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### **Justice in Reparations: The cost of memory and the value of talk**

1. Central and Eastern Europe's latter-day history has consisted in a number of spectacularly failed experiments in political philosophy. Communism's failure brought with it an important set of lessons; and in the former Soviet Union since 1989, the failure of unbounded capitalism has confirmed some important truths about healthy polities, for example the crucial role played by social trust in civil society, and the importance of a functioning tax and regulatory system. One important set of lessons, however, is yet to be fully distilled. These lessons arise from Central Europe's recent attempts to undo the expropriations and deprivations that occurred during the forcible transformation of peasants and bourgeoisie, institutions and individuals, from free-holders in land into unlanded participants in socialism.

Many others, of course, were losers under state socialism: those denied a choice of career, freedom to travel, possibilities of political agency. But losing land has had a special salience, partly because of the special role land ownership plays in social memory, and partly because the formerly landed often have other assets, and are able to mobilize political forces effectively. Thus, the restoration of expropriated property in kind or in value has been a legislative priority in the new states. The programs themselves have varied greatly in pace, ambition, efficiency, and scope. Any complete assessment of the success or failure of these programs must be highly local and contextual. Taken together, however, they pose a common problem: what should a state do when deprivation and injustice are systematic, their correction

necessarily piecemeal, and other projects of social repair are pressing? How much public attention and how many public resources are the victims of expropriation entitled to claim?

Here I take up the issue of land reparations in transitional democracies because of its intrinsic interest, and because it raises a number of deep issues in political, moral, and legal theory. These include the limits of legitimate political transformation, the relation of corrective to distributive justice, the value of purely symbolic political action, and the significance of place to identity among the goods promoted by a liberal state. Although these questions have force outside the transitional context, they have a special urgency and clarity within it.<sup>1</sup> I will assume that reparations programs are generally permissible, assuming they are put into place by reasonably democratic processes that take account of, even if they do not accede to, the wishes of these programs' cost-bearers. My focus in this article is whether victims of expropriation can claim reparations as a matter of right – in particular, whether a just state can nonetheless decline those claims in light of other demands on its resources.

This article argues the following. First, while injustice has a long life, remedy has a short one; and the general case for complete repair, through monetized reparations, diminishes quickly over time and across generations, especially when the injurers have departed the scene and given that reparations are in competition with the other claimants on scarce social resources. Second, some reparations claims for return of particular lands, such as trans-generational homesteads and cultural properties tied to collective ways of life, do rest on powerful moral and political grounds, chiefly the importance of tradition to the conditions of meaningful individual and collective life. The main argument for repair, in these cases comes from distributive justice, not from corrective justice. But even this stronger class of claims will fail or be severely limited under a number of plausible conditions. Thus I do not think the claims for repair typical of the

European context are in fact sufficient to generate duties of repair by the post-communist regimes.

## **2. The Symbolic Worth of Reparations**

In philosophical and political theory, the functions of national claims and gestures of repair are varied and not wholly consistent. Claims of repair sound in two registers, individual and collective, and are best treated separately. At the individual level, and in the most literal sense, a claim of repair is a claim to be made whole, to have a harm healed or corrected. This is obviously most easily accomplished for those who have lost money or lost things clearly monetizable, or for those seeking restitution of items or parcels of property, be it homesteads, commercial property, sacred lands, or pieces of art. The claim of repair is, in this strict sense, a claim to reverse the clock to the status quo ante. For those whose harms are physical or psychic, the problem of finding an adequate reparative equivalent looms large. No sum can compensate for stolen time in prison, nor for the loss of a loved one's life, nor for the degradation of torture. But money may help to rebuild a life, or to pay off debts incurred as a result of expatriation.<sup>2</sup>

Mainly, however, when the damage is non-monetary, a demand for monetary repair functions symbolically. We are accustomed to thinking of cash as alienating, the antithesis of expressions of genuine humanity and compassion.<sup>3</sup> But the very fungibility of money means that giving it up hurts, for there are always alternative uses to which it could be put by its donors. It is the infliction of that hurt upon the donors that grounds the symbolic value of cash payment, the acceptance of pain for oneself in order to mark the pain in another. This is not a cynical point; the claim of victims is not that others must suffer as they have. Their claim is, instead, that only when their suffering is put in the terms of a common language can the wrong done to them be

recognized. (Likewise, the unpleasantness of guilt is a part of its function.) Seen in its best light, then, the claim for money is, in part, a claim of dignity, a belated demand by victims that their equality and humanity be recognized by their injurers.

This point underlies much of our legal system in tort and criminal law; indeed, it is at the heart of both retributive justice, manifest in the criminal law's institution of punishment, and corrective justice, manifest in tort and contract law and their institutions of compensation and disgorgement. If we understand forms of justice by reference to their function rather than their forms or specific subject matters, both retributive and corrective justice can be understood as working a kind of repair, and in that respect as forms of reparative justice, although they have other functions as well, principally deterrence. Neither money nor carceral time can heal wounds or unwind the clock, but the very fact of their forced expenditure can re-orient individuals in moral space, creating a kind of coerced respect – and the possibility of a resulting genuine respect. In many cases, the absence of respect was precisely the problem in the first place. The petty thief and the reckless driver fail to appreciate the humanity of their possible victims; neither understands that the suffering they inflict is real. Corrective and reparative justice force the issue by rendering common both suffering and its basis humanity. The thief and driver, when forced to reckon with the losses they inflicted, come to see them as losses to persons like themselves. Punishment and restitution become forms of confrontation, and through confrontation the proper relationship between injurer and victim is restored.<sup>4</sup> Compelled empathy is the goal; and for certain offenders in certain social-settings, it appears to be achievable through some of the institutions of reparative justice.<sup>5</sup>

The possibility of reparative justice for crimes of passion, or any crime motivated by power or pleasure rather than economic gain, is dimmer. Rape is the central example. Although

rapists' motivations vary, part of the motivation in some core instances is a desire to humiliate and degrade the victim.<sup>6</sup> Such a motivation obviously presupposes a recognition of her humanity. Similarly for passionate assaults or murders: the injurer not only recognizes the victim's suffering but actively seeks to cause that suffering. In these cases, the point of reparative justice cannot be an acknowledgment of the victim's humanity, for it has already been acknowledged. If the criminal has funds, of course those can be used to compensate victims for medical bills, time from work, and other financial costs. A decent society, however, helps victims with those costs whether or not the wrongdoers can foot the bill; victim aid programs are part of reparative justice broadly construed, but not in the specific sense I am exploring here, which aims to reconstruct the relation between wrongdoer and victim. If reparative justice in the second sense has a role to play in violent crimes, it is principally as a form of education for the offender; any further gain accrues to society, not to the victim.

The great historical crimes of the last two centuries -- slavery, genocide, mass internment, strategic bombing of civilian centers, Stalinist political repression, Maoist political "re-education" -- mix elements of both these categories. On the one hand, these crimes exemplify the denial of their victims' humanity. Indeed, political leaders brought about many of these crimes precisely by getting the direct actors (soldiers, commissars, police, pilots) to see their victims as non-human. Either the victims' suffering simply failed to register; or the suffering was not seen as suffering at all but as a form of healthy discipline for the victims. This suggests that the mechanisms of reparative justice, namely confrontation and compensation, could be an important part of the moral reconstruction of the nation. This is part of the justification for the creation of international criminal tribunals to prosecute human rights violations and war crimes, for example, in the former Yugoslavia and in Rwanda. And it occupies a central role in the

contemporary U.S. movement for slavery reparations. Slavery's individual victims and perpetrators are long departed, but its institutional legacy lives on in many forms: materially, in white-black disparities in wealth, income, and education, and socially, in white-black differences in social status and vulnerability to official power. The point of reparations in this context is not, by and large, individual book-balancing, but rather mustering a national will to confront and take collective responsibility for slavery's long-term legacy.<sup>7</sup>

On the other hand, often the very possibility of efforts at reparative justice only arises with a change of regimes, when many of the political leaders and direct offenders have disappeared from the scene (as well as their victims in the more lethal instances).<sup>8</sup> Confrontation in these cases will often be impossible, as will compensation for the victims themselves.<sup>9</sup> Moreover, even if the perpetrators are accessible to justice, the only legitimate sentence in cases of genocide or human rights violations will be life imprisonment. Repair of the personal relationship between victims and perpetrators is beside the point. When the relationship between perpetrators and victims is irrecoverable, the aim of reparative justice is not, strictly speaking, repair at all. It is, rather, the creation of a new political community, one less likely to create classes of victims, with a future lived in the shadow of its past. Post-war Germany's undertaking of massive reparations was aimed at restoring the lives of Holocaust survivors, and at protecting international Jewry through support of Israel; but another significant desired effect was that the German public would be forced, in paying the reparations, to accept a long-term burden of atonement.

