

**Chicago-Kent College of Law**

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**From the Selected Works of Bernadette Atuahene**

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# Property & Transitional Justice: The Collected Works of Prof. Bernadette Atuahene

Bernadette Atuahene, *Chicago-Kent College of Law*

# PROPERTY & TRANSITIONAL JUSTICE

The Collected Works of

Professor Bernadette Atuahene



October 2010

## About the Author



Professor Atuahene is a property law professor at Chicago-Kent College of Law with a JD from Yale Law School, a master's degree from Harvard's Kennedy School of Government, and a bachelor's degree from the University of California, Los Angeles. She has published numerous law review articles about issues involving property and transitional justice, specifically focusing on how transitional states can address the property violations of former regimes. She has also published several opinion editorials in the popular press about property and transitional justice in publications such as *Business Day* (South Africa's primary business news publication), *Huffington Post*, and various local papers throughout the US.

Prof. Atuahene is the editor of the Social Science Research Network's *Transitional Justice Journal* and a frequent speaker at national and international conferences addressing property related issues, human rights, and international development.

In 2002, Prof. Atuahene was selected to become a Fulbright scholar in South Africa where she clerked on the Constitutional Court for Justices Sandile Ngcobo and Tholie Madala. She returned to South Africa in 2008 as a Council on Foreign Relations International Affairs Fellow and spent nine months working with the Land Restitution Commission to study its restitution program. During her time there, Prof. Atuahene interviewed over 150 people whose families were displaced from their homes and property by the apartheid government and who were compensated under the new democracy. The scope and scale of her study are unmatched, and the original research and emergent theory form the basis of her forthcoming book—*We Want What's Ours*.

Prof. Atuahene believes that the world must know about and can learn from South Africa's experience trying to rectify past property rights violations; consequently, she is producing and directing a documentary film—*Sifuna Okwethu* (We Want What's Ours)—about one family's journey to reclaim their land after apartheid. She founded a nonprofit organization, Documentaries to Inspire Social Change (DISC), to raise funds for the film and, upon completion, to distribute the film to school and community groups in South Africa and the US. To view a sneak peak of the film, visit the DISC website: [www.discwebsite.org](http://www.discwebsite.org). In August 2010, Prof. Atuahene was featured on the Chicago Public Radio show *Worldview* to speak about her forthcoming book and documentary; to listen to the interview and get more insight her work go to: [http://audio.wbez.org/wv/2010/08/wv\\_20100810.mp3](http://audio.wbez.org/wv/2010/08/wv_20100810.mp3).

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## Executive Summary

Throughout history, there have been several instances where state or non state actors unjustly expropriated real property from one group and gave it to another. If the two groups were racially, ethnically, or religiously distinct, then this illegitimate property transfer could have produced deep outrage, enduring resentment, and thus could remain a politically explosive issue even today. Figuring out whether or how to address these past property rights violations is one of the most pressing issues facing many developing nations that are transitioning from repressive regimes to democracies predicated on justice and equality. I am a property scholar whose intellectual work has been devoted to unraveling and analyzing the various issues these transitional states must consider.

*Property and Transitional Justice* examines the various options available to transitional states with the political will to address past property rights violations: these states can maintain the present property status quo, fully or partially return to a prior property status quo, or create a new property status quo altogether. Maintaining the present property status quo is not an option, however, for some states where redistribution is necessary to prevent backlash. *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Theft* explores how past property rights violations can lead to backlash in certain transitional states. The article introduces the concept of property disobedience and creates a unique rational choice model to evaluate when states should implement what I call a Legitimacy Enhancing Compensation Program (LECP) to prevent things from falling apart.

While a LECP has several permutations, certain situations call for a specific type of LECP—restoration. *From Reparations to Restoration: Moving beyond Restoring Property Rights to Restoring Political and Economic Visibility* argues that when a state has removed individuals or communities from the social contract by expropriating their property as part of a larger campaign of dehumanization, then this causes property-induced invisibility; under these circumstances, mere reparations are not sufficient. The article develops the concept of restoration, which is state compensation that—through its emphasis on choice and agency—integrates dispossessed individuals and communities into the social contract and affirms their humanity.

To effectively implement a restoration program and transform the balance of property and power in the society, a transitional state should adopt a conception of property rights that facilitates redistribution. The underlying premise of *Property Rights and the Demands of Transformation* is that if certain states truly aim to protect property rights, this must include compensating past owners for property rights violations as well as protecting the rights of present owners. The article introduces a new concept—the Transformative Conception of Real Property, which is designed to promote societal transformation by facilitating timely land reform to vindicate the rights of past owners without impermissibly confiscating present owners' properties.

There is a growing commitment in the American legal academy to analyzing property law from an international perspective; and these collected works move this burgeoning literature forward in important ways. The intended audience for these collected works is academics, NGOs, officials from transitional states, and Foreign Service officials in donor states who are working on issues of land reform, democracy & governance, peace & stability, historical injustice, and human rights.



## Table of Contents

### **PROPERTY AND TRANSITIONAL JUSTICE, 58 UCLA L. REV. DISC. 27 (2010).....1**

Abstract: Transitional justice is the study of the mechanisms employed by communities, states, and the international community to promote social reconstruction by addressing the legacy of systematic human rights abuses and authoritarianism. The transitional justice literature discussing how states can address past civil and political rights violations through truth commissions and international and domestic prosecutions is well-developed compared to the transitional justice literature concerning the redress of past property rights violations. Nevertheless, history is ripe with examples of states and private actors that have systematically and unjustly taken real property from one group and given it to another. The goal of this Article is to further an important conversation about how transitional states can address these past property rights violations to promote social reconstruction. I discuss the strengths and weaknesses of a state's three main options: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo altogether. I argue that a state should decide which option to choose through an inclusive public dialogue in which participants are well-informed rather than through a process involving only elites, which, despite being less time-consuming and less costly, would be inadequate in the long run.

### **PROPERTY RIGHTS & THE DEMANDS OF TRANSFORMATION, 31 MICH. INT'L L. J. 765 (2010) .....30**

Abstract: The conception of property that a transitional state adopts is critically important because it affects the state's ability to transform society. The classical conception of real property gives property rights a certain sanctity that allows owners to have near absolute control of their property. But, the sanctity given to property rights has made land reform difficult and thus can serve as a sanctuary for enduring inequality. This is particularly true in countries like South Africa and Namibia where—due to pervasive past property theft—land reform is essential because there are competing legitimate claims to land. Oddly, the classical conception is flourishing in these countries. The specific question this Article addresses is: for states where past property dispossession can cause backlash and potentially destabilize the current state, is the classical conception appropriate or do these states require an alternative conception of real property? I develop the transformative conception of real property to explore how the exigent need for societal transformation should inspire us to rethink property rights.

**THINGS FALL APART: THE ILLEGITIMACY OF PROPERTY RIGHTS IN  
THE CONTEXT OF PAST PROPERTY THEFT, 51 ARIZ. L. REV. 829 (2009) .....85**

Abstract: Past property theft is often a volatile political issue that has threatened to destabilize many nascent democracies. How does a transitional state avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft? To explore this question, I first define legitimacy and past property theft by relying on empirical understandings of the concepts. Second, I establish the relationship between property-related disobedience and a highly unequal property distribution that the general population views as illegitimate. Third, I describe the three ways a state can achieve stability when faced with an illegitimate property distribution: by using its coercive powers, by attempting to change people's beliefs about the legitimacy of the property distribution, or by enacting a Legitimacy Enhancing Compensation Program (LECP), which strengthens citizens' belief that they ought to comply with the law. Fourth, I develop a legitimacy deficit model, which is a rational-choice model that suggests when a state should enact an LECP to avoid property-related disobedience. To best promote long-term stability, I argue that states should, at the very least, enact an LECP as the cost of illegitimacy begins to outweigh the cost of compensation. Lastly, since many of the model's relevant costs are subjective, I suggest a process that states should use to determine and weigh the costs. In sum, the Article is intended to spark a debate about how compensation for past property theft can keep things from falling apart.

**FROM REPARATION TO RESTORATION: MOVING BEYOND RESTORING  
PROPERTY RIGHTS TO RESTORING POLITICAL AND ECONOMIC  
VISIBILITY, 60 SMU L. REV. 1419 (2007) ..... 127**

Abstract: How does a democratic state legitimize strong property rights when property arrangements are widely perceived to be defined by past theft? The answer, I argue, is through restorative justice measures that redistribute wealth based on past dispossession. This answer, however, leads to two more complex questions: Who gets priority in the restorative process given limited resources and how should the process unfold? The concise answers to these two ancillary questions are: First, instances of what I call property-induced invisibility should be prioritized as a baseline for achieving legitimacy. When property is confiscated as part of a larger strategy of dehumanization, people are removed from the social contract and made invisible. Widespread invisibility is of particular concern because it can lead to chaos and instability and places the legitimacy of existing property arrangements in serious doubt. Consequently, states must, at minimum, rectify property-induced invisibility in the restorative process. Second, societies must change the focus from reparations for the physical property confiscated to the larger project of restoring an individual or community's relationship to society. This will happen if those subject to property-induced invisibility are included in the social contract through a bottom-up process that provides the dispossessed with asset-based choices. The process of allowing people to choose how they are made

whole will do a substantial amount of work towards correcting property-induced invisibility and thereby increasing the legitimacy of existing property arrangements. I use a South African case study to test the practical effect of my theories of invisibility and restoration.

# PROPERTY AND TRANSITIONAL JUSTICE

Bernadette Atuahene<sup>\*</sup>

*Transitional justice is the study of the mechanisms employed by communities, states, and the international community to promote social reconstruction by addressing the legacy of systematic human rights abuses and authoritarianism. The transitional justice literature discussing how states can address past civil and political rights violations through truth commissions and international and domestic prosecutions is well-developed compared to the transitional justice literature concerning the redress of past property rights violations. Nevertheless, history is ripe with examples of states and private actors that have systematically and unjustly taken real property from one group and given it to another. The goal of this Article is to further an important conversation about how transitional states can address these past property rights violations to promote social reconstruction. I discuss the strengths and weaknesses of a state's three main options: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo altogether. I argue that a state should decide which option to choose through an inclusive public dialogue in which participants are well-informed rather than through a process involving only elites, which, despite being less time-consuming and less costly, would be inadequate in the long run.*

INTRODUCTION .....	66
I. THE HYPOTHETICAL NATION OF NAIKU .....	69
II. OPTIONS AVAILABLE TO THE NATION OF NAIKU .....	73
A. Option One: Maintaining the Present Property Status Quo .....	73
B. Option Two: Fully or Partially Returning to a Prior Property Status Quo .....	74
1. Return to T1 or T2 .....	81
2. Return to T3 .....	83
C. Option Three: Creating a New Property Status Quo .....	84
1. Tax and Transfer .....	84
2. Land Redistribution.....	86

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III. THE PROCESS OF CHOOSING FROM THE AVAILABLE OPTIONS .....	89
CONCLUSION .....	93

## INTRODUCTION

History is rife with examples of state and private actors systematically confiscating property from one group without consent and without paying just compensation and then transferring that property to another group. I call these actions property dispossession or property theft.<sup>1</sup> In some cases, dispossessed populations have made resounding cries for reparations during the transitions from the offending regimes to the new political orders.<sup>2</sup> During Communism, for example, several Eastern European governments took property from the aristocracy and Nazi sympathizers to distribute it to their peasant populations.<sup>3</sup> After the fall of these governments, pre-Communist owners in the Czech Republic, Estonia, Germany, Hungary, Latvia, Lithuania, and Slovakia demanded reparations.<sup>4</sup> To placate these constituencies, the transitional governments had to determine how to address the property dispossession that had occurred during Communism.<sup>5</sup>

1. It is a violation of human rights to confiscate property without consent and compensation. See Universal Declaration of Human Rights, G.A. Res. 217A, at 74, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (“No one shall be arbitrarily deprived of his property.”).

2. See *infra* notes 3–12 and accompanying text for several examples. See also Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, 43 LATIN AM. POL. & SOC’Y 61 (2001); George Meszaros, *Taking the Land Into Their Hands: The Landless Workers’ Movement and the Brazilian State*, 27 J.L. & SOC’Y 517 (2000) (describing how the Landless Workers’ Movement used direct action techniques to demand implementation of land reform policies in Brazil).

3. See Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 VAND. J. TRANSNAT’L L. 809, 812–13 (1994) (noting that from 1945 to 1949, the Soviet Military Administration of Germany confiscated all property holdings that exceeded 250 acres and initiated land reform to benefit “the general good of the working class”); see also Richard W. Crowder, Comment, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 IND. INT’L. & COMP. L. REV. 237, 238 (1994) (noting that from 1945 to 1948, the Czechoslovak government confiscated the land belonging to those “who had collaborated or sympathized with the Nazis during the Second World War”).

4. See Nicolás J. Gutiérrez, Jr., *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT’L L. 111 (1995) (reviewing restitution programs in the Baltic Republics, Bulgaria, Czech Republic, East Germany, Hungary, Nicaragua, Poland, Romania, and Slovakia); Mariana Karadjova, *Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses*, 29 REV. CENT. & E. EUR. L. 325 (2004) (presenting an overview of Eastern European restitution programs).

5. Not all post-Communist countries opted to return to a prior property status quo. See Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT’L L. 621, 625–26 (1996) (noting that Russian land reform laws have “prohibited the ‘return of land plots to former owners and their heirs’” and that Tajikistan has enacted similar laws).

Similarly, beginning in 1652, Europeans arrived in southern Africa, established economic and political dominance, and brutally took ownership of vast swaths of land from the African majority.<sup>6</sup> In the 1980s and 1990s, Zimbabwe, South Africa, and Namibia transitioned from white minority rule to majority rule.<sup>7</sup> One of the greatest challenges faced by these new African governments was how to help the African population reclaim their stolen land.<sup>8</sup>

Similar events have taken place in the Middle East. Saddam Hussein's rise to power culminated in 1979 when he was named president of Iraq. Over the course of his dictatorship, he subjected Kurds to severe discrimination—including unjust confiscation of their property.<sup>9</sup> In 2003, American troops ousted Hussein, setting the groundwork for Iraq's tumultuous political transition in which the Kurds gained significant political power.<sup>10</sup> For the Kurds, addressing past property dispossession was a political priority, but choosing the manner in which to proceed proved challenging.

Another example of property dispossession is the Rwandan genocide of 1994, in which significant amounts of property were stolen or unwillingly abandoned by citizens fleeing ethnic violence. In fact, one impetus behind the mass killings was the desire of many Hutus to confiscate Tutsi property.<sup>11</sup> When the

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6. Alois Mlambo, *The Ambiguities of Independence, Zimbabwe 1980–1990*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA 57, 64 (Margaret C. Lee & Karen Colvard eds., 2003).

7. *Id.* at 57, 65; Justine Hunter, *Introduction to WHO SHOULD OWN THE LAND? ANALYSES AND VIEWS ON LAND REFORM AND THE LAND QUESTION IN NAMIBIA AND SOUTHERN AFRICA* 1–6 (Justine Hunter ed., 2004); Cheryl Walker, *The Limits to Land Reform: Rethinking "The Land Question"*, 31 J. S. AFR. STUD. 805, 805–24 (2005).

8. See Mlambo, *supra* note 6, at 87, 411.

9. See JOHN FAWCETT & VICTOR TANNER, THE BROOKINGS INSTITUTION—SAIS PROJECT ON INTERNAL DISPLACEMENT, THE INTERNALLY DISPLACED PEOPLE OF IRAQ 10 (2002), available at [http://www.brookings.edu/~media/Files/rc/papers/2002/10iraq\\_fawcett/iraqreport.pdf](http://www.brookings.edu/~media/Files/rc/papers/2002/10iraq_fawcett/iraqreport.pdf) (explaining that the *al-Anfal* operation, which began in 1988, was based on the message that “the regime and its soldiers had a nigh-religious right to take Kurdish property and lives”).

10. See QUIL LAWRENCE, *INVISIBLE NATION: HOW THE KURDS' QUEST FOR STATEHOOD IS SHAPING IRAQ AND THE MIDDLE EAST* 235–36 (2008); Edward Wong, *Back From Exile, Kurds Demand Political Power and Reparations for Seized Property*, N.Y. TIMES, Jan. 19, 2004, at A9 (noting that the Kurds, recently back from exile, strongly demanded political rights and reparations from the transitional government).

11. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 193 (2001) (noting that a pattern emerged in which “[p]refects and burgomasters organized Hutu militants who identified and targeted Tutsi ‘collaborators,’ took over the land of those who were killed or fled, and redistributed it to militants”); GÉRARD PRUNIER, *THE RWANDA CRISIS 1959–1994: HISTORY OF A GENOCIDE* 248 (1995) (noting that while the desire to acquire Tutsi land was not the primary motivation behind the 1994 mass killings, there was “an element of material interest in the killings . . . Villagers also probably had a vague hope that if things settled down after the massacres they could obtain pieces of land belonging to the victims, a strong lure in such a land-starved country as Rwanda”); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis*

genocidal killing abated, Paul Kagame seized the reins of power and began the political transition. President Kagame—like many other leaders in times of transition—was forced to ask the recurrent transitional justice question: What can our government do about past property dispossession?<sup>12</sup>

Transitional justice is the study of those mechanisms employed by communities, states, and the international community to promote social reconstruction by addressing the legacy of systematic human rights abuses and authoritarianism. There is a well-developed transitional justice literature discussing how states can deal with past violations of civil and political rights such as incarceration, murder, sexual abuse, and torture.<sup>13</sup> There has also been healthy discussion about the value of truth commissions and international and domestic prosecutions concerning these violations.<sup>14</sup> Despite the important experiences of nations in Eastern Europe and Southern Africa, Iraq, and Rwanda that I have discussed, the transitional justice literature on how to address past property rights violations is significantly less developed.<sup>15</sup>

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in *Rwanda*, 75 N.Y.U. L. REV. 1221, 1249–250 (2000) (noting that some Hutu “pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled”).

12. PRUNIER, *supra* note 11, at 332 (noting that post-genocide, the Rwandan government struggled with “property grabbing by the former refugees now coming back from Uganda and Burundi”).

13. See, e.g., 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); Kuk Cho, *Transitional Justice in Korea: Legally Coping With Past Wrongs After Democratization*, 16 PAC. RIM L. & POL’Y J. 579 (2007); Omar Encarnación, *Reconciliation After Democratization: Coping With the Past in Spain*, 123 POL. SCI. Q. 435 (2008); Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 U. COLO. L. REV. 329 (2009); Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 HARV. HUM. RTS. J. 85 (2005); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301 (2003).

14. See CHARLES VILLA-VICENCIO & WILHELM VERWOERD, LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (2000); RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE (2001); Daniel J. Hendy, *Is a Truth Commission the Solution to Restoring Peace in Post-Conflict Iraq?*, 20 OHIO ST. J. ON DISP. RESOL. 527 (2005); Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 TUL. J. INT’L & COMP. L. 59 (2003); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81 (1996); Margaret Popkin, *The Salvadoran Truth Commission and the Search for Justice*, 15 CRIM. L.F. 105 (2004); Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT’L L. 375 (1997); Peter A. Schey, Dinah L. Shelton & Naomi Roht-Arriaza, *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER L. REV. 325 (1997); Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor*, 95 AM. J. INT’L L. 952 (2001).

15. For a few examples of transitional justice literature about past property rights violations, see RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 3 (Scott Leckie ed., 2003); Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419 (2007) [hereinafter Atuahene, *From Reparation to Restoration*]; Bernadette Atuahene, *Property Rights and the Demands of Transformation*, 31 MICH. J. INT’L L. 765 (2010); Bernadette Atuahene, *Things*



In this Article, I explore the effects of past property theft on the current property status quo. The property status quo or property distribution is the existing distribution of property among various racial, ethnic, or religious groups in a society. This status quo is important because property ownership structures group relations. When one group owns a disproportionate amount of property, the resulting asymmetries in social status and economic power can leave weaker groups open to various forms of subordination, which can foster deep resentment that undermines social reconstruction.<sup>16</sup>

When transitional states have the political will to address past property theft and promote social reconstruction, the enduring question is: How can a transitional state accomplish these goals? The answer to the question is complex and highly contextual. Thus, in Part I, to isolate the key issues that many countries face, I discuss a hypothetical transitional state called Naiku with a historical record that accentuates the challenges at hand. In Part II, I discuss Naiku's three main options: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo. In Part III, I argue that when a transitional state is determining the most advantageous option, its decisionmaking process is crucial. A state should decide which option to pursue through an inclusive public dialogue with well-informed participants rather than through a less time-consuming, less costly process involving only elites.

## I. THE HYPOTHETICAL NATION OF NAIKU

I have created the hypothetical African state of Naiku to illustrate my argument regarding the redress of past property theft. Three events in Naiku's history radically transformed the country's property allocation, and each one led to a new property status quo. The country is now on the cusp of its fourth potentially transformative event.

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*Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829 (2009) [hereinafter *Atuahene, Things Fall Apart*]; Scott Leckie, *Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice*, REFUGEE SURV. Q., Iss. 3, 2000, at 5.

16. See Daron Acemoglu & James A. Robinson, *A Theory of Political Transitions*, 91 AM. ECON. REV. 938, 957 (2001) (finding that high levels of inequality between groups in society lead to political instability); Ruth Hall, *A Political Economy of Land Reform in South Africa*, 31 REV. AFR. POL. ECON. 213, 214 (2004) (noting the World Bank's contention that redistributing the land in South Africa was necessary to avert social and political instability); Jaime Crook, Comment, *Promoting Peace and Economic Security in Rwanda Through Fair and Equitable Land Rights*, 94 CAL. L. REV. 1487, 1490 (2006) (arguing that the Rwandan government must further promote equitable land access through land reform to promote peace and stability).

- I. Archeologists have confirmed that the people of the small kingdom of Alim were the first modern humans to occupy the region now known as the country of Naiku. The Alim were farmers who tilled the fertile land. No one owned land, but custom dictated that all had rights to use it according to their needs. Following a sudden boom in the population of the neighboring nation of Alieu, coupled with a severe drought, the people of Alieu ventured out of their occupied territory in 1810 and conquered the Naiku region, bringing the concept of communal land ownership with them. The Alieu murdered the Alim leadership but incorporated the Alim people into the Alieu nation as full citizens with equal rights. Under the Alieu property system, the chief formally owned and controlled all land and gave members of the nation use rights according to each family's needs. In the new Alieu nation, the people of Alim and Alieu lived side-by-side peacefully and intermarried often.
- II. One hundred years later in 1910, the British arrived, vanquished the nation of Alieu, declared Naiku a colony, and claimed sovereignty over Naiku's land. They immediately evicted the natives from 90 percent of the land, divided that land into deeded lots, transferred the lots to British settlers and several members of the Alieu nation who cooperated with the British government, and created a land registry to maintain a record of ownership.<sup>17</sup> The British settlers were economically and politically dominant from this point on.
- III. In 1996, the warriors of Alieu united under the leadership of General Abdeena, ousted the British, and won independence for their people. Abdeena was initially highly respected and hailed as the country's redeemer, but quickly became unpopular because she ruled with a heavy hand and failed to redistribute land as promised. Instead, without paying just compensation and without consent, she expropriated all the deeded lots

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17. This situation is similar to that in southern Africa. See Johan van Tooyen & Bongiwe Njobe-Mbuli, *Access to Land: Selecting the Beneficiaries*, in *AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKETS AND MECHANISMS* 461 (van Zyl et al. eds., 1996) ("Land distribution in South Africa is highly skewed. Approximately 87 percent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 percent of the population, which is predominantly black, live on 13 percent of the land in high density areas—the former homelands."). The same is true in Namibia and was true in Zimbabwe prior to its tumultuous land reform program in 2002. See Uazuva Kaumbi, *Namibia: The Land is Ours!*, *NEW AFR.* Feb. 2004, at 28 ("[L]ess than 10% of the people own more than 80% of the commercial farmland as a result of colonial theft."); J.S. Juana, *A Quantitative Analysis of Zimbabwe's Land Reform Policy: An Application of Zimbabwe SAM Multipliers*, 45 *AGREKON* 294, 294 (2006) ("During the colonial era, land was distributed on racial lines, with approximately 4,660 large-scale predominantly white commercial farmers owning about 14.8 million hectares and about 6 million black smallholder farmers owning about 16.4 million hectares in mainly low agricultural potential areas.").

distributed by the British in years prior and transferred over 65 percent of these lots to herself, her family, and her political cronies.<sup>18</sup>

- IV. In 2009, Abdeena was deposed in a bloodless coup, and soon thereafter a new government took power in Naiku's first democratic election. Layla was elected president, in large part, based on her promise to transform the property distribution. This political transition placed Naiku on the cusp of the fourth event with the potential to drastically transform its property status quo. Most citizens—both black and white—agreed that the present property distribution was unjust because General Abdeena's corrupt allocations of property were patently unfair. But, the corrupt transfers of land made by the general were complicated by the fact that, by 2009, the owners had sold 20 percent of the deeded lots to innocent third parties at market prices.

#### CHRONOLOGY OF LAND OWNERSHIP

T1 (pre-1810)	T2 (1810)	T3 (1910)	T4 (1996)	T5 (2009)
Alim	Alim & Alieu	British settlers	Independence under General Abdeena	Democracy under Layla
	1 <sup>st</sup> transformation	2 <sup>nd</sup> transformation	3 <sup>rd</sup> transformation	4 <sup>th</sup> transformation?

The vast majority of Naiku's citizens agree that the state must do something about the multiple layers of land dispossession, so there is tremendous political will to transform present property arrangements. Today the population of Naiku is as follows: The Alim and Alieu (who are black) constitute about 80 percent of the population, while the offspring of British settlers (who are white) constitute about 10 percent. An additional 10 percent of the population falls under the category of "other" by either claiming both British and African ancestry or some other ancestry altogether. The economically dominant descendants of the British settlers, backed by the British government, are demanding a return to T3—the property distribution that was

18. General Abdeena's controversial redistribution of property is similar to what happened in Zimbabwe as a result of its fast-track program. See CRAIG RICHARDSON, *THE COLLAPSE OF ZIMBABWE IN THE WAKE OF THE 2000–2003 LAND REFORMS* (2004); Neil H. Thomas, *Land Reform in Zimbabwe*, 24 *THIRD WORLD Q.* 691, 700–02 (2003); INTERNATIONAL MONETARY FUND COUNTRY REPORT NO. 05/359, *ZIMBABWE: SELECTED ISSUES AND STATISTICAL APPENDIX 13* (2005) (noting that the lack of transparency has made it difficult to determine who benefited from the land reform by presently residing on confiscated farms).

in place just before independence in 1996.<sup>19</sup> Meanwhile, the people of Alim and Alieu—now politically powerful—are demanding a return to T2, the pre-colonial property distribution, or to start anew. A small faction, which traces its ancestry directly back to the Alim, is demanding a return to T1 when the Alim people were the sole inhabitants of Naiku. In the midst of these varied demands and stark uncertainty, one thing is definite: To consolidate the political transition, Layla's government must create an efficient yet fair resolution to the multiple layers of land dispossession that have occurred in Naiku.

T5 is a crossroads for Naiku because the nation has the opportunity to reconcile its past in order to secure its future. There are some constraints, however. A government's freedom to imagine alternatives is bound by the extant but unwritten rules that transitional states (especially resource-deprived transitional states) must follow to gain acceptance into the new globalized economy. If transitional states do not comply with these rules, they will likely experience a decrease in the bilateral, multilateral, and private sector funding necessary for economic development.<sup>20</sup> At least one nonnegotiable rule for acceptance in the globalized economy is the commitment to protecting private property rights and promoting free-market democracy. Naiku's newly elected government is aware of this requirement but remains determined to create a property distribution that the vast majority of its citizens view as legitimate.

There are, however, problems with each of Naiku's past property status quos. General Abdeena's 1996 land transfers to herself, her family, and her political cronies at T4 was unquestionably unjust; given the short span of time that has passed since then, this injustice still dominates the society's collective memory. The violent British acquisition of Naiku and the transfer of deeded plots to British settlers and their supporters at T3 were equally illegitimate. Although these events occurred a century ago, the resulting unequal, racially skewed property distribution lasted until 1996 and has been the source of much anger and outrage among the African majority. Consequently, the injustice is fresh in the nation's collective memory and has proven to be an explosive issue in current Naiku politics. The kingdom of Alim's defeat, the massacre of its leaders, and expropriation of its land at T2 were similarly unjust. As a result of the lapse of time between the present and T2 (about two hundred years),

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19. See, e.g., Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710, 1730 (1993) (arguing that in societies structured around principles of white superiority and racial subordination, white privilege can become a quintessential expectation of that society).

20. See Tony Killick, *Conditionality and IMF Flexibility*, in THE IMF, WORLD BANK AND POLICY REFORM 253 (Alberto Paloni & Maurizio Zanardi eds., 2006) (noting that the International Monetary Fund imposes conditions to ensure that member states use funds for policies that are consistent with the IMF's objectives).

these are the only events of dispossession that play a nominal role in the nation's collective memory and are not politically divisive. Given the complicated history of dispossession and its effects on the present state of affairs, Naiku must carefully decide its path at T5.

## II. OPTIONS AVAILABLE TO THE NATION OF NAIKU

The state's role in determining ownership patterns is especially pronounced in nations like Naiku where there have been multiple layers of property dispossession that have created multiple potentially legitimate claims to the same plots of land. In transitional states, the government's decision to address or ignore past property theft determines who will be considered the legitimate owner of each plot. Naiku's government has three possible courses of action at T5: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo altogether.

### A. Option One: Maintaining the Present Property Status Quo

If Layla's government chooses to maintain the present property status quo, it will look forward and not address the multiple layers of past land dispossession in Naiku. Instead, her government will rely on the market to place resources in the hands of those who will use them most efficiently. From an efficiency standpoint, who initially owns the property is irrelevant because the properties will end up in the hands of those who value them most highly, if transaction costs are low.<sup>21</sup> Thus, following the examples of Namibia, South Africa, and Zimbabwe in their transitions to democracy, Naiku can allow current trade and investment to continue unencumbered by giving current landowners clear title to their property despite how it was acquired.<sup>22</sup>

Maintaining the present property status quo ensures that investment and trade are not attenuated by protecting existing investment-backed expectations, including the expectation that innocent third parties who bought property during T4 at market rates will retain rights to that property without fear of expropriation. This option also requires the least bureaucratic intervention, consequently making it the least vulnerable to government failure, which "arises when government has created inefficiencies because it should not have

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21. See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 6 (2001) ("The 'Coase Theorem' holds that where market transaction costs are zero, the law's initial assignment of rights is irrelevant to efficiency, since if the assignment is inefficient the parties will rectify it by a corrective transaction.").

22. A.J. Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in *PROPERTY AND THE CONSTITUTION* 109, 111–12 (Janet McLean ed., 1999).

intervened in the first place or when it could have solved a given problem or set of problems more efficiently.”<sup>23</sup>

One central flaw is that maintaining the present status quo legally legitimizes a patently unfair land distribution. Before General Abdeena was deposed, she titled a vast amount of land to herself, her family, and her political cronies; consequently, the vast majority of citizens view present-day ownership patterns as illegitimate. Most importantly, this commonly held view of the current property distribution has engendered a great amount of societal resentment and anger. Layla’s government must ensure that this discontent is channeled in an orderly manner through existing social, legal, and political institutions; otherwise, the country risks economic-based political turmoil.<sup>24</sup> Even if maintaining the current status quo is the most economically efficient option, Layla’s government should choose a different option to avoid economic-based political turmoil.<sup>25</sup>

#### B. Option Two: Fully or Partially Returning to a Prior Property Status Quo

The second option Naiku has at T5 is to fully or partially return to a prior property status quo by taking the present property distribution as a starting point and using its powers of eminent domain to make land available for return to past owners.<sup>26</sup> If significant time has passed, and the state can no longer identify the beneficiaries of past unjust transfers, then it must provide the funds to purchase property from its general coffers. If, however, the beneficiaries of past unjust transfers are readily identifiable, the state can require them to fully or partially finance the return of property.<sup>27</sup>

23. CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 2–3 (2006).

24. For a detailed discussion of disobedience resulting from past property theft, see Atuahene, *Things Fall Apart*, *supra* note 15.

25. See Mark J. Roe, Essay, *Backlash*, 98 COLUM. L. REV. 217, 217 (1998) (“Voters may see market arrangements as unfair, leading them to lash back and disrupt otherwise efficient arrangements. To quell this backlash, inefficient legal structures may arise and survive, despite the fact that they could not withstand a normal efficiency critique. The prospect of backlash—or of strategically tempering otherwise efficient rules and institutions to finesse away a more destructive backlash—complicates a law and economics inquiry.”).

26. This is the decision that the South African transitional government made. See Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations Over the Protection of Property Rights in the Interim Constitution*, 11 S. AFR. J. HUM. RTS. 222, 229–38 (1995) (providing an insider’s view of the pre-liberation negotiation that led to the constitutional property clause, which protected existing property rights).

27. This is what happened in the Netherlands after World War II. See Wouter Veraart, ‘Reasonableness’ or Strict Law? *The Postwar Restitution of Property Rights in the Netherlands and in France (1945–1952)*, in YAD VASHEM—THE INTERNATIONAL CONFERENCE ON CONFRONTING HISTORY: THE HISTORICAL COMMISSIONS OF INQUIRY (2002) (on file with UCLA Law Review) (noting that the strict restitution law in France made it easier for former owners of property to get their land

To implement this option, Naiku can use two types of redistributive programs: reparations or restoration. Reparations programs are designed to vindicate past property rights.<sup>28</sup> In a reparations program, if property was confiscated unjustly, then the dispossessed have a window of time to file claims. These claims are vetted through a judicial or administrative process to determine whether compensation is warranted. A defining feature of reparations programs is that the beneficiaries do not have a great deal of choice in what they receive; they usually receive either land restitution or money as compensation.

Restoration is also a specific type of redistributive program designed to vindicate a past property right.<sup>29</sup> As with reparations, the state determines the process for accepting, validating, and paying restoration claims, but restoration is distinct from reparations on two counts. The first point of distinction concerns who is eligible to become a beneficiary. In a restoration program, beneficiaries must be subject to property-induced invisibility in order to qualify. As I have previously argued,<sup>30</sup> in certain situations, dispossession involves more than the confiscation of property; it involves the removal of an individual or community from the social contract. I call this property-induced invisibility and use the work of John Locke, Carole Pateman, and Charles Mills to provide a clear definition.<sup>31</sup>

Property-induced invisibility is defined as:

the widespread or systematic confiscation or destruction of real property with no payment of just compensation executed such that dehumanization occurs; the act is perpetrated by the state or other prevailing power structure(s), and adversely affects powerless people or people made powerless by the act such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.<sup>32</sup>

For example, if a colonial government impoverished my father by confiscating his property during T3 and subjected him to property-induced invisibility, he would qualify for compensation. But, if my father has passed away and my siblings and I have become well-off, then we would not qualify for compensation

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back because the judge was obliged to acknowledge the nullity of any transaction of property performed after the original owner had lost his right to dispose of it, meaning that all the transactions performed by so-called administrators were null and void and had to be undone). Southern Africa does not have this luxury because the identity of wrongdoers is not as clear as it was in the Netherlands due to the passage of time between the wrongful act and rectification.

28. See generally Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL'Y REP. 21 (2004) (discussing the importance of reparations for black Americans and potential challenges to reparations).

29. See Atuahene, *From Reparation to Restoration*, *supra* note 15.

30. *Id.*

31. *Id.*

32. *Id.*



from the state because we do not meet the last condition of restoration: We are not economically vulnerable and dependent on the state to meet our basic needs. In contrast, under the reparations paradigm, the current financial position of the dispossessed person or her descendants is irrelevant, so my siblings and I would qualify for compensation despite our elevated socioeconomic standing.

The second point of distinction between reparations and restoration programs is what the beneficiaries receive. When the confiscation of a community's or individual's property causes property-induced invisibility, the state's objective should not be simply to compensate them for the stolen property; the need is more profound. The state's objectives should be to bring them into the social contract, to restore their visibility, and to affirm their humanity. A state can accomplish these objectives by giving the dispossessed a choice.<sup>33</sup> It is important to allow those subject to property-induced invisibility to participate in determining their compensation in order to give them control over the terms of their reentry into the body politic and affirm their humanity. The choices may include: the return of the confiscated property; the grant of alternative property if the original property is no longer available; financial compensation; or a variety of in-kind benefits, such as subsidized credit, free higher education or vocational training for two generations, or urban housing rights.<sup>34</sup> In contrast, the focal point of a reparations program is not providing the victim with a choice.

Regardless of whether a state implements a reparations or a restoration program, to return to a prior property status quo, it must surmount six potential roadblocks. The first hurdle involves identification of program beneficiaries. When those who were originally dispossessed have died, it can be difficult to identify who should receive compensation in their stead. Some may argue that once the dispossessed person dies, his or her claims die as well. Others argue that a debt is not extinguished upon death. Instead, the debt is owed to the deceased's estate; and so should be the case with debts arising from dispossession. If individuals of Alim and Alieu descent successfully prove that their ancestors were dispossessed during T3, then the heirs of the dispossessed should receive compensation. But, identifying heirs can be extraordinarily difficult when a significant amount of time has passed between the event of

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33. *Id.* at 1447–50 & n.102.

34. Unrestricted cash grants will not necessarily be the best form of compensation in the group context. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 391 (1987) (noting that appropriate reparations might include “[m]oney for education, housing, medical care, food, job training, cultural preservation, recreation and other pressing needs of victim communities [that] will raise the standard of living of victim groups, promoting their survival and participation”).

dispossession and the moment of compensation. With each generation, the number of heirs increases exponentially, and the state will require complicated family trees to identify them.

If the Alim and Alieu community is intact, however, it can make a community claim for compensation.<sup>35</sup> This approach is more akin to a living victim making a claim because the community transcends the lives of its individual members and endures through time. The compensation would go to the collective for the betterment of all its members.<sup>36</sup> All people of African descent whose ancestors were born in Naiku are part of the Alieu nation that existed at T2. Due to frequent intermarriage, a return to T1 (when the Alim were the sole occupants of the land) would be almost impossible because the Alim are no longer a distinct community.

