them (and is still denied to them), it is worth noting that, in the context of child welfare, the federal Auditor General reported in 2008 that in British Columbia more than 50 per cent of the children in the child-welfare system were Aboriginal, despite the fact that Aboriginal people make up only 8 per cent of British Columbia's population. There is, without a doubt, a crisis in Indigenous communities, and the parallels

family disruption: parents die suddenly and questions about what to do with the children of those parents cannot be avoided. It follows that every culture must have its own systems for ordering family life when families suffer sudden loss. The contours of those systems will turn on the conception of the family. Among Cree people, the institution of the family is shaped not by the nuclear family but by the clan. In Cree, the word *Kohkum* means grandmother, but any blood sister or female clan relation of my mother is my daughter's *Kohkum*. On the men's side, the brothers of my father, and other male elders of our clan are *Mishomis*. One *Kohkum* is interchangeable with any other because no *Kohkum* holds a priority over their grandchildren. Similarly, the word *nôsisim* means grandchild, but can also mean any grandnephew or grandniece or any great-grandchild. This conceptual ordering of the family means that when children suddenly find themselves without parents, they do not find themselves without a family. The clan forms a web of relations that envelopes an entire community such that, while parents are important, they are not the institutional centre of Cree or most Indigenous conceptions of the family. The institution of the family, in turn, shapes the contours of secondary institutions like child-welfare systems, and given that the Cree conception of the family is different than the dominant settler conception of the family – a nuclear entity comprised of parents and children, with some small role to be played, perhaps, by grandparents, aunts, and uncles – the Cree conception of a child-welfare system is likely to stand in sharp contrast to that of the settler people. As Cindy Blackstock puts it, 'For First Nations, the assumption is that if communities are well, families do better and are able to keep their children safe. For western social work, individual families can keep their children safe with adequate services.'⁶⁵ This is because, in the Indigenous view, the family is embedded within an actual cultural community of persons who all exist within a web of relations. Children are part of their community, their clans, and clan relations, and this set of

between the number of children being taken today and the systemic taking of children under the residential-school system cannot be ignored. Indeed, it is estimated that there are now more than three times as many children in the child-welfare system than there were at the height of the residential-school system; see *Report of the Auditor General of Canada to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, 2008) ch 4 at 2; Cindy Blackstock, Nico Trocmé, & Marlyn Bennett, 'Child Maltreatment Investigations among Aboriginal and Non-Aboriginal Families in Canada' (2004) 10 *Violence against Women* 901 at 905.

⁶⁵ Cindy Blackstock, 'Why Addressing the Over-Representation of First Nation Children in Care Requires New Theoretical Approaches Based on First Nations Ontology' (2009) 6:3 *Journal of Social Work Values and Ethics*, online: <<http://www.socialworker.com/jswe/content/view/135/69/>>.

relations is the starting point for thinking about the health and well-being of families in general. Child welfare as it is currently practised in Indigenous communities is not governed by Indigenous conceptions of the family but by settler conceptions, and this has consequences for the way child welfare is conceived and implemented. In dealing with family disruption, such as the death of both parents, current child-welfare practices focus on a policy known as the ‘best interest of the child.’ This objective and neutral sounding term is, however, implemented in a way that sets aside Indigenous conceptions of the family in favour of settler-based conceptions. Marlee Kline demonstrates how courts and child-welfare-agency policies rely

upon a construction of the child’s interests as separate from, and abstracted out of, her familial and cultural context. The best interests of the child standard serves in practice to privilege an understanding of children *as decontextualized individuals* whose interests are separate and distinct from those of their families, communities and cultures.⁶⁶

In implementing a conceptual framework that separates the interests of a child from the interests of her community, Kline argues, ‘the actual removal of the child [from her community] is made to seem unproblematic.’⁶⁷ Thus, the very conception of what constitutes a family and how that conception is affirmed or denied is at issue in almost every instance of child removal in Indigenous communities. To remove children from their communities – and not merely from their nuclear families – is to denigrate Indigenous conceptions of the family because removing children means privileging settler conceptions of the family and the best interests of the child over Indigenous conceptions of the child as part of a clan, a community, and a culture.