In short, gestures of repair help constitute the identity of a transforming nation. Despite the truth in Ernest Renan's famous aphorism, that forgetting lies at the heart of the nation, collective memory is also essential to the construction of a national identity.<sup>10</sup> A chief function

of reparations movements is to create and hallow a particular set of memories, to restore to collective consciousness events otherwise obscured by official histories and “common sense” as defined by dominant groups. More ambitiously, a reparations movement oriented around recovery from an entire regime, as in Eastern Europe or South Africa, aims at the birth of an entirely new national consciousness. It is with such movements that the truth of Renan’s observation re-emerges. He referred to the wars and conquests among peoples bitterly divided that become, in national myths, stories of ancient racial or religious unity. Reparations movements also aim, paradoxically, at instilling a forgetting, erasing an injustice and the festering resentments that resulted. The ideal of equal citizenship at the heart of democratic culture is one that can only be sustained through a forgetting of the differences in status and power that run through any nation. (In this sense, the ideal of democracy itself is a forgetting of facts of dominance and inequality, replaced by a dream of equality and the common good.)

A different form of forgetting accompanies collective demands voiced by cultural or ethnic minorities who seek the return of traditional and sacred lands and buildings. Their wish is to restore a way of life made unlivable by prior regimes. Even if the land is unreturnable, for example because profaned, groups may seek money reparations to pay for rebuilding and relocation, or to try to reverse a diasporic trend by attracting former and would-be members of the group. The wish here is not for political inclusion but, to use Charles Taylor’s term, *recognition* of the group’s distinct identity and history.<sup>11</sup> As Taylor argues, demands for recognition are claims of dignity, claims that the distinctive cultural formation of a group is not merely a curiosity but a splendor of the nation. Claims of recognition are, in effect, demands that members of the dominant group learn to *see* in a certain way; that they bring into focus the distinct normative contours of individuals or groups otherwise obscured in a nation’s history of



expansion, colonization, or cultural homogenization. This is a democratic appeal as much as an aesthetic pitch, for the claim is not (just) that a culture matters because it has produced something of beauty. Rather, a culture's beauty consists centrally in its being a presentation of its creators' humanity. *Contra* Joseph de Maistre, such claimants demand to be seen both as members of a nation and as (hu)mankind.<sup>12</sup> It follows that a dying culture's appeals are not simply calls for a new truth-telling in history, for they are invariably acts of creative nostalgia, and so are also acts of Renanian forgetting. As with the construction of national identity, so the reconstruction of a tribal identity involves an imagined past, a consolidation of tradition and ritual. Indeed, a reparative movement, whether or not successful, may be one of the only ways for a cultural group to create unity out of fragmentation. (As I will argue below, the claim of necessity gives cultural groups priority over other claimants to reparative justice in the European context.).

Across all these contexts the demand for reparations shares a common function: to demonstrate the legal and moral subjectivity of the victims. The demand for repair makes clear not just that suffering occurred, but that it was felt by a person, someone with interests akin to those of the injurer. In the political analogue to this moral point, victims seek re-inclusion in the community as moral and political agents, subjects of a universal kingdom of ends. To skeptics of moralism, the demand for repair represents a form of magical thinking according to which an actual history of subordination of the dominated to raw power can be replaced and reversed through subordination of the dominant to justice. Part of the appeal of the reparations movement is the power it gives to the claimants to determine the state of the national conscience. We need not agree with Nietzsche that morality's triumph represents victory of subterfuge over strength to see that morality does represent a form of power for the weak – indeed, to see that as its virtue.

That power should breed fantasies of revenge, cloaked as demands of repair, is simply to acknowledge its attractions.

### **3. Is socialist expropriation a crime demanding repair?**

The political acts for which property reparations have been implemented do not count as crimes in the same way that other forms of political tyranny associated with Eastern European communism do; and this, in turn, affects the character of their justification. Expropriation on its own is not a categorical wrong like murder or political repression; it does not by its very nature vault to the head of the line for repair.<sup>13</sup> While some individuals, such as Soviet kulaks, were subjected to great state brutality – many others, including many of the residents of Central Europe, are better classified as the cost-bearers of a failed social revolution whose ideals, at one time, were widely supported. To be sure, the political transformation of post-war Eastern Europe was far more a product of Red Army power than any indigenous political support for socialism.<sup>14</sup> Even assuming the majority of the citizens of Eastern Europe might have supported both socialism in free elections and the expropriations socialism entailed, this does not make the transformation legitimate, any more than the fact that I might have given away my wallet makes its theft less disturbing. The anguish and frustration were raw and real for those stripped of family businesses and farms, or who suddenly found families of strangers living in their apartments, running their enterprises into the ground.

Yet, to say that the expropriations that were part of socialist transformation involved wrongs, that they are *prima facie* candidates for rectification, is not to condemn them as theft, despite all the inadequacies of the process. For one thing, these inadequacies do not fully account for the retrospective sense of wrongs committed. Few social revolutions have happened

at the polls, and even the revolutions that do happen at the polls produce losers – people un- or inadequately compensated by the beneficiaries of the changed regime.<sup>15</sup> It is hard to imagine that the call for reparations today would be weaker if electoral majorities had stood behind the original acts. The expropriations would seem just as unfair to their victims.<sup>16</sup>

Understanding this is a matter of getting right the starting point of the inquiry: moreover getting it right as much in emotional tone as in normative premises. What we need is a theory of retrospective moral assessment. For such great historical wrongs as slavery and genocide, the normative premises are clear – these acts were profound violations of the dignity of persons – and the appropriate response a generation later, just like the appropriate response at the time of the acts, must include a dose of moral horror.<sup>17</sup> The same is true for some particular expropriations, those punishing the exercise of basic rights that any legitimate regime must respect. But responding to the systematic expropriations undertaken as part of the socialist project has to involve a different tone and set of premises, seeing them as failed and humanly costly political mistakes, but not as crimes. This point holds, I believe, independent of one's preferred normative theory of property.

The only set of premises from which the expropriations' criminality can directly be deduced would be a distorted and dogmatic Lockeanism, one which took the mere fact of an owner's current legal title to private property as sufficient to exclude any systematic legal change in entitlement. Such a theory is, of course, normatively indefensible (if often defended) -- it simply privileges the status quo. A normatively more robust Lockean theory that limits state interference in the private holding and transmission of property requires more of current holders than just that they hold legal title. Their normative standing depends on the desert following from the manner of their original acquisition (typically through the injection of personal labor)

and of each successive transfer. It would take excessively strong and historically naive empirical assumptions about these historical processes to think that pre-expropriation baselines were entitled to strong normative deference.<sup>18</sup> In the light of the long and undeniable histories of arbitrary feudal privilege, exploitation of actual land-workers, and political corruption, there is no reason to think systematic socialization undermines moral desert any more than the status quo ante preserved it. Given the underlying moral indeterminacy of landholding on a Lockean view, there is nothing criminal, much less illegitimate, about the transformation of a private property system.

This point holds *a fortiori* for more teleological property theories, whether Humean theories maximizing social utility or Kantian or Hegelian theories stressing property's role in assisting self-realization. Such theories need to rest, also on pain of dogmatism, upon a basically empirical foundation in anthropology, psychology, and political economy. Before the communist transformations, there was good reason to doubt whether the existing private property system was doing much to achieve social utility or self-realization, either in absolute terms or as compared with imagined partly or fully socialized alternatives. Collective experimentation with these alternatives was not only consistent with teleological theories, but might even have been thought demanded by them. Even taking seriously the costs of disrupted expectations – costs to both efficiency and at least the self-realization of those with property – there was at least an empirical question whether those costs might not be worth bearing. We know now, it seems, the answer to that question: they were not. But the socialist expropriations could only have been condemned *at the time* as criminal as opposed to misguided in the spirit of a kind of moral priggishness, a grossly exaggerated sense of the importance of protocol in political

transformation. Such asymmetry derives from the elementary fact that, to paraphrase Kierkegaard, history can only be lived forward and assessed backward.

A further complicating factor in assessing the expropriations is that the patterns of expropriation and of reparative justice have varied significantly from place to place, reflecting the degree of collectivization, the form of privatization policy, the absolute degree of national wealth, inter-ethnic rivalries, and the powers of different political actors, including religious groups.<sup>19</sup> For example, expropriations in communist East Germany occurred in several phases. First were the expropriations commanded by the Red Army during the occupation of 1945-49, nominally a process of de-Nazification, in which “essentially all large business enterprises” were taken.<sup>20</sup> Next came expropriations of agricultural property holdings, in which “more than 7,000 private farms and estates” were taken, ranging from a minimum size of 100 hectares (250 acres) to large Junker estates; roughly 35% of all agricultural land in the Soviet zone was taken. This land was then redistributed to individual farmers in small plots, though it would eventually be collectivized over the next decade into state farms. Small businesses, however, remained in private hands until the 1970s, when there was a final expropriations program taking even small businesses. While the initial agricultural expropriations were uncompensated, under the theory that they were a punishment for fascist complicity, the later expropriations were done through formalistic mechanisms and came with limited compensation.