The second challenge to implementing a reparations or restoration program is obtaining verifiable proof of prior ownership or occupation. Producing a deed or other official written document would be the simplest way to prove ownership or occupation, but there were no deeds in Naiku until the advent of the Europeans at T3. Nevertheless, if the nation of Naiku desires to restore rights in existence prior to T3, it can accept diverse forms of evidence to prove that an individual or community had a right to a particular plot of land, as South Africa did in its land restitution program.<sup>37</sup> South Africa relied upon a variety of forms of evidence, including documents in the national archives, physical evidence such as graves or ruins that indicated occupation, and oral evidence such as testimony concerning ownership or occupation from the claimant verified against testimony from other occupants or their descendants who lived nearby.<sup>38</sup> But, despite a state's willingness to use diverse forms of evidence, the undeniable reality is that verifying who owned or occupied

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35. Mark Everingham & Crystal Jannecke, *Land Restitution and Democratic Citizenship in South Africa*, 32 J. S. AFR. STUD. 545, 548 (2006) (describing the political role of claimant communities in South Africa); Lewis P. Hinchman & Sandra K. Hinchman, *Australia's Judicial Revolution: Aboriginal Land Rights and the Transformation of Liberalism*, 31 POLITY 23, 23–51 (1998) (describing the progressive acceptance of aboriginal land claims on behalf of a community). Adrien K. Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L L.J. 295, 299 (1993) (emphasizing the importance of communitarianism in both South Africa and Namibia).

36. The extensive litigation involving the U.S. cigarette industry is a testament to the fact that uncertainty over the exact identity of victims and their heirs is not an insurmountable barrier. Courts used "[s]tatistical, pro rata distribution of damages" to cure "the problem of indeterminate defendants and indeterminate [victims]." Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 313 (2006).

37. Interview With Daniel Jacobs, Assistant Dir., Comm'n on the Restitution of Land Rights (Mar. 15, 2008).

38. *Id.*

land becomes more difficult as time passes because, for instance, people who can provide oral evidence to confirm ownership eventually die.

The third hurdle in fully or partially returning to a prior status quo is acknowledging people who never owned anything in the past. Before the state makes a decision to reinstitute a prior property status quo, there must be a national consensus that the previous arrangement was significantly more legitimate than the present one. This consensus will be informed by a nation's memory of the past as kept alive through historical texts, oral traditions, and popular culture. Nevertheless, even if there is a consensus, the prior status quo had various imperfections and those imperfections will be restored. Consequently, restoring a past property status quo can serve to resurrect a former aristocracy and to exclude those who never owned property in the past. Option three, which I discuss in the following Subpart, addresses this concern directly through a full-scale redistribution of wealth. In the alternative, to address the needs of people who are currently poor and have never owned property in the past, a state can implement a restoration or reparations program in concert with significant redistribution effected through the tax and transfer system, as demonstrated in South Africa.<sup>39</sup>

The fourth challenge to returning to a prior property status quo is the uncertainty that results from using eminent domain. When returning property to prior owners, the state should use eminent domain and pay existing owners just compensation. The determination of just compensation should use the fair market value as the starting point but must also take into consideration factors such as the conditions of acquisition, acquisition price, and any state subsidies from which the owner benefited.<sup>40</sup> Using eminent domain to restructure

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39. STEPHEN GELB, EDGE INST., *INEQUALITY IN SOUTH AFRICA: NATURE, CAUSES AND RESPONSES* 55 (2003), available at [http://www.sarpn.org/documents/d0000671/P686-Gelb\\_Inequality\\_in\\_SA.pdf](http://www.sarpn.org/documents/d0000671/P686-Gelb_Inequality_in_SA.pdf) (describing South Africa's social service spending).

40. The fifth hurdle in fully or partially returning to a prior property status quo or creating a new property status quo altogether is this involves government-led redistributive efforts that are highly susceptible to government corruption, inefficiency and ineptitude. See *supra* note 23 and accompanying text. As it stands, transitional states characteristically have weak administrative institutions that are particularly susceptible to corruption, bureaucratic inefficiency, and lack of transparency. The South African Constitution provides that "the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation." S. AFR. CONST. 1996 § 25; see also *Ex Parte Former Highland Residents; In Re Ash and Others v. Dep't of Land Affairs* 2000 (2) All SA 26 (LCC) (S. Afr.) (stating that for determining just and equitable compensation, equitable balance required by the constitution will in most cases be best achieved by first determining the market value of the property and then subtracting from or adding to the amount of the market value, as other relevant circumstances may require).

property rights promotes fairness to all groups, including nonindigenous people who immigrated to Naiku in the last one hundred years and at no point benefited from any unjust past land transfers. The downside of using eminent domain is that it can cause uncertainty and dampen investment. Jahangir Saleh notes that “[u]ncertainty of expropriation affects the uncertainty of returns and tends to discourage investment for risk-averse decision makers.”<sup>41</sup> This uncertainty begins when the redistributive program is announced (or when the public believes that it has a high probability of being implemented) and ends when the new owners of the land are determined.<sup>42</sup> Once the uncertainty ends, trade and investment are no longer affected unless the government does not make a credible promise that the transformation is a one-time ordeal.<sup>43</sup>

The sixth and most formidable hurdle in returning to a prior property status quo is answering the question: How far back? That is, a reparations or restoration program rectifies property rights violations that occurred during a specific time period, and the state must determine the eligible time period. This is a daunting question for nations like Naiku that have experienced multiple layers of property dispossession. Should Naiku’s program compensate people for property rights violations that occurred from 1910 to 2009 (including only T3 and T4) or from 1996 to 2009 (including only T4)? Or should the state include all violations that have occurred since 1810 (the period encompassing T2, T3, and T4)?

Numerous countries have dealt with these hard questions. In 1994, after the fall of apartheid in South Africa, the new political dispensation contended with apartheid-era land theft by enacting the Land Restitution Act, which instructs the state to compensate individuals and communities for a “right in land or portion of land dispossessed after 19 June 1913 as a result of past

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41. Jahangir Saleh, *Property Rights Institutions and Investment* 7 (World Bank Policy Research, Working Paper No. 3311, 2004); see also Stein Holden & Hailu Yohannes, *Land Redistribution, Tenure Insecurity, and Intensity of Production: A Study of Farm Households in Southern Ethiopia*, 78 LAND ECON. 573, 575 (2002) (finding an inverse relationship between the willingness of farmers to invest in long-term improvements on their land and the perception of insecurity based on land reform in flux in Ethiopia).

42. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 785 (2004) (“If all claims are immediately recognized and announced to the world, then both losers and winners will know the extent of their existing property rights, and they will invest and trade accordingly.”).

43. *Id.* (“As this description suggests, the amount of uncertainty {in investment} is a decision variable. A state can reduce uncertainty by requiring that all claims be filed within six months, as Czechoslovakia did, and by using expedited procedures . . . . If all claims are immediately recognized and announced to the world, then both losers and winners will know the extent of their existing property rights, and they will invest and trade accordingly.”).

racially discriminatory laws or practices.”<sup>44</sup> Similarly, in the Balkans prior to the NATO bombing of the region in 1999, thousands of Kosovo Albanians were forced to flee their homes due to a Serbian-led ethnic-cleansing campaign.<sup>45</sup> The interim U.N.-led civilian administration (the United Nations Mission in Kosovo or UNMIK) enacted a reparations program that gave any person who was dispossessed of a property right as a result of discrimination between March 23, 1989, and March 24, 1999 a right to restitution in kind or compensation.<sup>46</sup> In Germany, the government enacted the Law on Settlement of Open Property Questions in September of 1990, which permits return of property that was expropriated by the East German government after 1949 as well as property expropriated by the Nazis between January 30, 1933, and May 8, 1945.<sup>47</sup>

In 1991, the Hungarian government enacted the First Compensation Law for owners subject to Communist-era expropriations;<sup>48</sup> and in 1992, the government passed the Second Compensation Law, which mandates compensation for Jews dispossessed by Nazi Germany and ethnic Germans expelled from Hungary in the wake of the Nazi retreat.<sup>49</sup> Australia’s reparations program—instituted by the Aboriginal Land Rights (Northern Territory) Act of 1976—set aside a twenty-year period (1976–1996) during which the state allowed aboriginal people to make a collective property claim to crown land that had been stolen from them during conquest.<sup>50</sup>

Like many countries before it, Naiku must also decide which property violations it will rectify. It can return to the property status quo that existed

44. Restitution of Land Rights Act 22 of 1994, as amended by Act 48 of 2003, § 2(1) (S. Afr.); see also S. AFR. CONST. 1996 § 25(7) (“A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”).

45. NOAM CHOMSKY, ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS 34 (2000) (describing the situation in Kosovo prior to the NATO bombings).

46. On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, U.N. MIK Reg. No. 2000/60, § 2.2 (Oct. 31, 2000).

47. See Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. INT’L. L.J. 243, 257 (1993).

48. See generally ISTVAN POGANY, EUROPE AND CHANGE: RIGHTING WRONGS IN EASTERN EUROPE 155–65 (1997) (describing property restitution and compensation schemes in Hungary).

49. See Gutiérrez, *supra* note 4, at 130–34.

50. If an aboriginal group was able to prove traditional ownership, it was entitled to receive an inalienable freehold title held by a corporate land trust. See Hinchman & Hinchman, *supra* note 35, at 23, 36–37 (stating how the Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.) was a radical departure from *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.R. 141, which required an economic attachment to the land in order to make a property claim. Also, most claims were exceedingly difficult to establish, and by the end of the twenty-year period, aboriginal people possessed 43 percent of the northern territory (where 15 percent of the Australian aboriginal population lived)).

at T1, T2, or T3, each of which has its own specific virtues and vices, which I review below.

# 1. Return to T1 or T2

The most compelling argument for returning to T1 is the principle of first possession: first in time, first in right.<sup>51</sup> The Alim are the first known human inhabitants of the land and are the only group in present-day Naiku to have an indisputable claim to just acquisition. But, an addendum to the first-in-time principle is Locke's labor theory, which posits that being first to occupy is not sufficient to constitute ownership because land ownership results only when labor is mixed with the land.<sup>52</sup> Under Locke's labor theory, the Alim owned, and thus only have a potential claim to, lands that were under cultivation or being used in other productive ways. Similarly, the virtue of returning to T2 is that at T2, both the Alim and Alieu occupied the land on an equitable basis because the chief distributed land fairly according to each family's needs.

There are, however, specific obstacles to returning to T1. It has been about two hundred years since the Alim exclusively inhabited Naiku in T1 and just less than one hundred years since the Alieu nation ruled in T2. Due to consistent intermarriage, the two communities are no longer distinct, so returning to T1 is logistically impossible. But, since the Alieu community endures, a community claim is appropriate, and all present members would benefit from the compensation distributed by Layla's government. In contrast, with individual or family claims (or claims of an extinct community), the original claimants are deceased, so the beneficiaries are their heirs, who are potentially numerous and difficult to locate. Consequently, given the significant passage of time, a return to T2 is logistically possible only because the Alieu nation is a surviving, functional entity that can identify its members and distribute compensation for the betterment of all.

Even if a return to T1 were logistically possible, it is not clear whether it would be a morally appropriate solution. Jeremy Waldron's supersession thesis argues that circumstances change such that what was rightfully owned at one

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51. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 3 (5th ed. 2002) (discussing acquisition of property by first possession or "[f]irst come, first served."). See generally Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right"*, 64 NEB. L. REV. 349 (1985) (discussing first possession as the dominant method of establishing property rights and its continued relevance, and examining cases in which first possession is the dominant rule).

52. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 18 (C.B. Macpherson ed., Hackett Publishing 1980) (1690).

point may not be rightfully owned at a later time.<sup>53</sup> He reasons, for example, that if someone steals another person's car, this is a continuing injustice, so compensation provided for the car is not meant to rectify something that happened in the past, but rather to address a present ongoing injustice.<sup>54</sup>

Waldron tempers his claim by acknowledging that various circumstances erode even continuing entitlements. Consider, for instance, two communities—M and O. Each community has its own water source; thus, M has a moral right to exclude O from using M's water source, and O has a moral right to exclude M from use of O's water source. But if a drought dries up M's water source, then O no longer has a moral right to exclude M because the exclusion could lead to mass suffering and death in the M community. Even if M invaded O's waterhole by force prior to the drought, once M's water source has dried up, M has a moral right to continue using O's well because it is immoral to deprive someone of something necessary for her survival. Consequently, the initial injustice perpetrated against O (that is, the invasion) is superseded by circumstance (the drought).<sup>55</sup> In the case of Naiku, the Alim owned land at T1, a time of plenty. At T2, drought and population explosion caused land scarcity—the impetus behind the Alieu nation's attack on the Alim in 1810. Thus, according to the supersession thesis, subsequent circumstances superseded and morally justified the Alieu's use of Alim lands. According to the supersession thesis, returning to the property status quo at T1 and making the Alim the exclusive beneficiaries of the reparations or restoration program would therefore be morally unjust.

Returning to T2 also has its problems, namely evolving land ownership systems. In Naiku, land was not owned individually in fee simple until T3 when the British arrived, divided the land, and deeded each plot. Under the Alieu nation at T2, the chief owned all the land and parceled it out to his subjects according to their needs. The system introduced by the British, however, persists today, so a return to T2 would be problematic because a

53. Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQUIRIES L. 237, 245 (2004) ("[I]n certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice. And if the dispossession does not continue to count as an injustice, then reversion cannot be conceived as an appropriate remedy.").

54. See *id.* at 246 ("Justice may make reference to the past, through principles of desert and Lockean entitlement; but its primary focus is on the present—present-day people, present-day resources—and on the circumstances of the present inasmuch as they affect who should get what.").

55. See Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 23 (1992) ("If, for example, P acquires an oasis in conditions of plenty, she acquires (i) a right to use it freely and exclude others from its use so long as water remains plentiful in the territory, and (ii) a duty to share it with others on some fair basis if ever water becomes scarce. The right that is (permanently) acquired. . . is thus circumstantially sensitive in the actions it licenses.").



different land ownership structure existed then. One way to reconcile the different land ownership systems would be to treat occupancy rights at T2 as ownership rights in fee simple for purposes of the restoration or reparations program.<sup>56</sup> This is what the South African state did in its reparations efforts, for example.

## 2. Return to T3

A return to T3 is the most logistically feasible option if the state intends to compensate individuals rather than groups. When the British arrived in 1910, they introduced a property system based on written deeds and a land registry system. Therefore, determining who owned which parcel of land after T3 would not be nearly as challenging as returning to the period before British conquest. Also, since British settlers were dispossessed in 1996, concerns about identifying who should receive compensation are attenuated because most owners are still alive; if they are not, it will be simpler to track down their heirs than the heirs of those who passed away one hundred or more years ago.

The primary downside of returning to T3 is the unfairness of the extant property distribution. T3 marked the advent of colonialism, which forced Africans into economic and political subordination. Returning to T3 would ignore the injustices of colonialism, cement the consequent illegitimate economic gains accrued by whites, and likely erect a permanent color hierarchy in Naiku. Most importantly, the African majority could resist (if not violently rebel against) a return to T3 because that property status quo was unfair and illegitimate. Leonid Polishchuk argues that “if private property rights are not sufficiently broadly recognized in the society as legitimate and fair, it makes the property rights regime unstable. This instability precludes efficient relocation of assets, and as a result expected efficiency gains of private ownership fail to materialize.”<sup>57</sup> If Naiku wants its system of private property to thrive, the option of returning to T3 is not feasible.

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56. See South Africa Extension of Security of Tenure Act 62 of 1997 (S. Afr.) (providing that the right in land “may have been established by occupation of the land for a substantial period. It is not limited to a right recognized by law. It is not limited to ownership rights, and it may include certain long-term tenancy rights and other occupational rights”); DEP’T OF LAND AFFAIRS, S. AFR., WHITE PAPER ON SOUTH AFRICAN LAND POLICY (1998).

57. Leonid Polishchuk, *Distribution of Assets and Credibility of Property Rights* (Mar. 2, 2009) (unpublished manuscript on file with author).

### C. Option Three: Creating a New Property Status Quo

If implemented correctly, creating a new property status quo has the potential to level the playing field, to equalize wealth, and to promote stability.<sup>58</sup> The state can implement wealth redistribution through the tax and transfer system or by redistributing real property through land equalization, a concept that I develop in this Subpart.

#### 1. Tax and Transfer

Louis Kaplow and Steven Shavell argue that “redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient.”<sup>59</sup> Through the tax and transfer system, the government can broadly reallocate wealth from more financially astute citizens to those with greater financial vulnerability. Redistribution through taxation could include wealth in the form of real, personal, and intangible property, which would allow Naiku to move beyond the narrow problem of land dispossession and to address the larger problem of asset inequality. This is a particularly attractive remedy for nations that have moved from an agrarian-based economy, in which

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58. There is a vast body of literature confirming that land reform can increase economic growth and decrease the potential for instability. See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (2006); RUSSELL KING, *LAND REFORM: A WORLD SURVEY* (1977); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); Daron Acemoglu et al., *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117 Q.J. ECON. 1231 (2002); Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); Timothy Besley & Robin Burgess, *Land Reform, Poverty Reduction, and Growth: Evidence From India*, 115 Q.J. ECON. 389 (2000); Klaus Deininger & Lyn Squire, *New Ways of Looking at Old Issues*, 57 J. DEV. ECON. 259, 287 (1998); Edmundo Flores, *Issues of Land Reform*, 78 J. POL. ECON. 890 (1970); Herschel I. Grossman, *Production, Appropriation, and Land Reform*, 84 AM. ECON. REV. 705 (1994); T. David Mason, “Take Two Acres and Call Me in the Morning”: Is Land Reform a Prescription for Peasant Unrest?, 60 J. POL. 199 (1998); Karl Ove Moene, *Poverty and Landownership*, 82 AM. ECON. REV. 52 (1992); Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577 (1989); Bruce M. Russett, *Inequality and Instability: The Relation of Land Tenure to Politics*, 16 WORLD POL. 442, 453 (1964) (arguing that land reform and stability in underdeveloped countries is a necessary component, though not a guarantee, of political stability); Klaus Deininger & Pedro Olinto, *Asset Distribution, Inequality, and Growth* (World Bank Policy Research Working Paper No. 2375, 2000); Klaus Deininger & Songqing Jin, *Land Rental Markets as an Alternative to Government Reallocation?: Equity and Efficiency Considerations in the Chinese Land Tenure System* 22 (World Bank Policy Research Working Paper No. 2930, 2002); Klaus Deininger, Songqing Jin & Hari K. Nagarajan, *Land Reforms, Poverty Reduction, and Economic Growth: Evidence From India 1* (World Bank Policy Research Working Paper No. 4448, 2007).

59. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994).

access to land is vital, to an industry- or services-based economy, in which access to land is less important.<sup>60</sup>

Taxation is not a perfect solution, however. First, many transitional states have weak tax bureaucracies that are not effectively able to collect taxes and to transfer them to beneficiaries in the form of cash payments or social programs.<sup>61</sup> Second, higher taxation gives the wealthy an incentive to transfer wealth outside of the country and can dampen the incentives to create wealth domestically.<sup>62</sup> Third, while a reparations or restoration program mandates a one-time asset transfer to beneficiaries, tax and transfer programs redistribute wealth gradually, leaving beneficiaries vulnerable to changing political winds over time.<sup>63</sup> Layla's government has an incentive to announce a substantial tax and transfer program to quell present discontent concerning land inequality. But, while her political administration may be genuinely committed to correcting past wrongs using redistributive programs, future administrations may neglect such programs or cancel them altogether.<sup>64</sup>

This is the problem of time inconsistency: A present promise of future performance will not necessarily be honored. Time inconsistency is more likely to be a problem when beneficiaries constitute a politically powerless group because they cannot use the political system to influence future administrations to continue tax and transfer programs. But, problems associated with time inconsistency can even affect politically powerful groups like the Alieu in certain instances. For example, in some countries, international economic organizations, such as the International Monetary Fund, pressure local politicians to drastically reduce government spending in order to balance the country's budgets and thereby increase their capacity to repay international loans.<sup>65</sup> This coercion reduces the amount of funds available for use in the state's redistributive programs.

60. W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (3d ed. 1990) (describing the five stages of economic development).

61. See Richard M. Bird & Eric M. Zolt, *Redistribution Via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627 (2005).

62. *Id.* at 1669.

63. Robin Broadway, Nicolas Marceau & Maurice Marchand, *Investment in Education and the Time Inconsistency of Redistributive Tax Policy*, 63 *ECONOMICA* 171, 186–87 (1996) (describing the effects of time inconsistency in redistributive tax policy on education and wealth disparity).

64. See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 *NYU ANN. SURV. AM. L.* 497, 554 (2003) (discussing the decline in support for affirmative action policies because, with the passage of time, these policies are no longer viewed as a form of reparations for slavery). For further discussion about why affirmative action policies have suffered from time inconsistency, see, for example, BARBARA R. BERGMANN, *IN DEFENSE OF AFFIRMATIVE ACTION* 8 (1996).

65. See James H. Weaver, *What Is Structural Adjustment?*, in *STRUCTURAL ADJUSTMENT: RETROSPECT AND PROSPECT* 8 (Daniel M. Schydowsky ed., 1995) (“Virtually all IMF agreements have an expenditure reducing component.”).

A fourth problem with taxation is that tax and transfer programs will not be sufficient in certain states because the novel attributes of land make its actual transfer essential. In his empirical evaluation of public opinion related to land in South Africa, James Gibson found that “70% . . . of African respondents . . . agreed that ‘Land is special: Having land is more important than having money.’”<sup>66</sup> Land is special because it often has an unquantifiable cultural value that derives from the key role it plays in individual and group identity. Communities are often spiritually and emotionally tied to the land where their ancestors are buried.<sup>67</sup> As a result, although a group or individual may have been dispossessed long ago, dispossessed owners can still have a deep cultural connection to particular parcels of land that does not erode with the passage of time. Land is also unique because it is a highly visible sign of wealth; as a result, perceptions about inequality may not shift without the significant transfer of real property.<sup>68</sup> Additionally, land is special because it is the basis of sovereignty. If an oppressed indigenous majority does not reclaim land that was unjustly dispossessed by its colonizers, political independence can ring hollow.<sup>69</sup> Finally, in some societies, land is the most important means of production, making access to land the primary way to counteract poverty and marginalization.<sup>70</sup> Therefore, while some states can address inequality resulting from past land theft through tax and transfer programs, others require land redistribution.

## 2. Land Redistribution

At T5, the government of Naiku can choose not to pursue a reparations or restoration program and thus dispense with the work of identifying who owned or occupied particular land parcels and the work of locating their heirs. Naiku’s government can instead implement a program to redistribute real property that is not focused on vindicating past rights in land. The objective of land redistribution in Naiku would be to provide greater access to land based

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66. See JAMES L. GIBSON, *OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA* 40 (2009).

67. Waldron, *supra* note 55, at 4, 19–20 (qualifying his theory that property rights may fade with time by noting that property rights may not fade when the dispossessed entity is a tribe or community and the land taken is important to that group’s sense of identity).

68. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (discussing the importance we place on property and clear property rules, given the significance of property ownership as a signal of our economic and social standing).

69. See Kaumbi, *supra* note 17, at 28.

70. Moene, *supra* note 58, at 52, 53, 61 (“The amount of land relative to the population and the demand for labor in urban areas are shown to influence strongly the economic and social impact of land redistribution.”).

on an individual's current socioeconomic status or membership in a previously disadvantaged group. For example, in the redistributive prong of South Africa's land reform strategy—the Land Redistribution for Agricultural Development (LRAD) program—a citizen can qualify for a state grant to purchase land if he or she is an adult from a previously disadvantaged group who intends to engage in full-time farming and can contribute a minimum of R5,000 (\$665) towards the acquisition.<sup>71</sup> To secure land for redistribution, the state can either rely on willing sellers to whom the state pays a mutually agreed-upon price, or in the alternative, it can rely on eminent domain. In the latter case, the state determines the amount of just compensation given the circumstances, and the landowner has the right to appeal to the courts if she thinks the amount is inadequate.

Land equalization is a specialized type of land redistribution program that is best suited for societies in which land is a key economic commodity and in which historical injustice has led to multiple ownership claims to the vast majority of the nation's land parcels. It is a way for a society to wipe the land ownership slate clean and start over. Land equalization places individuals and corporations on equal footing without heeding the Marxist call to abolish all private property.

The difference between land equalization and taxation is that the former focuses on the redistribution of land rather than all wealth. In addition, land equalization mitigates time inconsistency concerns by delivering benefits to individuals and communities in a shorter timeframe. The most important difference between land equalization and land redistribution is their respective moral starting points. The starting point for land equalization is that everyone is entitled only to his or her fair share of land. Under land redistribution, the state assumes current owners are entitled to their current land holdings, so to acquire their land, the state must wait for current owners to willingly sell their land, or the state can invoke eminent domain and pay the current owners just compensation.

A system of land equalization in Naiku might look like this: Every citizen who reaches the age of eighteen by a certain date will be allocated a certain number of points, and each point is worth a certain amount of money. The primary caretakers for people under the age of eighteen will qualify for a set amount of additional points per dependent. The government and corporations

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71. MINISTRY FOR AGRIC. & LAND AFFAIRS, S. AFR., LAND REDISTRIBUTION FOR AGRICULTURAL DEVELOPMENT: A SUB-PROGRAMME OF THE LAND REDISTRIBUTION PROGRAMME (2000), available at <http://www.sarpn.org.za/documents/e0000008/20010604SibandaAppendix.pdf>. The dollar figures were calculated using an exchange rate of 7.5 to 1.

will also receive predetermined amounts of points. Through a participatory process involving government, civil society, and international experts, Naiku will devise a system by which each parcel of land, both publicly and privately owned, will be assigned a certain number of points based on its value. This determination will account for factors such as the price paid, fair market value, existing improvements, circumstances of acquisition, and the strategic importance of the land. These factors will ensure that land acquired in good faith is treated differently than land that was transferred under dubious circumstances.

Imagine that Naiku decides to allocate 100 points to each citizen. If X presently owns land worth 150 points, then she has two choices. She can either pay for the 50 points that she holds in excess of her 100 point allocation or relinquish her title to land worth 50 points in order to bring her land worth down to 100. In either case, to increase accountability, the money or land would be deposited into an internationally monitored land redistribution account. A corporation should receive points based on its contribution to society (determined by the number of people it formally employs, the amount of money invested in society, etc.); unlike individuals, corporations could not receive money from the redistribution account but would be required to pay into it.<sup>72</sup>

In contrast, if Y owns land worth 25 points, she can take a cash or an in-kind payment worth 75 points, acquire land worth 75 points, or receive some combination of both from the redistribution account in order to raise her point total to the allocated 100. In-kind payments are crucial to land equalization because the process of choosing from a wide array of viable options makes citizens active agents in the process of transformation.<sup>73</sup> All in-kind payment options would have predetermined point allocations and could include things like specialized vocational training, higher education for two generations, priority in an existing housing program, and access to subsidized credit.<sup>74</sup> The list of in-kind payments would have to be tailored to the abilities of the government and the needs of its people.<sup>75</sup>

The land equalization process would unfold in two rounds. The purpose of the first round would be to build up the redistribution account. Private citizens who own property in excess of 100 points would decide whether to place land or money into the redistribution account, and the government and corporations would place land in excess of their predetermined allocation of points

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72. The tradeoff is that this may reduce a corporation's ability to create jobs.

73. See Atuahene, *From Reparation to Restoration*, *supra* note 15, at 1447–50 (arguing that choice plays a large role in making people active agents and restoring their visibility).

74. *Id.* at 1448–49.

75. *Id.* at 1448–50.

into the account as well. In the second round of the process, the state would distribute land, money, and in-kind payments to those with less than 100 points. A national lottery would determine the order in which people spent their points. After the initial allocation of property rights through the point system, there would be no restraints on alienation, so people would then be free to trade at will.

Land equalization's main strength is its potential to reorder the property status quo and to level the playing field.<sup>76</sup> It is not designed to restore a prior status quo, so those who have never owned land are not excluded from the redistributive program as they are in restoration or reparations programs. A shortcoming shared by both land equalization and land redistribution programs is that wealth accumulated as a result of past land theft can be transferred to non-land-based investments such as securities, thereby achieving land ownership equity, but not asset equity.<sup>77</sup> Consequently, the state should implement tax and transfer programs alongside land equalization and redistribution programs.

### III. THE PROCESS OF CHOOSING FROM THE AVAILABLE OPTIONS

I have discussed the options available to Naiku and other states that have the political will to address past property theft. In this Part, I will argue that the process a state uses to choose between the available options is vitally important. More specifically, I argue that when choosing between options, the state should use a highly participatory process involving a broad swath of the polity because this will increase the perceived and actual legitimacy of the resulting property status quo. As it stands now, groups of elites often decide how states address past theft.

For example, in South Africa's Land Restitution Program, both the decision to compensate only those who were dispossessed of a right in land after 1913, as well as the process the state would use to compensate citizens, were made primarily with the involvement of political parties and experts with limited direct consultation of average citizens.<sup>78</sup> Likewise, in Kosovo, the decision to provide restitution in-kind or compensation only to persons dispossessed

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76. The strengths of land equalization are discussed in Part II.B, *supra*.

77. The downsides of land equalization are enumerated in Part II.B, *supra*.

78. See Restitution of Land Rights Act 22 of 1994, as amended by Act 48 of 2003, §§ 2(1)(b), 2(3), 4 (S. Afr.); Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, 3 REV. CONST. STUD. 18, 20 (1996).



between March 23, 1989, and March 24, 1999, was made by international actors, with limited involvement of average citizens.<sup>79</sup>

States that limit the participation of average citizens in their decisionmaking processes fail to avail themselves of several advantages of broad participation. First, because one primary purpose of addressing past theft is to increase the legitimacy of the state and present property arrangements, curtailing public participation in the process can place the perceived legitimacy of the program at risk. The evidence shows that people are likely to believe that the outcome of a legal process is legitimate even if it is unfavorable to them, as long as the process involved fair procedures and was conducted by the appropriate authorities;<sup>80</sup> Tom Tyler and others have proven that “the opportunity to express one’s opinions and arguments, the chance to tell one’s own side of the story, is a potent factor in enhancing the experience of procedural justice, even when the opportunity for expression really accomplishes nothing outside the procedural relationship.”<sup>81</sup>

Second, true participation results in the devolution of power to average citizens and hence serves as a check on the power of traditional decisionmakers. For example, if the process is transparent and highly participatory, it is more difficult for program administrators to perform corrupt acts because people have been allowed behind the closed doors and are actively watching. Third, a public conversation can help to ground citizens’ expectations in reality. Some transitional states cannot afford to give everyone compensation, so the public conversation can provide people with information about exactly what resources are available and what programs the state can offer given its limited resources. Fourth, direct citizen participation introduces a unique perspective not available when the decisionmaking process is dominated by elites. A broadly representative group of people is better suited than elites to know the

79. See On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, U.N. MIK Reg. No. 2000/60, § 3 (Oct. 31, 2000).

80. See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115, 149, 162–64 (1992). See generally JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

81. *Id.*; see also Robert Folger, *Distributive and Procedural Justice: Combined Impact of “Voice” and Improvement on Experienced Inequality*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977) (describing an experiment involving distribution of monetary rewards by a manager and finding that, on a measure of procedural fairness, “voice workers” (workers who expressed opinions on fairness) expressed more satisfaction with the allocation process than “mute workers” (workers who gave no statements of their opinions)); Stephen LaTour, *Determinants of Participant and Observer Satisfaction With Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOL. 1531 (1978) (finding that the satisfaction with an adjudicative procedure was impacted by procedural fairness and the opportunity for presentation of all relevant information to the decisionmaker).

population's preferences. Lastly, democracy is strengthened when people participate in deciding issues that directly affect them.<sup>82</sup>

When states decide to address past theft through an inclusive, highly participatory process, they must be ready to navigate around several potential pitfalls. First, the process can become time-consuming given the number of people who should be involved and the challenges of synthesizing the information received. But, by investing time in participatory procedures on the front end, the state can receive the dividends in the form of increased legitimacy at the back end.<sup>83</sup> Second, meaningful public participation requires significant resources that many cash-strapped transitional states cannot provide. Thus, it is crucial for states to involve civil society and international organizations in managing the process, which can reduce state expenditures and increase transparency. A third potential drawback of a highly participatory process is the difficulty of facilitating a conversation that adequately balances participation and deliberation precisely because participation has the potential to undermine deliberation. A common solution to the deliberation-participation paradox is for the organizing entity to choose community representatives.<sup>84</sup> But, there is no guarantee that the people the entity chooses will be accountable to, or representative of, the larger public.

Fourth, a public conversation about past property theft could serve to inflame extant divisions and ethnic- or religious-based hatred lurking just below the surface. But, it is not necessarily bad that talking about past injustices has the potential to cause latent animosities to boil up to the surface, so long as the conversation leads to a solution that will assuage the ethnic rancor moving forward. Fifth, the very concern a public conversation is intended to address—a lack of legitimacy—may prevent people from participating in the decisionmaking process. If people are discontent because of an illegitimate property distribution, this could result in apathy and disengagement rather than a determination to find a solution. Lastly, and most problematically, even if a state manages to facilitate a meaningful public conversation, there is no guarantee that the output of the conversation will affect the ultimate decision. The entire process can devolve into a propaganda campaign designed to give the illusion of power sharing when in actuality the state is carrying on with

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82. See CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 31 (1970).

83. *Id.* at 60–61 (citing the Port Townsend Terminal case and the time and money the government lost by only consulting organized groups and excluding others). For a discussion about participatory procedures, see Atuahene, *Things Fall Apart*, *supra* note 15, at 829, 859–65.

84. Bruce W. McClendon & J.A. Lewis, *Goals for Corpus Christi: Citizen Participation in Planning*, 74 NAT'L CIVIC REV. 72 (1985).

business as usual, and the decisions are being made by those in power with no regard for what average citizens desire.<sup>85</sup>

While the importance of involving the public in the political decisionmaking process is largely undisputed in the literature,<sup>86</sup> the level of control the public should have in the decisionmaking process is a very controversial matter. At the very basic level of participation, power holders aim to educate the public about options, rights, and responsibilities, but information flows in one direction.<sup>87</sup> This is not true participation. A moderate participation level involves token participation from certain stakeholders who are informed or consulted, but the present power holders are not forced or inclined to truly integrate the knowledge and suggestions of these participants.<sup>88</sup> Alternatively, a few handpicked citizens who are not accountable to their communities may be invited to join a decisionmaking body. In both situations, the community has no true opportunity to decide. A high participation level is achieved when participants exercise a significant amount of control over both the process and outcome;<sup>89</sup> this is the type of public participation envisioned in this Article.

To achieve a high participation level, a state must use a bottom-up approach for defining the relevant public groups, which may include stakeholders such as political parties, bureaucrats, community organizations, average citizens, and experts.<sup>90</sup> To ensure significant buy-in, the state must include both organized groups and citizens not affiliated with particular groups.<sup>91</sup> The end goal is to make the final decision about how to address past property violations in collaboration with a diverse, representative group of citizens.

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85. Cheryl Simrell King, Kathryn M. Feltey & Bridget O'Neill Susel, *The Question of Participation: Toward Authentic Public Participation in Public Administration*, 58 PUBLIC ADMIN. REV. 317, 322 (1998) (using focus groups in northeast Ohio—comprised of administrators and citizens—to examine the perceived effectiveness of attempts to incorporate public participation in administrative decisionmaking).

86. See Ortwin Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 POL'Y SCI. 189 (1993).

87. See Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLANNING ASS'N 216, 217–18 (1969).

88. *Id.* at 217, 219–20.

89. *Id.* at 217, 221–23.

90. See JOHN CLAYTON THOMAS, PUBLIC PARTICIPATION IN PUBLIC DECISIONS: NEW SKILLS AND STRATEGIES FOR PUBLIC MANAGERS 61–62 (1995) (noting how the state must not choose to engage only certain groups while excluding others with contrary views).

91. Before inviting organized groups, however, the state must explore how democratic each group is and whom each one represents. See Walter A. Rosenbaum, *The Paradoxes of Public Participation*, 8 ADMIN. & SOC'Y 355, 372 (1976) (“An almost universal finding in participation studies is that groups or individuals active in such programs (1) represent organized interests likely to have been previously active in agency affairs, (2) include a large component of spokesmen for other government agencies, (3) represent a rather limited range of potential publics affected by programs, and (4) tend toward the well-educated, affluent middle- to upper-class individuals.”).

## CONCLUSION

One of the most important issues facing transitional states is what they should do about past property violations. There is, however, a paucity of scholarship that explores the options a transitional state has. I examined the potential courses of action for a hypothetical country called Naiku in order to highlight the challenges many transitional states confront. Countries like Naiku, with the political will to address past land theft, have three options: (1) maintaining the present property status quo, (2) fully or partially returning to a prior property status quo, or (3) creating a new property status quo altogether. The main conclusion of this Article is that no matter which option a transitional state chooses, its decisionmaking process is crucial. Ensuring legitimacy and lasting results requires a well-informed, inclusive public dialogue rather than a less time-consuming, less costly process involving only elites.

For example, a state may decide to maintain the current property status quo because it does not have the bureaucratic capacity to redistribute property. While this is an important decision, what is more important is the participatory nature of the decisionmaking process. If the property status quo has been sullied by asset-based inequalities resulting, in large part, from past land dispossession, then a top-down decision not to reorder property arrangements can result in widespread resentment and feelings of injustice. In contrast, if the decision is a result of a highly inclusive, public dialogue, studies show that the population will likely perceive it as just.<sup>92</sup>

In sum, this Article aims to further the literature about how transitional states can deal with past property violations. While I created the nation of Naiku to streamline the discussion, the problems that Naiku faces are very real and deserve further intellectual inquiry.

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92. Tyler & Lind, *supra* note 80, at 162–64.