The current conflict between Indigenous and settler conceptions of the family is played out in child-welfare law, and the settler-dominated conception of the system continues to deny to Indigenous people something that they once had, and that I argue, they still possess the right to have, namely a child-welfare system that supports and affirms Indigenous conceptions of the family. From the perspective of corrective justice, the equation is relatively straightforward: Indigenous communities once had authority to determine their own child-welfare systems, that authority was taken from them and continues to be denied to their communities, and so, corrective justice requires that powers over child

⁶⁶ Marlee Kline, ‘Child Welfare Law, “Best Interests of the Child” Ideology and First Nations’ (1992) 30 Osgoode Hall LJ 375 at 395 [emphasis in the original].

⁶⁷ Ibid at 396.

welfare be restored to the Indigenous communities from which they were taken.⁶⁸

One way to approach the question of Indigenous institutions in general, and child welfare, in particular, is to implement some version of devolution. In this model, First Nation community members simply step into the place of the existing bureaucracy, and Indigenous persons apply all of the existing rules and regulations. The white face of child welfare is given a shiny new red skin. Devolution, however, changes nothing but the skin colour of the service provider and is unacceptable on the model of corrective justice because devolution does not return anything that was taken. As Judith Rae demonstrates, even the efficacy of ‘capacity building’ is doubtful.⁶⁹

Another approach is to do what was done in British Columbia, which was, in essence, to try and add Indigenous flavour to an existing settler-based structure of child welfare. Typically, these veneer-like efforts are ineffective but largely harmless. In British Columbia, however, they have proved fatal. In late January 2011, Mary Ellen Turpel-Lafond, BC Representative for Children and Youth, released a report examining the deaths of twenty-one infants who had been removed from their nuclear families. The Report indicates, ‘Child and Family Service Standards and Caregiver Support Standards direct social workers when removing Aboriginal children from their parents to place the children with extended family or within their Aboriginal community whenever possible.’⁷⁰ In one case, an infant was placed into a home in which eleven other people were already living and, while Ministry officials ‘followed standards regarding placing Aboriginal children with extended family, it appears that other standards for safe infant care were not met.’⁷¹ I want to set aside the absurd notion that negligently complying with rote government policies is what I mean by affirming Indigenous conceptions of the family. A policy to favour placing children with extended family does

68 The fact remains that Indigenous people know how to take care of their families according to traditional values and practices. Indeed, there is a Cree word for this: *ti-pen-i-may-wi-sen*. It means to understand how to take care of yourself and your family and your community. In Cree, this is the closest approximation to the English language concept of ‘government.’

69 Judith Rae, ‘Program Delivery Devolution: A Stepping Stone or Quagmire for First Nations?’ (2009) 7:2 *Indigenous LJ* 1.

70 British Columbia, Representative for Children and Youth, *Fragile Lives, Fragmented Systems: Strengthening Supports for Vulnerable Infants* (January 2011) at 45, online: Representative for Children and Youth <<http://www.rcybc.ca/Images/PDFs/Reports/Fragile%20Lives%20-%20FINAL%20Jan%202011.pdf>>. Also of note, fifteen of the twenty-one deaths investigated were Aboriginal, an ‘alarming number’; *ibid* at 3.

71 *Ibid* at 45.

not affirm Indigenous values; policies of this sort simply *mistake* one aspect of Indigenous culture – respecting the priority of extended family rather than the priority of the clan – and then say, ‘[W]e tried respecting your culture, we tried doing it your way and it didn’t work out.’ To affirm Indigenous values in the context of child welfare is to assist Indigenous communities in building a child-welfare system that has at its core an Indigenous conception of the family, and to build such a system is to set right one contemporary wrong on the model of corrective justice because building a child-welfare system based on Indigenous conceptions of the family restores to Indigenous people something that was taken from them: a child-welfare system that affirms their unique values and cultures.