Like the expropriations, post-unification reparations policy has taken various forms. The initial Soviet occupation expropriations were initially protected from reparations by treaty between West and East Germany, while reparations for property expropriated by the DDR itself were guided by a fundamental principle of reparation in kind (*in natura*) rather than cash payment, on the view that victims were entitled to as close an approximation as the state could

deliver to the status quo ante.<sup>21</sup> The class of eligible claimants was extremely broad, including non-linear heirs and expatriates, in accordance with a full-throated conception of reparative justice. But this approach also took on a pragmatic cast when it was applied in east-central Berlin, in that it generated funds for renovating a decrepit housing stock that the state could not manage on its own. The idea was that the state should deliver property swiftly into private hands, and the private holders (or new purchasers) could secure independent financing for its rehabilitation. It worked: the result was a fast, thorough and fairly efficient process of restitution, followed by immediate sale to housing developers who did indeed renovate the properties. The cost, however, was the eviction of long-time tenants and the raising of rental prices generally beyond what former eastern residents could afford.

The principle of reparations in kind was subject to three important exceptions: first, when the property was “needed for urgent investment uses that would yield general economic benefits in eastern Germany”; second, when the property had been developed in such a way that it could not be extracted for return; and third, when the property had been reacquired by a good faith purchaser.<sup>22</sup> (There were limited opportunities in the DDR for private ownership.) In such cases former owners would be compensated, but would not regain their land. However, many of the occupants of expropriated residential property were not owners, but enjoyed some form of long-term lease. Outside Berlin, in a well-studied example, houses leased as rewards to valued members of the socialist state – some collaborators and apparatchiks, undoubtedly, but also members of valued professions, such as teachers – were subject to restoration to original owners and their descendants, again resulting in significant individual dislocation. This dislocation sometimes had dire effects, for example in 1992, when two eastern Germans, whose homes had been restored to prior owners, hanged themselves in protest.<sup>23</sup> Finally, in 1994 a new

“Compensation and Equalization Payments law” added the Soviet era expropriations to the list, allowing former owners rights of low-cost repurchase or other compensation.<sup>24</sup> The restitutionary program was, on the whole, very efficiently implemented, with nearly 95% of all restitution claims resolved by 2001.<sup>25</sup>

In the former Czechoslovakia, the new government instituted a relatively comprehensive program to rectify communist injustices, ranging from political imprisonment to expropriation. Because the scale of state-sponsored injustice was so great, the level of reparations available was quite low, and the limitations fairly strict: property claimants must be individuals, as opposed to corporate entities or religious institutions; they or their heirs must be permanent residents of Czechoslovakia, and they had only six months in which to file; moreover only undeveloped properties would be returned, and any property that had appreciated in value (an unlikely event) could only be regained by paying into the public treasury the difference between the value at seizure and the appreciated value.<sup>26</sup> As in Germany, a major goal of the ostensibly backwards-looking policy of restitution was the forward-looking aim of moving state-owned land into private hands quickly, constrained by two more instrumental considerations: keeping the privatization process out of the hands of apparatchiks and preventing extra-national capital flight.<sup>27</sup>

In Poland the process has been even slower and more restrictive, a result of local-national conflicts and administrative and legal confusion. Property was nationalized relatively quickly by the post-war communist government in Poland, the process largely complete by the middle 1950's, and this was done through both formally legal (that is, in accordance with the regime's law) and illegal means (for example, state coercion). While other Eastern European nations were able to settle on restitutionary programs within a few years of 1989 (with some adjustments

later), the Polish debates continued until the mid 1990's. The position Poland has ended up with, at this writing, generally protects all legal expropriations under communism, thus entrenching the land reform undertaken post-war, which converted large estates into small-holdings rather than into collective farms, as in East Germany.<sup>28</sup> Full restitution is available for Catholic church property (indeed, for such property lost *at any time* in Polish history), Jewish religious property after the German invasion, or for property taken illegally during communism (but showing this involves substantial administrative burdens).<sup>29</sup> Although broader proposals have been introduced as legislation, none has survived.

We have, then, a range of reparative programs: the essentially comprehensive and retrospective (but instrumentally inflected) model of Germany, the fairly restrictive and heavily instrumental model of the Czech Republic and Slovakia; and the highly restrictive, non-instrumental model of Poland. Does any of these do justice to the claimants, and to the rest of the nation? Answering this question involves determining the urgency of the claims for repair that they meet or ignore. I will now turn to this matter and make the following assumptions. First, we should begin with a wide conception of *prima facie* valid claims, including both formally legal and de facto expropriations as subject to repair. Second, such claims concern the expropriation of real property and structures thereon, including homesteads, commercial properties (factory and residential), and communal or religious structures. Third, the losses inflicted by communism relative to expected levels of welfare under the types of welfare-state capitalism dominant in post-war Western Europe were pervasive and deep. And fourth, no significant identifiable group in the post-communist regime can be singled out as appropriate targets from whom to seek financial repair. True, there are individuals – apparatchiks or zealous collaborators – whose complicity in or principal authorship of state crimes is such that justice



demands their eviction from the properties their crimes have provided. But although such cases are useful for motivating a reparative politics, there is no reason to think they are typical. And thus my working hypothesis is that these cases can be handled separately, leaving us with the nub of the problem: what to do with those who do not deserve punishment but who will nevertheless bear the costs of reparations.

#### **4. The case against monetary compensation**

I will proceed by distinguishing two cases, one for cash compensation at some objective valuation, and one for return in kind, which I will call “subjective compensation,” since it seeks to restore former owners to the subjective state they enjoyed before expropriation. I begin with objective compensation, because understanding the reparative justice claim in cash-out terms will help to clarify some of the analytical issues, which are then applicable in the subjective case as well. To fix a point of departure, I will call such claims “maximalist” when they are claims for the total monetized value of the loss suffered by the former property owner.<sup>30</sup> A maximalist claim would entail at least the fair market value of the property at the time of expropriation, plus, for commercial properties, lost income for the property since expropriation, plus lost income on that income.<sup>31</sup> For homestead or communal properties, the maximalist claim would also include imputed income during the expropriated period, as measured by the rental value of comparable properties. This valuation would not capture the subjective value of the property to the resident, and so in that sense is not truly maximalist; but this is inevitable since subjective value is not obviously capable of being fully monetized. Doubtless there is some amount of money that could persuade virtually anyone to part with even the most sentimental of objects, but sale under

these conditions would only indicate voluntariness of the transaction, not a real equivalence in value, since monetary and sentimental values are incommensurable.

The maximalist pole is clearly financially unfeasible, at least in any country with a significant scale of expropriation. It nonetheless remains worth asking whether it is attractive as a regulative ideal. Let us focus first on the difficulties of making the maximalist assessment. It assumes, first, the possibility of specifying a fair market price for the property at the time of expropriation – but, of course, any actual market in land at that time would have been steeply discounted in light of general political unrest or neighboring expropriations. Compensating victims at a generally devalued rate for the particular loss they suffered is ethically awkward, in effect giving the state the benefit of a policy of broad injustice. On the other hand, (somehow) projecting a market value for the property based on an assumption of a stable, private-property respecting regime would be equally awkward, for that would likely result in victims receiving more for their land than those whose property was not expropriated, but who either continued to use it productively under socialism, or who received some form of compensation under the socialist regime.<sup>32</sup> I see no escape from this dilemma; and splitting the difference between the approaches means giving up on any principled approach to the valuational problem.

Next, even assuming one could identify a market price, consider the difficulty with assessing income on it. One would have to project imaginary rates of interest and taxation back into a counterfactual past. Then there the worry emphasized by Jeremy Waldron in his discussion of reparations for aboriginal groups: compensating fully for lost investment opportunity assumes that the victims would have been ideal stewards of the investment.<sup>33</sup> Over a relatively short period (say, a decade), or for enduring commercial entities, this assumption may be reasonable. But with five decades' opportunity for financial mistakes, and applied across the

full spectrum of victims, it becomes clearly unreasonable. It would, again, have the effect of putting the victims of expropriation in a far better position than non-victims over the same period. If the point were partly punitive, a matter of holding the expropriating regime to the most generous estimate of costs conceivable, then such an assessment might be defensible. But reparations work only in the dimension of corrective, not retributive, justice: though the victims remain, there is no state left to be punished. The very discontinuity between the current regime and the expropriators is what a reparations program is supposed to exemplify.

The passage of time raises a further problem for reparations claims in the European context: the relevant claimants now are, or soon will be, the heirs of the victims of expropriation. Victims will thus not be made whole by the reparations movement; rather, repairing at the maximalist level would give heirs, in effect, the largest conceivable bequest they might have received. But there is no good reason to assume that the victims of expropriation would have bequeathed their property in full to the particular set of claimants. This problem might be finessed, by limiting heirs' claims to the proportions they would receive under default laws governing inheritance (for example, divided evenly among succeeding generations), thus treating current inheritance law as a proxy for the victims' wishes.<sup>34</sup> If the maximalist aim is to leave heirs in the position they would have enjoyed without the expropriation, then that aim will be frustrated by the variety of possible tax rules, under some of which heirs might be entitled to only a small fraction, if any, of the value of the expropriated property.