# PROPERTY RIGHTS & THE DEMANDS OF TRANSFORMATION

*Bernadette Atuahene\**

I. INTRODUCTION .....	766
A. <i>Literature Review</i> .....	769
B. <i>Developing the Transformative Conception</i> .....	771
II. PAST PROPERTY THEFT CAN DESTABILIZE THE CURRENT STATE: THE CASE OF SOUTHERN AFRICA .....	773
A. <i>The History of Property Theft in Southern Africa</i> .....	776
B. <i>The Case for Land Reform in Southern Africa</i> .....	778
C. <i>Beyond Southern Africa: A Global Perspective</i> .....	780
III. THE CLASSICAL CONCEPTION .....	782
A. <i>The Classical Conception Defined</i> .....	782
B. <i>The Classical Conception Applied</i> .....	784
1. The Implementation of the South African Constitution's Land Restitution Provision .....	784
2. The Implementation of the South African Constitution's Eminent Domain Provision .....	785
C. <i>The Classical Conception Critiqued</i> .....	791
1. Weaknesses of Negotiated Land Reform .....	791
2. The Classical Conception Is Not Justified When the Legitimacy of Property Rights Is in Question .....	795
IV. THE TRANSFORMATIVE CONCEPTION .....	800
A. <i>The Transformative Conception Defined</i> .....	800
B. <i>The Transformative Conception Applied</i> .....	804
1. Automatic Right of First Refusal .....	805
2. Eminent Domain .....	806
3. Mandatory Land Rentals .....	808
C. <i>The Transformative Conception Critiqued</i> .....	811

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V. THE LIFESPAN OF THE TRANSFORMATIVE CONCEPTION .....	815
VI. CONCLUSION .....	818

## I. INTRODUCTION

When you own something you feel proud that you have got something, but when they take that away from you, you feel naked. You got nothing; there is nothing you have . . . I personally have got nothing to say “that was what I got from my grandfather or my mother or my grandpa or pa.” I had nothing; they took all what I had . . . one thing that you’ve got to realize is that the apartheid government did a lot of damage to us, the Blacks in South Africa. They did a lot of damage.<sup>1</sup>

This is one of many poignant stories told by black South Africans who were arbitrarily and brutally deprived of their property during the apartheid regime.<sup>2</sup> In many ways the South African experience is not unique. Past regimes in several other countries have also systematically took real property from one group and gave it to another. These countries include Zimbabwe, Namibia, US, Hungary, Israel, Nicaragua, Lithuania, Australia, Estonia, Canada, Latvia, Namibia, Kosovo, and Germany.<sup>3</sup> Most

1. See Confidential Interview with two former residents of Kilnerton and one former resident of Die Eland who were dispossessed under Apartheid, in Johannesburg and Cape Town, S. Afr. (2008).

2. For a history of land dispossession in South Africa see LEONARD THOMPSON, *THE HISTORY OF SOUTH AFRICA* (3d ed. 2001). All references to “property” in this Article refer to real property and not other forms of property such as cash, securities, or intangible property. Property is stolen or dispossessed when certain persons or communities are systematically deprived of property with no just compensation and this leads to a generalized belief in society that most owners would not own their property today but for these uncompensated takings, see *infra* Section II.

3. The Communist regime took property from the elites and redistributed it to peasants in Nicaragua, Hungary, Lithuania, Estonia, and Latvia. Europeans took property away from natives and gave it to settlers in the US, Canada, Australia, South Africa, Namibia, and Zimbabwe. During World War II, the Nazi regime took property from Jews in Hungary and Germany. The Israelis took property from the Palestinians during the Arab-Israeli war. Serbs and Albanians took property from each other during the Kosovo war. See, e.g., Nicolas J. Gutierrez, Jr., *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT’L L. 111, 133–42 (1995) (discussing historical dispossession of property by the Soviet regime in the Baltic Republics, Germany, Hungary, and Nicaragua, as well as possible restitution schemes); Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA 255, 261–64 (Margaret C. Lee & Karen Colvard eds., 2003); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992) (“The history of white settlers’ dealings with the aboriginal peoples of Australia, New Zealand, and North America is largely a history of injustice. People, or whole peoples, were attacked, defrauded, and expropriated; their lands were stolen and their lives were ruined.”); Mark Blacksell & Karl Martin Born,

interestingly, in a subset of these countries, past property dispossession has greatly contributed to present-day inequality and has become a politically explosive issue that can cause backlash.<sup>4</sup> Backlash is a violent, collective reaction to a social, political, or economic development or event.<sup>5</sup> In this Article, I explore the issue of backlash in the context of Southern Africa.

To sow the poisonous seeds of white rule in South Africa, Zimbabwe, and Namibia, the colonial and apartheid governments systematically stripped the African majority of nearly all of their native land and gave ownership of it to the white minority.<sup>6</sup> Consequently, at independence, whites in Southern Africa owned upwards of eighty percent of the fertile agricultural land although they constituted less than ten percent of the population.<sup>7</sup> Even though it has been more than fifteen years since independence, the African majority in Namibia and South Africa remains landless and impoverished while the affluent white

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*Private Property Restitution: The Geographical Consequences of Official Government Policies in Central and Eastern Europe*, 168 GEOGRAPHICAL J. 178, 182 (2002) (discussing property takings by the Nazis in Germany, Hungary, Poland, Bulgaria, and Romania); Eyal Benvenisti & Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 AM. J. OF INT'L L. 295, 297–99 (exploring the private property aspect of the Israeli-Palestinian conflict and the historical background leading to the displacement of Palestinian refugees); Bernadette Atuahene, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Property Theft*, 51 ARIZ. L. REV. 829, 849 & n.87 (2009) (citing UNMIK Reg. No. 2000/60, ¶ 2.2, UNMIK/REG/200/60 (Oct. 31, 2000), available at [http://www.unmikonline.org/regulations/2000/re2000\\_60.htm](http://www.unmikonline.org/regulations/2000/re2000_60.htm)).

4. Atuahene, *supra* note 3, at 838–41, 836 n.28.

5. See *id.* at 838–41 (establishing the link between inequality and property-related disobedience).

6. For a history of land dispossession in Southern Africa, see NIGEL WORDEN, *THE MAKING OF MODERN SOUTH AFRICA* 6–37 (3d ed. 2000). See also ERIKA VON WIETERSHEIM, *THIS LAND IS MY LAND! MOTIONS AND EMOTIONS AROUND LAND REFORM IN NAMIBIA* 47–48 (2008); Neil H. Thomas, *Land Reform in Zimbabwe*, 24 THIRD WORLD Q. 691, 700–02 (2003) (discussing the redistribution of land under President Mugabe); CRAIG RICHARDSON, *THE COLLAPSE OF ZIMBABWE IN THE WAKE OF THE 2000–2003 LAND REFORMS* (2004).

7. See Johan van Tooyen & Bongiwe Njobe-Mbuli, *Access to Land: Selecting the Beneficiaries*, in *AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKETS AND MECHANISMS* 461, 461 (J. van Zyl et al. eds., 1996) (“Land distribution in South Africa is highly skewed. Approximately 87 per cent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 per cent of the population, which is predominantly black, live on 13 per cent of the land in high density areas—the former homelands.”). The same is true in Namibia and it was true in Zimbabwe prior to the tumultuous land reform program in 2002. See JS Juana, *A Quantitative Analysis of Zimbabwe’s Land Reform Policy: An Application of Zimbabwe SAM Multipliers*, 45 AGREKON 294, 294 (2006) (“During the colonial era, land was distributed on racial lines, with approximately 4,660 large-scale predominantly white commercial farmers owning about 14.8 million hectares and about 6 million black smallholder farmers owning about 16.4 million hectares in mainly low agricultural potential areas.”); Uazuva Kaumbi, *Namibia: The Land is Ours!*, 426 NEW AFR. 28, 28 (2004) (“[L]ess than 10% of the people own more than 80% of the commercial farmland as a result of colonial theft[.]”).

minority still owns the majority of the land.<sup>8</sup> Consequently, there is a deep discontent that has been taking root among the African majority. If past property theft is not addressed in a timely fashion, the possibility of severe backlash is high. The world has already witnessed this possibility realized in Zimbabwe.<sup>9</sup>

Countries like those in Southern Africa will never emerge from the indomitable shadow of inequity and the serious threat of backlash unless real property is redistributed; but, the conception of property these countries explicitly or implicitly adopt can adversely affect their ability to redistribute. Under the classical conception of real property (the classical conception), redistribution is difficult because title deed holders are a privileged group who are given nearly absolute property protection.<sup>10</sup> Strangely, the classical conception is ascendant in many transitional states where redistribution is essential.<sup>11</sup> The specific question this Article addresses is: for states where past property dispossession has the serious potential to cause backlash and destabilize the current state, is the classical conception appropriate or do these states require an alternative conception of property? This Article is an attempt to map out a transformative conception of real property (the transformative conception) that facilitates property redistribution, which bolsters fairness and stability.

The research question I explore is concerned exclusively with states where past property dispossession has the potential to cause backlash and destabilize the current state. Nevertheless, on moral grounds, past theft should be remediated even if there is no threat of backlash. In reality, remediation often does not occur, however, because those with an interest in maintaining the current property distribution are at odds with those with an interest in transforming it. But, when the failure to address past theft through property redistribution can cause serious backlash, this creates a unique moment of interest convergence, where opponents and supporters of redistribution are most likely to work together to pursue a common goal—stability.<sup>12</sup>

8. See DEP'T OF LAND AFF. ANN. REP. 1 APRIL 2006—31 MARCH 2007 9 (2007) (S. Afr.) (acknowledging that the South African Department of Land Affairs had distributed only 4.3% of the target, which was to transfer 30% of white-owned agricultural land by 2014); SIDNEY L. HARRING & WILLEM ODENDAAL, "NO RESETTLEMENT AVAILABLE": AN ASSESSMENT OF THE EXPROPRIATION PRINCIPLE AND ITS IMPACT ON LAND REFORM IN NAMIBIA 29 (2007) (explaining that the Namibian government had exercised its expropriation powers only eight times since 2004).

9. For more about Zimbabwe's fast track program, see RICHARDSON, *supra* note 6; Thomas, *supra* note 6, at 700–02.

10. See *infra* Part III.A.

11. See *infra* Part III.C.1.

12. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).



### A. Literature Review

Although the research question this Article explores has a great deal of theoretical and practical importance, legal scholars have not directly addressed it. There is, for example, a substantial legal literature that examines whether it is wise to provide compensation to remediate past injustices experienced by various minority groups in the United States.<sup>13</sup> The philosophical literature has explored whether compensation for past wrongs is justified when there is a significant passage of time.<sup>14</sup> There is an expansive literature that summarizes and critiques specific efforts to vindicate the rights of dispossessed owners in a range of transitional states.<sup>15</sup> There are, however, no articles that specifically explore whether states, where land reform is necessary to avoid backlash, require a different conception of property.

This Article builds upon the legal literature about backlash created by Mark Roe, Amy Chua, and myself. Roe argues that, when economic-based political turmoil is likely, scholars must rethink the emphasis that law and economics places on analyzing the productive efficiency of a rule or institution.<sup>16</sup> He observes that:

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13. See, e.g., ERIC K. YAMAMOTO ET AL., *CIVIL LIBERTIES, NATIONAL SECURITY, AND THE JAPANESE AMERICAN INTERNMENT: RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001); William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 52–69 (2005); Emma Coleman Jordan, *The Non-Monetary Value of Reparations Rhetoric*, 6 AFR.-AM. L. & POL'Y REP. 21 (2004) (discussing the importance of reparations for black Americans and potential challenges to reparations); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 388–97 (1987); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

14. See, e.g., Bernard R. Boxill, *A Lockean Argument for Black Reparations*, 7 J. ETHICS 63, 65–66 (2003) (arguing that the passage of time is irrelevant to whether compensation for past wrongs is due and that there must be an unbroken causal chain to the detriment of the present-day group); Waldron, *supra* note 3, at 15–20 (arguing that previous owner's rights to property may fade with the passage of time and when the person no longer attaches meaningful expectations to the property by way of autonomy and planning); Jon Elster, *On Doing What One Can*, 1 E. EUR. CONST. REV. 15 (1992) (arguing that compensation after a significant passage of time is appropriate only when all guilty parties can be targeted, without inconsistent punishment).

15. See, e.g., *CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY* (Medard R. Rwelamira & Gerhard Werle eds., 1996); *RESTITUTION PAST, PRESENT AND FUTURE* (Cornish et al. eds., 1998); *RETURNING HOME: HOUSING AND PROPERTY RESTORATION RIGHTS OF REFUGEES AND DISPLACED PERSONS* (Scott Leckie ed., 2003); Ruth Hall, *Land Restitution in South Africa: Rights, Development, and the Restrained State*, 38 CAN. J. AFR. STUD. 654 (2004); Istvan Pogany, *The Restitution of Former Jewish-Owned Property and Related Schemes of Compensation in Hungary*, 4 EUR. PUB. L. 211 (1998); Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999); Richard W. Crowder, Comment, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 IND. INT'L & COMP. L. REV. 237 (1994).

16. See Mark Roe, *Backlash*, 98 COLUM. L. REV. 217, 239 (1998).

Voters may see market arrangements as unfair, leading them to lash back and disrupt otherwise efficient arrangements. To quell this backlash, inefficient legal structures may arise and survive, despite the fact that they could not withstand a normal efficiency critique. The prospect of backlash—or of strategically tempering otherwise efficient rules and institutions to finesse away a more destructive backlash—complicates a law and economics inquiry.<sup>17</sup>

While Roe gives examples of how a state could strategically temper efficient rules or institutions to stave off backlash in the context of bankruptcy law,<sup>18</sup> I apply his insights to the arena of property law. I develop the transformative conception, which is a mechanism for strategically tempering efficient rules to facilitate the timely reallocation of property rights in an effort to promote fairness, avert destructive backlash, and increase the property regime's efficiency.<sup>19</sup>

Amy Chua picks up on this theme of backlash in her book, *World on Fire*, where she examines how the mix of markets, democracy, and ethnicity can produce an explosive brand of backlash.<sup>20</sup> She argues:

[m]arkets concentrate wealth, often spectacular wealth, in the hands of the market-dominant minority, while democracy increases the political power of the impoverished majority. In these circumstances the pursuit of free market democracy becomes an engine of potentially catastrophic ethnonationalism, pitting a frustrated 'indigenous' majority, easily aroused by opportunistic vote-seeking politicians, against a resented, wealthy ethnic minority.<sup>21</sup>

Chua's analysis is particularly relevant to the land crisis in Southern Africa because most present owners are whites (an ethnically distinct market-dominant minority) while most dispossessed owners are Africans

17. *Id.* at 217.

18. *Id.* at 235–37 (arguing that when political backlash looms large, economically unwise but politically astute policies that will abate the backlash can increase overall economic efficiency).

19. See Leonid Polishchuk, *Distribution of Assets and Credibility of Property Rights*, Ctr. for Institutional Reform and the Informal Sector and New Econ. School (unpublished manuscript on file with author) (“[I]f private property rights are not sufficiently broadly recognized in the society as legitimate and fair, it makes a property rights regime unstable. This instability precludes efficient relocation of assets, and as a result expected efficiency gains of private ownership fail to materialize.”).

20. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 6–7 (2003) [hereinafter *WORLD ON FIRE*]; see also Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward A New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998).

21. *WORLD ON FIRE*, *supra* note 20, at 6–7.

(an impoverished yet politically empowered majority). I build upon Chua's work by explaining how strict adherence to the classical conception can prevent the equitable redistribution of property and ignite backlash.<sup>22</sup> I also move beyond Chua's analysis of the problem to propose a solution—the transformative conception.

I further added to this important literature about backlash in an article entitled, *Things Fall Apart: The Illegitimacy of Property Rights in the Context of Past Theft (Things Fall Apart)*.<sup>23</sup> That article explored the question: How does a state avoid present-day property-related disobedience when past property theft causes a significant number of people to believe that the current property distribution is illegitimate?<sup>24</sup> I argued that the most effective way to do this is to implement a Legitimacy Enhancing Compensation Program (LECP). The main contribution of *Things Fall Apart* was to develop a rational choice model that established the process a state should use to decide when to implement a LECP to avoid backlash.<sup>25</sup> This Article builds on my previous work by developing the transformative conception, which gives the state the legal framework necessary to expeditiously and efficiently implement a LECP.

### B. *Developing the Transformative Conception*

The transformative conception's central purpose is to strike the correct balance between defending the property rights of current owners and defending the property rights of unjustly dispossessed past owners by facilitating land reform. The state can give current owners varying levels of property protection. On one side of the spectrum is the classical conception and its call for minimal government intrusion into private property. But, if the state gives current owners' property rights a certain sanctity, this makes redistributive measures prohibitively expensive or so cumbersome that the pace of transfer is dangerously slow. This is illustrated by the deep discontent brewing in both Namibia and South Africa around the torpid pace of land reform because of the state's commitment to the classical conception and market-led land reform.<sup>26</sup>

On the other side of the spectrum is when private property rights have scant protection across the board or a select group is subject to

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22. The willing-seller/willing-buyer principle—also known as negotiated land reform—is a market-led approach to land reform where the state can only acquire property from willing sellers and refrains from using its eminent domain power to expropriate land. See discussion *infra* Part III.C.1.

23. See Atuahene, *supra* note 3.

24. *Id.*

25. *Id.* at 851–59 (arguing states should implement a LECP before reaching a legitimacy deficit. A legitimacy deficit is when the cost of illegitimacy begins to outweigh the cost of a LECP).

26. See *infra* Part II.

expropriation without compensation. Zimbabwe's chaotic land reform program in 2000 is a perfect case in point because the state expropriated white-owned farms without compensation.<sup>27</sup> The empirical evidence clearly demonstrates that expropriation without compensation discourages investment mainly because entrepreneurs cannot reap the fruits of their investment.<sup>28</sup> We need a middle ground between the two extremes where permissible redistribution does not morph into impermissible confiscation. This is the void the transformative conception attempts to fill by facilitating land reform while not falling prey to the well documented perils of nominal property protection.

I begin, in Part II, by giving a brief historical background that explains why past property theft threatens to destabilize certain states today. I use Namibia, South Africa, and Zimbabwe as my primary examples. Once the stage is set, I then move to Part III, where I define the classical conception's central principles. I provide two illustrations of the classical conception and explain why it is inadequate when past theft can lead to backlash. I then turn, in Part IV, to explain the transformative conception's defining principles. I provide concrete examples of redistributive policies—consistent with the transformative conception but not with the classical conception—that can facilitate timely land reform. After reviewing the potential criticisms of the transformative conception, I conclude that although it is not perfect, the transformative conception is a significant improvement over the classical conception for certain states that decide to address past land dispossession. In Part V, I emphasize the limitations of the transformative conception. I argue that the transformative conception is not suitable under all circumstances and when it is appropriate, I suggest a method for determining its appropriate duration. Part VI concludes by emphasizing that the transformative conception is more appropriate than the classical conception in situations where redistribution of real property is essential for promoting justice and stability.

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27. See, e.g., Thomas, *supra* note 6, at 700–02.

28. See Stijn Claessens & Luc Laeven, *Financial Development, Property Rights, and Growth*, 58 J. FIN. 2401 (2003) (finding secure property rights increase a firm's willingness to allocate resources to property, which in turn leads to overall economic growth); Stein Holden & Hailu Yohannes, *Land Redistribution, Tenure Insecurity, and Intensity of Production: A Study of Farm Households in Southern Ethiopia*, 78 LAND ECON. 573, 574–75 (2002) (describing observed relationships between willingness of landowners to make long-term improvements and tenure insecurity based on inconsistent land reform efforts in Ethiopia).

## II. PAST PROPERTY THEFT CAN DESTABILIZE THE CURRENT STATE: THE CASE OF SOUTHERN AFRICA

In this section, I give a brief history of Southern Africa to demonstrate why land theft, which occurred centuries or decades ago, still deeply embitters the African majority and has great potential to cause backlash. Although I focus on the Southern African case, there are other nations, such as Nicaragua and Kosovo, where the past confiscation of property could also potentially lead to backlash.

Property is stolen or dispossessed when certain persons or communities are systematically deprived of property with no just compensation and this leads to a generalized belief in society that most owners would not own their property today but for these uncompensated takings.<sup>29</sup> Under these circumstances, the population is likely to perceive the existing property distribution as illegitimate and this perception can serve as the basis for property disobedience and backlash. This definition is narrow and meant to cover only the cases in which past theft can significantly contribute to present-day backlash. It is not meant to diminish the importance of other instances where there were morally wrong takings of property that do not jeopardize current stability.

For example, this Article's definition of stolen or dispossessed property includes countries similarly situated to Southern Africa, but it does not cover countries like the US. This is because although the US government usurped land from Native Americans during Conquest, there is no generalized belief that I, for example, would not own my home in Chicago today but for past theft. For the majority of Americans, land usurped from Native Americans is a sordid but closed chapter in our country's history. Consequently, it is not currently a politically destabilizing issue. In contrast, in Namibia, South Africa, and Zimbabwe there is a generalized belief that present owners would not own their property today if not for the systematic confiscation of property in the past.<sup>30</sup> Moreover, past property theft can potentially destabilize these nations because it plays a prominent role in the present collective memory, the connection between current inequality and past theft is pronounced, the majority group was dispossessed by the minority group, and the state has a weak capacity or willingness to prevent or subdue destructive backlash.

29. See *supra* note 2.

30. See, e.g., JAMES L. GIBSON, *OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA* 46 (2009) ("Among black South Africans, the most widely accepted factor accounting for land inequality is the advantages whites still hold as a result of the apartheid past: 77% of blacks consider this to be either an important or very important cause of land injustice. Coloured people hold similar views (80%), as do those of Asian origin (63%). Whites, as usual, are the exception: Only 34% attribute land inequality to the apartheid past.").

In Southern Africa, the issue of past property theft is a time bomb waiting to explode. Uazuva Kaumbi, the Namibia Broadcasting Corporation Board Chairman, captured the mood of his countrymen when he noted that:

[t]he smoldering land question in Namibia will burst into a bonfire unless and until answers are provided to the satisfaction of the indigenous people who are historically the real owners of the land. Land is the most important means of production, and without an equitable restoration to its real owners, independence will remain a mere paper tiger.”<sup>31</sup>

Past property theft has the potential to cause backlash and potentially destabilize the Namibian state.

Similarly, a study done by James Gibson concludes that past theft has the potential to cause backlash and destabilize South Africa.<sup>32</sup> In one of the most ambitious and impressive public opinion studies done on land to date, Gibson surveyed 3,700 South Africans and found that eighty five percent of black respondents believe that “[m]ost land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today.”<sup>33</sup> In contrast, only eight percent of whites held the same view.<sup>34</sup> His most troubling finding is that two of every three blacks agreed that “land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country.”<sup>35</sup> Ninety one percent of whites disagreed with this statement.<sup>36</sup> Gibson argues that, in South Africa, “[l]and issues have all of the characteristics required to become volatile and destabilizing, should effective political leadership emerge to mobilize the discontented.”<sup>37</sup>

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31. See Kaumbi, *supra* note 7, at 28. See also Henning Melber, *Land & Politics in Namibia*, 32 REV. AFR. POL. ECON. 135, 141 (2005) (“[T]he land issue might be—as long as it remains unresolved for a large part of the population—a social factor to be easily activated by those competing for political power, material gains and seeking popular support.”); Justine Hunter, *Interviews on Land Reform in Namibia*, in WHO SHOULD OWN THE LAND? ANALYSES AND VIEWS ON LAND REFORM AND THE LAND QUESTION IN NAMIBIA AND SOUTHERN AFRICA 109, 117–21 (interviewing various government officials in Namibia about land reform, who all agree that land reform is an emotional issue with the potential to create social unrest); WIET-ERSHEIM, *supra* note 6, at 54 (“The unequal distribution of land became a symbol for all injustice—even when similar or even greater injustices happened in other economic sectors—and in the end the return of land epitomized the return of true independence.”).

32. See GIBSON, *supra* note 30, at 31–32.

33. See *id.* (internal quotation marks omitted).

34. *Id.* at 31.

35. *Id.* at 32 (internal quotation marks omitted).

36. *Id.*

37. *Id.* at 84.

In Zimbabwe, the volatile issue of past property theft is one primary cause of Zimbabwe's present destabilization.<sup>38</sup> The unjust, colonial land distribution that gave whites ownership of upwards of eighty percent of the fertile agricultural land was a source of deep resentment and frustration for Africans. After Robert Mugabe, Zimbabwe's president since its independence, led several unsuccessful attempts to fundamentally transform the property distribution, Africans in Zimbabwe (especially veterans of the independence movement) became increasingly unwilling to countenance the injustice any longer.<sup>39</sup> In a desperate attempt to rapidly deliver on the promise of land reform and retain power, Mugabe's government supported a hasty and violent land reform program in 2000.<sup>40</sup> Although the reform program redistributed eighty percent of commercial farmland from whites to blacks, it is not clear which blacks benefited<sup>41</sup>—those with ties to Mugabe's political party or those in need of land.<sup>42</sup>

Mugabe's program did make landownership more equitable; but, because it was implemented in a chaotic, violent manner, this came at an enormous cost.<sup>43</sup> By 2005, agricultural output, which is the mainstay of the economy, declined by thirty percent. The number of large, fully operational farms plummeted from 3217 to 250 partially operational farms.<sup>44</sup> The average annual rate of Zimbabwe's gross domestic product (GDP) growth from 2000 to 2006 was negative 5.6%, whereas in the preceding seven years (1993–1999) there was positive growth of 3.3%.<sup>45</sup> After Mugabe implemented his violent brand of land reform, inflation has been rampant and reached its peak of 500,000,000,000% in late 2008, before the government abandoned the Zimbabwean Dollar in favor

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38. Thomas, *supra* note 6, at 694–95.

39. *Id.* at 700.

40. *Id.* at 700–02.

41. See Int'l Monetary Fund [IMF], *Zimbabwe: Selected Issues and Statistical Appendix*, ¶¶ 14–17, Country Rep. No. 05/359 (Oct. 2005) (prepared by Sharmini Coorey et al.).

42. The lack of transparency has made it difficult to determine who is presently residing on confiscated farms and thus who benefited from the land reform. See *id.* ¶ 23.

43. Samantha Power, *How To Kill A Country*, THE ATLANTIC, Dec. 2003, <http://www.theatlantic.com/magazine/archive/2003/12/how-to-kill-a-country/2845/> (detailing Zimbabwe's economic decline and characterizing Mugabe's fast-track program as a "violent, country-wide land grab"); Heather Boyle, *The Land Problem: What Does the Future Hold for South Africa's Land Reform Program?*, 11 IND. INT'L & COMP. L. REV. 665, 666 (2001) ("In neighboring Zimbabwe, widespread violence, rampant theft, and farm invasions plague Zimbabwe's land reform program.").

44. IMF, *supra* note 41, ¶ 16.

45. U.N. Stat. Div., GDP Annual Rate of Growth (World Bank Estimates), <http://unstats.un.org/unsd/databases.htm> (search for "Zimbabwe GDP growth"; follow "GDP annual rate of growth (World Bank estimates)" hyperlink) (last visited Jul. 5, 2010) (showing Zimbabwe's annual GDP growth percentages from 1961 to 2006).

of a multi-currency system.<sup>46</sup> Today, Zimbabwe, a once great nation, has deteriorated to the point where shortages of basic goods are commonplace.<sup>47</sup>

Zimbabwe has provided the international community with an evocative portrait of how the failure to successfully address past property theft can lead to backlash and destabilize a state. The African majorities in South Africa and Namibia are also becoming dangerously impatient and if swift action is not taken to redistribute land, these countries may go the way of Zimbabwe. The following subsection explains how the region of Southern Africa came to this point.

#### A. *The History of Property Theft in Southern Africa*

During the pre-colonial period in Namibia, South Africa, and Zimbabwe, Africans used land in a variety of ways. Some ethnic groups were stationary, cultivated the land and raised livestock while others were nomadic pastoralists or hunters and gatherers.<sup>48</sup> In contrast to the European model of land ownership, in Southern Africa, those that cultivated land usually relied upon a chief or elder to assign land use rights according to need.<sup>49</sup>

Upon the arrival of Europeans, however, the status quo of property ownership in Southern Africa changed dramatically. The colonial powers—the British, the Germans, and the Dutch—used violence to systematically expropriate innumerable acres of land, without consent or just compensation, in violation of indigenous peoples' most basic human

46. Public Information Notice No. 09/53, IMF, IMF Executive Board Concludes 2009 Article IV Consultation with Zimbabwe (May 6, 2009), <http://www.imf.org/external/np/sec/pn/2009/pn0953.htm> (noting hyperinflation reached its peak in 2008 at 500 billion percent and the financial outlook remains precarious.). For a technical evaluation of Zimbabwe's Inflation, see Steve H. Hanke & Alex K. F. Kwok, *On the Measurement of Zimbabwe's Hyperinflation*, CATO J. 353, 355 (2009) (estimating Zimbabwe's annual inflation rate, as of November 14, 2008, was 89,700,000,000,000,000,000,000%, much higher than the IMF Executive Board's estimate).

47. See IMF, Zimbabwe: 2005 Article IV Consultation—Staff Report; Public Information Notice on the Executive Board Discussion; and Statement by the Authorities of Zimbabwe, AT 4, Country Rep. No. 05/360 (Oct. 2005); WIETERSHEIM, *supra* note 6, at 83 ("In Zimbabwe more than 4,000 (80%) of white farmers have left or were chased off their farms. Commercial farming has largely broken down, and more than 200 000 former farm workers are now both landless and jobless. Three million Zimbabweans have left their country, the inflation rate is the highest in the world, unemployment is around 80%, and almost 6 million citizens depend on food aid.").

48. Leonard Thompson, *supra* note 2, at 6–12 (describing the various modes of production in pre-colonial southern Africa, including hunter-gatherers, pastoralists, etc.); WIETERSHEIM, *supra* note 6, at 141 ("Traditionally, black Namibians have practiced communal ownership of land. Land belonged to the community and was allocated and administered by traditional chiefs. Farmers were allowed to use a piece of land assigned to them in a culturally accepted way, but it would always remain under the chief's authority and control.").

49. WIETERSHEIM, *supra* note 6, at 141.



rights. Land was not only stolen to provide white settlers with farms, but it was also taken to destroy African self-sufficiency and create a surplus of cheap labor to work on white-owned farms and mines.<sup>50</sup> As a consequence of this, today upwards of eighty percent of commercial farmland in the region is owned by whites, who constitute less than ten percent of the population.<sup>51</sup> Depriving Africans of their property was essential to their domination; consequently, many Africans believe that liberation will not be complete until the land comes back to Africans who are (in their view) its rightful owners.<sup>52</sup> This is why the return of stolen land was one of the most powerful motivating factors of the region's independence movements.<sup>53</sup>

In all three countries, independence involved a negotiated settlement between Africans and their former oppressors. In exchange for political independence, the African liberation parties agreed to allow present owners to keep their property and maintain their jobs despite past injustice.<sup>54</sup> This meant that if, for example, a white family received a surplus of land free of charge from the apartheid or colonial government—which took it from an African community without consent and without paying just compensation—upon independence, the family's legal ownership of that land was solidified.<sup>55</sup> If the democratic government wanted to expropriate the property from the white family and return it to the African community that owned it originally, then the government had to pay just compensation.<sup>56</sup>

In this bargain, the white minority secured valid legal title to substantial assets while dispossessed African communities received a promise of land reform. For South Africa and Namibia, this promise has been elusive because the majority of Africans have yet to receive land or

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50. See Alois Mlambo, *The Ambiguities of Independence, Zimbabwe 1980–1990*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra* note 3, at 64.

51. See sources, *supra* note 7.

52. WIETERSHEIM, *supra* note 6, at 52–53; RICHARDSON, *supra* note 6; GIBSON, *supra* note 30.

53. *Id.*

54. See Margaret Lee, *The Rise and Decline of the Settler Regimes of South Africa, Namibia, and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra* note 3, at 1.

55. Section 25.1 of the South African Constitution ensures that all property owners are protected regardless of how they acquired the property. S. AFR. CONST. 1996, § 25.1. European colonizers most often took land from African communities and not individuals. See e.g. Adrien Wing, *Communitarianism v. Individualism: Constitutionalism in Namibia and South Africa*, 11 WIS. INT'L L.J. 295, 299 (1992–1993) (emphasizing the importance of communitarianism in both South Africa and Namibia).

56. S. AFR. CONST. 1996, §§ 25.2, 25.3.

other equitable compensation for past theft.<sup>57</sup> Consequently, some critics argue that since land reform is moving so slowly, the bargain is illegitimate. Thus, whites who acquired land under dubious circumstances have no legitimate right to it and should relinquish title without the payment of just compensation.<sup>58</sup> But, although only one side of the liberation bargain has been upheld, the governments of Namibia and South Africa have honored the bargain and thereby ensured its legitimacy.<sup>59</sup> This is the current reality. Consequently, the starting point for the analysis in this Article is the assumption that present owners have valid legal title to their land and that land reform is imperative.

### B. *The Case for Land Reform in Southern Africa*

The objective of land reform, as defined in this Article, is to secure greater access to land for those individuals and groups who were unjustly dispossessed of land or robbed of the opportunity to acquire land in the first place. Without land reform, the unwieldy vines of past property theft will strangle justice and the indelible ink of Colonialism and Apartheid will forever stain the emergent democracies of Southern Africa. In addition to facilitating justice and successful democracies in Southern Africa, land reform is also vital because Africans are in dire need of land. For example, in Namibia, although land is scarce, seventy percent of the population is dependent upon agriculture for their sustenance.<sup>60</sup> Likewise, prior to the chaotic land reform in 2000, Zimbabwe's economy was primarily agrarian and about seventy percent of its popula-

57. See Wietersheim, *supra* note 6, at 43 (arguing that in Namibia, only about 17% of formerly white land is now settled by blacks). See also *supra* note 7 and accompanying text; *supra* note 8; *infra* note 64.

58. See, e.g., Wolfgang Werner, *Land Reform in Namibia: The First Seven Years* 1, 8–9 (Namibian Econ. Policy Res. Unit [NEPRU], Working Paper No. 61, 1997) (noting that, based on the assumption commercial farmers in Namibia had stolen the land from indigenous farmers, “[p]oliticians from the ruling and opposition parties argued that to buy back commercial farm land was ‘immoral and illegal.’”).

59. Zimbabwe honored the liberation bargain from independence in 1980 until the chaotic land reform program in 2000. See generally Norma Kriger, *Liberation from Constitutional Constraints: Land Reform in Zimbabwe*, 27 SAIS REVIEW 63 (2007) (detailing Zimbabwe's initial policy of paying just compensation to white farmers and the constitutional restraints that were removed by Mugabe in 2000 to circumvent that policy).

60. See *id.*; Mmantsetsa Toka Marope, *Namibia Human Capital and Knowledge Development for Economic Growth with Equity* 5 (World Bank, Afr. Region Human Dev., Working Paper No. 84, 2005); Phaniel Kaapama, *Commercial Land Reforms in Postcolonial Namibia: What Happened to Liberation Struggle Rhetoric?*, in *TRANSITION IN NAMIBIA: WHICH CHANGES FOR WHOM?* 29 (Melber Henning ed., 2007) (“Although the country has a very low population density, most of this land mass comprises semi-arid rangeland, with low rates of rainfall and infertile soils, making it unsuitable for large-scale agricultural production. This has created a condition of land scarcity that has over the years remained a source of social tension and indirectly a potential source of violent political conflict.”).

tion resided in the countryside.<sup>61</sup> There is a serious need for land in South Africa as well because although only four percent of its GDP is based on agriculture, half of its population resides in rural areas.<sup>62</sup>

Two World Bank economists, Deiniger and Feder, convincingly argue that access to land is vitally important. They state that:

[i]n agrarian societies land is not only the main means for generating livelihood but often also to accumulate wealth and transfer it between generations. The way in which land rights are assigned therefore determines households' ability to produce their subsistence and generate marketable surplus, their social and economic status (and in many cases their collective identity), their incentive to exert non-observable effort and make investments, and often also their ability to access financial markets or to arrange for smoothing of consumption and income.<sup>63</sup>

Despite the importance of land, the region's land reform programs have slumbered along for at least ten or more years after independence.<sup>64</sup> Government failure to deliver on the promise of land reform has already had disastrous consequences in Zimbabwe and has the potential to wreak havoc in Namibia and South Africa. This Article tries to uncover and address the legal obstacles to implementing efficient and effective land reform programs.<sup>65</sup>

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61. See Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe* in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra* note 3, at 261; U.N. Stat. Div., *Population by Sex and Urban/Rural Residence*, <http://unstats.un.org/unsd/demographic/products/dyb/dyb2002.htm> (search for "Zimbabwe urban/rural 2002"; follow "Population by sex and urban/rural residence" hyperlink) (last visited Apr. 24, 2010) (showing over 65% of Zimbabweans living in rural areas in 2002).

62. See Ruth Hall, *supra* note 61, at 258, 261.

63. Klaus Deininger & Gershon Feder, *Land Institutions and Land Markets 1* (World Bank, Dev. Res. Group, Working Paper No. 2014, 1998).

64. In Zimbabwe, for example, the government had "acquired only 3 million hectares of land, 44% of which was in the dry and infertile Natural Regions IV and V, while only 5% of the peasant farmers in the communal areas had been resettled." Mlambo, *supra* note 50, at 65, 70. Likewise, the distribution of land under Namibia's land reform program has been slow in its implementation:

[U]ntil July 2007, 349 full-time farmers and 274 part-time farmers had bought farms through the Affirmative Action Loan Scheme. In addition, about 180 blacks have purchased commercial farms on the open market without participating in a state loan scheme. 40 commercial farms were in black hands even before independence. This means that about 14%, or one out of seven commercial farms (843 out of 6,000), is today in the private ownership of black Namibians.

WIETERSHEIM, *supra* note 6, at 33–36.