Redesigning and maintaining child-welfare systems is one example of what it can mean to redress contemporary wrongs on a model of corrective justice, just as returning some lands can redress some historic wrongs. As the child-welfare model demonstrates, what is at issue is not merely the jurisdiction over second order institutions; what is at issue is the first-order institutions on which those systems are based, institutions like conceptions of the family. It is not enough to try to infuse contemporary systems with Indigenous flavours; a complete rebuilding of those systems is required if our goal is to return to Indigenous communities what was taken from them or what has been denied to them.

To gather together some of what has been said in this section, let me say here that land is important to Indigenous people, but land alone does not encompass the entirety of what was lost to Indigenous people. What Indigenous people lost in acts of historic injustice, and what the settler people must return, is the right and capacity of Indigenous people to order their lives and to exercise their freedoms in particularly Indigenous ways: to effect particular political arrangements, to steward over and be stewarded by land, to protect the property that they have held for generations, to manage disagreements and disputes between members, to develop and expand upon Indigenous philosophies, and to pass these institutions onto their children and grandchildren. In the context of child welfare, settler laws have denied Indigenous communities the ability to implement systems of child welfare that affirm and accord with Indigenous identity and so, on the model of corrective justice, it makes perfect sense to talk about recreating child-welfare systems in Indigenous communities, not because those systems are failing, though they are – we have to talk about rebuilding Indigenous systems of child welfare because Indigenous people had that very system taken from them and corrective justice requires that it be returned. Losses like these cannot be compensated for through access to land or fishing rights. To return to Indigenous people only their land is to return

Farmer John to a barren landscape devoid of civic institutions or to organize a war party to steal ponies in contemporary Prince Albert⁷² – these actions are incoherent across existing cultural and social boundaries – they have no meaning, they are nothing more than gestures in the general direction of justice.

As between the three approaches canvassed above, only the Institutional approach captures the entirety of Indigenous loss. Well, not the entirety; there is, on the institutional level, no room to compensate for hurt feelings and the like, but there is sufficient room to encompass the broad range of activities, traditions, and institutions that gave value and meaning to Indigenous life.

V *Corrective justice and historic wrongs*

If we take seriously the idea of justice then we must be willing to accept its form and implications. Corrective justice requires that persons who have been wronged be put into the position that they would have been in had there been no injustice because doing so is the only way to treat the injured party with the respect that they deserve. Indigenous claims are not mysterious, or metaphysical, or even ancient: they are contemporary claims for redress, although admittedly some of those claims are generations old. It is worth talking in greater detail about the ancient versus contemporary claims because doing so allows me to demonstrate that the two claims (ancient and contemporary) are intertwined in such a fashion as to form a single distinct claim rather than two competing claims.

⁷² To organize a war party to steal ponies in contemporary Prince Albert need not be a meaningless gesture. Professor John Borrows pointed out to me that organizing a pony raid in contemporary Prince Albert might actually be a lot of fun. Indeed, one can easily imagine, in a world of strong and vibrant Indigenous traditions, that the occasional ceremonial pony raid might not only be fun but also part of a strong and vibrant Indigenous culture. The point of stealing ponies was, after all, not to deprive one's enemy, although it had that effect for a while; the point was to demonstrate one's bravery; and having done so by stealing the ponies, why not give them back? And this behaviour should not seem strange, or arbitrary, or even sad: people still participate in civil war and World War II re-enactments, and a great centrepiece of Quebec's recent four-hundredth anniversary celebration was to be a re-creation of the great battle on the Plains of Abraham. The event was cancelled because, even four-hundred years later, remembering the defeat of the French in Quebec was deemed too controversial. Other people visit historical forts to see a re-creation of settler life or partake in ancient rituals such as communions, bar mitzvahs, or journeys to Mecca. Setting one's contemporary self in the historic rituals of one's culture is both healthy and normal.