These technical questions are daunting. But they raise a yet thornier set of normative issues, one going to the deeper question of the justice of inherited wealth itself. Projecting a baseline of inherited property in effect presumes the legitimacy of what ought to be an open question in principle and has been an open question in history, namely intergenerational wealth

transfers. While current populist rhetoric in the United States is deeply hostile to the idea of “death taxes” that in fact only affect the very wealthiest Americans, significant inheritance taxes are a nearly universal constituent of the great range of modern tax systems. As with the basic case for private property, only a dogmatic Lockean could conclude that social experimentation with very onerous estate taxes was per se illegitimate. To the contrary, a legitimate and basically just state could have adopted any of a range of inheritance tax schemes whose net results would have been co-extensive with actual expropriation.<sup>35</sup> The normative instability of an inheritance baseline thus dogs the foundation of the maximalist position. (The general problem of shifting normative baselines is the subject of Section 5.)

The second deep problem with the maximalist position is that it treats the suffering of the expropriated in normative isolation, separate from the claims of other victims of communism. But only the relative suffering of the expropriated, not their absolute claims, can determine whether their claims to the state’s limited resources now take priority. Consider the landless compatriots of the reparative claimants. While doubtless some of the landed acquired their lands through effort more than luck, a great many more owned their property by virtue of a fortuitous birth, to families already endowed with property, or with the social and economic capital that enabled the acquisition of land. As a generalization, then, the landed differed from the unlanded primarily by being luckier – a fact which is, as John Rawls reminds us, without moral significance.<sup>36</sup> Moreover, up until the point of expropriation the landed were in full enjoyment of the benefits of their luck. They were then deprived of these benefits. But did this make them worse off than the luckless landless? Furthermore, as I mentioned in discussing the putative criminality of the expropriations, many of the expropriated holdings might well have rested on foundations more dubious than mere luck, that is on foundations of economic exploitation, sexist

inheritance law, and feudal tradition. If this is so, as it surely was in many cases, the argument for reparations becomes weaker still.

I do not mean to trivialize the moral and human costs of the expropriations. The landed who held their property under reasonable institutional expectations had responsibly planned their lives around those expectations. Such claims ought to and could have been respected and compensated more than they were by the socialist regimes, even in the pursuit of radical social change. But the harm is now done. The fundamental point is that the economic and moral harm done to the victims of expropriation does not dominate the general deprivations suffered by the landed and landless alike. The landless too have been deprived of a substantial fraction of the income they would have received on their capital – human capital – if the socialist regimes had not come to power. But since they likely outnumber reparative claimants, it is they, as a group, who will bear the substantial cost of the reparations program, either now or in future generations, if reparations are paid out of future revenues in the form of bonds. Since they were already worse off than the landed before the expropriation, it seems a double injustice to worsen their position again, once the value of their labor has been restored.<sup>37</sup>

What about other claimants on the public funds that would go to pay off the maximalist claims? Even very wealthy nations would find the maximalist claims difficult to meet, without compromising other important claims and the new capitalist economies of Eastern Europe would find the cost insurmountable. Reparations claims that were reduced in light of strained resources would still be in competition with other claims, and the reparations claims should not rank very high as matters of justice. The victims of expropriation may no longer be among the best off in their nations, but there is no reason to think that they are among the worst off. In terms of distributive justice, then, their claims on public resources rank below those whose claims are

grounded in absolute need and deprivation, as well as below general claims for adequate health care, later life pensions, and other state investments in human capital, particularly education for the young.

## **5. How reparative justice depends on distributive justice**

The distinctly normative as opposed to technical failure of the maximalist position I considered above stemmed from two concerns sounding in distributive justice: the legitimacy of a wide range of rules concerning wealth transfer, and the relative suffering over time of the landless victims of communism. This suggests the priority of distributive justice over reparative justice, and thus over the form of reparative justice specific to property restoration: corrective justice. Justifying this claim requires a detour into the relation between the two. Distributive justice refers to the principles of justice establishing what individuals are entitled to within a legitimate public political ordering: what negative protections they can claim from incursions against their persons and holdings<sup>38</sup> in land and things, and what positive claims they can make on others, for assistance in meeting needs for security, shelter, nutrition, and perhaps much more.<sup>39</sup> The negative claims of distributive justice are embodied principally in the criminal law (and in the law of property, which establishes some of the boundaries policed by the criminal law), while the positive claims are embodied in a range of governmental and sub-governmental institutions, including tax, educational, and health systems, typically with some redistributive effect.<sup>40</sup>

Corrective justice refers to principles of justice that aim to rectify wrongful invasions of individual entitlements, particularly entitlements to bodily integrity, mental well-being, and property. In Anglo-American law, these principles are manifested primarily in the institution of

tort law, but also in some aspects of contract law, for example provisions protecting contractors from the costs of breach.<sup>41</sup> Although the typical subject of corrective justice is individual accidents and misadventures, the rubric can also function as a plausible cover for expropriations. The demand that lost property be restored or compensated is, in its object, a claim of corrective justice. Moreover, the kinds of losses under discussion – routine expropriations as opposed to punishments for political disobedience – resemble more the misadventures resulting from legitimate activity (here, ordinary politics with a socialist cast) than the malicious harms regulated by retributive justice. Since the principal wrongdoers are now largely off the stage, and with so many pervasive forms of complicitous getting-by during the socialist period, the primary task for the post-socialist state is properly correction, not punishment.

The Central European countries, like all others, face the task of meeting the demands of both corrective and distributive justice. This raises the question how the two relate to one another, especially when they compete. In the abstract, then, corrective and distributive justice might seem directly related: distributive justice fixes entitlements, and corrective justice protects them against invasion. The simple Lockeanism discussed above would relate them in this way. Assuming that prior holders enjoyed legitimate entitlements, corrective justice demands the restoration of the stipulatively just status quo ante. There will of course be a problem about the force of corrective justice claims under non-ideal conditions, when owners do not deserve their holdings, because of improper acquisition or transfer. If the status quo ante lacks legitimacy, then no reasons of justice would support its restoration; there is no (Lockean) injustice to correct. Of course, there might be other, instrumental reasons for individuals to regard themselves as owing duties of repair, or for the state to impose such duties, for example efficiency and deterrence reasons.<sup>42</sup> But the problem with this move, as with any attempt to fuse deontological

and utilitarian reasoning, is that the instrumental reasons threaten to devour the Lockean foundations. That is, once efficiency reasons are regarded as sufficient to compel individuals to transfer resources to one another in repair, then they would also be sufficient to motivate a general redistribution of holdings to one with greater social value.

The difficulty a Lockean view has in coping with demands for repair of non-ideal holdings, and thus in generating any coherent normative framework for dealing with the messy world we live in, is one among many reasons for preferring a more robust conception of distributive justice. One such conception is that of a generally egalitarian liberalism, where distributive justice principles require each person's access to minimally adequate food, shelter, medical care, as well as the opportunity for meaningfully equal participation in social, economic, and political life.<sup>43</sup> I do not mean here to defend such a conception, or to regard it as beyond controversy. I do, however, mean to stipulate it now, because I take it to be sufficiently widely attractive that investigating the relation between it and corrective justice has intrinsic interest. According to the kind of liberal conception I invoke, the justice of prior holdings is not fixed just by principles of legitimate acquisition and transfer, but rather by whether and to what degree extant holdings satisfy the universal demands for minimally decent living conditions and equal participation.<sup>44</sup>

Unlike a Lockean view, which can take only a binary view of the legitimacy of a given holding (as consistent or inconsistent with its underlying principles), a liberal view has conceptual space for questions about the independent force of reparative claims in non-ideal circumstances. Intuitively, it seems that claims of corrective justice have force even when a state's distribution of holdings strays from a full implementation of distributive justice. As Jules Coleman has pointed out, while there is probably no defensible theory of distributive justice



under which Bill Gates is entitled to the full holdings he has, he nonetheless has a claim on me in corrective justice when I dent his car.<sup>45</sup> Claims of distributive and corrective justice have because, on a liberal conception, they have different subjects. Distributive justice regulates the state as such, and is a condition of its legitimacy, defining the relations of citizens to the state – or, alternatively, between citizens taken one at a time and the citizenry collectively.<sup>46</sup> Corrective justice, by contrast, orders the relations of individuals to one another (or of individuals to the state, when the state acts as an injurer). They thus express an inter-personal dimension of justice, not the institutional dimension of distributive justice.