65. There is a vast literature confirming that land reform can increase economic growth and decrease the potential for instability. See generally SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 378–80 (1968) (observing that land reform has a stabilizing

### C. Beyond Southern Africa: A Global Perspective

Although I focus on Southern Africa, there are also several other nations where contested land rights could potentially lead to backlash. In Nicaragua, for example, the left-leaning Frente Sandinista de Liberacion Nacional (the Sandinistas) wrested power from the infamously corrupt Somoza regime. The Sandanistas implemented massive agrarian land reform that transferred land from Somoza loyalists and large landowners to poor peasants.<sup>66</sup> Upon the defeat of the Sandanistas in 1990, Chamorro and her newly elected administration recognized that the ownership of many land parcels was contested; and that if the claims of both present and past owners were not swiftly addressed, this had the potential to up-end Nicaragua's nascent democracy.<sup>67</sup> Despite this, Chamorro and

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effect on the political system and increases agricultural productivity in the long run); RUSSELL KING, *LAND REFORM: A WORLD SURVEY* (1977); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); Daron Acemoglu, et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001); Timothy Besley & Robin Burgess, *Land Reform Poverty Reduction and Growth: Evidence from India*, 115 Q. J. OF ECON. 389 (2000) (arguing land reforms in India were associated with poverty reduction); Klaus Deininger & Lyn Squire, *New Ways of Looking at Old Issues: Inequality and Growth*, 57 J. DEV. ECON. 259 (1998); Edmundo Flores, *Issues of Land Reform*, 78 J. POL. ECON. 890 (1970); Herschel I. Grossman, *Production, Appropriation, and Land Reform*, 84 AM. ECON. REV. 705 (1994) (determining that land reform can benefit landlords); T. David Mason, *Take Two Acres and Call Me in the Morning: Is Land Reform a Prescription for Peasant Unrest?*, 60 J. POL. 199 (1998); Karl O. Moene, *Poverty and Landownership* 82 AM. ECON. REV. 52 (1992) (concluding that land reform's effectiveness depends on the availability of fertile land); Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577 (1989); Klaus Deininger & Pedro Olinto, *Asset Distribution, Inequality, and Growth* (World Bank, Dev. Res. Group, Working Paper No. 2375, 2000) (arguing that land inequality has a negative impact on economic growth); Klaus Deininger, Songqing Jin & Hari K. Nagarajan, *Land Reforms, Poverty Reduction, and Economic Growth: Evidence from India* (World Bank, Dev. Res. Group, Working Paper No. 4448, 2007); Klaus Deininger & Songqing Jin, *Land Rental Markets as an Alternative to Government Reallocation?: Equity and Efficiency Considerations in the Chinese Land Tenure System* (World Bank, Dev. Res. Group, Working Paper No. 2930, 2002); KLAUS DEININGER ET AL., *HOW LAND REFORM CAN CONTRIBUTE TO ECONOMIC GROWTH AND POVERTY REDUCTION: EMPIRICAL EVIDENCE FROM THE INTERNATIONAL AND ZIMBABWEAN EXPERIENCE 1* (2000), available at <http://siteresources.worldbank.org/INTARD/825826-1111148606850/20431879/Zimbabwe.pdf>.

66. See Michael Roche, *Competing Claims: The Struggle for Title in Nicaragua*, 39 VAND. J. TRANSNAT'L L. 577 (2006).

67. See Deena I. Abu-Lughod, *Failed Buyout: Land Rights for Contra Veterans in Postwar Nicaragua*, 27 LATIN AM. PERSPECTIVES 32 (2000) (discussing hastily and poorly executed land reform efforts intended to prevent unrest); Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, 43 LATIN AM. POL. & SOC'Y 61 (2001) (discussing volatile property right issues as a threat to emerging democracies, using Nicaragua as an example).

subsequent regimes have failed to address the claims of past owners, making backlash and state destabilization a tangible possibility.<sup>68</sup>

Kosovo is another example. Prior to the NATO bombing in 1999, thousands of Kosovo Albanians were forced to flee hastily and leave their property behind due to a Serbian-led ethnic cleansing campaign.<sup>69</sup> When the Kosovo war ended, the interim UN-led civilian administration (the United Nations Mission in Kosovo (UNMIK)) recognized that the failure to resolve contested property rights could undermine the peace process and lead to serious backlash.<sup>70</sup> Consequently, the arguments I make in this Article likely apply beyond Southern Africa.

In sum, prior to independence, the Southern African liberation parties struck a deal with the white power structure. In exchange for political freedom, the liberation parties agreed that whites could maintain their property despite its provenance.<sup>71</sup> But, there was one major proviso—the state had to vindicate the property rights of the

68. See Anja Nygren, *Competing Claims on Disputed Lands: The Complexity of Resource Tenure in the Nicaraguan Interior*, 39 *LATIN AM. RES. REV.* 123, 132–35 (2004) (describing the land reform policies of Nicaraguan leadership following the Sandinista defeat); David R. Dye et al., *Contesting Everything, Winning Nothing: The Search for Consensus in Nicaragua, 1990–1995* (Hemisphere Initiatives, Brookline, MA) Nov. 1995, available at <http://lanic.utexas.edu/project/hemisphereinitiatives/contesting.htm> (noting the inability of the Chamorro government to address land reform issues adequately and the resulting land invasions and discord).

69. See Leopold von Carlowitz, *Resolution of Property Disputes in Bosnia and Kosovo: The Contribution to Peacebuilding*, 12 *INT'L PEACEKEEPING* 547, 551 (2005) (noting that of the estimated 860,000 Kosovo Albanians who fled or were removed during the conflict, the majority returned to find that approximately 50% of the housing was destroyed during the conflict). Hans Das, *Restoring Property Rights in the Aftermath of War*, 53 *INT'L & COMP. L. Q.* 429, 430–33 (2004) (noting that, by the end of the conflict, approximately 800,000 nationals had fled or been driven out of Kosovo).

70. The United Nations Interim Administration Mission in Kosovo (UNMIK) decided to defend the rights of past owners by passing a law that states any person who was dispossessed of a property right between March 23, 1989 and March 24, 1999 as a result of discrimination has a right to restitution in kind or compensation. UNMIK, *On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission*, § 2.2, UNMIK/REG/2000/60 (Oct. 31, 2000). See also Leopold von Carlowitz, *Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo*, 10 *GLOBAL GOVERNANCE* 307, 307 (2004) (acknowledging that it is too early to judge how successful UNMIK's land reform policies have been; however, arguing that "resolution of property issues is often pivotal for the success of a peace building process in a post conflict situation").

71. See RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 312, 317 (2000) (noting that the interim Constitution reflected a compromise between the two positions); Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution*, 11 *S. AFR. J. HUM. RTS.* 222, 229–38 (1995) (providing an insider's view of the pre-liberation negotiation that led to the constitutional property clause, which protected existing property rights); A.J. Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in *PROPERTY AND THE CONSTITUTION* 109, 111–12 (Janet McLean ed., 1999).

dispossessed African majority through land reform.<sup>72</sup> In the end, whites kept their land and Africans never received theirs. It should therefore come as no surprise that the cheated African majority is now overcome with anger.<sup>73</sup> Consequently, past property theft has the potential to cause backlash and destabilize the South African and Namibian states, as we have already seen in Zimbabwe. Although I focus on Southern Africa in this section, the reallocation of property rights is necessary to secure peace in other nations as well.<sup>74</sup>

### III. THE CLASSICAL CONCEPTION

In this section, Part A outlines the classical conception's origins and its defining principles. To paint a more lucid picture of the classical conception, Part B provides two contemporary manifestations of it: the implementation of the South African constitution's land restitution provision and the implementation of the South African constitution's eminent domain provision. After providing a comprehensive description of the classical conception, Part C offers a critique of it, where I explain the weaknesses of the classical conception.<sup>75</sup> I also argue that the justifications for the classical conception fall short when systematic past property theft places the legitimacy of property rights in question.

#### A. *The Classical Conception Defined*

The classical conception is often associated with Blackstone who famously defined property as, "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."<sup>76</sup> Blackstone's definition has become a trope for the belief that property is unified (rather than a bundle of rights) and that an owner rightly has near

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72. See S. AFR. CONST. 1996 s. 25(7). See also HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 85-92 (2000) (describing the strategies used to confront historical injustice in the constitution).

73. See generally Kaumbi, *supra* note 7; Gibson, *supra* note 30.

74. See Daron Acemoglu & James A. Robinson, *A Theory of Political Transitions*, 91 AM. ECON. REV. 938 (2001) (finding that high levels of inequality between groups in society leads to political instability); Jamie Crook, *Promoting Peace and Economic Security in Rwanda Through Fair and Equitable Land Rights*, 94 CAL. L. REV. 1487, 1490 (2006) (arguing that the Rwandan government must further promote equitable land access through land reform in order to create peace and stability); Ruth Hall, *A Political Economy of Land Reform in South Africa*, 31 REV. AFR. POL. ECON. 213, 214 (2004) (noting that the World Bank advised that redistributing the land in South Africa was necessary to avert social and political instability).

75. For more information on negotiated land reform, see *infra* Part III.B.2.

76. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

absolute power to control his property.<sup>77</sup> However, it is clear that Blackstone's absolutist and individualist definition was merely a starting point from which he introduced limiting provisions.<sup>78</sup> In reality, the genesis of the classical conception predates Blackstone, arising in feudal times when a land lord had full control over his land. Land lords had sovereignty over the land that included the power to govern, nominate priests, exact military service, levy taxes, pass legislation, and establish courts.<sup>79</sup>

Today, the classical conception is still predicated upon significant owner control. Singer argues that "[t]he classical conception focuses on the concepts of title and ownership and presumes full control of specific valued resources by the 'owner' backed up by state power. This conception remains powerful and exerts substantial determinative force in adjudicating and developing the rules of property law."<sup>80</sup> As a practical matter, Singer's argument that the classical conception gives owners full control of their property is a slight overstatement.<sup>81</sup> The following four principles are a more accurate description of the classical conception. Under the classical conception, an owner must:

1. acquire valid legal title through individual efforts to become the sole owner with consolidated rights;
2. possess near absolute control over the use and transfer of her property so long as it does not cause significant harm to anyone else;
3. rely upon the state to defend her rights against third parties who attempt to infringe upon this control while deemphasizing her duties to third parties; and,

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77. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–04 (1998); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 THEORETICAL INQUIRIES L. 103, 104–07 (2009).

78. See Rose, *supra* note 77, at 603–04; Schorr, *supra* note 77, at 104–07. See also Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 22 (1927) (pointing out that "[l]awyers occupied with civil or private law have in any case continued the absolutistic convention of property; and in doing this, they are faithful to the language of the great 18th century codes, the French, Prussian, and Austrian, and even the 19th century codes like the Italian and German which also begin with a definition of property as absolute or unlimited though they subsequently introduce qualifying or limiting provisions"); Marshall Harris, *Legal Aspects of Land Tenure*, 23 J. FARM ECON. 173, 176–80 (1941) (providing a very brief history of the classical conception of property from the Roman period to the early English classical school).

79. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 259–61 (3d ed. 1990).

80. Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 69, 70 (G.E. van Maanen & A.J. van der Walt eds., 1996).

81. See, e.g., Harris, *supra* note 78, at 176–80.

4. expect that the state or other third parties will bear the burden of justifying any actions that attenuate her control of the property.<sup>82</sup>

### B. The Classical Conception Applied

#### 1. The Implementation of the South African Constitution's Land Restitution Provision

South Africa's implementation of its constitution's land restitution provision is a prime example of the classical conception at work. The South African government has a three-prong land reform strategy that includes land tenure reform, land redistribution, and land restitution. Land tenure reform is intended to secure tenure by transforming informal property rights into more formal rights. Land redistribution gives formerly disadvantaged individuals an opportunity to own land regardless of what they may have owned or possessed in the past. Land restitution compensates individuals and communities whose land was expropriated by past governments. According to Section 25.7 of the South African constitution, "a person or community dispossessed of property after June 19, 1913 as a result of past racially discriminatory laws or practices" is entitled to land restitution or redress.<sup>83</sup>

There are many problems with the government's implementation of the constitutional land restitution provision.<sup>84</sup> One of the most troubling is the amount of financial compensation that the government has paid individuals and communities who did not opt for restitution of their land.<sup>85</sup> Due to financial constraints, the compensation paid was merely

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82. In 1990 when the post-apartheid Namibian state was established, the court solidified the nation's commitment to the classical conception. In the landmark case of *De Roeck v. Campbell & Others* the court ruled that, "ownership includes the right to possess one's property, to dispose of it and even destroy it. If anyone else lays claim to such property or to interfere with any one of those rights, the onus is on such person to justify his claim." See *De Roeck v. Campbell & Others*, (1) 1990 NR 126 (HC) (Namib.). As required by the classical conception, the Namibian state defends the ownership rights of title deed holders who have extensive power to control their property; and non-owners bear the burden of proving the validity of encroachments on owner control.

83. S. AFR. CONST. 1996 § 25(7). See also Restitution of Land Rights Amendment Act 48 of 2003 (S. Afr.) (enabling the means for the right to restitution or redress provided in the constitution).

84. See generally THE RIGHTS AND WRONGS OF LAND RESTITUTION: RESTORING WHAT WAS OURS (Derick Fay & Deborah James eds., 2009); Edward Lahiff, *Land Reform in South Africa: A Status Report 2008*, at 2-6 (Programme for Land and Agrarian Studies, Research Report No. 28, 2008) (highlighting the progress and concerns regarding land tenure reform, land distribution, and land restitution in South Africa).

85. See DEP'T OF LAND AFF. ANN. REP. 1 APRIL 2008 — 31 MARCH 2009, at 30 (2009) (S. Afr.).



symbolic and did not reflect the market value of the property at the time of confiscation or at present.<sup>86</sup> For example, the government paid R40,000 (about \$5200) to non-whites who were evicted from valuable land they owned in Sophiatown.<sup>87</sup> The government claims that the reason the amounts it paid were so small is because it lacks the resources to pay market-related prices.<sup>88</sup> But, if the government uses eminent domain to purchase land from whites who now live in Sophiatown for redistribution to dispossessed populations, then despite its budget constraints, the government pays market value.<sup>89</sup>

The government gives current owners market compensation while past owners who were unjustly dispossessed receive symbolic compensation because the government is giving existing owners' rights more value than the rights of dispossessed individuals and communities. This is because the state is working within a conceptual framework that assumes current owners acquired valid legal title through their individual effort to become the exclusive, deserving owners. The framework assumes that since you worked hard to acquire and develop the property, then you are entitled to the full market value of the property upon expropriation. The framework dismisses the possibility that current owners acquired their property unjustly; and it also ignores the rights of owners unjustly dispossessed. Most importantly, the framework overlooks the duties present owners may have to dispossessed populations with valid ownership claims. Thus, despite the transformative potential of Section 25.7, the classical conception is the framework that has informed the government's decisions and determined the outcomes.

## 2. The Implementation of the South African Constitution's Eminent Domain Provision

Negotiated land reform—also known as the willing-seller/willing-buyer principle—is a market-led approach to land reform where the state can only acquire property from willing sellers and refrains from using its eminent domain power to expropriate. It emerged as the dominant land reform paradigm following the end of the Cold War.<sup>90</sup> Prior to this, the norm was administrative land reform, characterized by a state-led,

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86. *Id.*

87. *Id.*

88. *Id.*

89. For more information, see *infra* Part III.B.2 and accompanying text.

90. ROSSET, PATEL, & COURVILLE, *PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM* 18 (2006) ("The end of the Cold War heralded at least the temporary end of the possibility of radical land reform programs. While it was inconceivable that land could be redistributed through a willing buyer-willing seller approach at the beginning of the Cold War, by the Cold War's end it was inconceivable that it could be done any other way.").

centralized process.<sup>91</sup> In Southern Africa, negotiated land reform has been implemented such that owners have near absolute power to decide to whom, at what price, and on what terms they will sell their land, despite the fact that expeditious land reform is necessary to address past injustice and avert backlash.<sup>92</sup> Consequently, negotiated land reform is a powerful illustration of the classical conception.

As a constitutional matter, both the South African and Namibian governments *in theory* have the power to use eminent domain to make land available for land reform.<sup>93</sup> But, *in practice* they do not, and it is important to understand why. In the 1979 Lancaster House Agreement—which was the independence constitution containing the negotiated terms of Zimbabwe's political liberation—the post-colonial, democratic government was restricted to negotiated land reform for the first ten years.<sup>94</sup> During this time, if the government decided to use its powers of eminent domain, then, as a disincentive, it was forced to pay landowners just compensation in scarce foreign currency.<sup>95</sup> Since Zimbabwe set the blueprint for the region's political transition, negotiated land reform would become the norm in Namibia and South Africa, which gained independence years later.

Unlike Zimbabwe, eminent domain was never constitutionally curtailed in Namibia and South Africa, but due in part to advice from the World Bank, both countries refrain from using it.<sup>96</sup> World Bank economists have fervently advocated for negotiated land reform and against

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91. Klaus Deininger, *Making Negotiated Land Reform Work: Initial Experience from Brazil, Colombia, and South Africa* 2, 28–29 (World Bank, Dev. Res. Group, Working Paper No. 2040, 1999). See generally *id.*

92. Michael Aliber & Reuben Mokoena, *The Interaction between the Land Redistribution Programme and the Land Market in South Africa: A Perspective on the Willing-Buyer/Willing-Seller Approach* (Programme for Land and Agrarian Studies, Occasional Paper No. 21, 2002); see Deininger, *supra* note 92, at 9–10 (describing how the landlord's power to decide the particular buyer and sale price created collusion between the buyer and seller, resulting in overstated property values).

93. See S. AFR. CONST. 1996 § 25; NAMIB. CONST. 1990 art. 16(2). See also ANDRE VAN DER WALT, *CONSTITUTIONAL PROPERTY CLAUSES* 309–58 (Juta & Co. 1999).

94. Southern Rhodesia Constitutional Conference Held, London, Eng., Sept. 10–Dec. 15, 1979, *Lancaster House Agreement* (Dec. 21, 1979).

In its place Britain offered a compromise under which, in return for the Zimbabweans guaranteeing existing property rights, the British would underwrite half the costs of a resettlement program. Land could change hands only on a 'willing seller, willing buyer' basis. Thus whites who wished to keep their farms were free to do so; there would be no expropriation of land.

Robin Palmer, *Land Reform in Zimbabwe, 1980–1990*, 89 AFR. AFFAIRS 163, 166 (1990).

95. See Mlambo, *supra* note 50, at 72–73.

96. HARRING & ODENDAAL, *supra* note 8, at 11; Ruth Hall, *supra* note 61, at 258; Kaapama, *supra* note 60, at 34–38.

eminent domain.<sup>97</sup> More importantly, these economists have set the tone for what other foreign donors and investors view as acceptable land reform policies. Since Southern African countries require foreign assistance and investment to complete their land reform programs, the governments are somewhat constrained by the neoliberal views of these influential economists.<sup>98</sup>

But, the story of why negotiated land reform has been the prevailing policy is more complicated than this. In South Africa, for example, the landless poor and their civil society representatives want the ruling party, the African National Congress (ANC), to drastically decrease its emphasis on negotiated land reform. At the Land Summit, the landmark land reform meeting involving South African civil society and government, participants overwhelmingly identified negotiated land reform as the major obstacle to timely land reform.<sup>99</sup> On the other hand, white farmers, their civil society representatives, and the World Bank have encouraged

97. Marc Wegerif, *A Critical Appraisal of South Africa's Market-based Land Reform Policy: The Case of the Land Redistribution for Agricultural Development (LRAD) Program in Limpop 9* (Programme for Land and Agrarian Studies, Research Report No. 19, 2004), available at [http://www.sarpn.org.za/documents/d0001269/P1506-RR\\_19\\_Marc\\_Wegerif.pdf](http://www.sarpn.org.za/documents/d0001269/P1506-RR_19_Marc_Wegerif.pdf) ("The World Bank, along with allied academics, had started to engage in policy debates in South Africa from 1990, and they appear to have had a strong influence on policy development with their proposals for a market-based land reform model."). See Yolandi Groenewald, *Mass Land Grabs Dismissed*, MAIL & GUARDIAN (Johannesburg), Feb. 10, 2006, at 7 (quoting senior World Bank economist Rogier van den Brink, who also argued that "[i]t is better for government to negotiate a settlement with farmers" instead of using its expropriation powers to compel purchases). See also KLAUS DEININGER, *LAND RIGHTS AND ADMINISTRATION IN AFRICA 2* (2004), <http://www.iiied.org/pubs/pdfs/G00127.pdf> (noting the threat of expropriation has undermined tenure security and investment in many African countries). In addition to negotiated land reform, World Bank economists also advocate for reforming land markets by removing subdivision restrictions and instituting a land tax. R. van den Brink, *Land Reform Policy in Sub-Saharan Africa: Consensus and Controversy*, in LAND REFORM 14 (2003), available at <http://www.landcoalition.org/pdf/wbqrdbaf.pdf>; Ben Cousins, *Comments*, in LAND REFORM, *supra*, at 43.

98. *Id.* Regarding the influence of the neoliberal governance model:

It is equally important to acknowledge that the Namibian transition to independence coincided with the ascendance of the neoliberal governance model. Not only was this model seen as a viable idiom for state design and reconstruction, but also its adoption became a prerequisite for the accommodation of emerging and/or reformed states within the context of the international politics of development aid, aid that was instantaneously needed to kick-start their reconstruction and development processes. Thus, the need to embrace the principle of economic neo-liberalism is said to have arisen from these geopolitical shifts at the global level.

Kaapama, *supra* note 60, at 35.

99. See, e.g., Thozzi Gwanya, Acting Dir. Gen., S. Afr. Dep't of Land Aff., *Impact Assessment of Land Reform in South Africa*, slide 20, Remarks at the World Bank Conf. (Feb. 15, 2008) available at [http://siteresources.worldbank.org/INTIE/Resources/WorldBankConference14\\_15February2008-TGwanya.ppt](http://siteresources.worldbank.org/INTIE/Resources/WorldBankConference14_15February2008-TGwanya.ppt) (last accessed Apr. 27, 2010).

the ANC to continue with negotiated land reform.<sup>100</sup> Gibson's empirical work further highlights these opposing views, finding that "a majority of blacks, Coloured people, and those of Asian origin support going further than existing policy to force landowners to sell some of their property to the government for purposes of redistribution. A majority of whites oppose expanding the policy."<sup>101</sup>

Although those advocating for increased use of eminent domain have significant electoral power, those lobbying for negotiated land reform have immense economic power. If the ANC spurns foreign donors or upsets local investors by more aggressively using its powers of eminent domain, then investment is likely to decrease. On the other hand, since there is no viable opposition party in South Africa, the ANC faces no genuine threat of electoral defeat at the national level.<sup>102</sup> In the 2009 national elections, for example, the ANC retained power with sixty six percent of the vote.<sup>103</sup> This suggests that the consequences of rattling those with economic power are conspicuous and potentially severe, while the consequences of agitating those with electoral power are less apparent. As a result, the ANC has made a strategic choice to pacify those with economic power and continue with negotiated land reform against the wishes of the majority.<sup>104</sup>

100. See Rogier van den Brink et al., *Consensus, Confusion and Controversy* 35 (World Bank, Working Paper No. 71, 2006), available at [http://knowledgebase.terrafrica.org/fileadmin/user\\_upload/terrafrica/docs/345150Consensus101OFFICIAL0USE0ONLY1.pdf](http://knowledgebase.terrafrica.org/fileadmin/user_upload/terrafrica/docs/345150Consensus101OFFICIAL0USE0ONLY1.pdf) (arguing that South Africa's market-assisted land redistribution programs have been successful at transferring land "at reasonable cost and speed"); AGRI SA, Submission on the Expropriation Bill [B16—2008], at 18 (May 14, 2008), available at <http://www.pmg.org.za/report/20080617-expropriation-bill-public-hearings> (follow "AGRI SA Submission" hyperlink) (last visited July 6, 2010) (arguing that expropriation should be used only "as a measure of last resort" and subject to fairness and transparency); DEMOCRATIC ALLIANCE PARTY, LAND REFORM AND THE WILLING BUYER, WILLING SELLER PRINCIPLE 1, available at [http://www.da.org.za/docs/566/willingbuyerwillingsseller\\_document.pdf](http://www.da.org.za/docs/566/willingbuyerwillingsseller_document.pdf) (last visited Aug. 6, 2010) (favoring a market-oriented approach and blaming the slow progress of land reform on "inefficient management and a lack of financial commitment on the part of the state.").

101. GIBSON, *supra* note 30, at 68–69.

102. See Barry Bearak, *South African Voters Grumble, but Favor the Party in Power*, N.Y. TIMES, Apr. 22, 2009, at A6 (noting that the ruling political party for the past 15 years, the ANC, retains its power despite disappointment among voters because the Democratic Alliance, the only potential challenge to the ANC, still failed to garner a majority of the votes; and Congress of the People (COPE), the splinter group recently created from within the ANC, developed disputes of its own).

103. See S. AFR. ELECTORAL COMM'N., RESULTS REPORT (2009), available at <http://www.elections.org.za> (follow "Results Report" hyperlink; then select "22 Apr 2009 National Election"; then select "<All Provinces>"; then follow "View Report" hyperlink) (last visited Apr. 27, 2010).

104. For a more detailed discussion about race and class dynamics behind the ANC's reluctance to implement more radical land reform, see Jeremy Seekings & Nicoli Nattrass, *Class, Distribution and Redistribution in Post-Apartheid South Africa*, 50 TRANSFORMATION 1, 10 (2002) ("The semi-privileged position of politically powerful African groups—including

Zimbabwe faced a similar political calculus in the late 1980s. But, as soon as its ruling party (ZANU-PF) realized that a precipitous change in the political tide was upon them and the unresolved land question would be the impetus behind the political establishment's potential defeat, the government began facilitating hasty, violent land expropriations.<sup>105</sup> To be sure, there are many important differences between present-day South Africa and Zimbabwe in the late 1990s—namely, South Africa has a much more independent judiciary, which can stop the executive branch from engaging in illegal land grabs. However, in the future, should the ANC consider the unresolved land question to be a key factor in its impending political defeat, the ANC could potentially take actions similar to those of the ZANU-PF.

The international community is betting on the fact that the electoral calculus will not shift drastically in South Africa, thereby making hasty land expropriations necessary for the ANC to maintain power. This is an immensely risky bet to make. A safer bet for the international community is to facilitate the timely and orderly redistribution of real property before the situation severely deteriorates.<sup>106</sup> The World Bank and other international actors must understand that the classical conception's emphasis on negotiated land reform is causing reform to move at a dilatory pace, which can have potentially fatal consequences. The state must use eminent domain more aggressively to redistribute property.

Even in the relatively few instances where South Africa has used its constitutional power of eminent domain to make land available for land reform, the classical conception undermined the transformative potential of this Section. Section 25(3) demands that the state employ a contextual understanding of just compensation that considers several equity enhancing factors. Section 25(3) states,

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—(a) the current use of the property; (b) the history of the

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the urban, industrial working class, sections of the intermediate class and the semi-professional class (especially teachers)—gives them good reasons to oppose a universal welfare system in that radical welfare reform would require increased taxation on them, making them subsidizers of the poor rather than beneficiaries of redistribution from the rich.”).

105. William H. Shaw, *They Stole Our Land: Debating the Expropriation of White Farms in Zimbabwe*, 41 J. MODERN AFR. STUD. 75, 76 (2003) (discussing Mugabe's increasing unpopularity and the volatile political climate preceding the implementation of the fast track plan).

106. See Atuahene, *supra* note 3, at 851–59 (arguing a Legitimacy Enhancing Compensation Program (LECP) can temper property-related disobedience).

acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.<sup>107</sup>

These equity enhancing factors are a key part of the liberation bargain. Whites kept land acquired during Apartheid and Colonialism despite the circumstances of acquisition; but, if the government needs to expropriate the land post-Apartheid, then the circumstances of acquisition will determine what amount of compensation is just. According to Section 25(3), the Fair Market Value (FMV) should be just a starting point for determining just compensation rather than the final sum current owners are entitled to.<sup>108</sup>

Despite this progressive constitutional provision, my interview with Blessing Mphela, the Chief Land Claims Commissioner, revealed that when the government acquires property through negotiated land reform, *in practice*, the price paid often only reflects the FMV and not the other equity enhancing factors enumerated in Section 25(3) of the Constitution.<sup>109</sup> Evidently, this is because the service providers the government hires to do the valuation sometimes do substandard work and submit estimates that do not take into account the equity enhancing factors.<sup>110</sup> Even if the service providers do their job properly, the government often pays landowners FMV because, as Mr. Mphela explained, “We don’t like to refer disputes around price to the court because it will take forever. It can drag on for over two years before the matter is resolved.”<sup>111</sup>

This practice of paying FMV without considering the equity enhancing factors exhibits a myopic understanding of just compensation, causes the state to overpay landowners, undermines an important piece of the liberation bargain made in 1994, and treats owners as if they have no duties arising from South Africa’s history of land dispossession. While Section 25(3) appears to embrace a transformative conception of property, in practice, the classical conception prevails because the state gives existing owners more protection than even the constitution requires. Ul-

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107. S. AFR. CONST. 1996 § 25(3).

108. *Id.* See also *Ash and Others v Dep’t of Land Aff.* 2000 (2) All SA 26 (LCC) at 40 (S. Afr.) (stating that for determining just and equitable compensation, “equitable balance required by the Constitution for the determination of just and equitable compensation will in most cases best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require”).

109. Interview with Blessing Mphela, Acting Chief Land Claims Comm’r, Dep’t of Land Aff., in Johannesburg, S. Afr. (May 15, 2008).

110. *Id.*

111. *Id.*

timately, this undermines the state's efforts to vindicate the rights of dispossessed populations.

In this section, I have explored two of South Africa's constitutional property clauses. I argued that the government's implementation of the provisions reflects a classical conception of property, which has eviscerated the transformative potential of these constitutional provisions.<sup>112</sup>

### *C. The Classical Conception Critiqued*

The classical conception is predicated upon owner control, and hence any policy that interferes with owner control—like eminent domain, for example—is discouraged. In the context of Southern Africa, I argue that the classical conception and its distaste for eminent domain is not appropriate. I then move beyond the Southern African context and the specific issue of eminent domain under Section 25(3) to explore why the classical conception is not justified when the legitimacy of property rights is in question.

#### *1. Weaknesses of Negotiated Land Reform*

In the context of Southern Africa, the classical conception, its emphasis on negotiated land reform, and its rejection of eminent domain has several weaknesses. First, relying upon willing sellers often undermines the state's planning capacity because the government cannot condemn and acquire contiguous parcels of land in a specific area. Condemning blocks of land is advantageous and efficient because it allows the state to capitalize upon economies of scale by, for instance, building an irrigation infrastructure to service numerous resettled individuals and families.

Second, negotiated land reform gives landowners the upper hand in land negotiations, which can result in the state paying inflated prices for land.<sup>113</sup> Aliber and Mokoena argue that this is because of the small supply of farms for sale, the high demand for particular properties due to ancestral connections or proximity to established communities, and the high transaction costs involved in rejecting the landowner's offer and starting the process again.<sup>114</sup> Third, the quality of the land available

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112. *Id.*

113. Wietersheim, *supra* note 6, at 60 (2008) ("There are many willing buyers in the market looking for land, but they end up being frustrated by abnormal prices, insufficient capital, government bureaucracy, and most importantly by the unwillingness on the part of the current owners to sell the land.' By keeping prices of farms high, according to Kandji, 'commercial farmers are making sure that the yesterday "have-nots" remain the "have-nots" of the day after tomorrow.'"). See *supra* note 92.

114. Aliber & Mokoena, *supra* note 92, at 24.

through negotiated land reform is more likely to be sub-standard.<sup>115</sup> Landowners with thriving farms are not likely to want to sell a profitable enterprise, while unprofitable farms with degraded land are more likely to be willingly sold.

Fourth, a pervasive and potentially fatal problem with negotiated land reform is that it is too slow.<sup>116</sup> This is true in Namibia, South Africa, and Zimbabwe. In an address to the nation, the Namibian Prime Minister Theo-Ben Gurirab stated that, “[o]ver the years, the government has come to realize that the ‘willing-seller-willing-buyer’ approach is cumbersome and as a result, it would not be able to keep up with the high public demand for agricultural land.”<sup>117</sup> In 1994, South Africa, advised by the World Bank, modestly aimed to redistribute thirty percent of the country’s agricultural land in five years, but less than one percent was redistributed by 1999, less than three percent by 2003, and less than five percent by 2008.<sup>118</sup> In Zimbabwe, the slow process was one key reason behind the great backlash that has led to the destabilization of a once great nation.

Despite the sluggish pace of land reform, World Bank economists argue that negotiated land reform is still a better option than eminent domain because of:

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115. Commenting on the factors that diminish the quality of land reform:

The bureaucratic complexity of the process does not make it attractive to landowners, while limited grant sizes, limited budgets, lengthy and restrictive approval processes and landowner prejudice combine to ensure that would-be land reform beneficiaries are restricted to a small proportion of the land coming onto the market every year, and often end up with land that is of relatively poor quality and more extensive than they would wish.

Edward Lahiff, ‘Willing Buyer, Willing Seller’: *South Africa’s Failed Experiment in Market Led Agrarian Reform*, 28 *THIRD WORLD Q.* 1577, 1586 (2007).

116. See Wegerif, *supra* note 97, at 8; Edward Lahiff, *supra* note 115, at 1581–83. (detailing the time-consuming market-based land reform process and noting the slow pace and inability to meet objectives “makes it unlikely that it can ever be a means of large-scale redistribution”); Groenewald, *supra* note 97 (noting that during the State of the Nation speech, President Thabo Mbeki said that “the Land Affairs Department would review the ‘willing-seller, willing-buyer’ principle to speed up land reform”).

117. Uazuva Kaumbi, *Land Reform: Namibia Moves into the Fast Lane*, 428 *NEW AFR.* 28, 30 (2004). See also David Shriver, *Rectifying Land Ownership Disparities Through Expropriation: Why Recent Land Reform Measures in Namibia Are Unconstitutional and Unnecessary*, 15 *TRANSNAT’L L. & CONTEMP. PROBS.* 419, 429 (2005) (“The success, or lack thereof, of the willing-seller, willing-buyer approach is a source of significant contention in Namibia because the program has been inefficient and sluggish.”); WIETERSHEIM, *supra* note 6, at 87 (“So far (September 2008) only five white farms have been expropriated, a ridiculously small number after 18 years of independence.”).

118. See Ruth Hall, *supra* note 61, at 257; DEP’T LAND AFF. ANN. REP., *supra* note 8, at 9 (acknowledging that the Department of Land Affairs had distributed only 4.3% of the target, which was to transfer 30% of white-owned agricultural land by 2014).



the need to maintain public confidence in the land market and more generally to affirm the government's respect for individual property rights. It also reflects the recognition that expropriation in other countries has failed to provide rapid access to land for a large number of people, instead degenerating into lengthy political maneuvering and rent-seeking.<sup>119</sup>

I disagree with this position for four reasons.

First, these economists' notion of protecting individual property rights is quite shallow because it exclusively refers to the rights of current titleholders and potential investors. A more robust protection of property rights would include not only these well-positioned populations, but also the property rights of individuals and families who were unjustly dispossessed. Land dispossession has severely impoverished many individuals and families by depriving them of their primary asset. If a state protects only the property rights of the economically well-heeled and ignores those of its most vulnerable citizens, then can it truly claim to respect property rights?

Second, in defending their preference for negotiated land reform, World Bank economists argue that corrupt, highly centralized bureaucracies have consistently undermined state-led land reform efforts in other countries.<sup>120</sup> Although corruption poses an undeniable risk to land reform, to defend their position World Bank economists must demonstrate that increasing the use of eminent domain would make the state more vulnerable to corruption than relying primarily on negotiated land reform. Evidence from South Africa should make us skeptical of this claim.

For example, the Mpumalanga Land Claims Commissioner was removed because he colluded with speculators to inflate sale prices, and the Limpopo Land Claims Commissioner stood trial for misappropriating compensation set aside for displaced residents.<sup>121</sup> This suggests that corruption is also capable of subverting land reform efforts whether the state increases its use of eminent domain or continues to rely on negotiated land reform. The goal should be to devise mechanisms to increase transparency and prevent corruption regardless of what method of land reform a state adopts.

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119. Klaus Deininger, *Making Market Assisted Land Reform Work: Initial Experience from Columbia, Brazil, and South Africa*, in *AGRICULTURE AND THE ENVIRONMENT: PERSPECTIVES ON SUSTAINABLE RURAL DEVELOPMENT* 156, 169 (Ernst Lutz ed. 1998).

120. Deininger, *supra* note 91, at 2, 9–10.

121. Sydney Masinga, *Land Commissioner Out of Job*, NEWS24.COM, July 14, 2008, [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_2357202,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2357202,00.html) (last visited Apr. 29, 2010); Ügen Vos, *Land-Reform Boss Charged*, THE CITIZEN, Jan. 9, 2008, <http://www.citizen.co.za/index/article.aspx?pDesc=55857,1,22> (last visited Apr. 29, 2010).

Third, from the perspective of World Bank economists, it is more time consuming and financially costly to move away from the classical conception and allow eminent domain to assume a more prominent role in land reform because due process requires various layers of judicial appeals.<sup>122</sup> As a result, these economists do not recommend using eminent domain.<sup>123</sup> But, is the appropriate response to streamline the eminent domain process to make it more expedient, transparent, and efficient or to shy away from it altogether as recommended by these economists? The answer depends on the nation's legal framework, the level of political will, and the quality of its courts and implementing bureaucracy. There is no one size fits all. Therefore, increased use of eminent domain may be a gainful option in certain states, but not in others.