The ancient claims are largely claims about land. These claims are complicated by the fact that disputed lands may be occupied today by persons who have themselves done no wrong – *bona fide* purchasers for value without notice – and it is wrong to uproot such persons in order to redress ancient claims to ownership. In other cases, the interests that occupy disputed lands are the corporate interests of resource sector industries who may have timber licences or mining companies who have explored and staked out claims on Crown lands – and, also, note that in these circumstances, the resource companies themselves are not purchasers, they are mere licence holders, and the licence issuers – the Crown – are not without notice. So, in these instances, the grounds for rejecting the claims of Indigenous people are, I think, less strong because the interests that would be displaced are primarily, if not exclusively, financial and so can easily be compensated for, given the greater fungability of money in comparison to the much less fungible personhood interests⁷³ that a family may have invested in a home over years or generations. And land will be an important component of redressing Indigenous claims because lands really *were* taken by settler governments and because the Indigenous descendants of the tribal groups that had those lands stolen still exist. So these claims are not really ancient at all; they are contemporary claims made by contemporary persons. Returning some lands where it is easy to do so would go a long way to putting contemporary Indigenous people in the position that they would have been in had there been no injustice.

But, as my example of farmer John demonstrates, to return a person his land absent all of the institutions that make possession of the land meaningful is a very thin, empty form of redress. On its own, the return of lands fails to achieve meaningful redress, because lands alone do not achieve the correlative requirements of corrective justice. To make redress correlative it is necessary to return to Indigenous people the full scope of what it is that was taken from them and that is today still being denied to them; namely, the right to create and maintain a set of institutions that positively affirm and promote Indigenous identity in Indigenous communities. It is that set of institutions that makes Farmer John's life what it is, that provide meaning and structure to his understanding of what it is to be a farmer: to be part of a community and to rely on a network of social and political structures that frame those understandings and promote them in a way that reaffirms Farmer John's own understanding of his world view. Indigenous people have distinct

⁷³ See Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993).

understandings of what constitutes a community, a family, a justice system, a government; and one of the most debilitating and cruel wrongs that continues to be committed against Indigenous people is the use of state power to deny them the right to affirm these public institutions in ways that are meaningful to contemporary Indigenous people.

I want to make just two points of clarification here. The first is that the creation and maintenance of Indigenous affirming institutions is a goal for corrective justice, but it is not the end of story as between Indigenous nations and the settler people. The creation of institutions that affirm Indigenous identities is required on a model of corrective justice, but Indigenous people and the Crown will remain in a relationship and getting that relationship right is, I think, the point of redressing past wrongs. It just turns out that getting the relationship right means creating and restoring in particular ways particular kinds of institutions; but having done so, what remains is a relationship, and so, Indigenous peoples and the Crown will need to continue to work together on a wide range of issues, just as provinces and municipalities and the federal government all work together in a relationship called federalism. The second point I want to clarify is that redressing wrongs on a model of corrective justice is not a guarantee that all decisions made by Indigenous communities will have positive results. Some Indigenous communities may make choices that are not the most economically efficient or that do not appear to directly advance their particular political or social objectives. Corrective justice is indifferent to these outcomes. The point of redressing wrongs on a corrective justice model is to put parties into the position they would have been in, not to guarantee that the outcomes are better or that people are happier with their choices. This is not to say that Indigenous people want only to make their own mistakes. Indigenous people want to have choices about how best to exercise their freedoms – the very freedoms they once possessed and now want returned to them – and of course, part of making choices is the risk of making poor choices. It goes without saying that, for the past one-hundred-and-twenty years, settler society has prevented Indigenous people from making any real choices about their communities, and the choices that settler society has made on behalf of Indigenous people has resulted largely in poverty and despair for Indigenous people. Indigenous people should be free to make choices about how best to set and pursue their own ends, and corrective justice requires returning to Indigenous people the ability to make choices in the context of communities that affirm Indigenous values and traditions.