Given their different subjects, corrective and distributive justice could relate to one another in a number of ways.<sup>47</sup> First, corrective justice might be ancillary to distributive justice: its principles seek to maintain or bring about just distributions of holdings, under the recognition that institutional considerations may often make impossible the full realization of distributive justice.<sup>48</sup> On this account, corrective justice claims derive their normative force from distributive justice but retain force despite a significant gap between the actual social state and what distributive justice entails. Second, corrective justice might be seen as normatively independent of distributive justice: corrective justice aims to repair individual invasions of legitimate individual holdings, where “legitimate” is spelled out in terms that do not (or need not) make reference to distributive justice norms – for instance in terms of reasonable institutional expectations.<sup>49</sup> Even if we conclude that Central European socialism failed entirely as a scheme of distributive justice because of the constraints it imposed on individuals’ choices to participate in work and politics, we might still think that the holdings citizens acquired under that system – a car, an apartment lease, a country cottage – merit protection from arbitrary taking. And, of course, similarly for holdings acquired under the flawed *ancien régime* distribution. On this

account, the force of corrective justice claims stems from the violation of these expectations per se, not from their underlying relation to distributive justice.

Neither of these views is fully satisfactory. The derivative view fails because it is hard to see how corrective justice might inherit significant normative force from distributive justice without ending up simply subordinated to distributive justice concerns. If distributive justice principles are sufficient to evaluate the post-violation distribution, then any reparative claim is either simply determined or overruled by distributive justice. Alternatively, if distributive justice principles apply only to basic social institutions (as Rawls argues), so that actual distributive shares are a matter of consensual transactions within a just institutional framework, then it is hard to see how their moral force is the ground for claims about disruptions to particular patterns of holdings. Distributive justice principles either matter too much or not enough, on this view.

There remains room for a third, and more plausible, view of the relationship between corrective and distributive justice. Corrective justice principles do represent a distinct normative ground insofar as they express ideals of interpersonal conduct and accountability; but their force presupposes an effective scheme of distributive justice. Two consequences follow. First, a state substantially unable to ensure minimally adequate living standards in its population has no business instead first meeting the historically-grounded claims of those whose lives are, or are mainly, already above that minimum.<sup>50</sup> Financial resources should not be drained out of the project of creating social welfare institutions – or, more minimally, meeting claims of material need in an unsystematic way – in order to compensate expropriation victims. In principle, of course, funding ambitious reparations schemes can only be wrong when there are competing claims of need; in the abstract, there is nothing objectionable about paying reparations. If, contrary to fact, reparations programs were designed to pay out slowly enough (or funded

through long-term bond issuance), there might also be no stark choice between corrective and distributive justice. But in the current, fragile moment of the emergence of the new democracies, reparations programs do force a choice, and in the wrong direction.

The second consequence of the dependence of corrective justice on distributive justice is deeper. It goes to why corrective justice is ultimately the wrong framework for considering reparative claims. While corrective justice governs more than just relations among individuals, also including claims by and against firms and governments, it remains individualistic in one important respect: it controls and seeks repair from distortions to a social framework whose normativity is given independently, by distributive justice. In other words, the application of corrective justice principles presupposes an exogenous baseline; they do not themselves construct that baseline. In the department of Anglo-American corrective justice concerning accidents, this is shown through the liability tests of the “reasonable person,” whose conduct sets the baseline of non-compensable interaction; and of routine commercial practice, ultra-hazardous variants of which motivate strict liability. In the law of theft, the baseline is set by the norms of property. What happened under communism, however, cannot plausibly be seen as a violation of baseline private property norms. What happened was, rather, a transformation of the baseline itself— a transformation, I argued above, that must be considered within the limits of legitimate political experimentation. The systematic state expropriations cannot be measured against a baseline normatively much richer than either respect for formal legality (as with the Polish reparations program), or a prohibition on religious, ethnic, or political persecution. Those principles arguably form part of any theory of state legitimacy; a private property system does not. Post-socialist claims of corrective justice thus commit a kind of political anachronism, by measuring the expropriations against baselines irrelevant to the expropriation period itself.

While the harms from the expropriations are relevant to distributive justice concerns about the relative position of their victims, it follows that formally legal expropriations fall outside the scope of the harms subject to corrective justice.

## **6. The trouble with compromise**

What, then, of programs short of maximalism? In the United States, as I mentioned above, significant but not fully compensatory payments were made to Japanese-American victims of wrongful internment. Similarly, in Eastern Europe, we might reject maximalist claims while endorsing some form of individualized reparation. For example, compensatory reparations could be capped, paid proportionately to the loss, or paid at progressively lower rates of compensation for higher-valued takings, as in Hungary's reparations scheme.<sup>51</sup> Such a compromise might seem to reflect a balancing of backward and forward-looking claims, and between the claims of particular victims of expropriation and the pockets of the many who must pay those claims. Compromise is attractive, whether between adverse positions or between ideals and adverse realities. As Cass Sunstein has argued, it can be socially valuable to avoid resolving principled disagreement by instead constructing a *modus vivendi* representing a balance of interests.<sup>52</sup>

But the case for pragmatic compromise is unconvincing here. Maximalist compensation, despite its ultimate unfeasibility, would be an expression of principle: original owners are entitled to be restored to the state they would have enjoyed but for expropriation. Say a regime picks a compensatory rate of 75% of market value at the time of seizure. Even assuming, contrary to my argument above, that corrective justice claims have force in this context, by hypothesis this compensation rate fails to do corrective justice, for it does not restore a status quo

ante but only marks financially the incidence of a loss long ago absorbed. With respect to the expropriation victims, the function of the compensatory scheme is largely symbolic, and there is no good reason for the symbolism to be as expensive as this. One might argue that money is a show of earnest that renders other forms of symbolism – legislative apology, public monuments – more than cheap talk. But this claim rests on an assumption about human psychology without much intuitive, much less empirical, support. Partial payment might just as well irritate as salve old wounds in a way that a non-monetized gesture will not. Of course money is nice, and some is better than none. But it seems likely that anything short of the maximalist program will leave claimants dissatisfied that justice has been done at all, much less fully. If symbolic, partial payment cannot achieve subjective repair, then one might as well choose a cheaper form of symbolism – saying it with daisies instead of roses.

Equally importantly, singling out victims of expropriation for symbolic cash payments mistakes both the nature of the harms inflicted by socialism, and the form of a proper response. The harms were systemic and universal, in the lack of freedom of movement, political agency, choice of employment, and the flow of information. Symbolic monetary compensation to the single, especially influential, class of the expropriated belies the universality of suffering. Such payments would signal that the new regime is not a community oriented around the future, but rather a congeries of interest groups resting in the past.<sup>53</sup> Perhaps cash payments could be given to everyone who suffered under communism, but since this class is pretty nearly coextensive with the current population, funding a universal set of reparations is not even robbing Peter to pay Paul; it is taxing Peter to pay Peter himself. By contrast, a collective gesture of memory – a social and institutional recording of the many different varieties of suffering and waste – stands for the common nature both of social experience and of social hope.

A final reason against symbolic financial compensation is that the comparative justice problem continues to loom. A compensation scheme, even if not maximalist, is a significant draw on the state treasury, and so competes against other urgent claims. To compete favorably as a matter of right, the compensation scheme requires a principled argument that partial payment (as opposed to cheaper symbolism) really is required as a matter of justice. But an argument for expensive but non-corrective justice is precisely what we lack; it cannot be presupposed in the case for compromise without begging the basic question.

Although there is no compelling moral case for reparations, there may be good instrumental arguments for reaching a compromise scheme that combines monetary with non-monetary reparations. Corrective justice institutions stabilize property arrangements and contribute to a general sense of public order that is itself part of the condition of meaningful collective and individual life. In the special case of post-communist transitions, where cultivating private property ownership is crucial to the emergence of a new economy, selling off state assets and distributing the proceeds to expropriation victims may aggregate social welfare better than the alternative likely uses of those assets.<sup>54</sup> Membership in international organizations may also turn on the effectiveness of a reparations scheme, as may the nation's ability to attract foreign investment capital.<sup>55</sup> All of these considerations may add up to an argument that the social value of reparations exceeds the value of meeting other material needs.<sup>56</sup> Calculating the social value of the reparations scheme is difficult to be sure, particularly establishing that the value is properly distributed across the whole of the political community. But assuming the claim of social value is sound, then there is nothing to object to in such a program, whatever its expense, the material for any objections having already been factored into

the calculations. Note however that this is not an argument for reparative justice at all, but simply a question of optimal social investment.

## **7. A limited case for land reparations**

The argument against cash reparations thus seems clear, when the general population of victims greatly outruns the population of those subject to expropriation, and when the latter are not the worst-off of the former. However, my argument so far has treated only the case for compensation for the lost value of land, principally on the ground that others, too, lost or never had things of comparable value. I have argued that the functions of memorialization and recognition can be accomplished better through collective gestures that do not revolve around the problem of finding a monetary equivalent of suffering. My argument leaves room for claims to return of land itself, particularly land invested with sentiment, tradition and collective meaning – land, in other words, that does not have a monetary equivalence in the first place. So I turn now to consider that question.