Fourth, maintaining public confidence in the land market is the main reason for South Africa and Namibia's obdurate commitment to the classical conception and its emphasis on the negotiated land reform.<sup>124</sup> The most notable downside of expropriating land from unwilling sellers is that this can make it difficult for owners to engage in long-term planning because expropriation involves a degree of uncertainty that a state can never fully mitigate. For example, the owner can never be certain if the state will subject her land to expropriation or what exact price she will receive if the state takes the land, and this uncertainty adversely affects investment.<sup>125</sup>

But as I have argued, it is clear that if land reform continues at its current dilatory pace, instability may prevail. Political instability is far worse for the investment environment than strategic expropriation geared towards making the land reform process more efficient. In addition, in societies where animosity over the unfulfilled promise of land reform threatens to destabilize the state, expropriation could potentially alleviate more social tension and political polarization than it will cause. Zimbabwe's present crisis was in large part fueled by the slow redistribution of land. Thus, in order for the international community to ensure the backlash experienced in Zimbabwe never happens again, it must realize

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122. See VAN DEN BRINK ET AL., *supra* note 97, at 34.

123. Deininger, *supra* note 91, at 2, 9–10 ("The choice of negotiated land reform rather than expropriation (which, as in Columbia, can still be used as an instrument of last resort) was based on the need to maintain public confidence in the land market, and more generally to affirm the government's respect for individual property rights.").

124. D.L. Carey Miller and Anne Pope, *South African Land Reform*, 44 J. AFR. LAW 167, 167–168 (2000) (describing the influence of Roman-Dutch philosophy, which is based on the assumption that "absolute right of ownership provide[s] maximum security of title").

125. See, e.g., Sarah Gavian & Marcel Fafchamps, *Land Tenure and Allocative Efficiency in Niger*, 78 AM. J. AGRIC. ECON. 460, 469 (1996) (using survey data from Niger to determine that tenure insecurity causes farmers to divert scarce resources to fields where there is greater tenure security); sources *infra* note 139.

that the extensive protection given to current landowners under the classical conception makes the process of land reform extremely cumbersome and dangerously slow.

## 2. The Classical Conception Is Not Justified When the Legitimacy of Property Rights Is in Question

There are three reasons why the classical conception is not justified in Southern Africa as well as other places where the legitimacy of property rights is in question. First, the theorists who have developed the classical conception did not intend for it to apply in contexts where past property theft was never rectified. Second, the classical conception makes redistribution difficult, but when a significant portion of the population is property-less, redistribution that gives everyone a baseline of property can expand the zone of autonomy. Third, failing to redistribute property can open the flood gates of societal fury and cause things to fall apart.

First, the theorists who have developed the classical conception—primarily John Locke and Robert Nozick—did not intend for it to apply in contexts where past property theft was never rectified, causing severe present-day inequality. One primary justification for the classical conception is the labor theory of ownership developed by John Locke in the *Second Treatise of Government*.<sup>126</sup> Locke and present day natural law scholars assume that property rights are acquired through individual effort or free and fair market exchanges.<sup>127</sup> Therefore, an individual's property rights have been violated if the law restrains an owner's control beyond what is necessary for the maintenance of order and protection of other people's rights to control their property.<sup>128</sup> Locke, however,

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126. According to Locke, each person has exclusive control over his body and his labor; therefore, each person also has exclusive control over the property that he creates through his labor:

Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.

See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 18 (C.B. Macpherson ed., Hackett Publ'g 1980) (1690).

127. *Id.* at 20–21 (arguing that an individual may take as much property as she can make use of before it spoils, ensuring that enough is left for others); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568–69 (2003).

128. LOCKE, *supra* note 126, at 66, 68 (arguing that the chief end of government is to preserve individuals' property and that government shall act only to ensure "the peace, safety, and public good of the people").

acknowledges that the labor theory has its limits. For example, private ownership is legitimate so long as there is some property left over for others.<sup>129</sup> Locke's labor theory does not apply in the context where past property theft has led to severe present-day ownership inequality where some people have so much property that others are left with none. This is the case in South Africa where, in 1994, eighty seven percent of the land was owned by whites who constituted less than ten percent of the population.<sup>130</sup> Under these conditions of severe inequality, Locke's labor theory cannot justify the classical conception.

In *Anarchy, State and Utopia*, Robert Nozick tries to justify the principles underpinning the classical conception by constructing an historical entitlement theory that builds upon Locke's work.<sup>131</sup> The entitlement theory is based on the assumption that people deserve their present property holdings, so it is not meant to apply in situations where the connection between past theft and present ownership undermines basic notions of desert. Nozick argues that a person is entitled to their property and minimal government interference with it if the principles of just acquisition and just transfer of property are satisfied. Nozick states that:

1. A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
2. A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
3. No one is entitled to a holding except by (repeated) applications of 1 and 2.<sup>132</sup>

If some injustice has occurred at any point of acquisition or transfer, Nozick argues that minimal government intervention could be justified through the principle of rectification, which corrects violations of the first two principles.<sup>133</sup>

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129. *Id.* at 19 ("[F]or this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.").

130. Tooyen & Njobe-Mbuli, *supra* note 7, at 461.

131. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 150-53 (Basic Books 1974).

132. *Id.* at 151.

133. According to Nozick, the principle of rectification is crucial:

This principle uses historical information about previous situations and injustices done in them (as defined by the first two principles of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a

Many critics have lambasted Nozick because he gives no content to the principles of just acquisition, just transfer or rectification.<sup>134</sup> Nozick himself admits that:

to turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holding: the principle of acquisition of holding, the principle of transfer of holdings, and the principle of rectification of violations of the first two principle. I shall not attempt that task here.<sup>135</sup>

Although the principles lack specified content, it is hard to imagine a state where these principles have never been violated. Although there may be a society where, for the most part, hard work and individual effort determine ownership, in the states this Article is concerned with—that is, states where the current legitimacy of property rights is low because of rampant past property theft—the principles of just acquisition and transfer have been egregiously violated. Therefore, according to Nozick, unless the injustice is rectified, then the entitlement theory's commitment to minimal government is not justified. Consequently, the classical conception and its commitment to minimal government (which includes the state not intervening to correct property imbalances) is not justified. The transformative conception picks up where Nozick left off by beginning to give content to the principle of rectification.

Second, even though the theorists who developed the classical conception did not intend for it to apply in the context of past theft, one can argue that the classical conception is justified because it may be necessary to secure freedom. The classical conception and its emphasis on limited interference with private property promotes freedom by ensuring a zone of autonomy for the owner. In this zone, the owner's individuality can develop and self-expression can flourish. For example, if a homeowner wants to paint her house bright purple in a salute to her Mexican heritage, she can; or if a homeowner chooses to live in a community where everyone has contractually relinquished their right to paint their home a bright color, she can do that too.<sup>136</sup> In addition, the autonomous

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probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.

*Id.* at 152–53.

134. See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 255 (1988).

135. NOZICK, *supra* note 131, at 153.

136. Renowned novelist, Sandra Cisneros, decided to paint her San Antonio home bright purple and her neighbors unsuccessfully tried to force her to change the color by claiming that

zone guarantees privacy so that owners can engage in acts not allowed in public spaces, like being nude.

While I admit that a zone of autonomy is important even in societies where ownership rights are hotly contested, as the legal realists have pointed out, when a significant portion of the population is property-less, redistribution that gives everyone a baseline of property can expand the zone of autonomy.<sup>137</sup> The state must not foil redistributive efforts by giving the same high level of property protection to the current owner's primary home (where autonomy is crucial) as to her non-residential investment property, for example, where autonomy is less a factor.<sup>138</sup>

Third, the utilitarian justification for the classical conception is that it maximizes societal wealth because people have an incentive to make long-term investments in property when they can reasonably expect that the future benefits will be secure. The assumption is that the classical conception bolsters security by shielding titleholders from the government and other third parties that may encroach on owner control. The empirical evidence proves that when basic property protection exists, investment thrives.<sup>139</sup> In these studies, the measure of basic property protection is based on, for example, whether owners are subject to arbitrary expropriations without compensation.<sup>140</sup> But, the existing empirical stud-

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it did not fit with the rest of the Victorian homes and was "historically incorrect." Sara Rimer, *San Antonio Journal*; *Novelist's Purple Palette Is Not to Everyone's Taste*, N.Y. TIMES, July 13, 1998, at A13.

137. See Cohen, *supra* note 78, at 18–19; Margaret Radin, *Property as Personhood*, 34 STAN. L. REV. 957, 957–1016 (1982).

138. See *infra* Part IV.A.

139. See, e.g., Holden & Yohannes, *supra* note 28, at 757 ("Many authors . . . have argued that tenure insecurity discourages investment in land by removing the incentives for it, as one may not be able to collect the expected flow of benefits of one's efforts if there looms a threat of losing the land in the future."); Simon Johnson et al., *Property Rights and Finance*, 92 AM. ECON. REV. 1335, 1351 (2002) (finding that "[t]he most insecure firms' investments" were 39% lower than the investment of "[f]irms with the most secure property rights"); Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207, 223 (1995) (finding that political institutions that protect property rights are crucial to economic growth and investment); Daniel Ayalew Ali et al., *Property Rights in a Very Poor Country: Tenure Insecurity and Investment in Ethiopia* 24 (World Bank, Dev. Res. Group, Working Paper No. 4363, 2007) (finding that Ethiopian farmers invest more heavily in their farms when transfer rights are present and there is tenure security).

140. See generally Timothy J. Riddiough, *The Economic Consequences of Regulatory Taking Risk on Land Value and Development Activity*, 41 J. URB. ECON. 56, 56–57 (1997). See also Simon Johnson et al., *Property Rights and Finance*, 92 AMER. ECON. REV. 1335 (2002) (arguing that "weak property rights discourage firms from reinvesting their profits, even when bank loans are available. Where property rights are relatively strong, firms reinvest their profits; where they are relatively weak, entrepreneurs do not want to invest from retained earnings." But, property rights were measured by responses to a survey asking entrepreneurs whether firms in their industry make extralegal payments for licenses and government services or payments for protection of their activities.); David Leblang, *Property Rights, Democracy*

ies do not measure whether forbidding eminent domain and other similar redistributive land policies increases investment. The empirical studies confirm only that a basic level of property protection increases investment (i.e. no expropriations without compensation) and not the heightened level of property protection required by the classical conception (i.e. no expropriations at all). Thus, the claim that the classical conception increases investment is empirically unproven.

Even though it is unclear what exact level of property protection gives owners the incentive to invest and develop their properties, we do know that stability is a prerequisite to sustainable investment. Morris Cohen, a renowned legal realist who wrote the classic article *Property and Sovereignty*, argues that:

[c]ontinued possession creates expectations in the possessor and in others and only a very poor morality would ignore the hardship of frustrating these expectations and rendering human relations insecure, even to correct some old flaws in the original acquisition . . . . Any form of property which exists has therefore a claim to continue until it can be shown that the effort to change it is worth while.<sup>141</sup>

In certain countries with a history of past theft that inspires present-day backlash, honoring current expectations can open the flood gates of societal fury and can leave the state on the brink of collapse. In these situations, human relations are rendered insecure not by disrupting existing expectations, but rather by the failure to disrupt existing expectations built upon a foundation of past property dispossession and oppression.

The paradox is that the classical conception's promise of increased investment requires political stability, but the classical conception's focus on protecting existing expectations can undermine land reform and thereby promote wealth-reducing instability.<sup>142</sup> Thus, in certain contexts, a transparent, accelerated reallocation of property rights—that is not in line with the classical conception—can be the most efficient way to promote investment and maximize wealth.

In this section, I have made four concise arguments that explain why the classical conception is inappropriate in Southern Africa. I have also

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and *Economic Growth*, 49 POL. RES. Q. 5 (1996) (arguing that "economies of nations that protect property rights grow more rapidly than those of nations that do not protect property rights." But, to measure property rights he uses data on the prevalence of exchange restrictions and total credit allocated to private enterprise as a percentage of GDP).

141. Cohen, *supra* note 78, at 16.

142. There is growing evidence from all over the world that redistributive land reform helped reduce poverty, increase efficiency, and establish the basis for sustained growth. See *supra* note 67.

provided three reasons why the classical conception is unjustifiable, more generally, in countries where the legitimacy of property rights is in question. It is now time to re-imagine the possibilities. It is time to explore a transformative conception of real property.

#### IV. THE TRANSFORMATIVE CONCEPTION

In this section, I begin by establishing the transformative conception's defining principles. The transformative conception is a unique approach to property developed in this Article, but it is also rooted in the work of legal realists, critical legal scholars, and African legal scholars who have examined the ways in which property law can undermine transformation. To further illustrate the transformative conception, I give specific examples of how a state can apply it. I present three redistributive policies that can facilitate prompt land reform and explain why the state can only implement the policies once it abandons the classical conception and adopts a transformative conception. After providing a comprehensive description of the transformative conception and demonstrating how it would apply in practice, I critique it. I find that although the transformative conception is far from perfect, it is a significant improvement over the classical conception in certain contexts.

##### A. *The Transformative Conception Defined*

The transformative conception is designed to address a problem experienced by many countries: a past regime stole real property from one group and gave it to another. The two groups were often racially, ethnically, or religiously distinct, which exacerbated the consequential societal fissures and animosity.<sup>143</sup> The past theft never becomes a thing of the past because wealth is an intergenerational phenomenon in that it is accumulated during a person's lifetime and then passed along to kin.<sup>144</sup> Likewise, disadvantage is also accumulated over subsequent generations

143. WORLD ON FIRE, *supra* note 20, at 6–7 (arguing that the volatile dynamic of inequality produces social instability in the form of a backlash against market-dominant minorities, democracy, and markets).

144. See MELVIN OLIVER & THOMAS SHAPIRO, BLACK WEALTH WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 6 (1997) (Oliver and Shapiro argue that “Just as blacks have had ‘cumulative disadvantages,’ many whites have had ‘cumulative advantages.’ Since wealth builds over a lifetime and is then passed along to kin, it is, from our perspective, an essential indicator of black economic well-being. By focusing on wealth we discover how black’s socioeconomic status results from a socially layered accumulation of disadvantages passed on from generation to generation.”). See generally JOHN BRITTAIN, THE INHERITANCE OF ECONOMIC STATUS (1977) (investigating social mobility and intergenerational transfer of wealth using regression analysis to predict the son’s economic status based on parental characteristics).



such that the devastating tremors from the initial theft of assets reverberate through time.<sup>145</sup> As a result, in some countries the dispossessed group presently occupies the lowest rungs on the economic ladder in large part due to the fact that they have not recovered from the catastrophic depletion of their assets; while the group that directly or indirectly benefited from the past theft is economically dominant.<sup>146</sup> Under these circumstances, a transfer of assets is needed to put the two groups on more equal footing and ensure that past theft no longer debilitates future generations.<sup>147</sup> The classical conception, however, can make redistribution of real property prohibitively expensive, perilously slow, or altogether impossible and hence is inappropriate when redistribution is vital.<sup>148</sup> The transformative conception has the potential to adequately address past property theft because it gives countries the tools to expedite the transfer of assets without bankrupting the state.

There are four defining principles of the transformative conception. First, one of its major premises is that all property is not alike and thus one uniform standard of protection is inappropriate. The classical conception gives the same protection to a family's home on a farm, for example, as it does to the 1000<sup>th</sup> acre of their farm. The transformative conception strategically protects autonomy by giving the state the burden of proving that certain modifications intended to facilitate the reallocation and relegitimization of property rights are not justified (which is akin to the heavy burden of proof under the classical conception) only when the case involves modifying the property rights of someone's primary residence.<sup>149</sup>

As Margaret Radin has argued, private property is essential because it provides a sphere where the state has limited powers to intrude, creating a space where individuals can control their external environment so

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145. BRITTAIN, *supra* note 144.

146. PETER ROSSERT ET AL., *PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM* 58–64 (2006) (detailing the historical background of South African land dispossession and the resulting economic and racial disparities).

147. The transformative conception is agnostic as to whether the state implements land reform that requires specific proof of past ownership or not. Under a proof-based framework, the state's goal is to vindicate the rights of identifiable past owners of specific parcels of land, so proof of prior ownership or occupation is the basis on which the state distributes compensation. The South African Land Restitution Program is a case in point. Under the alternative framework—exemplified by the Namibian land reform program and the South African land redistribution program—the state reallocates ownership rights without requiring an individual or community to provide proof of past ownership. The primary concern is whether the beneficiary is a member of a previously disadvantaged group.

148. See *supra* Part I.B.

149. The state should place a cap on the size of the primary homestead that will receive heightened protection so that a person owning a 500-acre property cannot claim the entire property constitutes her primary residence.

individuality and autonomy can flourish.<sup>150</sup> To promote autonomy, everyone deserves some basic amount of property for their home, even in societies where the legitimacy of ownership rights is contested.<sup>151</sup> When the homestead is *not* at issue, then under the transformative conception, property owners' rights are not protected by a heavy burden of proof. The transformative conception requires the state to commit to devising context specific property rules and resist the temptation to formulate one uniform standard of protection.

Second, the transformative conception requires the state to vindicate the rights of both present title deed holders and past owners who were unjustly dispossessed. The rhetoric of defending property rights is powerful. But the essential, unexplored question is: at what point does the state begin defending property rights? Under the classical conception, the state only defends the property rights of present titleholders because the underlying assumption is that all past acquisitions and transfers of property were just or that any injustices have since been rectified.<sup>152</sup> The classical conception does not tolerate the possibility that—due to a past injustice—two or more parties have a valid claim to the same piece of property. In contrast, the transformative conception fully embraces this very real possibility. Under the transformative conception, the state defends the property rights of both the present titleholder and past owners who were unjustly dispossessed.

Third, while the classical conception focuses solely on unidirectional demands titleholders can make on society, the transformative conception requires the state to focus on the duties of titleholders and not just their rights. The transformative conception expands the conversation to include the duties titleholders owe to a society bruised by past property theft.<sup>153</sup> Hohfeld famously argued that rights and duties are jural

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150. See Radin, *supra* note 137, at 957–1016 (exploring the relationship between property and personhood and concluding that “[a]t least some conventional property interests in society ought to be recognized and preserved as personal,” and “that right should be protected to some extent against government invasion.”). In many countries, including the US and South Africa, the state already gives heightened protection to the homestead. See also Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1099–1102 (2009) (listing the various forms of protections offered by the government that are “grafted on to American property, bankruptcy, and tax law,” including “[h]omestead exemptions, tenancy by the entirety, and foreclosure-relief legislation [to] help owners to shield a portion of their personal wealth from creditors and to retain their homes,” tax benefits available to homeowners, and legislation limiting eminent domain for private redevelopment adopted by different states at varying levels).

151. Stern, *supra* note 150, at 1099–1102.

152. NOZICK, *supra* note 131, at 152–53.

153. See JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 16 (2000) (arguing that there is a tension between liberty and obligation. He argues that “[w]e tend to reconcile this tension by privatizing obligation. After all, one might believe that owners

correlatives—one cannot exist without the other.<sup>154</sup> If I have an exclusive right to occupy a parcel of land, then you have a duty not to interfere with my occupation. In the Southern African context, as a result of the political compromise made by the liberation parties, titleholders have a right to their existing property despite the potentially unfair circumstances of acquisition. But, they also have a duty to facilitate redistribution. Likewise, those dispossessed by the past regime have a duty to respect the rights of present titleholders, but they also have a right to the vindication of their land rights.<sup>155</sup> This mutually reinforcing relationship between rights and duties is deeply embedded in the transformative conception.

Fourth, the burden of proof is an important baseline for legal analysis. Singer argues that “[t]he classical conception leads one to attempt to identify the ‘owner’ and then to presume that the owner’s interests prevail in any dispute over use of the property unless some sufficiently strong reason can be evinced to strip the owner of her rights. In this way, the classical conception allocates burdens of proof.”<sup>156</sup> In contrast, the transformative conception does not automatically place the burden of proof on third parties. It requires the owner to bear the burden of proving that certain modifications intended to facilitate the reallocation and re-legitimization of property rights are not justified.<sup>157</sup>

In addition to these four principles, there are several further distinctions between the classical and transformative conceptions. The classical conception assumes that property was acquired purely through individual effort and thus abhors government’s attempts to change the property status quo. In contrast, the transformative conception acknowledges that government policies have played a large role in shaping the

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should be encouraged to act in a caring manner toward others but that it is wrong for government to mandate such behavior.”).

154. See WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING & OTHER LEGAL ESSAYS* 38 (W.W. Cook ed. 1920) (“If X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”).

155. See S. AFR. CONST. 1996 § 25.

156. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1457 (1996). SINGER, *supra* note 153, at 84 (“When judges cannot figure out how to rule in a dispute between conflicting interests, values, or policies, they often fall back on presumptions and burdens of persuasion. Traditional property law, to a large extent, is about adopting those presumptions and allocating those burdens.”).

157. See generally AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); Heinz Klug, *Hybrid(ity) Rules: Creating Local Law in a Globalized World*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 276 (Yves Dezalay & Bryant G. Garth eds. 2002) (describing the negotiation process that led to the property provision in the South African Bill of Rights and explaining how the constitutional property provision complicates transformation).

present-day, inegalitarian property distribution and thus seeks to use government policy to increase the property status quo's equity.

Also, the transformative conception is predicated upon the fact that property rules play a significant role in structuring human relationships. Under the classical conception, only the property claims of present titleholders are recognized, and thus they are placed in a dominant societal position. Those with valid historical claims are subordinate to titleholders, if acknowledged at all.<sup>158</sup> The transformative conception seeks to mitigate this power asymmetry by protecting the rights of current titleholders and also defending the rights of those unjustly dispossessed.

### *B. The Transformative Conception Applied*

The specific policies that a nation adopts to address past theft are informed by the conception of property it embraces. If a nation adopts the transformative conception, then this will determine the range of policy options that follow. Although the policy options available under the transformative conception can facilitate land reform to address inequality generally, this Article specifically argues in favor of eschewing the classical conception and implementing the transformative conception in the extreme case, which is when inequality emanating from past property theft has the potential to cause backlash and destabilize the state.<sup>159</sup> Destabilization is more likely to occur when the current society has a strong collective memory of past property theft; when there are enduring consequences of the past theft such as severe inequality; when the majority or a mobilized minority was dispossessed; and, when the state's capacity or willingness to prevent or subdue potential disobedience is weak.<sup>160</sup>

When state destabilization is on the horizon (like in South Africa and Namibia), redistribution is needed to keep things from falling apart. Policies resulting from the classical conception are particularly inapt at facilitating timely land reform, but policies resulting from the transformative conception are ideal. If the political will exists, a state can abandon the classical conception and use redistributive policies such as the automatic right of first refusal, eminent domain, and mandatory land rentals to redistribute land. In the following section, I explain each policy

158. See *WORLD ON FIRE*, *supra* note 20, at 6 (noting how the racial and ethnic aspects to this subordination animate the conflict). For a more on how race confers economic privilege, see also Cheryl Harris, *Whiteness as Property*, 106 HARVARD L. REV. 1707, 1710 (1993) ("In a society structured on racial subordination, white privilege became an expectation and, to apply Margaret Radin's concept, whiteness became the quintessential property for personhood.").

159. See, e.g., Atuahene, *supra* note 3, at 838 ("If a population begins to perceive that its highly unequal property distribution is illegitimate, property-based disobedience may result if the state's last line of defense—its coercive power—fails to secure compliance with law. There is substantial evidence that economic inequality can lead to instability").

160. See *id.*

and why it is incompatible with the classical conception, but exemplary of the transformative conception.

### 1. Automatic Right of First Refusal

Under the classical conception, all regulations that encroach upon an owner's power to transfer her property are deeply suspect. But under the transformative conception, regulations that are designed to remedy past wrongs by facilitating land transfer are encouraged. For instance, an automatic Right of First Refusal (ROFR) for the state on pre-determined lands is consistent with the transformative, but not the classical conception.<sup>161</sup> A ROFR is the right to enter into a contract to acquire an asset from the owner on the exact or approximate transaction terms as a third party.<sup>162</sup> The state must exercise the ROFR within a reasonable time after the owner notifies it of a tentative sale. After exercising its ROFR, if the state does not provide payment for the land within a specified time, then its rights extinguish automatically and the owner is free to sell the land to the buyer. Under this redistributive tool, the owner bears the burden of proving that the ROFR is not justified.

The automatic ROFR is valuable because it can increase the supply of land available for redistribution. It can also give the state an opportunity to seize upon owner sales that are below FMV and thus facilitate the affordable acquisition of land for redistributive purposes. The potential downside of an automatic ROFR is that there are transaction costs in negotiating a sale agreement. If the state chooses to exercise its ROFR, the potential buyer is not able to recover these costs; and ultimately, this

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161. Namibia has something similar to a right of first refusal (ROFR) on its books. All owners must first offer land to the state for purchase under negotiated land reform, but, if the state refuses, owners can sell it to anyone else at their elected price. Shriver, *supra* note 117, at 429 ("Any owner who wishes to sell land within Namibia must first offer it to the GRN via the Ministry of Lands, Resettlement and Rehabilitation (Lands Ministry)"). This is not effective because an owner can offer the land for sale to the government at one price and, if the state refuses to purchase the land, the owner can offer it for sale at a lower price to a private party. For example, an owner has the power to offer land to the government for \$10 million and, upon government refusal, offer the same land to a private party for \$5 million. Under the ROFR consistent with the transformative conception, the state can capitalize on the \$5 million sale even if the seller objects. See Kaumbi, *supra* note 7, at 30 (quoting Namibia's Prime Minister confirming that "[t]he process has become too slow because of arbitrarily inflated land prices"). Ultimately, the ROFR under the transformative conception should reduce an owner's incentive to inflate the price offered to the state.

162. Marcel Kahan, *An Economic Analysis of Rights of First Refusal* 4 (N.Y.U. Ctr. for Law & Bus., Working Paper No. 99-009, 1999), available at <http://papers.ssrn.com/abstract=11382> (last visited Apr. 29, 2010) ("A right of first refusal requires the owner of the property subject to the right to offer the property to the rightholder on the same terms as those offered by a third party before the owner can sell the property to that third party.").

can lead to a reduction in land sales.<sup>163</sup> To mitigate this concern, states can subsidize the potential buyer's transactions costs when it exercises its ROFR. Another potential concern is that the ROFR will increase the red tape involved with land sales and thereby introduce unnecessary inefficiencies into the land market.<sup>164</sup> This is why it is important that the window of time that the government has to exercise its ROFR and provide payment is relatively short and that the option expires automatically when the time period expires with no need for further government intervention.

## 2. Eminent Domain

Eminent domain allows the state to acquire property against the owner's will so long as it is for a public purpose and just or fair compensation is paid. Eminent domain is widely considered a legitimate part of a state's police power because it counteracts the undue power of intransigent owners to obstruct or make the state's acquisition of land for a valuable public purpose prohibitively expensive. Under the classical conception, however, eminent domain is considered a serious infringement of an owner's rights to use and transfer her property and hence is seriously discouraged.

It is important to note that western nations, like the US, did not spurn eminent domain in their own land reform efforts. In the 1946 case *Puerto Rico v. Eastern Sugar Associates*, Puerto Rico used its powers of eminent domain to condemn 3,000 acres of land on the Island of Vieques that was owned by Eastern Sugar Associates.<sup>165</sup> The condemnation was part of an official strategy to end existing oligopolies, as well as "assist in the creation of new landowners [and] facilitate the utilization of land for the best public benefit."<sup>166</sup> The First Circuit allowed the state to take large corporate land holdings and distribute them to squatters and subsis-

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163. See Hayley H. Chouinard, *Auctions with and Without the Right of First Refusal and National Park Service Concession Contracts*, 87 AM. J. AGRIC. ECON. 1083, 1084 (2005) (exploring how attaching a ROFR to auctioned contracts may lead to non-competitive bids and fewer participants).

164. See Edward Lahiff, *From 'Willing Seller, Willing Buyer' to a People-Driven Land Reform 2-3* (Programme for Land and Agrarian Stud., Policy Brief No. 17, 2005), available at <http://www.icarrd.org/es/proposals/Policy17.pdf> (suggesting South Africa could end the landowner "veto over land reform" and ensure a better quantity and quality of land is available by granting a ROFR to the state). Lahiff also notes, however, that giving the state a ROFR may not necessarily lead to land availability and lower prices since "disagreement over price" and "bureaucratic complexity and potential disruption to the land market" could make it less effective than expropriation. *Id.*

165. *Puerto Rico v. E. Sugar Assoc.*, 156 F.2d 316, 319 (1946), *cert. denied*, 329 U.S. 772 (1946).

166. *Id.* at 318.

tence farmers.<sup>167</sup> The court described the redistributive strategy as an acceptable public use under the Fifth Amendment; and the Supreme Court denied certiorari.<sup>168</sup> The same oligopoly that plagued the Puerto Rican Island of Vieques also afflicted the islands of Hawaii, where the government owned forty nine percent of the land while forty seven percent was owned by seventy two private landowners.<sup>169</sup> Consequently, the Hawaiian Legislature enacted the 1967 Land Reform Act, where it used its powers of eminent domain to purchase land from lessors and transfer it to long-term lessees.<sup>170</sup> In *Hawaii Housing Authority v. Midkiff*, the US Supreme Court unanimously ruled that Hawaii's land reform program—intended to dismantle its land oligopoly—served a valid public purpose.<sup>171</sup>

Under the transformative conception, the state is encouraged to use its power of eminent domain to facilitate land reform and end oligopolies. Following the US example, states should consider land reform a valid public purpose. More importantly, using South Africa as an example, states should adopt a contextual understanding of just compensation that legally establishes the FMV as part of a non-exhaustive list of considerations, which can include current use, amount paid, capital improvements, circumstances of acquisition, and all forms of government subsidy invested in the land.<sup>172</sup> A state can, for example, subtract past receipt of government subsidies from FMV and add a certain amount to the FMV when there is a taking of a primary residence to account for the subjective, non-market value attached to homes.<sup>173</sup> The

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167. *Id.* at 319.

168. *Id.* at 322–25.

169. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1994).

170. *Id.* at 233.

171. *Id.* at 243–45.

172. Land reform is a public purpose and

[t]he amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including a. the current use of the property; b. the history of the acquisition and use of the property; c. the market value of the property; d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e. the purpose of the expropriation.

S. AFR. CONST. 1996 § 25. See also *Ex parte Former Highlands Residents; In re: Ash v. Dep't of Land Affairs* 2000 (2) SA 26 (LCC) (stating that for determining just and equitable compensation, equitable balance required by the Constitution will in most cases be best achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require).

173. See Janice Nadler & Shari Seidman Diamond, *Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity*, 5 J. EMPIRICAL LEGAL STUD. 713, 748 (2008) (showing that even if there is a commendable purpose for the taking, the justness of the taking is determined by the level of subjective attachment to the property). James J. Kelly, "We Shall Not Be Moved": *Urban Communities, Eminent Domain*

state may also consider disruption costs (including moving expenses and loss of good will), which are customarily not included in compensation calculations.<sup>174</sup>

In the context of systematic past property theft, it is not appropriate to assume that compensation should be automatically equivalent to the FMV because property was sometimes not acquired on fair market terms. If I, for instance, acquired a parcel of land from the former regime at nominal cost, is it reasonable for me to demand FMV for that land today? I deserve FMV when the state takes the improvements to the land if I paid FMV for them, but it is unreasonable for me to expect to receive FMV for the underlying land when I did not pay FMV to acquire it. The transformative conception deconstructs this assumption of fair market transactions and creates a new understanding of ownership that takes into account the reality of how an owner actually acquired the land. Under an eminent domain regime consistent with the transformative conception, the owner has the burden of proving that only FMV should apply and not a more contextual understanding of just compensation.

There are downsides to the transformative conception's approach to eminent domain. First, the cost of land transactions will increase for some owners because of the research required to assess the factors beyond the FMV that a state must take into consideration. Second, this approach to eminent domain may discourage long-term investment and planning if investors are unclear about what just compensation entails. "Uncertainty of expropriation affects the uncertainty of returns and tends to discourage investment for risk-averse decision makers."<sup>175</sup> To encourage current owners to invest in their property, it is important that all improvements created or fully paid for by them are entitled to FMV upon expropriation so that owners can recoup their investment. Compensation for the underlying land, however, should be subject to the contextual understanding of just compensation.

### 3. Mandatory Land Rentals

In many countries, there is ample idle, yet productive land available for redistribution. One consequence of extreme inequality is that there are a few owners who often have more high quality land than they can use productively. For instance, in 1980, sixty percent of large-scale

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and the *Socioeconomics of Just Compensation*, 80 ST. JOHN'S L. REV. 923 (2006) (arguing that traditional calculation of just compensation as a solely equitable remedy (FMV) fails to compensate the property owner for intangible and future earnings, as well as non-monetary value)

174. Kelly, *supra* note 173, at 923.

175. Jahangir Saleh, *Property Rights Institutions and Investment* 7 (World Bank, Working Paper No. 3311, 2004). See also *supra* note 125 and accompanying text.



commercial land in Zimbabwe was completely unutilized.<sup>176</sup> Often, the reason that states do not acquire this unutilized land is because of its high cost and the competing claims on state resources.<sup>177</sup> To overcome this hurdle, states can differentiate productive and unproductive land and subject unproductive land to long to medium term leases with the state. In order to provide current owners with adequate notice, the state should create a comprehensive list of uses that it is likely to classify as unproductive. Once the state classifies land as unproductive, the burden is on the owner to prove that the classification is unjustified.

Under the classical conception, an owner can allow her fertile land to lay fallow even when the state desperately needs it for redistribution to dispossessed populations. But under the transformative conception, owners have a duty to facilitate redistribution. For instance, if an individual owns ten acres of land and she is only using six productively, then the state can rent the remaining four acres for a five to forty year period so long as it pays just compensation for the rental. If the owner objects, then she has the burden of proving that the land use is productive and hence not justifiably subject to a mandatory land rental. In essence, mandatory land rentals are a creative form of eminent domain.<sup>178</sup>

For a cash-strapped state, the cost of renting land is often far more feasible than buying it. Therefore, with mandatory land rentals, those unjustly dispossessed will have access to land at a price the state can afford. In their study about access to land, Sadoulet et al. convincingly argue that even though rental is not a transfer of wealth, it does produce welfare effects because in the long-run tenants can labor, build their wealth, and eventually become owners.<sup>179</sup> The goal is to give the landless short-term leases on unused but high quality land in order to increase the land's productivity. The transformative conception makes a distinction between land used productively and unproductively. It recognizes that not all property is the same, so to encourage entrepreneurs to work hard and increase the overall economic pie, all property does not require the same level of protection.<sup>180</sup>

176. Zimbabwe Ministry of Lands, Land Reform and Resettlement, Land Reform Programme, <http://www.lands.gov.zw/landreform/landreform.htm> (last visited Apr. 17, 2010).

177. Shaw, *supra* note 105, at 76 ("During the 1990s, however, the pace of change slowed, and disenchantment grew as meaningful and economically viable land reform turned out to be more difficult and more expensive than expected.").

178. See *supra* Part IV.B.2.

179. See Elisabeth Sadoulet, Rinku Murgai, & Alain de Janvry, *Access to Land via Land Rental Markets*, in *ACCESS TO LAND, RURAL POVERTY, AND PUBLIC ACTION* 196–229 (Alain de Janvry et al. eds., 2001).

180. It is important that environmentally productive uses do not fall into the unproductive category. See generally CARL FOLKE ET AL., *RESILIENCE AND SUSTAINABLE DEVELOPMENT: BUILDING ADAPTIVE CAPACITY IN A WORLD OF TRANSFORMATIONS* (2002) available at <http://www.sou.gov.se/mvb/pdf/resiliens.pdf> (describing how drastic changes to

An alternative measure for discouraging speculative land holding is to increase the property tax on unproductive land. However, mandatory land rental better serves the dual purpose of preventing speculation and providing the landless with land. The key to making mandatory land rentals work is transparency. The state must clearly define what it considers productive and unproductive land to avert rent seeking behavior among program administrators.<sup>181</sup> Also, the state should create and widely disseminate model lease agreements to ensure that owners of unproductive land have sufficient notice of the potential terms of the rental.

These three redistributive policies are consistent with the transformative conception's four defining principles. First, context is crucial. The redistributive policies presented above are merely meant to be examples because a guiding principle of the transformative conception is that not all policies are appropriate in all contexts. Similarly, the level of state protection property receives is also dependent on the context. Thus, to protect autonomy, the owner's primary homestead gets heightened protection while property not used for the primary homestead does not.

Second, a defining feature of the transformative conception is the need to vindicate the rights of both present and past owners. The redistributive policies discussed are specifically designed to facilitate the orderly and expeditious transfer of land to past owners who were unjustly dispossessed while protecting the rights of current owners. Third, in the context of pervasive past theft, all owners have a duty to facilitate the orderly transfer of land. To count as an infringement on an owner's property right under the transformative conception, the redistributive policy must force her to substantially exceed her duty as a property owner. In contrast, under the classical conception the sole focus is on an owner's right to have near full control of her property and hence all encroachments on owner's control are considered unjust infringements.

Fourth, the premise underlying all the redistributive tools mentioned above is that transforming the property ownership status quo and promoting fairness and stability has priority over protecting existing expectations and buttressing owner control. The transformative conception operationalizes this conscious moral judgment by requiring the current owner to bear the burden of proving that the implementation of the redistributive policy infringes on her property rights.

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an environment can render a society unable to adequately adjust, which can lead to social instability).

181. See generally John Mbaku & Chris Paul, *Political Instability in Africa: A Rent-Seeking Approach*, 63 PUBLIC CHOICE 63, 63–72 (1989).

In sum, the redistributive policies presented in this section are incompatible with the classical conception, but quintessential manifestations of the transformative conception.

### C. *The Transformative Conception Critiqued*

In this section, I enumerate the most pointed critiques of the transformative conception and explain why I believe that, despite its imperfections, it is still the best available option in certain situations where past property theft threatens to cause backlash and destabilize the current state.

The first critique of the transformative conception is that it is unnecessary because tax and transfer programs more efficiently redistribute assets. Kaplow and Shavell argue that “redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient.”<sup>182</sup> Thus, while some economists may agree that redistribution is necessary to prevent backlash, they may insist that the redistributive mechanism should be tax and transfer programs rather than altering property rules as required by the transformative conception.<sup>183</sup> I acknowledge that when the transfer of real property is not critical, tax and transfer programs may suffice. In certain states, however, tax and transfer programs will not be sufficient because the novel attributes of land make its actual transfer essential.