Let us begin by setting aside the case of commercial properties: farmlands, factories, apartment complexes. Since the function of these properties is income production, the loss to victims is primarily a loss of future income. The argument I offered above controls this issue: the claims of the victims (or victims' heirs) to the future income stream from these properties is no stronger, and perhaps even weaker, than the claims of many other victims. From the perspective of justice and efficiency, it would seem better to auction these properties to their highest valuing users, with the auction proceeds then allocated through institutions of distributive justice. Moreover, and particularly for foreign-owned businesses, the risk of expropriation was not unreasonably borne by the businesses themselves.<sup>57</sup> To be clear: the initial expropriations

may have been unjustified, but the possibility of securing insurance *ex ante* removes the unfairness of putting priority on distributive justice forty years *ex post*.

For some businesses – family-owned firms, or others with a particular cultural valence – this will seem a hard doctrine, for the value of the business exceeds the income flow. Even in these cases, however, restitution seems to me inappropriate. The passage of time has ended the symbolic lives of these businesses; restitution would be an exercise in sentimentality. As I argued above, businesses fail for many reasons, and there is no assurance that these particular ones would have succeeded during the intervening years, nor that alternative tax systems would have permitted their transmission over a generation. I conclude, therefore, that no special claims of repair are generated.

The more compelling case is the family home or family farm, particularly one that has been in a family for generations. Even more so than with the family business, the ratio of sentimental value to (imputed) income value is very high; indeed, it is so high that it undermines the case for money reparations. Such homesteads may be places where children were raised, memories formed, and were perhaps also anchors in local communities. Meaningful return and re-habitation may be possible, even after a generation, even for expatriates. If a homestead can be re-invested with memory and identity, then its real value can be preserved: its role in grounding identity and giving family members a sense of origin, place and rootedness. This sense of place is what Rawls calls a “primary good”: a general resource common across a great range of particular conceptions of ways of living well. Thus, restoring homesteads has an intimate and pervasive connection to the fundamental aim of the state, enabling individuals to live good lives, which distinguishes it from the case of commercial enterprises.<sup>58</sup> Life in a family-owned business is also a way of leading a good life, but only one particular way among



many, and so should not be privileged over the many ways of working that inevitably disappear; no doubt some children of carriage-makers also pine for the family tradition.

And yet: there are worse misfortunes than not to be able to return to the place of one's childhood. Many of us are members of modernity's deracinated throngs, who have moved many times and whose lives and families' lives have been led in housing vulnerable to market and landlord vicissitudes. A family homestead would have been nice, to be sure; but what enables such lives to be good nonetheless is not property ownership but adequate housing as such. Ensuring that is the province of the state; happiness is up to us, to make it in the circumstances in which we find ourselves. Lives without homesteads are, nonetheless, lives with their own myths of origins and memories. The cosmopolitan life, in this thin sense, has its disadvantages; and there are clearly values missing from it, values found only in the concentration of tradition that a particular place makes possible. But it is nonetheless a good life, and one upon which no claims for compensation can generally be grounded. Indeed, as modern Jews can attest, the deep values associated with ancient origin and the underlying myth of autochthony can contribute catastrophically to crimes against those deemed not to belong, to the rootless and the landless. A reparations movement that honors the longstanding resident may end up playing into a politics of otherness and exclusion, fomenting dangerous myths of racial purity and pride.<sup>59</sup> That way Europe must surely not go again.

This danger implies another argument against the restitution of land, which is that such programs create a new class of dispossessed, and among them are many whose claims seem no weaker than the original owners'. True, some of the fancier properties subject to restitution were rewards for party lackeys, and collaborators of the nastiest sort. But others were just citizens who performed social roles valued in any state or society, such as artists, scientists, and athletes.

Yet others, in the large land estates, were workers whose housing, as well as all other social services – were provided by the collective farms those estates had become. The expectations of those using property under a socialist system deserve as much as respect as those of the prior owners. This does not mean the new inhabitants enjoy an absolute right to stay – to claim that would simply be to parallel the dubious position taken by the expropriated, that no change can be justified – but it does mean that their interests in the nature of the restitutionary program must be taken into account, for example in giving them priority in other claims on state resources.

For the many who never had an opportunity to establish or inhabit a trans-generational homestead, devoting scarce resources to ensuring that some can return to one will clearly seem less urgent than the provision of other primary goods, notably education and health care. The opportunity cost of restoring homesteads (the auction price of the properties) may not be very great. But if it is, then the issue of priorities of distributive justice looms large, for reparations look again like a program of rewarding the already fortunate the expense of the unfortunate. Because what is restored is more a repository of particular, relational concrete meanings than of economic value (despite its shadow economic cost), the problem of comparative priorities does not have the same significance as with monetized reparations. But it is a significant countervailing consideration nonetheless. In short, the case for homestead reparation is strong but not decisive, and the balance of considerations suggests that the claims of victims should be met, if they should at all, as a judgment of preferred social policy, and not as a trumping claim of social justice.

## **8. Restitution of communal property**

I come now to the final and most compelling form of reparations claims: claims to communal properties that function essentially to make possible a distinct cultural, religious, or intellectual tradition, for example, churches, synagogues, seminaries, museums, performance spaces, and universities. What such institutions provide is a form of public good: an indivisible (and only partially excludable) resource of structure, ritual, and significance in the lives of their members.<sup>60</sup> Reparative claims for these properties cannot in general be monetized; the value comes from the fact of their geography, enabling a kind of crossroads for their members, in whose interactions a common culture is formed. If the confiscation of property destroyed the institution itself in a particular region, and if restoring the property could enable the restoration of the institution in the lives of people to whom it remains meaningful then restoration has a very great claim on social attentions and resources.

This claim derives partly from the ways these institutions contribute to the lives led by their members. As I argued in the case of homesteads, the alternative to their restoration is not an absence of a common culture, but a common culture of a different, less institutionally-dependent form.<sup>61</sup> True, the loss of a common culture rooted in a shared history is a very great loss, greater than the loss of home or business, but that loss has happened; the former members of that culture have already necessarily adjusted their lives; and the sentimental resurrection of the institution will differ from naïve continuity. Thus, while the argument for restoration on these grounds has weight, it is not decisive. Therefore the stronger argument for reparations in these cases comes from the importance to the nation as a whole of having a range of distinct social institutions, future sources of cultural, intellectual, and religious mongrelization and hybridization. Their sheer existence fosters the tolerance necessary for national (and individual) flourishing. And the destruction of a nation's cultural institutions undermines something crucial

to its citizens: a sense of belonging to a collective project whose aims and identity transcend their own. Edmund Burke made a similar point about the destruction of political institutions with a stark image:

[O]ne of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters. . . . hazarding to leave to those who come after them, a ruin instead of an habitation. . . . By this unprincipled facility of changing the state . . . the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.<sup>62</sup>

Flies of a summer live and die, just one damn fly after another, not even with the dignity of bees whose lives contribute to the construction of a hive. We need not agree with Burke's wholesale conservatism to see the force of his claim. Reparation in the case of cultural, intellectual and religious institutions is a diachronic condition of the meaningfulness of collective life as such, analogous to the synchronic condition of access to the material bases of self-respect. If the properties themselves are unreturnable, then a subsidiary claim for compensation will also be justified, provided that compensation will be used for rebuilding elsewhere the tradition's infrastructure. Thus, there is an argument in justice, not just policy, for reparation, but it is an argument in distributive, not corrective, justice.

And it is, I believe, the strongest argument for reparations. Yet it too operates only with substantial qualifications. First, the claim for reparations rests on the empirical assumption that the continuity of the institution was seriously threatened by expropriation, and could be restored by restitution. The Catholic Church's existence in Eastern Europe, while rendered more difficult under communism, was not seriously imperiled. At the opposite extreme, a community of members or potential members must be available. They cannot all have relocated or scattered diasporically, as in the case of Eastern European Jews, making a restoration of Jewish culture in

the region extremely unlikely. Second, the claim of restoration applies only to the properties clearly essential to the cultural life of the institution, principally places of study and worship, but also income-producing properties in whose absence the institution would surely fail. It may well be that some of the institutions had very great holdings of income-producing properties, beyond those necessary to ensure cultural survival. Claims for such extra properties must compete with, and will ordinarily lose to, other claims on social resources. Last, the claim that cultural institutions merit protection and reparative response does not imply that they are beyond any form of political control or interference. Some institutions may have exercised disproportionate social and political power during their heyday, contributing in their own right to unjust policy and custom, for example by inciting religious intolerance. It is surely consistent with the aim of restoring their distinct cultural contribution to do so in a way that does not give rise to the same imbalances of power. Such considerations would be a further reason to limit the scope of reparative claims.