Land is unique in several ways: First, land often has an unquantifiable cultural value because it plays a key role in individual and group identity.<sup>184</sup> Communities are often spiritually and emotionally tied to the land where their ancestors are buried. As a result, although a group or individual may have been dispossessed long ago, past owners can still

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182. Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994).

183. *Id.*

184. Waldron, *supra* note 3, at 20 (1992). Nadler & Diamond expounded upon particular factors that influence the cultural values and identity associated with land:

We use this term to capture all the reasons why owners might have a special attachment to their property: the improvements they have made over the years using their own labor and design ideas; the memories inexorably connected with the property, including milestones like births, birthdays, and weddings, along with mundane but no less important memories of everyday living; proximity to friends and family; connections with others in the neighborhood that leverage social capital; expression of personality; the ability of a home to provide opportunity to maintain and express personal and group identity.

Nadler & Diamond, *supra* note 173, at 713 (2003). Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005) (arguing that indigenous communities should have a legal right to protect their cultural identity).

have a deep cultural connection to land that the passage of time does not erode. Second, people's perceptions of inequality and unfairness are one primary source of backlash.<sup>185</sup> Since land is a highly visible sign of wealth, perceptions about inequality may not shift without the significant transfer of real property. Third, land is the basis of sovereignty. If an oppressed indigenous majority does not reclaim land that was unjustly dispossessed by an ethnically distinct market-dominant minority, then political independence can ring hollow.<sup>186</sup> Fourth, in some societies land is the most important means of production so access to land is the primary way to counteract poverty and marginalization. Therefore, while some states can address inequality resulting from past theft through tax and transfer programs, others require a new conception of property that facilitates prompt land transfer.

The second critique of the transformative conception is its seeming impracticality. That is, why would countries now shift course and implement the transformative conception when they have failed to move away from the classical conception in the past? In Southern Africa, for example, before the state can implement the transformative conception it has to jump one daunting hurdle—its fear of foreign divestment. But, the current global economic crisis may significantly deflate this roadblock. In the current economic climate, bank lending has decreased drastically and the flow of money to the developing world has lessened.<sup>187</sup> With reduced foreign investment, the fear of disinvestment is also attenuated.

Also, the laissez faire, non-interventionist economic model associated with the classical conception is rapidly losing credibility given the havoc it has wrought in the U.S. banking system. This means that the external forces edifying the classical conception are weakening.<sup>188</sup> At the same time, the internal demands of the poor for a wide range of redistributive programs are becoming more fervent.<sup>189</sup> Consequently, the

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185. Mark Irving Lichbach, *An Evaluation of "Does Economic Inequality Breed Political Conflict?"* *Studies*, 41 *WORLD POL.* 431, 456 (1989) ("In other words, [Deprived Actor] theories generally suggest how psychological processes (both cognitive and emotional) intervene and hence may turn grievances about economic inequality into political dissent."). See sources cited *supra* note 31.

186. See Kaumbi, *supra* note 7, at 28.

187. E.S. Browning, Alistair MacDonald & Jonathan Cheng, *Credit Scare Spreads in U.S., Abroad: Fears of a Recession Spark a Global Selloff; New Pressure on the Fed*, *WALL ST. J.*, Jan. 22, 2008, at A1 ("U.S. and European investors, seeking to preserve their gains, are repatriating money they invested in the developing world, helping drive those markets lower, analysts say.").

188. *Id.*

189. Sam Moyo, *The Land Question in Southern Africa: a Comparative View*, in *THE LAND QUESTION IN SOUTH AFRICA: THE CHALLENGE OF TRANSFORMATION AND REDISTRIBUTION* 60, 74 (Lungisile Ntsebeza & Ruth Hall eds., 2007) (noting that "recent experiences of rural land occupations in Zimbabwe and in peri-urban South Africa and Namibia show the

governments of South Africa, Namibia, and other similarly situated nations have a unique window of opportunity to implement the transformative conception although they have failed in the past.

If the particular country's implementation of the transformative conception is riddled by corruption and ineptness, then this will deter investment. But, if the country successfully implements the transformative conception, then financial investment will continue to thrive and, more importantly, the potential for backlash caused by past theft may slowly attenuate.

The third critique of the transformative conception is that it assumes redistribution will mitigate backlash. But, redistribution can also create backlash if, for example, a violent minority wreaks havoc or a foreign power precipitates instability in their opposition to the land reform program. In Nicaragua, for instance, the US funded a military insurgency (the CONTRAS), in part, to prevent the Sandinistas from instituting socialism and a massive redistribution of property.<sup>190</sup> Consequently, the Sandinista land reform program was compromised because the state had to spend a significant portion of its budget on military operations, leaving scarce funding for its land reform program.<sup>191</sup> Thus, states should carefully consider not only the backlash that land reform is intended to mitigate, but also the backlash that it may create.

The fourth critique is that all the modifications to existing property rights required by the transformative conception will affect those who had varying degrees of complicity in the past property theft as well as those who had no part in it at all. But, when the wrongdoer's identity is blurred or the state is not able to hold her accountable due to the passage of time, this is a necessary and unavoidable price that present landowners must pay to ensure a stable future.<sup>192</sup>

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intensity of popular demand for land redistribution among a diverse range of beneficiaries such as the rural landless, . . . the rural poor, [and] the urban poor . . ."). See also sources cited *supra* note 31.

190. Abu-Lughod, *supra* note 67, at 34; See Everingham, *supra* note 67.

191. See W. Gordon West, *The Sandinista Record on Human Rights in Nicaragua*, 22 *DROIT ET SOCIÉTÉ* 393, 401 (1992) ("In response, whereas Nicaraguan military spending constituted only 7% of the 1980 and 1981 national budgets, the figure had to rise through 13% (1982), 19% (1983), 25% (1984) to about 50% since.").

192. The identity of the wrongdoer is not always muddy. After World War II, for example, France forced individuals occupying Jewish property to return it, even if they acquired it legally from the Nazis, on the theory that they were complicit in the taking. Consequently, property owners not directly involved or complicit in the taking did not have to shoulder the primary burden of rectification. See Wouter Veraart, 'Reasonableness' or Strict Law? The Postwar Restitution of Property Rights in the Netherlands and in France (1945–1952) 9–10 (Dec. 30, 2002) in *YAD VASHEM—THE INTERNATIONAL CONFERENCE ON CONFRONTING HISTORY: THE HISTORICAL COMMISSIONS OF INQUIRY* (noting that the strict restitution law in France made it easier for former owners of property to get their land back because "the judge was obliged to acknowledge the nullity of any transaction of property performed after the

The fifth critique of the transformative conception is that the modifications may deprive the country of necessary capital by giving present landowners an incentive to transfer wealth from real property to other forms of wealth or out of the country all together. The modifications can also impede foreign investment or alienate landowners, causing them to emigrate with their capital and skills. To mitigate these concerns, the state must set clear limits on its power to modify property rights, have a transparent process for defining which properties are subject to rights modification, and give owners ample notice of all impending changes. Once the new rules have been announced to the public, the markets will adjust. It is important to remember that while changing property rules may adversely affect the investment environment, the failure to deliver timely land reform may destroy it.

The sixth critique is that implementation of policies consistent with the transformative conception requires a high level of bureaucratic capacity, which many transitional states do not have. In contrast, the classical conception does not promote the state-led reordering of property rights and thus policies consistent with it are not as severely affected by bureaucratic incapacity. ROFR, eminent domain, and mandatory land rentals, for example, are policies that require a skilled, accountable, and transparent bureaucracy to implement them. The critique is that it is better not to promote policies that redistribute property than to implement redistributive policies that are undermined by corruption and ineptitude. To attenuate this challenge, it is crucial that the international community proactively intervene to assist nations in building the bureaucratic capacity necessary to implement redistributive policies.

The seventh critique is that while the transformative conception facilitates land reform, what is needed is agrarian reform, which is land reform implemented in concert with the socio-economic and political reforms necessary to ensure land reform beneficiaries are successful.<sup>193</sup> The real challenge of any land reform program is not just acquiring land, but also ensuring that beneficiaries are able to use the land efficiently.<sup>194</sup>

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original owner had lost his right to dispose of it. This meant that all the transactions performed by so-called 'administrators' were null and void and had to be undone.") available at [http://www1.yadvashem.org/about\\_yad/departments/institute/pdf/veraart\\_paper\\_revised\\_since\\_conference\\_new.pdf](http://www1.yadvashem.org/about_yad/departments/institute/pdf/veraart_paper_revised_since_conference_new.pdf). Southern Africa does not have this luxury because the identity of wrongdoers is not as clear as it was in the Netherlands due to the passage of time between the wrongful act and rectification.

193. See Saturnino M. Borras, Jr. et al., *Agrarian Reform and Rural Development: Historical Overview and Current Issues* 3 (ISS/UNDP, Land, Poverty & Pub. Action, Policy Paper No. 1, 2007), available at <http://www.iss.nl/content/download/3831/37212/file/ISS%20UNDP%20Overview%20paper.pdf>.

194. See also Saturnino M. Borras, Jr., *Questioning Market-Led Agrarian Reform: Experiences from Brazil, Colombia and South Africa*, 3 J. OF AGRARIAN CHANGE 367, 385 (2003) (noting that the lack of co-ordination between the Rural Development Program and

To ensure success, the state is required to not only transfer title, but also to provide post-settlement support, subdivide the farm, construct infrastructure, and relocate people. The transformative conception, however, only facilitates land acquisition and must be understood as the first of several steps to achieving a more equitable property distribution.<sup>195</sup>

Despite the aforementioned criticisms, the transformative conception is still a viable option for states where the lack of timely land reform heightens the possibility of backlash and state destabilization. But, while the transformative conception is necessary for expedited land reform, it is ultimately a limited, technical legal solution. What is needed for comprehensive, lasting transformation is an accompanying political solution. The transformative conception is one piece in a larger puzzle. The other pieces I did not develop in this Article include how a state can: build a transparent, efficient bureaucracy to implement state-led land reform; choose who will benefit from land reform programs; ensure the court system effectively protects the rights of current owners; and, create effective agrarian reform policies. Every puzzle is solved one piece at a time.

## V. THE LIFESPAN OF THE TRANSFORMATIVE CONCEPTION

Depending on the context, the transformative conception may be appropriate as a long-term policy, it may be suitable for a shorter period of time and then reach its expiration point, or it may never be appropriate in the first place. This section argues that the appropriateness and lifespan of the transformative conception depends upon whether a state is more

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Department of Land Affairs contributes to the failure in implementing farm and beneficiary development).

195. While the focus of this Article is on how to transfer land more effectively, in prior articles I have dealt with how to ensure land reform is successful. I argue that under certain circumstances, dispossession involves more than just the confiscation of an individual or community's property, it is about their removal from the social contract. When they are removed, then they are subject to what I call property-induced invisibility. I argued that the state's task in this instance is not just to give land to the dispossessed, but to do it such that they are reintegrated into the social compact and made visible. While reparations deals exclusively with providing compensation, at the core of restoration is giving the dispossessed a choice as to how they are compensated so that they can decide the terms of their re-inclusion into the social contract. The choices can include, for example, free higher education for two generations, subsidized credit, cash, the actual land that was unjustly taken, or alternative land if it is not available. Restoration allows land reform beneficiaries to choose from an array of compensation options rather than only giving them the option of receiving land, even if they do not have the skills or capital to use it effectively. Restoration—with its focus on choice—is the key to moving from land to agrarian reform. See Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1444–45 (2007).

prone to market or government failure. The section also develops a mechanism states can use to shift from the transformative conception to the classical conception or vice versa.

When deciding whether to adopt the classical conception, the transformative conception, or some hybrid of the two, decision makers must realize that, while the classical conception is vulnerable to market failure, the transformative conception is subject to government failure. Market failure is the idea that “the production and distribution of a commodity through a competitive market in which all the relevant agents are pursuing their own self-interest will result in an allocation of that commodity that is socially inefficient.”<sup>196</sup> For instance, market processes can lead to a highly unequal and socially inefficient distribution of land.<sup>197</sup> Insofar as the classical conception serves as a stumbling block to fostering a socially efficient distribution of property, it is vulnerable to market failure.

Alternatively, government failure “arises when government has created inefficiencies because it should not have intervened in the first place or when it could have solved a given problem or set of problems more efficiently[.]”<sup>198</sup> The value of the transformative conception is that it facilitates government reallocation of property rights. However, government failure can occur if lack of transparency, corruption, bureaucratic incapacity, or other inefficiencies undermine redistributive efforts. The key to mitigating imperfections of a government-led approach is to maintain effective checks on governmental power.

The judiciary plays an important role in limiting the government’s power, but the court walks a fine balance. It must protect the rights of current owners. At the same time, when interpreting existing or new property legislation, the court must reject the classical conception’s seductive siren song, which is the false assumption that all property was acquired due to individual effort and thus the state should give it near absolute protection to reward that effort. Also, once laws consistent with the transformative conception are passed, those charged with implemen-

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196. See Julianle Grand, *The Theory of Government Failure*, 21 BRIT. J. POL. SCI. 423, 423 (1991).

197. Although many economists exclude distributional concerns from their evaluation of market success and failure, “from one perspective, it is theoretically correct to consider distributional inequity as an example of market failure. From this perspective, income distribution, or equity as a general systemic attribute, is a particular type of public good.” Charles Wolf, Jr., *Market and Non-Market Failures: Comparison and Assessment*, 7 J. PUB. POL’Y 43, 52 (1987).

198. CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICRO-ECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 3 (AEI-Brookings Joint Ctr. for Reg. Stud. 2006), available at [http://www.brookings.edu/~media/Files/rc/papers/2006/09monetarypolicy\\_winston/20061003.pdf](http://www.brookings.edu/~media/Files/rc/papers/2006/09monetarypolicy_winston/20061003.pdf).



tation will inevitably have some degree of discretion, and if this discretion is abused in any way, it is important for the courts to promptly intervene to correct the situation. Successfully implementing the transformative conception involves the joint effort of the legislature and judiciary.

Each state must carefully weigh the potential for and consequences of market failure against that of government failure. If the potential for market failure is more acute, then policies more in line with the transformative conception are a viable option. However, if the potential for government failure is overwhelming, then policies consistent with the classical conception, which require less government intervention, are a better option. South Africa and Namibia are susceptible to both market and government failure. But, market failure is the more detrimental in these countries because the consequences of not implementing redistributive policies and allowing a socially inefficient land distribution to endure are potentially explosive. These countries must implement policies in line with the transformative conception and rely on the international community to help further strengthen their domestic bureaucratic capacity.

Once a state decides which conception of property is more appropriate, then there is the question of how a state can transition from where it is to where it needs to be. The transformative conception is usually ideal during the period in which society is changing from one set of values based on exclusion and oppression to another based on inclusion and fairness. This process of transformation may take five years or fifty; there is no one size fits all. There may come a moment when redistributive efforts make substantial progress towards leveling the playing field imbalanced by past property theft. Once there is a generalized belief that present owners acquired their property fairly, the society may move to the point where the vast majority of citizens believe that it is in their self-interest to adopt a conception of property that prioritizes protecting owners rather than facilitating land reform. At this point, the state can move from the transformative conception to the classical conception or to some hybrid of the two.

The Canadian Notwithstanding Clause of the Charter of Rights provides a practical example of how this transition can occur. Section 33(1) of the Charter allows either Parliament or the provincial legislature to expressly overrule certain sections of the Charter by passing an Act.<sup>199</sup>

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199. David Johansen & Philip Rosen, *The Notwithstanding Clause of the Charter 2* (The Library of Parliament, Background Paper No. BP-194E, 2008) (Can.). The purpose of the clause is to provide balance between the legislative and judicial branches, but in practice the clause is rarely used. *Id.* at 8, 13.

“Section 33(3) provides that each exercise of the notwithstanding power has a lifespan of five years or less, after which it expires, unless Parliament or the legislature re-enacts it under section 33(4) for a further period of five years or less.”<sup>200</sup> In effect, the overruling legislation has a sunset clause, which forces politicians and society at large to deliberate about the merits of the impugned section of the Charter. In the same spirit, a state could enact property laws consistent with the transformative conception, which will automatically expire in five years unless the legislature re-enacts the laws for an additional period of five years or less. Laws implementing the transformative conception should have a sunset clause to encourage society to deliberate about the status of rectification and the continued need for the transformative conception.

In sum, the transformative conception is not always the optimal conception of property for a state to adopt. When it is, its optimal lifespan varies; it could be two years, twenty years, or an indefinite period of time. I have attempted to suggest the factors a state should consider when determining its optimal conception of property. I have also presented a potential mechanism for transitioning from one conception to another.

## VI. CONCLUSION

The conception of property that a transitional state adopts is critically important because it affects the state's ability to transform society. The classic conception of property gives property rights a certain sanctity that allows owners to have near absolute control of their property. Singer explains this when he argues that, “[w]hen ownership rights are limited, we imagine those limits to be exceptions to the general rule that owners can do whatever they want with their property. The burden is always on others (meaning non-owners or the state) to explain why the owner's rights should be limited, and in today's political climate that burden is quite heavy.”<sup>201</sup> In countries where ownership is contested and land reform is essential due to pervasive past property theft, the sanctity given to property rights has made land reform difficult and thus has served as a sanctuary for enduring inequality.

Oddly, the classical conception is flourishing in transitional states, like South Africa and Namibia, where transformation of the property status quo is essential for the state's stability. The virtue of the classical conception is that it gives owners highly secure property rights, which supposedly enhances the investment environment. But, in nations where

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200. *Id.* at 2.

201. SINGER, *supra* note 153, at 3.

past property theft can lead to backlash and destabilize the current state, political instability could result if the state does not alter existing property rights and redistribute land in an orderly fashion. Instability can be far worse for the investment environment than redistributive policies; nevertheless, the classic conception endures under these circumstances.

The specific question this Article addresses is: for states where past property dispossession can cause backlash and destabilize the current state, is the classical conception appropriate or do these states require an alternative conception of real property? In Southern Africa, the state robbed Africans of their lands because the property rights systems during Apartheid and Colonialism were built upon a white supremacist ideology. The transition from white minority rule to democracy ushered in a radical change in values, so the property rights system cannot remain the same. I develop the transformative conception to explore how the exigent need for societal transformation should inspire us to rethink what a state's commitment to protecting property rights means. Protecting property rights cannot just be about protecting the rights of current owners; it must also entail vindicating the rights of owners who have been unjustly dispossessed by prior regimes.

# THINGS FALL APART: THE ILLEGITIMACY OF PROPERTY RIGHTS IN THE CONTEXT OF PAST PROPERTY THEFT

Bernadette Atuahene\*

*Past property theft is often a volatile political issue that has threatened to destabilize many nascent democracies. How does a transitional state avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft? To explore this question, I first define legitimacy and past property theft by relying on empirical understandings of the concepts. Second, I establish the relationship between property-related disobedience and a highly unequal property distribution that the general population views as illegitimate. Third, I describe the three ways a state can achieve stability when faced with an illegitimate property distribution: by using its coercive powers, by attempting to change people's beliefs about the legitimacy of the property distribution, or by enacting a Legitimacy Enhancing Compensation Program (LECP), which strengthens citizens' belief that they ought to comply with the law. Fourth, I develop a legitimacy deficit model, which is a rational-choice model that suggests when a state should enact an LECP to avoid property-related disobedience. To best promote long-term stability, I argue that states should, at the very least, enact an LECP as the cost of illegitimacy begins to outweigh the cost of compensation. Lastly, since many of the model's relevant costs are subjective, I suggest a process that states should use to determine and weigh the costs. In sum, the Article is*

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\* J.D. 2002, Yale Law School; M.P.A. 2002, Harvard University, John F. Kennedy School of Government; B.A. 1997, University of California, Los Angeles. I benefitted from the comments and criticisms of Karen Alter, Traci Burch, Bruce Carruthers, Ewurama Ewusi-Mensah, Terence Halliday, Michael Plaxton, Richard Warner, and Ekow Yankah. I also received valuable comments from the participants of: the American Bar Foundation Seminar Series; Chicago-Kent College of Law Faculty Speaker Series; Cincinnati/Chicago-Kent Junior Faculty Exchange; Fordham Law School Faculty Speaker Series; Law and Society Annual Conference; Property Works-in-Progress Conference; University of Illinois Conference on the New Human Rights Arena: Transnational Criminal Law; University of Witwatersrand Faculty of Law Seminar Series; and Valparaiso Law School Faculty Speaker Series. Outstanding research and library assistance was provided by Christine McIsaac, Gillian Nicols-Smith, and Stephanie Crawford.

*intended to spark a debate about how compensation for past property theft can keep things from falling apart.*

### INTRODUCTION

A significant amount of property, especially land, has been unjustly acquired or transferred through force at various points throughout history. The Americas, for example, were founded upon land forcibly taken from native peoples.<sup>1</sup> Under Hitler, the Nazis plundered vast amounts of property from Jews, Roma, and Sinti.<sup>2</sup> In Communist countries, newly minted governments expropriated property without paying compensation from innumerable individuals and vested it in the state.<sup>3</sup> Colonial powers usurped untold amounts of land in Africa, Latin America, and Asia and transferred it to European settlers.<sup>4</sup> And, in the midst of the Rwandan genocide, radical Hutu appropriated much of the property owned by the Tutsi and moderate Hutu they massacred.<sup>5</sup> Examples of the uncompensated taking of property by force abound.

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1. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005).

2. See SAUL S. FRIEDMAN, *A HISTORY OF THE HOLOCAUST* (2004); JUDIT MOLNÁR, *THE HOLOCAUST IN HUNGARY: A EUROPEAN PERSPECTIVE* (2005); 2 *THE NAZI HOLOCAUST: THE FINAL SOLUTION: THE IMPLEMENTATION OF MASS MURDER* (Michael R. Marrus ed., 1989); Doris L. Bergen, *The Nazi Concept of 'Volksdeutsche' and the Exacerbation of Anti-Semitism in Eastern Europe, 1939–45*, 29 J. CONTEMP. HIST. 569, 571 (1994).

3. See, e.g., Richard W. Crowder, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 IND. INT'L & COMP. L. REV. 237, 238 (1994) (noting that outside of the Soviet Union itself, the greatest magnitude of property confiscation and nationalization occurred in the Czech Republic); Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621, 626 (1996); Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 VAND. J. TRANSNAT'L L. 809, 813 (1994) (noting that Communist expropriations in East Germany occurred both under the Soviet occupation from 1945 to 1948, and under the East German Government from 1949 to 1989).

4. See generally Naved Hamid, *Dispossession and Differentiation of the Peasantry in the Punjab During Colonial Rule*, 10 J. PEASANT STUD. 52 (1982); Anna Johnston & Alan Lawson, *Settler Colonies*, in *A COMPANION TO POSTCOLONIAL STUDIES* 360 (Henry Schwarz & Sangeeta Ray eds., 2000); Thembele Kepe, *Land Restitution and Biodiversity Conservation in South Africa: The Case of Mkambati, Eastern Cape Province*, 38 CANADIAN J. AFR. STUD. 688, 688 (2004) ("Land dispossession of Africans was central to colonialism and apartheid. Thus, the struggles against these two forces in South Africa focused on loss of land . . ."); Joseph Schechla, *Ideological Roots of Population Transfer*, 14 THIRD WORLD Q. 239, 241 (1993) ("[R]acist concepts prevailed among the colonisers that consigned the indigenous people to sub-human categories and sought to justify the acquisition of their land by force. . . . In less than a century after the accidental arrival of Columbus on the continent, [Pedro] de Valdivia had realized the dream to extend Spanish possession over all the lands southward to the Tierra del Fuego. In this period, a policy to 'descargar la tierra' (empty the land) was implemented to break the indigenous people's characteristic attachment to their territory.").

5. See MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 197 (2001) (citing a USAID-commissioned study which attributes conflicts between neighbors to land scarcity, and concludes by saying

This Article explores the question: how does a state avoid present-day property-related disobedience when past property theft causes a significant number of people to believe that the current property distribution is illegitimate? Several scholars have explored how inequality can cause political violence and how land reform can prevent revolution.<sup>6</sup> There are also several scholars that have analyzed how restitution or reparations can remedy past property theft.<sup>7</sup> This Article adds to the existing literature by specifically investigating the relationship between past property theft, a present property distribution widely perceived as illegitimate, and property-inspired rebellion.

In the first Part of the Article, I define legitimacy and past property theft, relying on empirical understandings of the concepts. From there, I proceed in the second Part to demonstrate the relationship between a highly unequal property distribution that the general population views as illegitimate, and property-related disobedience. In the third Part, I describe the three ways a state can achieve stability if an illegitimate property distribution leads to property-related disobedience: by using its coercive powers; by attempting to change people's beliefs about the legitimacy of the property distribution; or by enacting a Legitimacy Enhancing Compensation Program (LECP). In the fourth Part of the Article, I develop the concept of a legitimacy deficit, which is a rational-choice model that establishes when a state should enact an LECP if its primary concern is averting property-related disobedience. The model requires states to weigh the net cost of compensation against the net cost of illegitimacy. To best promote long-

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"[d]isputes over land are reported to have been a major motivation for Rwandans to denounce neighbors during the ethnic conflicts of 1994"); GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 248 (1995) (noting while the desire to acquire Tutsi land was not the primary motivation behind the 1994 mass killings, there was "an element of material interest in the killings. . . . Villagers also probably had a vague hope that if things settled down after the massacres they could obtain pieces of land belonging to the victims, a strong lure in such a land-starved country as Rwanda."); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1249–50 (2000) (noting that some Hutu "pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled").

6. See *infra* Section III.

7. See, e.g., Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419 (2007) [hereinafter Atuahene, *From Reparation to Restoration*]; Ruth Hall, *Land Restitution in South Africa: Rights, Development, and the Restrained State*, 38 CANADIAN J. AFR. STUD. 654, 654 (2004) ("During the negotiated transition to democracy, many South Africans expected that liberation would bring the return of land of which they had been dispossessed under colonialism and apartheid, but the terms on which the transition was negotiated constrained the parameters of how this could happen."); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003); see also RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS (Scott Leckie ed., 2003); Michael Heller & Christopher Serkin, *Revaluing Restitution: from the Talmud to Postsocialism*, 97 MICH. L. REV. 1385 (1999) (reviewing HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (1998)); Michael L. Neff, *Eastern Europe's Policy of Restitution of Property in the 1990s*, 10 DICK. J. INT'L L. 357 (1992).

term stability, I argue that states should enact an LECP as the cost of illegitimacy begins to outweigh the cost of compensation.

Lastly, since many of the model's relevant costs are subjective, I suggest a process states should use to determine and weigh the costs. This model is a valuable contribution to the literature on transitional justice because it gives conceptual clarity to the question of how a transitional state can maintain stability if extensive past property theft threatens its present stability. Further, this model gives citizens, policymakers, and academics a framework within which they can identify and debate the various costs and benefits involved. Finally this model is a valuable analytical tool because it is versatile enough to apply to a wide array of contexts and time periods.

The Article is intended to spark a debate about how compensation for past property theft can keep things from falling apart by preventing land invasions and other property-centered crimes. The terms "property-related disobedience," "property-related instability," and "property-related rebellion" refer to the breakdown of a state's authority relationships that results in systematic property-related noncompliance.<sup>8</sup> This Article only investigates ways that states can avoid property-related disobedience, but acknowledges that other issues beyond the scope of this inquiry are at play. For example, how an existing state can promote justice, equality, or efficient markets when past property theft causes a significant number of people to believe that the current property distribution is illegitimate.

The research question I pose is timely and important for four primary reasons. First, several states (including Zimbabwe, Nicaragua, Rwanda, Israel, Guatemala, and South Africa) have experienced or are experiencing property-related disobedience at least partly because of the unjust and uncompensated taking of property that occurred in the past.<sup>9</sup> Second, many states that go through

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8. Scholars have defined political instability in various ways. See, e.g., Alberto Alesina et al., *Political Instability and Economic Growth*, 1 J. ECON. GROWTH 189, 189 (1996) (noting that political instability is the "propensity [for] government collapse"); Tatiana Fic & Omar F. Saqib, *Political Instability and the August 1998 Ruble Crisis*, in GERMAN INSTITUTE FOR ECONOMIC RESEARCH SERIES (2006), available at <http://www.diw.de/documents/publikationen/73/44717/dp626.pdf> (noting that political instability is frequent changes in and of government); Donald G. Morrison & Hugh Michael Stevenson, *Political Instability in Independent Black Africa: More Dimensions of Conflict Behavior Within Nations*, 15 J. CONFLICT RESOL. 347, 348 (1971) (defining political instability as "a condition in political systems in which the institutionalized patterns of authority break down, and the expected compliance to political authorities is replaced by political violence").

9. TOM TIRIVANGANI, LAW, LAND REFORM AND SOCIAL JUSTICE: A CASE FOR ZIMBABWE (2004); LUKE ZUNGA, FARM INVASIONS IN ZIMBABWE: WHAT LESSONS FOR DEMOCRACY IN AFRICA? (2003); Deena I. Abu-Lughod, *Failed Buyout: Land Rights for Contra Veterans in Postwar Nicaragua*, LATIN AM. PERSP., May 2000, at 32; Mark Everingham, *Agricultural Property Rights and Political Change in Nicaragua*, LATIN AM. POL. & SOC'Y, Fall 2001, at 61; Michael Fischbach, *Settling Historical Land Claims in the Wake of Arab-Israeli Peace*, J. PALESTINE STUD., Autumn 1997, at 38; Ruth Hall, *A Political Economy of Land Reform in South Africa*, 31 REV. AFR. POL. ECON. 213, 214 (2004) (noting the World Bank advised that redistributing the land in South Africa was "necessary to avert social and political instability"); Donald Neff, *U.S. Policy and the Palestinian Refugees*, 18

radical political transition in the future will have to address property theft that occurred under the previous regime to ensure legitimacy and stability in the new political environment.

Third, as I argue in Part III, in certain situations, *when a state decides to ignore past property theft*, its actions can run contrary to intuitive views of justice, lead to reduced compliance with the law,<sup>10</sup> and potentially undermine the state's stability. Intuitive views of justice suggest that if property owners acquire their property through just means, they deserve some degree of freedom to retain or transfer their property. The notion of desert underlies a state's duty to protect property as well as a citizen's obligation to respect property rights. However, a widely held perception that the present property distribution is the result of extensive past property theft corrupts the notion of desert. The result is that intuitive understandings of justice no longer dictate that law should give strong protection to property that is widely regarded as stolen unless past theft is rectified.

Fourth, and in contrast, a state's decision *to address past property theft* is also potentially problematic because evaluating past misdeeds can inflame extant class, racial, regional, or ethnic tensions, foment unrest, and even render a state weak and ungovernable.<sup>11</sup> In designing its Land Restitution Program (LRP), South Africa decided to remedy land dispossession claims dating only as far back as 1913 although systematic, unjust land dispossession had occurred since the arrival of Europeans in 1652.<sup>12</sup> The government made this decision because "most deep historical claims are justified on the basis of membership in a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics."<sup>13</sup> Property-related instability can loom large whether or not a state decides to address past property theft.

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J. PALESTINE STUD. 96, 96–98 (1988) (discussing the initial property theft, which evolved into violent instability between Israel and Palestinians); Saskia Van Hoyweghen, *The Urgency of Land and Agrarian Reform in Rwanda*, 98 AFR. AFF. 353, 353 (1999) ("If Rwanda is to evolve towards a more stable future, the urgency with which the country's land problem demands action cannot be overemphasised. In addition to being one of the most pressing problems, the issue of land is also perhaps the most complex—being absorbed by (and coming to embody) the various economic, social and political challenges facing present-day Rwanda."); Álvaro Del Carpio León, *Analysis and Possible Improvements of the Land Restitution Process in Guatemala* (Mar. 2005) (unpublished M.S. thesis, International Institute for Geo-Information Science and Earth Observation), available at [http://www.itc.nl/library/Papers\\_2005/msc/gim/del\\_carpio.pdf](http://www.itc.nl/library/Papers_2005/msc/gim/del_carpio.pdf).

10. There is evidence that people are less willing to comply with laws that diverge from their commonsense views of justice. More problematically, if people perceive one law as unjust, then this can adversely affect their willingness to comply with unassociated laws. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1399 (2005).

11. This point is made repeatedly in the literature on why truth commissions are superior to prosecutions. See, e.g., Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, LAW & CONTEMP. PROB., Autumn 1996, at 81.

12. See S. AFRICAN DEP'T OF LAND AFFAIRS, THE GREEN PAPER ON SOUTH AFRICAN LAND POLICY 37 (1996).

13. *Id.*



For these four reasons, it is important that scholars think critically about how a state can avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft.

### I. LEGITIMACY AND PAST PROPERTY THEFT DEFINED

One can assess legitimacy empirically or morally; the former is based primarily upon average citizens' observed attitudes and beliefs, while the latter is based on a theory of justice. Max Weber, one of the most influential theorists on the topic of legitimacy, adopts an empirical definition in his great work, *Economy and Society*.<sup>14</sup> He claims that legitimacy is (a) a widespread belief that one ought to obey the law and (b) the resulting compliance with the law based on this belief.<sup>15</sup> Weber asserts:

[L]egitimacy is meant to designate the beliefs and attitudes that members have toward the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails.<sup>16</sup>

Weber's definition of legitimacy is based upon willing compliance with law or authority and thus is closely related to stability.<sup>17</sup> Since stability is central to my research question, I have also adopted a Weberian, empirical definition of legitimacy. "Legitimacy" is a generalized belief that an authority, institution, law, or social arrangement *ought to be* obeyed because it is appropriate within some socially constructed system of norms, values, and beliefs.<sup>18</sup> One can evaluate

14. MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Univ. of Cal. Press 1978) (1968).

15. Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 382. There may be, however, instances where an individual believes she ought to obey the law but—due to weakness of will—she does not comply. Weber's definition of legitimacy still holds true, nevertheless, so long as we assume that this weakness of will is not the norm.

16. See A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 748–50 (1999) (quoting and discussing Charles Taylor, *Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada*, in COMMUNITARIANISM: A NEW PUBLIC ETHIC 58 (Markate Daly ed., 1994)). There is a substantial literature in psychology and political science about legitimacy. For a thorough literature review of legitimacy as discussed in psychology, see Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 376–77 (2006). For a thorough literature review of legitimacy as discussed in political science, see James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187 (2005).

17. Hyde, *supra* note 15, at 381.

18. The level of willing compliance with law and hence the level of stability is positively correlated with the magnitude of the generalized beliefs. There are various definitions of legitimacy in the literature. See, e.g., Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379, 381 (1999) (Legitimacy is the "normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor's *perception* of the institution.");

legitimacy at various levels (for example, the legitimacy of a state, society, leader, institution, or social arrangement). Much of this Article explores the legitimacy of a particular socio-legal arrangement—property distribution.<sup>19</sup> Under a legitimate property distribution there is a generalized belief that the laws and institutions upholding the property distribution ought to be obeyed because they are appropriate within some socially constructed system of norms, values, and beliefs.<sup>20</sup>

The legitimacy of the state may alter a population's acceptance of an illegitimate property distribution. In South Africa, for example, the post-apartheid state has significant legitimacy although, due to the severe and enduring inequalities born under Apartheid, the property distribution does not.<sup>21</sup> James Gibson surveyed 3700 South Africans and found that 85% of black respondents believe that "most land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today."<sup>22</sup> Two of every three blacks agreed that "land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country."<sup>23</sup> If it were not for the legitimacy of the state, Gibson's data suggests that South Africa probably would have had an outbreak of land invasions long ago.

Like the definition of legitimacy, the definition of past property theft is primarily based on the average citizen's observed beliefs and values, although objective historical facts play an important role. "Property theft" or "unjust dispossession" occurs when a society has a generalized belief that one group would not own their property if it were not for the past systematic and uncompensated confiscation of property from another group. Based on objective historical fact, the United States confiscated parts of Texas, California, Arizona,

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Mark Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995) ("Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."); Tyler, *supra* note 16, at 377 ("Legitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just.").

19. "Property" includes real, personal, and intangible property.

20. A society's belief that the laws ought to be obeyed should be corroborated by actual compliance with the laws.

21. See Robert Mattes, *Building Popular Legitimacy for the "New" Democratic South Africa: A Partial Success Story?*, YALE CENTER FOR INT'L & AREA STUD. (2007) (noting that even though many South Africans live in poverty and are without land, the state has experienced high levels of legitimacy).

22. JAMES GIBSON, *OVERCOMING HISTORICAL INJUSTICES: LAND RECONCILIATION IN SOUTH AFRICA* 31 (2009) [hereinafter GIBSON, *OVERCOMING HISTORICAL INJUSTICES*].

23. *Id.* Nationally 68% of crimes are property related. The most common types of property-related crimes are "burglary at a residential premises," "theft out of or from a motor vehicle" and "malicious damage to property." CRIME INFO. ANALYSIS CTR., S. AFR. POLICE SERV., *CRIME STATISTICS FOR SOUTH AFRICA (1994/1995 to 2003/2004)*, available at [http://www.capecgateway.gov.za/eng/pubs/public\\_info/C/86878/1](http://www.capecgateway.gov.za/eng/pubs/public_info/C/86878/1). In the country's urban centers, electric fences, private security guards, high security walls, and alarm systems are the norm because of the high theft rates.

Nevada, and New Mexico from Mexico in the mid-nineteenth century.<sup>24</sup> There is, however, no generalized belief among the populations of Mexico or the United States that the individuals who own property in these areas today are beneficiaries of past property theft. In contrast, based on objective historical fact, European descendants have confiscated land from Africans in Zimbabwe, Namibia, and South Africa since the nineteenth century.<sup>25</sup> But, there is a strong generalized belief in Zimbabwe, Namibia, and South Africa that much of the land presently owned by whites is stolen.<sup>26</sup>

While the empirical definitions of legitimacy and past property theft I have provided are ideal for framing a discussion about stability, they have several limitations.<sup>27</sup> First, leaders can manipulate a population's beliefs. For example, during World War II and the Rwandan genocide average citizens engaged in morally abhorrent activities because genocidal leaders took advantage of citizens' fears and angst.<sup>28</sup> These leaders duped ethnic Germans and Hutus into believing that their fellow citizens' lives were worth very little—literally, less than vermin.<sup>29</sup>

Second, a small privileged group can affect societal beliefs and attitudes in unfavorable ways. One example is that the elite who control thought-shaping

24. See ODIE B. FAULK, *LAND OF MANY FRONTIERS: A HISTORY OF THE AMERICAN SOUTHWEST* 107–25, 140–47, 264–67 (1968) (explaining how each state transitioned from Mexican rule to American statehood).

25. See J.B. Peires, *The British and the Cape 1814–1834*, in *THE SHAPING OF SOUTH AFRICAN SOCIETY, 1652–1840*, at 472, 503 (Richard Elphick & Hermann Giliomee eds., 1989) (explaining that “request-places” became the dominant form of land tenure used by British settlers, whereby a farmer could occupy a piece of land as soon as he had sent in a “request”); Neil H. Thomas, *Land Reform in Zimbabwe*, 24 *THIRD WORLD Q.* 691, 693 (2003) (noting that beginning in 1879 British “settlers helped themselves to the best land, ensnared the original inhabitants, or else pushed them out into less fertile areas”).

26. See GIBSON, *OVERCOMING HISTORICAL INJUSTICES*, *supra* note 22.

27. Others find problematic the purely attitudinal accounts of legitimacy, which heavily depend upon the context in which generalized beliefs are formed. See Simmons, *supra* note 16, at 750 (“On such accounts states could create or enhance their own legitimacy by indoctrination or mind control; or states might be legitimated solely by virtue of the extraordinary stupidity, immorality, imprudence, or misperceptions of their subjects.”); see also Robert Grafstein, *The Legitimacy of Political Institutions*, 14 *POLITY* 51, 51 (1981) (arguing for a revised conception of legitimacy in which legitimacy is based not on psychological states, but rather the direct properties of an institution).

28. See MAMDANI, *supra* note 5; Drumbl, *supra* note 5, at 1249–50 (noting that some Hutu “pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled.”). See generally sources cited *supra* note 2.

29. For example, Tutsi were routinely referred to as cockroaches. See Cyprian F. Fisiy, *Of Journeys and Border Crossings: Return of Refugees, Identity, and Reconstruction in Rwanda*, 41 *AFR. STUD. REV.* 17, 21 (1998) (“The Tutsi were consistently stereotyped by the regime as inyensi (‘cockroaches’), who should never be allowed to rule again.”). See also BILL BERKELEY, *THE GRAVES ARE NOT YET FULL: RACE, TRIBE, AND POWER IN THE HEART OF AFRICA* 2 (2001) (quoting radio propaganda by Simon Bikindi of A Thousand Hills Free Radio-Television: “The Tutsi *inyenzi*—cockroaches—are bloodthirsty murderers. They dissect their victims, extracting vital organs, the heart, liver and stomach.”) (internal quotations omitted).

social institutions such as media outlets may have an undue influence on what people believe. For instance, in the United States, Rupert Murdoch's News Corporation is one of the largest media conglomerates in the world with a market capitalization of about \$68 billion.<sup>30</sup> Some believe that by using some of his media outlets to promulgate his conservative views and support Republican political leaders, Murdoch has leveraged his company's dominance to shape what Americans believe.<sup>31</sup>

Third, my definition of legitimacy and past theft considers only the existence and prevalence of a belief rather than the logic or legitimating ideology behind it.<sup>32</sup> But, the legitimating ideology may be objectionable on moral grounds. For instance, in some societies there may be a generalized belief that all women should be subject to female genital mutilation. If the logic underlying this belief is that women are inferior childlike beings who cannot control their sexual urges, then the belief is objectionable on moral grounds. An empirical definition of legitimacy and past property theft accounts only for what people believe without evaluating the moral worthiness of the logic underlying the belief.

Fourth, empirical definitions of legitimacy and past property theft present potential challenges for minority groups because they rely on generalized beliefs. The property distribution's legitimacy in America versus South Africa is a perfect illustration of the problem. Given the history of brutal land theft in the United States, Native Americans' beliefs regarding whether they ought to obey property laws may differ significantly from the perspectives of the rest of the population. Their compliance with property laws may be explained more by the threat of sanctions than by any internalized notions of what they ought to do.<sup>33</sup> But, since

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30. Rik Kirkland, *Think Again: Rupert Murdoch*, 158 FOREIGN POL'Y, Jan. 2007, at 24.

31. See Daya Kishan Thussu, *Murdoch's War—A Transnational Perspective, in WAR, MEDIA, AND PROPAGANDA: A GLOBAL PERSPECTIVE* 93, 95 (Yahya R. Kamalipour & Nancy Snow eds., 2004) ("In the United States, Murdoch's media has been an enthusiastic supporter of the Republican cause, including the deregulation of broadcasting. Analyzing for nineteen weeks (between January and May 2001) the FOX News Channel's flagship daily program *Special Report with Brit Hume*, the media monitoring group FAIR (Fairness and Accuracy in Reporting) found an overwhelming slant on FOX News toward Republicans and conservatives: of the fifty-six guests with declared political affiliations interviewed on the program during the monitoring period, fifty were Republicans. Of the others, sixty-five of the ninety-two guests (71 percent) were avowed conservatives.").

32. For discussion purposes, I am making a hard distinction between beliefs and the legitimating ideologies underpinning the beliefs, but in reality the two concepts are much more fluid. Beliefs are reflective of background ideologies. See Brenda Major, *From Social Inequality to Personal Entitlement: The Role of Social Comparisons, Legitimacy Appraisals, and Group Membership*, 26 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 293, 294 (1994). A person can believe she ought to obey an authority based on various legitimating ideologies. Weber categorizes the different legitimating ideologies as falling under three sources of authority, which include traditional (derived from religious beliefs, customs, values, and morals), charismatic (derived from the actions or character of a person in power), and rational bureaucratic (derived from the authority's compliance with the rule of law). WEBER, *supra* note 14, at 941–55.

33. See *infra* Part III.

Native Americans account for less than 2% of the population, the measure of the United States' property distribution's legitimacy is only nominally affected by this group's beliefs.<sup>34</sup> In contrast, if Africans in South Africa<sup>35</sup> (who constitute about 80% of the population) have markedly different beliefs than non-Africans as to whether they ought to obey property laws, the measure of the legitimacy of South African property distribution is heavily affected.<sup>36</sup> Thus empirical measures of legitimacy and past theft can be problematic because they discount the beliefs of minorities when they differ from those of the majority.

Moral definitions of legitimacy and past property theft that are based on a theory of justice would address these four enumerated shortcomings. But, while a moral definition is important, it is beyond the scope of my research. This Article investigates how a state can avoid present-day property-related rebellion when a significant number of people believe that the current property distribution is illegitimate because of past property theft. Despite the moral shortcomings of an empirical definition, the key to stability is whether a significant section of the population *believes* that past property theft has occurred and whether they *believe* that they ought to comply with property arrangements nevertheless. Consequently, an empirical definition is most relevant and useful for the research question presented in this Article.<sup>37</sup>

## II. THE RELATIONSHIP BETWEEN AN UNEQUAL AND ILLEGITIMATE PROPERTY DISTRIBUTION AND PROPERTY-RELATED INSTABILITY

If a population begins to perceive that its highly unequal property distribution is illegitimate, property-based disobedience may result if the state's last line of defense—its coercive power—fails to secure compliance with law. There is substantial evidence that economic inequality can lead to instability. An empirical study by Bruce Russett uses regression analysis to show that political instability is positively correlated specifically with land-related inequality.<sup>38</sup> Other scholars have found a correlation between instability and inequality that is not necessarily land-related. For example, Manus Midlarsky presented empirical evidence that political violence does not result from general inequality but rather

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34. U.S. CENSUS BUREAU, RACIAL STATISTICS BRANCH, THE AMERICAN COMMUNITY—AMERICAN INDIANS AND ALASKA NATIVES: 2004, at 1 (May 2007), *available at* <http://www.census.gov/prod/2007pubs/acs-07.pdf> ("The 2004 ACS estimated the number of American Indians and Alaska Natives to be about 4 million, or 1.4 percent of the U.S. household population.").

35. In the context of South Africa, Black with a capitalized "B" includes groups known as Africans, Coloureds, and Asians under Apartheid.

36. SouthAfrica.info, South Africa's Population, [http://www.southafrica.info/ess\\_info/sa\\_glance/demographics/population.htm](http://www.southafrica.info/ess_info/sa_glance/demographics/population.htm) (last visited July 22, 2008) ("Africans are in the majority at just over 38-million, making up 79.6% of the total population. The white population is estimated at 4.3-million (9.1%), the coloured population at 4.2-million (8.9%) and the Indian/Asian population at just short of 1.2-million (2.5%).").

37. Morality comes into an inquiry about stability as one of many legitimating ideologies that explains why a significant section of the population may believe they ought to comply with an authority.

38. Bruce M. Russett, *Inequality and Instability: The Relation of Land Tenure to Politics*, 16 WORLD POL. 442 (1964).

patterned inequality, which is the level of a population's impoverishment in comparison to the ruling sector.<sup>39</sup> Collective Action and Deprived Actor theorists argue that political violence results when inequality is coupled with some other factor.<sup>40</sup> Collective Action theorists suggest that in order for revolutions or political instability to result, income inequality must be accompanied by high levels of dissident organization and low levels of government repression.<sup>41</sup> Deprived Actor theorists argue that economic inequality will lead to rebellion "only if some intermediate psychological processes (e.g., expectation formation and anger) are present to transform grievances about relative poverty into behavioral dissent."<sup>42</sup> The collective evidence thus supports the claim that inequality significantly contributes to instability.<sup>43</sup>

In this Article, I am specifically interested in whether a severely unequal property distribution can become the motivating factor behind property-related disobedience. The international illegal squatting phenomenon presents an excellent example of how a highly inegalitarian property distribution can cause a large section of the population to consider it illegitimate and hence motivate the population to flout the laws that uphold that distribution. Millions of squatters illegally occupy publicly and privately owned lands all over the developing

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39. Manus I. Midlarsky, *Rulers and the Ruled: Patterned Inequality and the Onset of Mass Political Violence*, 82 AM. POL. SCI. REV. 491, 493 (1988). For a critique of Midlarsky, see Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577 (1989).

40. See Mark Irving Lichbach, *Will Rational People Rebel Against Inequality? Samson's Choice*, 34 AM. J. POL. SCI. 1049, 1050 (1990). What makes peasants rebel is a question that received intense scholarly attention throughout the seventies. Many scholars believe that inequality per se is not the answer. Scott posits that it is the erosion of subsistence security, while Prosterman argues that it is the high rate of landlessness. Paige believes that peasants that are easily organized—tenants and wage laborers on commercial estates—are the most revolutionary. See JEFFREY M. PAIGE, *AGRARIAN REVOLUTION: SOCIAL MOVEMENTS AND EXPORT AGRICULTURE IN THE UNDERDEVELOPED WORLD* 3 (1975); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); JAMES C. SCOTT, *THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTENCE IN SOUTHEAST ASIA* (1976). Lichbach points out that the relationship between economic inequality and rebellion is hardly clear:

Two decades of empirical research—consisting of over three dozen studies of conflict using aggregate data at the city, regional, and national levels—have challenged the conventionally accepted view that a strong positive relationship exists between economic inequality and political conflict. Numerous studies do purport to show that economic inequality has a positive impact on political dissent, but numerous studies also purport to show negative and negligible relationships.

Lichbach, *supra*, at 1050.

41. Mark Lichbach, *An Evaluation of "Does Economic Inequality Breed Political Conflict?"* *Studies*, 41 WORLD POL. 431, 464 (1989).

42. *Id.* at 459.

43. Kang H. Park, *Income Inequality and Economic Progress: An Empirical Test of the Institutional Approach*, 55 AM. J. ECON. & SOC. 87, 87 (1996) ("The empirical results show that the greater the inequality in the distribution of personal incomes, the greater the level of socio-political instability, and that the greater the level of socio-political instability, the slower the economic progress.").

world.<sup>44</sup> Squatters gain possession through land invasions, which occur when an individual or group illegally occupies a vacant parcel of land and immediately erects some form of shelter.<sup>45</sup>

People illegally occupy land for numerous reasons, the most prominent of which is pervasive societal inequality.<sup>46</sup> In many countries, some individuals own so much land that much of it is left vacant while others have none.<sup>47</sup> This inequality in conjunction with the fact that poor people lack access to affordable housing and land means that indigent individuals and families often have no other choice but to secure shelter or land for subsistence farming through land invasions.<sup>48</sup> In the Philippines, land invasions are so prevalent that “as of 1995, forty percent of the urban population did not own or have clear title to the land they occupied.”<sup>49</sup> UN-Habitat reports that in many cities more than two-thirds of the population lives in informal settlements, which are created through land invasions.<sup>50</sup> In countries where land invasions are commonplace and squatters

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44. See Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT’L L. REV. 1109 (2004) [hereinafter Atuahene, *Legal Title*] (analyzing the issue of land invasions and titling in the Philippines, Peru, and South Africa).

45. The authorities can either do nothing about the invasion and allow the squatters to remain in possession, or they can demolish the structures and reclaim the land for the landowner; the former response is more likely because generally squatters are also voters. This is the case in many developing countries, including Turkey:

Given that squatters are voters, this made it very unlikely that politicians would rein in the overnight builders. Statistics in Istanbul show the growth. In 1958, city authorities counted 40,000 *gecekondu* (informal) houses in Istanbul, with a population of 280,000 people. By 1963, that had tripled to 120,000 houses with a population of about 660,000 people, or close to 35 percent of the city.

Robert Neuwirth, *Security of Tenure in Istanbul: The Triumph of the ‘Self Service City,’* prepared for U.N. HUMAN SETTLEMENTS PROGRAMME, ENHANCING URBAN SAFETY AND SECURITY 6–11 (2007) available at <http://www.unhabitat.org/downloads/docs/GRHS.2007.CaseStudy.Tenure.Turkey.pdf>.

46. James L. Gibson, *Overcoming Land Injustices: An Experimental Investigation Into the Justice and Injustice of Land Squatting in South Africa*, WORKING GROUP IN AFRICAN POL. ECON. 7 (2005), available at [http://www.sscnet.ucla.edu/polisci/wgape/papers/8\\_Gibson.pdf](http://www.sscnet.ucla.edu/polisci/wgape/papers/8_Gibson.pdf) (“Squatting is caused by two dominant factors: (1) The massive influx of landless people from the countryside to the cities; and (2) the vast economic inequality in the country.”).

47. *Id.*

48. Gerrit Huizer, *Land Invasion as a Non-Violent Strategy of Peasant Rebellion: Some Cases from Latin America*, 9 J. PEACE RES. 121 (1972) (arguing that land invasions are a non violent strategy of land reform).

49. Atuahene, *Legal Title*, supra note 44, at 1145 (quoting Michael Lee, *The Community Mortgage Program: An Almost-Successful Alternative for Some Urban Poor*, 19 HABITAT INT’L 529, 532 (1995)).

50. See U.N. Human Settlements Programme [UN-HABITAT], *Monitoring Housing Rights: Developing a Set of Indicators to Monitor the Full and Progressive Realisation of the Human Right to Adequate Housing*, 1 (Working Paper No. 1, 2003); see also United Nations Human Settlements Programme [UN-HABITAT], *The Challenge of Slums: Global Report on Human Settlements*, 82–83, 211–12 (2003) (“In Durban, informal

make up a significant portion of the population, the property distribution is illegitimate because average citizens do not believe that they ought to obey the property laws that uphold the present property status quo.<sup>51</sup>

In sum, the international squatting phenomenon is one effective illustration of the relationship between inequality, an illegitimate property distribution, and noncompliance with law.<sup>52</sup>

### III. HOW A STATE CAN AVOID PROPERTY-RELATED DISOBEDIENCE WHEN FACED WITH AN ILLEGITIMATE PROPERTY DISTRIBUTION

#### *A. Bases for Compliance with Law*

Legitimacy is not the only impetus for compliance with law; the threat of coercive sanctions, self-interest, and habit form additional bases of obedience.<sup>53</sup>

When compliance is based on coercion, external factors are most prominent in an individual's decision-making calculus. There must be an asymmetry of power such that the stronger party has the ability to force compliance despite the self-interest of the weaker party.<sup>54</sup> If the threat of sanctions wanes, compliance with authority will diminish, but if the threat is pronounced, compliance will increase.<sup>55</sup> The state often uses coercion in a routine exercise of its police power. For instance, tickets for speeding, fines for littering, and incarceration for killing are generally considered acceptable uses of the state's coercive power. But the state can also use its coercive power in furtive ways,<sup>56</sup> and

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dwellings act as substitutes for about 75% of the metropolitan gross housing backlog of 305,000 units. . . . It is estimated that 20 to 25 per cent of Jakarta residents live in *kampungs*, with an additional 4 to 5 per cent squatting illegally along riverbanks, empty lots and floodplains.”).

51. Laws contrary to people's commonsense views of justice may encourage diminished compliance with not only the laws people perceive as unjust, but also unrelated laws. Nadler provides preliminary experimental evidence that suggests a “willingness to disobey the law can extend far beyond the particular unjust law in question, to willingness to flout unrelated laws commonly encountered in everyday life.” Nadler, *supra* note 10, at 1399.

52. Zimbabwe is another example. In Zimbabwe, property theft during the Colonial and Apartheid periods has led to acute inequality of landownership and widely held views that property distribution is illegitimate. Consequently, in 2000 there was massive noncompliance with law in the form of land invasions, which were encouraged by the ruling party. For a more thorough discussion of property theft in Zimbabwe, see generally TIRIVANGANI, *supra* note 9; ZUNGA, *supra* note 9; see also sources cited *infra* note 110.

53. See Tyler, *supra* note 16, at 377 (noting that legitimacy “is an additional form of power that enables authorities to shape the behavior of others distinct from their control over incentives or sanctions”).

54. See Hurd, *supra* note 18, at 383–84.

55. *Id.*

56. The intrepid voting rights activist, Fannie Lou Hamer, eloquently describes a furtive use of the state's coercive power during the U.S. Civil Rights Movement:



non-state actors can use coercive power to force compliance with prevailing laws.<sup>57</sup>

When obedience is based on self-interest, people will follow a rule or authority because it promotes their individual well-being. A rule's compatibility with an individual's self-interest is positively correlated with her degree of compliance. But, self-interest on its own is a fickle basis to secure obedience because laws often do not coincide with an individual's self interest. For instance, exacting physical revenge on my enemies, parking wherever I want, and not paying taxes are all in my self-interest but are against the law.<sup>58</sup>

There is a definite overlap between self-interest and coercion. They differ, however, in that self-interest is explained by self-restraint based on various psychological and social incentives and disincentives, while coercion is based on external restraint such as the threat or use of physical violence or sanctions.<sup>59</sup> The line between the two is not always clear because people can internalize the threat of external sanctions.

Sometimes, neither self-interest nor the threat of sanctions factors into the decision-making calculus that determines compliance with law. Sometimes people comply with a law because they always have. Habit is a source of obedience based on reflex rather than reasoning. Habit is an even less effective means for states to secure compliance because they cannot systematically control people's habits such that their compliance with law increases.<sup>60</sup>

A confluence of self-interest, sanctions, habit, and legitimacy—or just one factor in isolation—can explain an individual's compliance with law.<sup>61</sup> The

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On just one day—September 3, 1962—these incidents occurred, all connected to the vote drive: a black city worker in Ruleville was fired, two black dry cleaning establishments were shut down, Williams Chapel Baptist Church was told it was losing its tax exemption and free water, and a plantation bus driver was told that henceforth he would need a hard-to-obtain commercial license to ferry workers to the field. The fired city worker's wife had been going to the voter registration classes. The dry cleaners were owned by blacks. The suddenly uninsured church was a meeting place for voter registration workers. And the mother of the harassed bus driver had registered to vote.

KAY MILLS, *THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER* 40 (1993).

57. For instance, during the Civil Rights Movement, landowners used their economic power over black sharecroppers to ensure that they complied with prevailing Jim Crow laws by firing sharecroppers who dared to vote. An example of this can be found in Fannie Lou Hamer's biography. *See id.*

58. This is related to the prisoner's dilemma, which characteristically entails a conflict between group and individual rationality. *See generally* WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* (1992); ANATOL RAPOPORT & ALBERT M. CHAMMAH, *PRISONER'S DILEMMA* (1965); FRANK ZAGARE, *GAME THEORY: CONCEPTS AND APPLICATIONS* (1984).

59. Hurd, *supra* note 18, at 386.

60. For a general discussion of habit, see H.L.A. HART, *CONCEPT OF LAW* 6–115 (1961).

61. In general, people's obedience most often has something to do with the threat of sanctions or legitimacy because habit and self-restraint do not consistently and effectively secure compliance.

following hypothetical illustrates the anatomy of obedience: Kwame is a race-car enthusiast who has just bought a brand-new Mustang, reputed to accelerate from 0 to 60 miles per hour (mph) in 4.5 seconds. He is driving along a deserted country road in Kankakee, Illinois, and complying with the 40-mph speed limit. He is one hour late for his son's baptism, there are no other drivers on the road, and he knows for a fact that the police do not monitor this obscure road. Generally, Kwame may comply with the speed limits for several reasons: he does not want to get a speeding ticket (sanctions); he wants to decrease his chances of collision (self-interest); he has put no thought into it and obeys because he always has (habit); or he believes that he ought to (legitimacy).

In this specific situation, it is in Kwame's self-interest to speed because he is anxious to arrive at his son's baptism and the chances of having an accident on this deserted road are minimal. He is an avowed speed demon, so he does not drive within the speed limit due to habit. He knows the police do not monitor the road so it is impossible for him to receive a speeding ticket. In this scenario, the legitimacy of the law, state, or law-making process is the reason Kwame believes he ought to obey the speed limit and the reason he acts on this belief by driving 40 mph.

This hypothetical illustrates that legitimacy can be differentiated from self-interest, habit, or coercion when a person's obedience is based primarily upon internalized notions of what he *ought* to do.<sup>62</sup>

***B. Three Options a State Has to Maintain Stability when It Is Encumbered with an Illegitimate Property Distribution***

A state has three viable options for securing compliance with the law when it is encumbered with an illegitimate property distribution:<sup>63</sup> it can (1) use its coercive power to ensure compliance with the illegitimate property distribution, (2) increase the property distribution's legitimacy by shaping people's beliefs, or (3) implement a Legitimacy-Enhancing Compensation Program (LECP).

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62. Tyler and Lind, for example, point out that "Social psychologists have long distinguished between obedience that is the result of coercion and obedience that is the result of internal attitudes and opinions (i.e. voluntary compliance)." Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, in 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 118 (Mark Zanna ed., 1992). For further discussion, see generally HERBERT KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE* (1990); Barry Collins & Bertram Raven, *Group Structure: Attraction, Coalitions, Communication, and Power*, in 4 *THE HANDBOOK OF SOCIAL PSYCHOLOGY* 102 (Gardner Lindzey & Elliot Aronson eds., 1969); Bertram Raven & John R.P. French, Jr., *Group Support, Legitimate Power, and Social Influence*, 26 *J. PERSONALITY* 400 (1958).

63. A property distribution is illegitimate when it causes a significant segment of the population to believe that they ought not comply with the laws that uphold the property distribution. See *supra* Part I.

### 1. Using Coercion

In a seminal work, James Davies argued that when legitimacy is lacking, states will use coercive pressure to secure compliance with the law.<sup>64</sup> Building on Davies' work, S. Brock Blomberg conducted a study and found that increases in defense spending lead to decreases in political instability.<sup>65</sup> But, coercion enhances stability only to a certain point. In fact, due to the alienating effects of coercion, a state's use of coercion can lower a citizen's willingness to voluntarily comply or, at worst, lead to aggressive instances of noncompliance.<sup>66</sup> Also, there is ample evidence in social psychological literature that the "use of power, particularly coercive power, requires a large expenditure of resources to obtain modest and limited amounts of influence over others."<sup>67</sup> Thus, in the end, securing *willing* compliance is much more effective and less costly than a state's use of coercive power.

### 2. Influencing People's Beliefs

Pervasive inequality can cause a population to believe that the property distribution is illegitimate. When this happens, willing compliance with laws that uphold unequal property distribution may lessen. To maintain stability, states can rationalize endemic inequality by initiating, propagating, or exaggerating the various stereotypes and doctrines that shape what people believe.<sup>68</sup>

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64. James C. Davies, *Toward a Theory of Revolution*, 27 AM. SOC. REV. 5, 6–7 (1962) (noting that the state will more frequently need to use the police power to coerce people to comply with the law in absence of legitimacy). Yankah defines coercive pressure as "that which can overcome one's will and make a particular course of action unreasonably costly." Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1218 (2008).

65. S. Brock Blomberg, *Growth, Political Instability and the Defence Burden*, 63 ECONOMICA 649, 649 (1996).

66. Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259 (Joel Slemrod ed., 1992) ("However, the retroactive, confrontational, and coercive aspects of a deterrence approach to law enforcement also have an indirect, negative effect by alienating taxpayers and lowering their willingness to comply voluntarily with the law. Lower willingness to comply may lead to active efforts to evade taxes illegally, as well as to such other forms of tax resistance as aggressive legal avoidance, increased use of appeals processes, and political lobbying to muzzle the tax agency.").

67. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 277 (2006). *See also* Raven & French, *supra* note 62; Tyler, *supra* note 16, at 376. Also, domestic monies spent on defense have significant opportunity costs because it crowds out spending in other social sectors. *See* Blomberg, *supra* note 65, at 656. Foucault argues that in lieu of physical force or direct threats states can use techniques of organization, standardization and observation to maintain order as done in jails, schools, military institutions and factories. *See generally* MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1970).

68. M.R. Jackman & M.S. Senter, *Different, Therefore Unequal: Beliefs about Trait Differences Between Groups of Unequal Status*, 2 RES. SOC. STRATIFICATION & MOBILITY 309, 331–32 (1983) (noting that stereotypes can make inequality seem natural).

Some stereotypes vilify the poor by portraying them as shiftless, morally corrupt individuals who deserve their fate.<sup>69</sup> Based on psychological evidence, Brenda Major argues that:

[B]ecause outcome disparities between themselves and disadvantaged outgroup members tend to be attributed to internal causes or causes under personal control, members of disadvantaged groups often appraise these disparities as legitimate. Consequently, the disadvantaged often come to believe they are personally entitled to less than do members of more advantaged groups.<sup>70</sup>

On the other hand, stereotypes can also be used to depict poverty as virtuous in an effort to rationalize inequality, particularly through complementary stereotypes “in which advantaged and disadvantaged group members are seen as possessing distinctive, offsetting strengths and weaknesses.”<sup>71</sup> An experimental study by Aaron Kay and John Jost found that the “poor but happy” and “poor but honest” stereotypes are particularly effective in helping the poor to rationalize and tolerate inequality.<sup>72</sup>

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Alternatively, the state can passively benefit from the ability of individuals, media, and other thought-shaping social institutions to accomplish the task.

69. Many empirical studies have investigated society’s tendency to derogate the poor to satiate its need to believe that we live in a just world. See Aaron C. Kay & John T. Jost, *Complementary Justice: Effects of “Poor but Happy” and “Poor but Honest” Stereotype Exemplars on System Justification and Implicit Activation of the Justice Motive*, 85 J. PERSONALITY & SOC. PSYCHOL. 823, 824 (2003). See also Carolyn L. Hafer & James M. Olson, *Beliefs in a Just World and Reactions to Personal Deprivation*, 57 J. PERSONALITY 799, 799 (1989); Leo Montada & Angela Schneider, *Justice and Emotional Reactions to the Disadvantaged*, 3 SOC. JUST. RES. 313 (1989); Barbara Reichle & Manfred Schmitt, *Helping and Rationalizing as Alternative Strategies for Restoring the Belief in a Just World: Evidence from Longitudinal Change Analyses*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 127 (Michael Ross & Dale T. Miller eds., 2002).

70. See Major, *supra* note 32, at 313. When the disadvantaged are aware that their outcomes differ from those of others and believe that those discrepancies are illegitimate, then they will feel like their entitlements have been violated. Perceptions of illegitimacy are enhanced when there are:

- (1) personal or situational factors that cause a person to take a collective rather than a personal perspective on deprivation and disadvantage;
- (2) factors that enhance the perception that the procedures underlying the current distribution of outcomes are unfair (e.g., biased, inconsistent, prejudice), and (3) personal ideologies and collective representations that locate the cause of disadvantage in external agents (e.g., the system) rather than in individual attributes.

*Id.* at 338.

71. John T. Jost et al., *System-Justifying Functions of Complementary Regional and Ethnic Stereotypes: Cross-National Evidence*, 18 SOC. JUST. RES. 305, 308 (2005).

72. Kay & Jost, *supra* note 69, at 834. Kay and Jost also discuss the conclusions of previous scholarship:

Lane (1959) theorized that holding complementary, offsetting stereotypic beliefs helped people (especially the poor) to tolerate and justify economic inequality. He specifically suggested that ‘poor but happy’ and ‘poor but honest’ stereotypes were particularly useful in

Certain doctrines can function much in the same way as stereotypes. For example, the Christian religious doctrine concerning the children of Ham helped justify the economic, social, and political subordination of black slaves in the Antebellum South.<sup>73</sup> The ninth chapter of Genesis in the Christian Bible tells us that, enraged by an indiscretion of his son Ham, Noah cursed the descendants of Ham's son Canaan (who were ostensibly black) and damned them to be slaves for eternity.<sup>74</sup> In the American South, many citizens' beliefs were shaped decidedly by this doctrine, and hence they thought that it was God's will for blacks to be enslaved, dehumanized, and reduced to property.<sup>75</sup>

States can increase the legitimacy of a potentially illegitimate property distribution by influencing the population's beliefs about the status quo through stereotypes and doctrines or by other non-material means. States could, for instance, increase a population's political rights in hopes of increasing the state's legitimacy to compensate for the lack of legitimacy of the property distribution. In the southern African states of Namibia, South Africa, and Zimbabwe, this is exactly what happened. In these countries, present-day ownership is sullied by the brooding cloud of past property theft and thus the property distribution is illegitimate.<sup>76</sup> Nevertheless, in the Faustian bargains that led to their independence, all three countries agreed to maintain the illegitimate property ownership status quo in exchange for political equality.<sup>77</sup>

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rationalizing inequality. Lerner (1980) also suggested that people are motivated by the BJW [Belief in a Just World] to see the underprivileged as 'having their own compensating rewards.' In four experimental studies, we obtained support for the notion that exposure to complementary stereotypes exemplars both increases system justification at the explicit level and satisfies the justice motive at the implicit level, relative to noncomplementary stereotypes exemplars [for example, poor and unfulfilled and rich and happy].

*Id.*

73. See DAVID M. GOLDENBERG, *THE CURSE OF HAM: RACE AND SLAVERY IN EARLY JUDAISM, CHRISTIANITY, AND ISLAM* 142 (2003) ("In a study of the mythic world of the antebellum South vis-a-vis Blacks, Thomas Peterson showed that the notion of Blacks as 'the children of ham' was a well entrenched belief: White southern Christians overwhelmingly thought that Ham was the aboriginal black man."). For an explanation of the curse of Ham, see *id.* at 168–71 (describing the biblical justification for the eternal curse of slavery imposed on Blacks).

74. See *Genesis* 9:25–27.

75. See Steven L. McKenzie, *Cursing of Ham/Canaan*, in *THE OXFORD COMPANION TO THE BIBLE* 268 (Bruce M. Metzger & Michael D. Coogan eds., 1993).

76. GIBSON, *OVERCOMING HISTORICAL INJUSTICES*, *supra* note 22 (explaining that even when contemporary white land claims are legitimate, black South Africans are unwilling to accept these claims because of historical disposessions).

77. See also LUNGISILE NTSEBEZA & RUTH HALL, *THE LAND QUESTION IN SOUTH AFRICA: THE CHALLENGE OF TRANSFORMATION AND REDISTRIBUTION* 6 (2007) (noting leading Zimbabwean scholar Sam Moyo's view that "[w]ith respect to the former settler colonies which went through a negotiated political transition, such as Zimbabwe, Namibia and South Africa, the legacy of racially unequal land control was by and large maintained at independence in the form of constitutional guarantees such as the protection of existing property rights").

A more specific method of influencing people's beliefs is an LECP, which is differentiated primarily by its focus on the transfer of material goods.

### 3. *Instituting Legitimacy Enhancing Compensation Programs (LECPs)*

Both coercion and influencing people's beliefs do not get to the root of the problem—the distribution of assets. The most effective way for a state to increase its current property distribution's legitimacy is to institute a specific type of compensation program, called a Legitimacy Enhancing Compensation Program (LECP). I define LECP as a compensation program that redistributes assets and strengthens the average citizen's belief that she ought to comply with the law. It is distinct from the usual compensation program in two ways.

First, the *process* of devising and implementing an LECP is crucial because the perceived fairness of the procedures affects an individual's belief as to whether she ought to comply with the law.<sup>78</sup> Several studies have shown that “the key to authoritativeness and legitimacy lies not in judgments about the decisions of an authority, but rather in judgments about the procedure, the process, and the quality of interactions that characterize encounters with authority.”<sup>79</sup> Second, with an LECP the fact that compensation is provided is not the final point; instead, the ultimate *effect* of the compensation is key. For example, if the compensation program restores property to the elite in a manner a wide swath of the population views as inconsistent with intuitive views of fairness, there will likely be no legitimacy-enhancing effect.

Within the LECP framework, there are various types of compensation programs that can increase the legitimacy of a state's property distribution, including symbolic reparations, redistribution, reparations, and restoration.

#### a. Symbolic Reparations

An LECP can include *symbolic reparations*. The aim of symbolic reparations is not to rectify past wrongs, but to publicly acknowledge them by building monuments, erecting headstones, renaming streets or public facilities, establishing days of remembrance, securing official apologies, and conducting reburials.<sup>80</sup> But, while symbolic reparation is in many cases necessary, it does not significantly alter the property distribution and so is rarely sufficient to increase the property distribution's legitimacy.

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78. Also it is possible that there will be a different effect on legitimacy if the process includes compensation that is provided by the government as opposed to through the market mechanism.

79. Tyler & Lind, *supra* note 62, at 162–63 (arguing that people are likely to believe that the outcome is legitimate even if it is unfavorable to them, so long as the process involved fair procedures and was conducted by the appropriate authorities). See also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); TYLER, *supra* note 67. In some situations, societal animosity and mistrust may run so deep that the state must involve a third party, such as an international organization, in developing the procedures so that citizens perceive the result as legitimate.

80. See, e.g., Mia Swart, *Name Change as Symbolic Reparation after Transition: The Examples of Germany and South Africa*, 9 GERMAN L.J. 105 (2008).

## b. Redistribution

An LECP can entail redistribution, which *does not* require evidence of prior ownership. This includes redistribution through the tax and transfer system, or land reform where the goal is to target the broader dispossessed group generally as opposed to giving specific compensation to certain dispossessed individuals. There are several examples of redistribution programs where increasing legitimacy was the stated goal. When faced with powerful insurgent movements in the 1970s and 1980s, the governments of El Salvador and Peru tried to increase the property distribution's legitimacy and cultivate popular support for their regimes by enacting agrarian reform.<sup>81</sup> The 1969 land reform in Kerala, India, caused a reduction in inequality in land ownership, income, and caste, thereby increasing the legitimacy of the property distribution.<sup>82</sup>

## c. Reparations

An LECP can include a reparations program,<sup>83</sup> which *requires* evidence of prior ownership. Once a claimant (or her heir) successfully proves that she was unjustly dispossessed, compensation usually comes in the form of restitution of the actual property lost, a grant of alternative property, or monetary compensation.<sup>84</sup> Reparations programs are usually paid for by the taxpaying population and not by the dispossessors or their heirs. Reparations programs have been enacted post Apartheid or Colonialism, post conflict, post Communism, and post Conquest. The following are examples of reparations programs.

In 1994, after the fall of Apartheid in South Africa, the new political dispensation contended with Apartheid-era land theft by enacting the Land Restitution Act. This Act instructs the state to compensate individuals and

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81. Repressive state violence, however, undermined the effects of the massive redistribution. If redistribution occurs concomitantly with repressive state violence, the state's illegitimate use of violence can counteract the legitimacy brought about by redistribution. See T.R. GURR, *WHY MEN REBEL* 238 (1970) ("The threat of severity of coercive violence used by a regime increases the anger of dissidents, thereby intensifying their opposition, up to some high threshold of government violence beyond which anger gives way to fear."); Mark Lichbach, *Deterrence or Escalation? The Puzzle of Aggregate Studies of Repression and Dissent*, 31 J. CONFLICT RESOL. 266, 269 (1987) (quoting T.H. GREENE, *COMPARATIVE REVOLUTIONARY MOVEMENTS* 112 (1974)) (noting that if citizens perceive that the state is arbitrarily using violence against them, then this will lower the government's legitimacy and increase the chances of political instability); T. David Mason, *"Take Two Acres and Call Me in the Morning": Is Land Reform a Prescription for Peasant Unrest?*, 60 J. POL. 199, 199 (1998) (noting that in both Peru and El Salvador "repressive violence by the state undermined the remedial effects of land reform on popular support for the regime").

82. Richard W. Franke, *Land Reform Versus Inequality in Nadur Village, Kerala*, 48 J. ANTHROPOLOGICAL RES. 81, 87 (1992).

83. Reparations is compensation that *does not* focus on repairing a relationship to society by giving the dispossessed a choice in how she is compensated. See Atuahene, *From Reparation to Restoration*, *supra* note 7, at 1444–45.