## **9. Conclusion**

My argument, then, is overwhelmingly negative. Despite the harms flowing from expropriation, reparation by new regimes will usually fail to restore justice, and will instead cause yet further injustice. This claim reflects, in two senses, what I have elsewhere called the relationality of responsibility.<sup>63</sup> First, the gesture of repair is owed by injurers, not by the world at large, and certainly not by fellow victims. Say a neighbor breaks a vase at your party. I may not meaningfully apologize for that neighbor's misconduct (assuming he was not somehow under my control). And you cannot demand payment from me for the vase he broke: my apology would be hollow, and your demand misapplied. If the injurer has fled the scene, then

the unfortunate fact is that no claims to repair lie in justice. Second, responsibility is relational in the sense that the importance of meeting responsibility claims rests on the importance, and nature of, the underlying social and political relationships such responsibility claims protect.

The claims of repair, and their rejection, need to be understood in terms of the relationships they both presuppose and project among fellow citizens. A central task of Europe's nascent democracies is establishing the mutual relationships of respect and reciprocity constitutive of common citizenship. Demands by some for compensation for crimes committed, in similar form, against all presuppose instead a different form of relationship: interest-seekers at a common pool, fighting for individual shares of resources. By seeking collective forms of memory and respect for victims and common protections against future crimes, the democratic relationship is far better honored.<sup>64</sup>

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<sup>1</sup> See the valuable paper by Eric Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117 (2004): 761-828, to which I am much indebted.

<sup>2</sup> A demand for reparative payment may also mask a demand for punishment, and so not genuinely count as reparative. I leave open whether inflicting punishment can itself be reparative. In the peculiarities of U.S. politics, capital punishment is now frequently justified by its purported contribution to victims' and survivors' healing, or "closure." There is, to my knowledge, no psychological or sociological evidence for its making any such contribution.

<sup>3</sup> See, e.g., Marcel Mauss, *The Gift: Forms and functions of exchange in archaic societies.*, trans. Ian Cunnison. (Glencoe, Ill.: Free Press, 1954).

<sup>4</sup> That punishment (in the sense of institutionally inflicted suffering) should have reparative functions does not preclude its having retributive and compensatory functions as well. Reparative justice need not be viewed as a competitor theory of punishment, in the sense of claiming to offer a privileged justification of punishment. As I am deploying it here, it is just an account of a possible function or range of functions of certain social practices.

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<sup>5</sup> Roughly speaking, reparative justice may effectively compel empathy when the crime is relatively minor (and so forgivable) and the offender feels some connection to the community calling him to account. For discussion of this question, see Geoffrey Sayre-McCord, “Criminal Justice and Legal Reparations as an Alternative to Punishment,” in *Legal and Political Philosophy*, ed. Enrique Villanueva (New York: Editions Rodopi, 2002), pp. 307-38; and John Braithwaite, *Crime, Shame and Reintegration* (New York: Cambridge University Press, 1989).

<sup>6</sup> See, e.g., M.L. Cohen et al., “The Psychology of Rapists,” in *Forcible Rape*, ed. Duncan Chappell et al. (New York: Columbia University Press, 1977), pp. 291-314, which distinguishes as “types” of rapes (a) rape motivated by overwhelming sexual impulses; (b) rape as a defense against homosexual wishes; (c) rape as sexual and sadistic expression; and (d) rape as expression of a more generally predatory disposition (p. 296). Of course many forms of rape do involve an absolute failure to acknowledge the victim’s humanity.

<sup>7</sup> For a general discussion of the slavery reparations issues, see Eric Posner and Adrian Vermeule, “Reparations for Slavery and Other Historical Injustices,” *Columbia Law Review* 103 (2003): 689-747, and citations therein.

<sup>8</sup> This is not true in all cases. Military intervention in Kosovo and the international criminal tribunals in Rwanda and former Yugoslavia followed the atrocities for which they were formed by only a few years. But justice has been much slower with the fall of Eastern European communism.

<sup>9</sup> Their descendants may be compensated, however, and their reputations may be repaired through posthumous review and vacating of criminal convictions or discharges.

<sup>10</sup> “L’oubli, et je dira même l’erreur historique, sont un facteur essentiel de la creation d’une nation . . . .” Ernest Renan, “Qu’est-ce qu’une nation?,” reprinted in *Qu’est-ce qu’une nation?* (Paris: Pocket, 1992), p. 42.

<sup>11</sup> See Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton: Princeton University Press, 1992), pp. 30-37.

<sup>12</sup> “I have seen, in my life, French, Italians, Russians, etc.; I even know, thanks to Montesquieu, that one can be Persian: but when it comes to mankind, that I have never encountered in my life.” Joseph de Maistre, *Considérations sur la France* (2d ed. London: Bale, 1797), p. 102 (quoted in K. Anthony Appiah, “Identity, Authenticity, Survival,” in Taylor, pp. 149-163, at p. 150).

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<sup>13</sup> Expropriation as part of a genocidal program is a different matter, and this is why I do not consider here the proper treatment of claims by Holocaust survivors or victims' descendants. Those claims are, I think, substantially stronger than the purely political claims I examine in this article.

<sup>14</sup> I do not mean that there were no indigenous socialist movements, but that, as one leading historian has written, they "never had a chance" – they were crushed by Stalin and his satellite parties, working with the Red Army at their backs. See Norman M. Naimark, "Revolution and Counterrevolution in Eastern Europe," in *The Crisis of Socialism in Europe*, ed. Christiane Lemke and Gary Marks, (Durham: Duke University Press, 1992), pp. 61-83.

<sup>15</sup> The fact that the transition to socialism was not a Pareto improvement is no reason on its own to condemn it; any even minimally redistributive transition from a state of massive inequality and grinding poverty to one of even meager protection of the poor fails the Pareto criterion.

<sup>16</sup> The Nazi party, and hence Hitler, famously came to power through roughly democratic means; his regime's illegitimacy is due more to the substance of its policies than the vehicle of their implementation. Retrospective assessment is a matter of both process and substance.

<sup>17</sup> It may also include much else, for example regret at one's (or one's nation's) complicity in the crimes, depending on the position of the theorist.

<sup>18</sup> This point is, of course, very familiar, from criticisms of Robert Nozick's Lockean theory in *Anarchy, State and Utopia* (New York: Basic Books, 1977).

<sup>19</sup> Elazar Barkan, *The Guilt of Nations* (Baltimore: Johns Hopkins University Press, 2001), ch. 6; Mark Blacksell, "The Reality of Property Restitution in Central and Eastern Europe," MS presented at Conference on Political Transformation, Restitution, and Justice at Jagiellonian University, Krakow, Poland, 6-8 June 2002.

<sup>20</sup> Peter Quint, *The Imperfect Union* (Princeton: Princeton University Press, 1997), 125. The rest of my discussion of East Germany draws heavily on Quint, pp. 125-26.

<sup>21</sup> Nazi-era expropriations were also treated this way.

<sup>22</sup> Quint, pp. 129-30.

<sup>23</sup> Commission on Security and Cooperation in Europe, "Human Rights and Democratization in Unified Germany," excerpted in Neil J. Kritz, ed., *Transitional Justice* vol. 3 (Washington, D.C.: United States Institute of Peace Press, 1995), at pp. 595-602, 600.



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<sup>24</sup> Quint, 142.

<sup>25</sup> Grazyna Skapska, “Restitutive Justice and the Rule of Law,” paper presented at Conference on Political Transformation, Restitution, and Justice at Jagiellonian University, Krakow, Poland, 6-8 June 2002.

<sup>26</sup> Michael Neff, “Eastern Europe’s Policy of Restitution and Property in the 1990’s,” *Dickinson Journal of International Law* 10 (1992): 357-81, at pp. 368-73 (1992).

<sup>27</sup> Vojtech Cepl, “A Note on the Restitution of Property in Post-Communist Czechoslovakia,” excerpted in Kritz, pp. 581-85.

<sup>28</sup> The greater economic viability of the Polish small farm lots, by contrast to the economically disastrous collective farms of the DDR, is another reason Poland has been reluctant to engage in agricultural sector reparations; there would be no efficiency gain but only transaction costs from reparations.

<sup>29</sup> See Neff, pp. 376-380, for discussion of the early Polish discussions of restitution, and Skapska.

<sup>30</sup> I am grateful to Stephen Williams for correspondence discussing this model.

<sup>31</sup> Strictly speaking, the fair market value is a function of either the actual lost income or the income that would have been lost by a more profitable alternative use of the property. I owe this point to Eric Posner.

<sup>32</sup> There is a further, conceptual point: since land markets are activities grounded in and hence relative to particular social, political, and legal institutions and practices, it makes no sense to stipulate a market price based on a purely hypothetical and idealized regime. On the other hand, it is true that some Central European countries (notably Poland) maintained some markets in private property. Although such market prices would presumably be too low (given constrained surplus earning) to satisfy expropriation victims, they might serve as a defensible valuational marker. The arguments below in the text against paying any significant valuation still control the issue.

<sup>33</sup> Jeremy Waldron, “Superseding Historical Injustice,” *Ethics* 103 (1998): 4-28. See also Gregory Alexander, “The Limits of Property Reparations,” (paper presented at Conference on Political Transformation, Restitution, and Justice at Jagiellonian University, Krakow, Poland, 6-8 June 2002) for arguments drawn from cognitive psychology that also impugn our ability to judge counterfactuals.

<sup>34</sup> But if default inheritance provisions are unjust – for example, sexist – then the case for recourse to this formula is very weak.

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<sup>35</sup> My own view is that a confiscatory estate tax is justified, with some sort of sentimental exemption for limited transfers of property. But matters are obviously complex: for example, spousal inheritance presumably ought to be untaxed; and provisions for minor dependents would need to be made. More complicated yet is the proper treatment of a family home. I cannot defend my view here, and it is anyway irrelevant to the argument, which rests only on the claim that second-generation claimants cannot plausibly maintain that they would have inherited the property under any set of just state policies. For more discussion of some of these issues, see Liam Murphy and Thomas Nagel, *The Myth of Ownership* (New York: Oxford University Press, 2002).

<sup>36</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, rev. ed. 1999), p. 87.

<sup>37</sup> Jon Elster makes a similar point, in “On doing what one can: An argument against restitution and retribution as a means of overcoming the Communist legacy,” *East European Constitutional Review* 1 (1992): 15-17. Even if the landless were to receive compensation for the wasting of their human capital, they would still be relatively worse off, since the previously-landed would be entitled to the same claim, on top of the claim for their land. And even if the claims of the landed were limited, then reparations would seem largely a matter of taking in each other’s wash.

<sup>38</sup> “Holdings” refers to possessions in a normatively neutral way – land and physical stuff people have within a locus of physical control or strong causal influence.

<sup>39</sup> This description of distributive justice is meant to be neutral between highly restrictive (for instance, libertarian) conceptions, which see justice as backing few if any positive claims (e.g. Nozick’s) and highly collective conceptions, which see individual needs as, at bottom, a matter of social responsibility (of which Rawls’ *Theory of Justice* is a leading example).

<sup>40</sup> The realization of negative claims of course depends on the existence of positive institutions: criminal law provides no protection without a police force and court system, and those will be under-supported without a coercive tax system.

<sup>41</sup> This characterization of corrective justice is meant to be neutral between libertarian conceptions, which focus on individual duties to repair harms caused by individual action (see, e.g., Richard Epstein, “A Theory of Strict Liability,” *Journal of Legal Studies* 2 (1973): 151-204); and moralized conceptions, which focus on violations of individual moral duties to take care with others’ entitlements (see, e.g. Jules Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992), or Stephen Perry, “Responsibility for Outcomes, Risk, and the Law of

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Torts,” in *Philosophy and the Law of Torts*, ed. Gerald Postema (New York: Cambridge University Press, 2002). I discuss the relation of corrective and retributive justice to underlying notions of responsibility in “Responsibility,” *Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman & Scott Shapiro (Oxford University Press, 2002), pp. 548-87.

<sup>42</sup> Showing the relevance of such reasons is, roughly, the program of law and economics. See, e.g., Richard A. Posner, *The Economic Analysis of Law* (New York: Aspen Publishers 2003).

<sup>43</sup> I mean to invoke a familiarly Rawlsian view, although Rawls’ Difference Principle is more stringent than a demand for a social minimum; the view in the text also has much in common with (but may be weaker than) the conceptions of, for example, Ronald Dworkin, Jeremy Waldron, Brian Barry, or Bruce Ackerman. More stringent theories of distributive justice yet, either strict egalitarian or act-utilitarian, might require the full subordination of corrective justice principles to the realization of their distributive goal. The argument I make in the text, therefore, presumes a theory of distributive justice that allows some play at the level of particular distributions of holdings. (I owe this point to Seana Shiffrin.)

<sup>44</sup> Alternatively, extant holdings are evaluated by reference to the institutional principles of acquisition and transfer that flow from an underlying conception of distributive justice.

<sup>45</sup> Coleman, *Risks*, 304. Coleman’s main discussion of the relation of corrective to distributive justice is at 350-354.

<sup>46</sup> In Rawls’ formulation, the subject of distributive justice is the “basic structure” of society: “the political constitution and the principal economic and social arrangements.” Rawls, p. 6.

<sup>47</sup> For discussion, see Stephen Perry’s valuable article, “On the relationship between corrective and distributive justice,” in *Oxford Essays in Jurisprudence, Fourth Series*, ed. Jeremy Horder (New York: Oxford University Press, 2000), pp. 237-63. James Gordley defends a more sophisticated variant of the derivative view as an Aristotelian conception of corrective justice, in “Tort Law in the Aristotelian Tradition,” in *Philosophical Foundations of Tort Law*, ed. David Owen (New York: Oxford University Press, 1995), pp. 131-58.

<sup>48</sup> One such view is presented by Coleman and Arthur Ripstein, “Mischief and Misfortune,” *McGill Law Journal* 41 (1995): 91-131. On their view corrective justice protects distributively just (or “political”) allocations of responsibility and agency.

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<sup>49</sup> This is Stephen Perry's view, in Horder, ed. One could construct a similar account from Thomas Scanlon's contractualist theory of the pre-institutional wrong involved in promise-breaking; see Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), ch. 7.

<sup>50</sup> Poor states may still devote resources to ensuring that current corrective justice claims are met, for example compensating new property takings or injuries. Such payments are a crucial part of fostering the rule of law and a regime of private property. Provided that the benefits of the rule of law and a private property system redound to all, as public goods – a significant condition in eastern Europe – then the interests of all, including the destitute, are thereby served.

<sup>51</sup> See Neff, in Kritz, p. 686; and for further discussion, Posner and Vermeule.

<sup>52</sup> See, e.g., Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 2001).

<sup>53</sup> This point holds *a fortiori* for the maximalist position, which puts hard as well as symbolic capital behind the victimhood of the expropriated.

<sup>54</sup> This will not be true when the victims are foreign businesses and expatriates, who will play no continuing role in the nation's new economic or political life.

<sup>55</sup> This last point is often suggested, see, e.g., Posner and Vermeule, MS at 19. I find it hard to see why current state B's reparations payments for predecessor state A's expropriations should provide any reassurance either against successor state C's inclination to expropriate again, or super-successor state D's willingness to repair C's expropriations. A lot of crystal-ball gazing is presupposed.

<sup>56</sup> Posner and Vermeule make an analogous point about the value of post-transition criminal trials. MS at 28.

<sup>57</sup> Of course, the new regimes will want to reduce the future risk as much as possible if they hope to attract foreign capital; and as I suggest in the text above, restoring properties taken by the previous regime's acts may also be necessary to attract that investment. But moving down that path may entail discriminating against domestic victims who lack the bargaining power of foreign firms. I therefore worry about efforts by foreign nations to condition aid and investment on property restitution.

<sup>58</sup> For the same reasons, it also seems to me a requirement of a just tax policy that there be an exemption, up to some reasonable threshold, for bequests of homesteads; the parallel claim in justice for family businesses seems to me far

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weaker, though perhaps advisable as a matter of economic policy, given the deadweight and efficiency costs of ownership transfers to those less familiar with the business.

<sup>59</sup> To clarify: my argument here is not that reparations might be “bad for the Jews,” as the expression goes, for Jewish victims of expropriation are among the claimants. Rather, it is that any movement that privileges national belonging is dangerous to any group deemed an outsider or newcomer. In today’s world of increasingly easy movement across borders, such worries may abate – or the conflicts may intensify.

<sup>60</sup> I say “partially excludable,” for of course cultural and religious institutions do exclude non-members, and the benefits to members may be allocated on the basis of sex, age, and family status. But, putting aside the issue of non-members, to the extent that the life such institutions enable is a good at all for their members, its goodness comes by virtue of members’ general participation in them. My argument here is indebted to Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press, 1996).

<sup>61</sup> For an analogous argument on which I have drawn, see Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative,” in *The Rights of Minority Cultures* ed. Will Kymlicka, (Oxford: Oxford University Press, 1995), pp. 93-119.

<sup>62</sup> Edmund Burke, *Reflections on the Revolution in France*, ed. C.C. O’Brien (New York: Viking, 1982), pp. 192-193. The first sentence does not parse even without ellipses, but the meaning is reasonably clear.

<sup>63</sup> See my *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000), ch. 2.

<sup>64</sup> I am grateful to Robert Cooter, Meir Dan-Cohen, Mel Eisenberg, Steven Munzer, Robert Post, Eric Posner, Eric Rakowski, Arthur Ripstein, Jessica Riskin, Connie Rosati, Samuel Scheffler, Seana Shiffrin and an anonymous referee for their comments on this, to the other members of the Bay Area Forum for Law and Ethics (BAFFLE), to audiences at UCLA and Cornell Law Schools, and to the participants at the Conference on Political Transformation, Restoration and Justice, Jagiellonian University, Krakow, June 6-8, 2002. I am also grateful to Bradley Bryan for his excellent research assistance.