84. See *id.* at 1445.

communities for their “right in land . . . dispossessed . . . after 19 June 1913 as a result of past racially discriminatory laws or practices.”<sup>85</sup>

When civil wars or other violent conflicts occur, property rights are often disrupted, and the post-crisis state may choose either to address or ignore property theft that occurred during the conflict.<sup>86</sup> Kosovo, for example, chose to address past property theft. Prior to the NATO bombing of the region in 1999, thousands of Kosovo Albanians were forced to flee due to a Serbian-led ethnic-cleansing campaign. When the Kosovo war ended, political stability was in part contingent upon the reintegration of refugees and internally displaced people and the return of their property, which had been dispossessed during the war. Consequently, the interim UN-led civilian administration (the United Nations Mission in Kosovo or UNMIK) established a property compensation program. Through this program, any person who was dispossessed of a property right between March 23, 1989, and March 24, 1999, as a result of discrimination, has a right to restitution in kind or compensation.<sup>87</sup>

Several former communist countries in Eastern Europe addressed claims of prior owners as a prelude to or in tandem with their massive privatization programs.<sup>88</sup> In September of 1990, the German government enacted the Law on Settlement of Open Property Questions, which permits return of property that was expropriated by the East German government after 1949 as well as property expropriated by the Nazis between January 30, 1933 and May 8, 1945.<sup>89</sup> In 1991 the Hungarian government passed the First Compensation Law, which provides compensation to property owners who suffered from Communist Era

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85. See Restitution of Land Rights Act of 1994 s. 2(1) (S. Afr.) [hereinafter LRA].

86. The state’s decision can affect its ability to achieve enduring political reconciliation and hence affects the strength of its democracy for years to come.

87. UNMIK Reg. No. 2000/60, ¶ 2.2, UNMIK/REG/200/60 (Oct. 31, 2000), available at [http://www.unmikonline.org/regulations/2000/re2000\\_60.htm](http://www.unmikonline.org/regulations/2000/re2000_60.htm).

88. See, e.g., Crowder, *supra* note 3, at 238; Frank, *supra* note 3, at 813 (reviewing communist expropriations in East Germany); Cheryl Gray et al., *Hungarian Legal Reform for the Private Sector*, 26 GEO. WASH. J. INT’L L. & ECON. 293, 309 (1992); Nicolás J. Gutiérrez, Jr., *Righting Old Wrongs: A Survey of Restitution Schemes for Possible Application to a Democratic Cuba*, 4 U. MIAMI Y.B. INT’L L. 111 (1995) (reviewing restitution programs in Baltic Republics, Bulgaria, Romania, Czech Republic, Slovakia, East Germany, Hungary, Poland, and Nicaragua); Heller & Serkin, *supra* note 7, at 1402; Jose Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT’L & COMP. L. REV. 321, 344–53 (2000) (reviewing restitution programs in the Baltic Republics, Germany, Hungary, Czech Republic, Slovakia, East Bulgaria, and the program still being created in Poland); Katherine Verdery, *The Elasticity of Land: Problems of Property Restitution in Transylvania*, 53 SLAVIC REV. 1071 (1994) (discussing how the post-communist Romanian government enacted legislation in 1991 to compensate former owners, who lost their land in forcible collectivization).

89. Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. INT’L L.J. 243, 257–60 (1993).



expropriations;<sup>90</sup> and in 1992 the government passed the Second Compensation Law, which mandates compensation for Jews dispossessed by Nazi Germany as well as ethnic Germans expelled from Hungary in the wake of the Nazi retreat.<sup>91</sup>

Post-Conquest, many countries have enacted restitution programs to make amends for lands stolen from Native Peoples. In Australia the Aboriginal Land Rights (Northern Territory) Act of 1976 provided a twenty-year period (1976–1996) in which the state allowed Aboriginal people to make a collective property claim to Crown land, which was stolen from them during Conquest. If an Aboriginal group could prove traditional ownership, then it was entitled to receive an inalienable freehold title held by a corporate land trust.<sup>92</sup>

While the reparation programs in countries like South Africa, Kosovo, Germany, Hungary, and Australia have successfully given individuals and communities compensation for property stolen from them in the past, this does not necessarily mean that they are LECPs. The process used to distribute compensation as well as the effect of the compensation is what defines an LECP. I have elsewhere theorized about how a state can best ensure its compensation program has a significant legitimacy-enhancing effect.<sup>93</sup> I argued that states must implement programs focusing on restoration as opposed to reparation.

#### d. Restoration

In prior work, I have argued that there are certain instances in which property theft leads to severe dehumanization and removal of individuals and communities from the social contract.<sup>94</sup> In these instances, in order to significantly increase the property distribution's legitimacy, the state should provide compensation in the form of restoration. *Restoration* is compensation that gives individuals and communities an array of options that allow the dispossessed to offer input on how they are to be compensated and thereby reintegrated into the social contract.<sup>95</sup> In contrast, reparation is not as effective in enhancing legitimacy because it does not prioritize choice. The choices for restoration range from

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90. Istvan Pogany, *The Restitution of Former Jewish-Owned Property and Related Schemes of Compensation in Hungary*, 4 EUR. PUB. L. 211 (1998).

91. Gutiérrez, *supra* note 88, at 132.

92. Aboriginal Land Rights (Northern Territory) Act, 1976 (Austl.). The Act was a radical departure from the *Milirrpum* case, which required an economic attachment to the land in order to make a property claim. Most claims were exceedingly difficult to establish. By the end of the twenty-year period, Aboriginal people possessed 43% of the Northern Territory (where 15% of the Australian Aboriginal population lived). Lewis P. Hinchman & Sandra K. Hinchman, *Australia's Judicial Revolution: Aboriginal Land Rights and the Transformation of Liberalism*, 31 POLITY 23, 37 (1998).

93. See Atuahene, *From Reparation to Restoration*, *supra* note 7, at 1445.

94. See *id.* (arguing that property-induced invisibility is the widespread or systematic confiscation or destruction of real property with no payment of just compensation executed such that dehumanization occurs. The act is perpetrated by the state or other prevailing power structure(s) and adversely affects powerless people or people made powerless by the act such that they are effectively left economically vulnerable and dependent upon the state to satisfy their basic needs. When property is confiscated in this manner, then people are removed from the social contract).

95. *Id.* at 1445–46.

restitution of the actual property lost, grant of alternative property, monetary compensation, or distribution of in-kind benefits such as free higher education for two generations, priority in an already established housing process, or highly subsidized credit, for example.<sup>96</sup>

In theory, the South African Land Restitution Program is the best example of a true restoration program. Beneficiaries of the LRP were to receive a choice in how they were compensated. The White Paper on Land Policy—the government’s definitive policy on land matters—states that “solutions must not be forced on people.”<sup>97</sup> In reality, however, many beneficiaries were not given a choice due to time constraints and lack of prioritization. Most commonly, the government gave people only one option—financial compensation.<sup>98</sup>

In sum, when a state is faced with an illegitimate property distribution, an LECP is at times more effective in maintaining long-term stability than the state’s other two options—coercion and changing beliefs. When illegitimacy runs high, relying purely upon coercion to secure compliance involves high surveillance and enforcement costs.<sup>99</sup> Influencing the population’s beliefs about the property distribution is possible, but it does not address the root of the illegitimacy—pervasive material inequality. In order to most effectively address material inequality in a manner that will promote long-term stability, states should utilize an LECP.

#### IV. A LEGITIMACY DEFICIT: A RATIONAL-CHOICE MODEL

##### *A. To Prevent Property-Related Disobedience, a State Should Enact an LECP Before It Enters a Legitimacy Deficit*

A legitimacy deficit is a rational-choice model that suggests when a state should implement an LECP to avert property-related disobedience. I employ the assumption of rationality because I seek to describe what rational, informed decisionmakers primarily interested in maintaining stability in the face of pervasive past theft ought to do; I do not seek to make any claims about what they will actually do.<sup>100</sup> The value of the model is threefold: it gives conceptual clarity

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96. *Id.*

97. S. AFRICAN DEP’T OF LAND AFFAIRS, WHITE PAPER ON SOUTH AFRICAN LAND POLICY 49 (1997).

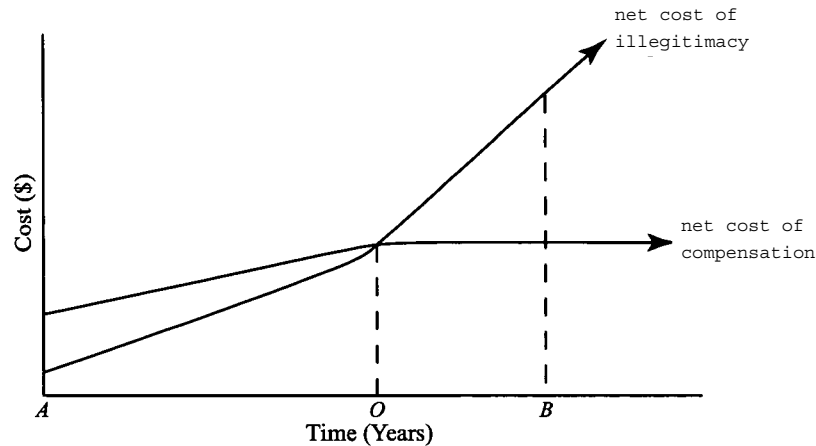
98. Interview with Tozi Gwanya, Dir. Gen. of Land Affairs, in Johannesburg, S. Afr. (July 8, 2009).

99. Hurd, *supra* note 18, at 384.

100. I assume that the relevant decisionmakers are rational agents who engage in expected utility maximization. That is, when agents are confronted with a range of options they are able to rank-order their preferences, taking into consideration the probability of achieving each one, and choose the most efficient means to their desired end. For more on the general contours of rational-choice theory, see Richard Warner, *Impossible Comparisons and Rational Choice Theory*, 68 S. CAL. L. REV. 1705 (1995). There is a substantial literature critiquing rational-choice theories that primarily challenges their predictive power because people often act irrationally. For an argument that the predictive power of rational-choice theory is limited because the rational man is not a psychologically realistic portrait of an average person, see, for example, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

to the question of how a state can avoid property-related disobedience in the face of extensive past property theft; it provides citizens, policymakers and academics a framework within which they can identify and debate the various costs and benefits involved; and it provides a flexible framework that can apply to a wide array of contexts and time periods.

Figure 1



The symbolic representation of the model is as follows:

$C_I$  = Net cost of illegitimacy

$C_C$  = Net cost of compensation

When

$C_C < C_I$ , then LECP is suggested

$C_C = C_I$ , then LECP is suggested

$C_C > C_I$ , then status quo is possible

Point *A* in Figure 1 represents the point when the original property theft occurred. A stable status quo exists between point *A* and point *O*, where the cost of an LECP is greater than the cost of an illegitimate property distribution. When there is a stable status quo, addressing past property theft may be morally prudent or wise for a variety of reasons, but failure to address past property theft will not lead to massive noncompliance with property laws or breed broader instability that could possibly upend a state.

A rational decisionmaker should enact an LECP before the state reaches a legitimacy deficit. A legitimacy deficit exists between point *O* and point *B*, where the cost of an illegitimate property distribution outweighs the cost of an LECP. Between points *O* and *B*, the cost of illegitimacy rises because—due to the present effects of pervasive past property theft—the average citizen maintains only a weak belief that she *ought to* comply with property-related laws, and *actual* compliance is low based on this pervasive belief. There is convincing experimental evidence from legal psychology that suggests if people perceive one law as unjust, then this

can adversely affect their willingness to comply with unassociated laws.<sup>101</sup> *B* is the point at which property-related disobedience inspires broader instability and finally destabilizes the state. The situation intensifies as a society approaches point *B*, placing enormous pressure on a state either to act or to face political or economic destabilization as a result of its inaction.

The time it takes one country to move from point *A* to point *B* as well as the construction of the cost curves depends upon unique, local circumstances. The legitimacy deficit model is not designed to predict when  $C_C < C_I$ . Rather, the model is designed to determine what a country should do once, for whatever reason,  $C_C < C_I$ .

### 1. Net Cost of Illegitimacy

The net cost of an illegitimate property distribution is the cost of illegitimacy ( $C_I$ ) minus the benefit of illegitimacy ( $B_I$ ), which can be symbolically represented as follows:  $F(C_I) = (\text{ability to coerce}) (\text{coercive force available}) + (\text{costs related to non-material influencing of beliefs}) + (\text{remaining disobedience}) - B_I$ .

The primary benefit of an illegitimate property distribution is the ability to maintain the political and economic support of all those who are benefitting from the status quo. There is also, of course, the costs saved from not having to implement an LECP. But, the cost of doing nothing and maintaining an illegitimate property distribution can lead to varying levels of property-related disobedience. The level of disobedience depends upon the political and economic power of the dispossessed group, their percentage of the population, and their ability and incentive to organize disruptive protest actions.

The cost of illegitimacy declines as the impetus to rebel is reduced. This could be because organized opposition to the unjust dispossession is suppressed as time moves on; memories fade and the unfairness of the unjust dispossession no longer causes people to disobey property laws; or people's beliefs are influenced through stereotypes or doctrines such that the past property theft is no longer an impetus for noncompliance.

The net cost of an illegitimate property distribution will rise if a state must spend money on institutions or propaganda that facilitate the population's acceptance of a highly unequal property distribution. The net cost will rise more dramatically when there is systematic noncompliance with property-related laws and the state is forced to employ its coercive mechanisms. Coercion depends on two factors: a state's political ability to use coercion and the availability of coercive force. A state's political ability to use coercion depends upon the existence of constitutional or other legal restraints. The United States, for example, is not legally allowed to engage in activities that amount to torture; this serves as a restraint on the permissible responses to noncompliant actors. In North Korea, however, no such legal restraint exists. Also relevant is the level of support or condemnation for using coercion among domestic and international constituencies. A rational decisionmaker should not use coercive power such that the push back

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101. Nadler, *supra* note 10, at 1407.

from domestic or international actors will knowingly cause it to lose significant political capital. The availability of coercive force involves the capacity of existing institutions such as the police and military. It entails the affordability of weapons, surveillance apparatus, and other tools used to establish control.

The cost of coercion increases in accordance with the disobedient actors' level of disregard for law and their use of violence. There may come a point, however, when the state's coercive powers are not sufficient to contain disobedient populations, resulting in property-related rebellion that can escalate to complete state destabilization (Point *B*). While the fabric of society can withstand losing a few threads, once frayed extensively the fabric can do nothing but fall apart.

## 2. Net Cost of an LECP

The net cost of an LECP is the cost of compensation ( $C_C$ ) minus the benefit of compensation ( $B_C$ ), which can be symbolically represented as follows:  $F(C_C) = (\text{direct payments}) + (\text{administrative costs}) + (\text{consequences of perceived process illegitimacy}) - B_C$ .

The primary benefit of an LECP is that if it is done correctly, it will increase the property distribution's legitimacy and drastically decrease the chance that past property theft will cause property-related disobedience.

The cost of an LECP includes several factors. First, the most financially taxing costs are direct payments to present landowners and past victims. Under no circumstance is it acceptable to expropriate the land of innocent third parties without just compensation.<sup>102</sup> Hence, many compensation programs provide present landowners with monetary compensation when the dispossessed elect to regain their land. But if the original land is not returned, the programs provide the dispossessed with alternate land, monetary compensation, or some other form of compensation.<sup>103</sup> The cost of compensation will rise along with inflation or

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102. In South Africa, for instance, the state considers various factors when determining just compensation including "the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation." S. AFR. CONST. 1996 s. 25(3). Also, every state must decide who is an innocent third party.

103. See Alan Dodson & Veijo Heiskanen, *Housing and Property Restitution in Kosovo*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 225, 233 (Scott Leckie ed., 2003) (noting Kosovo's Regulation 2000/60 provides for three categories of claims and a successful category A claimant will receive restitution of the property right lost or compensation, depending on the circumstances); Gerhard Fieberg, *Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question*, in CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY 79, 84 (Medard R. Rwelamira & Gerhard Werle eds., 1996) (describing the debate between East and West Germany over the two options for land reform: restitution in kind, meaning the government returns the confiscated assets, or compensation through a payment of money); Hall, *supra* note 9, at 217 (describing the South African policy which allows the claimants to return to their land or opt for cash compensation or other forms of redress); Vraitislav Pechota, *Privatization and Foreign Investment in Czechoslovakia: The*

increasing land values. The cost of compensation also escalates if the state has to pay just compensation to expropriate the land, but it will not increase as much if the state can distribute state-owned land.

Second, there are administrative costs involved in reallocating property rights. This includes the cost of establishing a bureaucracy, or adding work to an existing bureaucracy.<sup>104</sup> Establishing an administrative apparatus requires significant upfront investment. For restitution programs, the cost of compensation increases as time progresses and evidence of prior ownership becomes more difficult to secure. Administrative costs are also affected by rent-seeking behavior within bureaucracies, which can drastically reduce the compensation's legitimacy-enhancing effects and undermine the entire effort. The worst case scenario is if the compensation is siphoned off by corrupt officials and never reaches the targeted beneficiaries.

Third, there are significant costs if certain populations do not believe that the LECP or the process by which it is implemented is fair or efficient. For instance, there are the costs of disobedience and instability that may result if the ostensible unfairness awakens or amplifies preexisting ethnic or religious divisions and rancor.<sup>105</sup> Alternatively, entrenched interests (such as the military or economic elites) who vehemently oppose the LECP can take up arms or instigate chaos. There is also the potential cost of bringing in a neutral third party to administer the LECP so that the populace believes that the process and procedures are fair.<sup>106</sup> Additionally, there are costs involved if, in response to market uncertainty created by the LECP, investors pull out of the country before reallocation of property rights is complete.<sup>107</sup> There are also costs when a foreign state withholds necessary humanitarian or economic financing, suspends diplomatic privileges, or initiates or

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*Legal Dimension*, 24 VAND. J. TRANSNAT'L L. 305, 308 (1991) (explaining the Czech Republic and Slovakia restitution programs, which provide for the return of a small portion of the private property to its original owner or compensation if physical restitution is not feasible due to the property's destruction, irrevocable alteration, or improvement through use).

104. See Dodson & Heiskanen, *supra* note 103, at 233 (concluding Kosovo's restitution program lacks the necessary large-scale administrative institutions, staffing, information technology facilities and other resources to fulfill the required need because there is not sufficient funding from the international community); Fieberg, *supra* note 103, at 84 (discussing the administrative constraints of implementing East Germany's restitution programs, which required thousands of employees); Hall, *supra* note 9, at 219 (noting that national budgets cannot meet the demands of restitution-related costs).

105. See *supra* note 13 and accompanying text.

106. International and regional organizations may fill this role at no cost to the state (e.g. Kosovo).

107. See Stijn Claessens & Luc Laeven, *Financial Development, Property Rights, and Growth*, 58 J. FIN. 2401, 2402–03 (2003) (finding secure property rights increase a firm's willingness to allocate resources to property, which in turn leads to overall economic growth); Stein Holden & Hailu Yohannes, *Land Redistribution, Tenure Insecurity, and Intensity of Production: A Study of Farm Households in Southern Ethiopia*, 78 LAND ECON. 573, 575 (2002) (finding an inverse relationship between the willingness of farmers to invest in long-term improvements on their land and the perception of insecurity based on land reform in flux in Ethiopia).

funds an aggression in response to an LECP it perceives as illegitimate. In Nicaragua, for instance, the Sandinista government faced adamant opposition from the United States when it implemented an LECP. The United States funded a military insurgency (the CONTRAS), in part to prevent the onset of socialism and a massive redistribution of property.<sup>108</sup> Consequently, the Sandinista land reform program was compromised because the state had to spend a significant portion of its budget on military operations, leaving scarce funding for its land reform program.<sup>109</sup>

### 3. *The Model's Descriptive Power*

The cost curves in Figure 1 are informed by factors such as: how long ago the property theft occurred; the continuing effects of the past property theft; the current political relevance of the past property theft; and the value of land in relation to other forms of wealth. They are also informed by various facts about the dispossessed and the dispossessors, including population size, continued identifiability, and current political and economic power. While there are various ways to graphically represent the costs, I base my analysis upon the graph shown in Figure 1, which tells a particular story. This story has four pillars: as time progresses the cost of illegitimacy rises; only years after the initial theft is the cost of compensation equal to the cost of illegitimacy (point *O*); prior to point *O*, the cost of compensation is greater than the cost of illegitimacy; and after point *O*, the cost of illegitimacy is greater than the cost of compensation. This is arguably the story of southern Africa.

Even prior to the nineteenth century, the ascendant white regimes in Namibia, South Africa, and Zimbabwe brutally confiscated vast acres of land without compensation or consent.<sup>110</sup> The white minority's sophisticated military apparatus overwhelmed those Africans who tried to rebel against this injustice. Aware of their military disadvantage, Africans generally accepted their fate and widespread rebellion did not materialize until the latter half of the twentieth century. Because property-related disobedience and other forms of noncompliance were low during the zenith of white rule, the cost of illegitimacy was low.

108. Abu-Lughod, *supra* note 9, at 32; Everingham, *supra* note 9; Philip J. Williams, *Dual Transitions from Authoritarian Rule: Popular and Electoral Democracy in Nicaragua*, 26 COMP. POL. 169, 177 (1994).

109. W. Gordon West, *The Sandinista Record on Human Rights in Nicaragua*, 22 DROIT ET SOCIÉTÉ 393, 401 (1992) ("In response, whereas Nicaraguan military spending constituted only 7% of the 1980 and 1981 national budgets, the figure had to rise through 13% (1982), 19% (1983), 25% (1984) to about 50% since.").

110. See, e.g., CATHERINE BUCKLE, *AFRICAN TEARS: THE ZIMBABWE LAND INVASIONS* (2001); Alois Mlambo, *The Ambiguities of Independence, Zimbabwe 1980-1990*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA (Margaret C. Lee & Karen Colvard eds., 2003); SIDNEY HARRING & WILLEM ODENDAAL, 'ONE DAY WE WILL ALL BE EQUAL': A SOCIO-LEGAL PERSPECTIVE ON THE NAMIBIAN LAND REFORM AND RESETTLEMENT PROCESS, LEGAL ASSISTANCE CENTER 9, 19, 33 (2002). See also Ruth Hall, *A Comparative Analysis of Land Reform in South Africa and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra*; Margaret Lee, *The Rise and Decline of the Settler Regimes of South Africa, Namibia, and Zimbabwe*, in UNFINISHED BUSINESS: THE LAND CRISIS IN SOUTHERN AFRICA, *supra*.

During this period, the cost of compensation was higher than the cost of illegitimacy. If the white government had given Africans compensation for past theft, it would have severely undermined the white supremacist logic on which it was founded, deeply alienated its political base, and threatened its political survival. That is, the cost of perceived process illegitimacy was very high. Thus, from the perspective of the apartheid government, it was arguably more rational and less costly to invoke its military might than to aggressively pursue equitable policies.

When the countries in the region attained political independence, the cost analysis changed dramatically. Although the connection between past land theft and present inequality is palpable and undeniable,<sup>111</sup> Zimbabwe, South Africa, and Namibia all made bargains when independence was granted, allowing whites to keep their property regardless of how it was attained, and in exchange receiving political liberation and the promise of land reform. Over a decade after independence was granted, the promise of land reform remains largely unfulfilled despite the intense economic and cultural importance of land in these societies.<sup>112</sup> Consequently, among South Africa's populace there is a generalized belief that the dispossessors remain rich while the dispossessed remain poor; this serves as a source of a widespread, visceral anger and a pounding sense of injustice.<sup>113</sup> As demonstrated in Zimbabwe, a demagogue can hasten a country's arrival at point *B* and cause things to fall apart by manipulating this profound sense of illegitimacy to serve his interests at the expense of the common good.<sup>114</sup>

While the highly unequal land distribution and severe inequality remain largely unchanged in South Africa and Namibia since independence, the states'

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111. J.S. Juana, *A Quantitative Analysis of Zimbabwe's Land Reform Policy: An Application of Zimbabwe SAM Multipliers*, 45 AGREKON 294, 294 (2006) ("During the colonial era, land was distributed on racial lines, with approximately 4,660 large-scale predominantly white commercial farmers owning about 14.8 million hectares and about 6 million black smallholder farmers owning about 16.4 million hectares in mainly low agricultural potential areas."); Uazuva Kaumbi, *Namibia: The Land is Ours!*, NEW AFRICAN 28 (2004) ("[L]ess than 10% of the people own more than 80% of the commercial farmland as a result of colonial theft."); Johan van Rooyen & Bongiwe Njobe-Mbuli, *Access to Land: Selecting the Beneficiaries*, in AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKET AND MECHANISMS 461 (Johan van Zyl et al. eds., 1996) ("Land distribution in South Africa is highly skewed. Approximately 87 per cent of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71 per cent of the population, which is predominantly black, live on 13 per cent of the land in high density areas—the former homelands.").

112. *Id.*

113. See Atuahene, *From Reparation to Restoration*, *supra* note 7, at 1453–56 (describing the history of land dispossession in South Africa that left the majority of the Blacks powerless and poor and the present-day consequences, including a widespread belief among Blacks of the illegitimacy of the current land distribution). See also AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 6–7 (2003) (noting that the unequal distribution of wealth "pit[s] a frustrated 'indigenous' majority, easily aroused by opportunistic vote-seeking politicians, against a resented, wealthy ethnic minority"). See also GIBSON, *OVERCOMING HISTORICAL INJUSTICES*, *supra* note 22, at 31.

114. *Id.*



ability to use coercion to suppress property-related disobedience has decreased dramatically because of the majority's newfound political rights. As the euphoria of political independence wears thin and the promise of land reform remains elusive, the dispossessed majority becomes impatient, rebellion becomes more likely, and the cost of illegitimacy increases. Consequently, post-independence, the cost of illegitimacy is gradually becoming greater than the cost of compensation.

Although my analysis is primarily based on the story of South Africa, in the Appendix I outline various scenarios that would cause the cost curves to assume a different shape than in Figure 1. I leave it to other scholars, however, to apply the model outside of the southern African context and investigate whether each of the four patterns in the Appendix accurately tells the story of a different region or country.

#### 4. *The Model's Constraints*

The model's first major constraint is that determining the relevant costs over time is difficult (but not impossible). In order to draw the diagram for any particular country, one must know how the net cost of compensation and illegitimacy decreases or increases over time and at what pace. This is difficult because the model is not limited to quantifiable, market-related costs, so a precise, technical cost-benefit balancing is not possible. But, it is possible to provide qualitative descriptions of the costs that are comprehensible to the general public.<sup>115</sup> In the next Section, I argue that the most effective way to properly determine costs is through a highly participatory procedure involving a broad swath of the polity.

The model's second limitation is that because its focus is solely stability, it overlooks the fact that there are morally unsavory dictatorships that have a high degree of stability. In North Korea, for example, there is no evidence of property-related instability or even widespread disobedience. My analysis is purely focused on promoting a stable society, and thus does not deal with the morally troubling means that the North Korean government may use to ensure stability. Although the legitimacy deficit model only deals with promoting stability, it is still valuable because it provides conceptual clarity to a very important question faced by several transitional democracies about how a state can avoid present-day property-related disobedience when a significant number of people believe that the current property distribution is illegitimate because of past property theft.

Lastly, under the model, groups that are willing to use violence in response to a property distribution that they perceive as illegitimate are more likely to receive compensation regardless of the moral strength of their position. Consider the hypothetical country of *Ai*, in which 5% of the population owns over 80% of the land. This minority population engaged in morally abhorrent activities

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115. Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 293–94 (arguing costs that are not commensurable along a single metric are difficult to balance). Sunstein urges the U.S. Congress to accompany all cost-benefit analysis with a “disaggregated, qualitative description of the consequences of government action, so that Congress and the public can obtain a fuller picture than the crude and misleading precise ‘bottom line’ of the cost benefit analysis.” *Id.*

for twenty years in an ultimately unsuccessful attempt to maintain their economic power. Under the new political dispensation of *Ai*, most of the minority population's land is expropriated without compensation. As a result, the former landowners believe that the property distribution is illegitimate and, more importantly, are willing to use violence to get their land back. As noted earlier, violence increases the cost of illegitimacy. If the cost of illegitimacy outweighs the cost of an LECP, then under the stipulations of the model, a rational leader should provide compensation to the minority despite the moral weakness of the claim. The cost of illegitimacy for a similarly situated group that is *not* willing to engage in violence would be lower. Hence, one major limitation of the legitimacy deficit model is that it can reward violence. In certain situations when the decisionmakers balance the cost of the illegitimacy against the cost of an LECP, a given group's potential for violence may increase their chance of securing an LECP. But, while promoting stability can have such moral costs, it is still a worthy end.

***B. The State Should Use a Highly Participatory Process to Properly Understand the Costs Involved***

The legitimacy deficit model requires qualitative descriptions of the costs and their importance. This may seem inadequate when compared to other models where the costs are quantifiable; but, although quantifiable costs may seem more accurate, often the process of assigning monetary values can be imprecise and arbitrary. To ensure that the costs involved in the legitimacy deficit model are an accurate reflection of citizen perceptions, I propose that decisionmakers determine and balance the costs through a highly participatory process involving various sectors of the populace.

The importance of involving the public in the political decision-making process is largely undisputed in the literature.<sup>116</sup> But the level of control the public should have in the decision-making process is a very controversial matter.<sup>117</sup> At the very basic level, which I will call level one, power holders aim to educate the public about options, rights, and responsibilities, but information flows in one direction.<sup>118</sup> This is not true participation. Level two involves token participation from certain participants who are informed or consulted, but the present power holders are not forced or inclined to truly integrate the knowledge and suggestions of these participants.<sup>119</sup> Alternatively, a few handpicked citizens who are not accountable to their communities may be invited to join a decision-making body. In both situations, the community has no true opportunity to decide. True participation occurs at level three when participants have a significant amount of control over both the process and outcome.<sup>120</sup>

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116. Ortwin Renn et al., *Public Participation in Decision Making: A Three-Step Procedure*, 26 POL'Y SCI. 189, 189 (1993).

117. *Id.*

118. Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASS'N 216, 217 (1969).

119. *Id.*

120. *Id.*

As it stands now, in many nations the cost involved in a legitimacy deficit are balanced by an elite group, which usually consists of political parties, the experts they rely upon, and individuals and institutions highly capable of influencing politics. This is a significant problem because the outcome of a cost analysis depends on who is doing the analysis. The costs as perceived by a ruthless dictator may be different than those perceived by an accountable, democratically elected government, or by the populace at large. The costs as perceived by the rich, who have an economic buffer, are different than the costs as perceived by the poor. Also, if unchecked, decisionmakers will likely weigh the immediate costs involved more heavily than costs that will be incurred down the road because politicians often face formal or informal term limits that incentivize them to sacrifice long-term success for short-term benefit. If given free reign, decisionmakers may also fail to consider the total net costs involved and only focus on the costs relevant to politically or economically powerful groups that pose a threat to their power.

In South Africa's Land Restitution Program, both the decision to compensate only those who were dispossessed of a right in land after 1913 and the process the state used to compensate citizens involved primarily political parties and experts, with limited direct consultation with average citizens.<sup>121</sup> Likewise, after the Kosovo War, international actors did not extensively consult average citizens when they decided to provide compensation "to any person who was dispossessed of a property right between March 23, 1989 and March 24, 1999 as a result of discrimination."<sup>122</sup> Because the processes in both Kosovo and South Africa failed to secure significant involvement from a broad cross-section of citizens, the decisionmakers did not have all the information they needed to determine and balance the costs appropriately. In fact, the most important piece of the puzzle was left out: average citizens' beliefs about the correct outcome. It is possible for elite decisionmakers to properly gauge a population's preferences, but success is more likely if they go straight to the source—the people.

States must determine whether a legitimacy deficit exists and what type of LECP is necessary to correct it through a highly participatory procedure involving a broad swath of the polity. I am not suggesting that the goal of the conversation should be to achieve full consensus; this would be highly impractical given the various conflicting interests involved. Rather, the goal should be to allow people to participate in assessing the need for an LECP and in designing it. Empirical studies done by Tom Tyler confirm that if people have a say in the process they are more likely to view the outcome as fair.<sup>123</sup> Consequently, if a

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121. A.J. Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in PROPERTY AND THE CONSTITUTION 109, 111–12 (Janet McLean ed., 1999) (describing the initial debates regarding the inclusion of the property clause in 1993 and 1995, that "constitutional entrenchment of property rights would 'insulate' existing landholdings against land reform efforts" and noting that, despite these concerns, the property clause was inserted in the constitution and that "the absence of any real political debate about the legitimacy and potential effects of a constitutional property clause suggests the existence of a political compromise that was never open to real debate or negotiation").

122. See UNMIK Reg. No. 2000/60, *supra* note 87.

123. See TYLER, *supra* note 67.

broad cross-section of the population is involved in a well-regarded process to determine if a legitimacy deficit exists and to design an LECP to address it, then they are more likely to view the resulting LECP as fair. An LECP that includes a broad constituency and takes particular pain not to exclude those who can unsettle the social order can increase legitimacy and inspire willing obedience to property-related laws. Without widespread participation, it is likely that a few well-organized groups will implement an LECP only if it suits them and they will design it according to their preferences. This is not likely to have the legitimacy-enhancing effects necessary to avert property-related disobedience.

There are several benefits as well as drawbacks to mandating widespread public participation. The downsides are, first, that the process can become time-consuming given the number of people who should be involved and the challenges of synthesizing the information received. This is particularly problematic for states that have a narrow window of time in which to avoid property-related rebellion. But, by using participatory procedures, the state makes an investment of time at the front end and will receive the dividends—potentially saving the state from chaos—at the back end.

Second, meaningful public participation of the envisioned magnitude requires significant resources, which creates a problem for cash-strapped states in or approaching a legitimacy deficit. This is why it is crucial for states to involve civil society and international organizations in managing the process, a step that both reduces state expenditures and increases transparency.

Third, making room for public participation in deciding whether to provide compensation for past property theft requires a government that is ethical and transparent, with a reasonably efficient bureaucracy and the political will to get the job done. This exists in some countries facing a legitimacy deficit, but not in others.

Fourth, facilitating a conversation that balances participation and deliberation is difficult because high participation has the potential to undermine deliberation. The crux of the deliberation–participation paradox is that, although it is difficult to thoroughly discuss issues in a large group, if the state chooses community representatives, there is no guarantee that those people will be accountable to, or representative of, the larger public.

Fifth, a public conversation about past property theft could open the proverbial can of worms and inflame extant divisions and ethnic or religious-based hatred that may lurk just below the surface. While talking about past injustices has the potential to cause latent animosities to boil up to the surface, this is not necessarily a bad thing. If past injustice is the root of the ethnic resentment, then an LECP with widespread buy-in has the potential to address the root cause and possibly assuage ethnic rancor.<sup>124</sup>

Sixth, the very thing a public conversation is intended to address—a lack of legitimacy—may prevent people from participating in the

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124. If, however, the LECP does not have widespread buy-in and does not increase legitimacy, a public conversation could be antagonistic to stability.

decision-making process. But the literature on public participation tells us that “[c]itizens usually want to be involved only when they have strong feelings on an issue or when a decision will affect them directly.”<sup>125</sup> A state’s decision to implement or not implement an LECF is something potential beneficiaries would be directly affected by, so participation would be likely *if* the population did not view the LECF process as a farce.<sup>126</sup>

Lastly, and most problematically, even if a state manages to facilitate a meaningful public conversation, there is no guarantee that the output of the conversation will affect the ultimate decision. The entire process can devolve into a propaganda campaign designed to give the illusion of power sharing when in actuality it is business as usual and the decisions are made by those in power with no regard for what average citizens believe or desire.

Nonetheless, there are still significant benefits to prioritizing public participation in the process of determining and balancing the costs involved in a legitimacy deficit.<sup>127</sup> First, democracy is strengthened when people participate in deciding issues that directly affect them. For John Stuart Mill:

[I]t is at local level where the real educative effect of participation occurs, where not only do the issues dealt with directly affect the individual and his everyday life but where he also stands a good chance of, himself, being elected to serve on a local body. It is by participating at the local level that the individual ‘learns democracy’. ‘We do not learn to read or write, to ride or swim, by being merely told how to do it, but by doing it, so it is only by practicing popular government on a limited scale, that the people will ever learn how to exercise it on a larger [scale]’.<sup>128</sup>

By participating in the decision-making process informed by the legitimacy deficit model, average citizens practice democracy.

Second, true participation results in a devolution of power to average citizens, hence serving as a check on the power of traditional decisionmakers.

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125. JOHN CLAYTON THOMAS, PUBLIC PARTICIPATION IN PUBLIC DECISIONS: NEW SKILLS AND STRATEGIES FOR PUBLIC MANAGERS 56 (1995).

126. In some instances participants are paid a small stipend to incentivize them to participate. See Carl Tobias, *Great Expectations and Mismatched Compensation: Government Sponsored Public Participation in Proceedings of the Consumer Product Safety Commission*, 64 WASH. U. L.Q. 1101, 1156–64 (1986) (noting the virtues and vices of providing participant compensation in the U.S. experience).

127. In the 1960s the virtues of citizen participation led legislators to mandate that agencies involve the public. See Walter Rosenbaum, *The Paradoxes of Public Participation*, 8 ADMIN. & SOC’Y 355, 357 (1976) (“First came the Economic Opportunity Act (1964) with its unprecedented congressional mandate, as nebulous as it was controversial, that the Office of Economic Opportunity (OEO) achieve ‘maximum feasible participation’ among the poor in the Community Action Programs; next came the Demonstration Cities Program (1966) with its insistence that HUD ‘organize the unorganized’—the poor most often affected by the program.”).

128. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 31 (1970).

Third, a public conversation can help to ground citizens' expectations in reality. Some countries cannot afford an extensive LECP, so the conversation can provide people with information about exactly what resources are available to implement a compensation program and what kind of programs a state can offer given its limited resources.

Fourth, decisionmakers will have better information if the decision-making process includes direct citizen participation. Increasing legitimacy depends on impacting what a wide cross-section of the citizenry believes, so the best information will come straight from the source—the citizens. Lastly, public participation, which gives citizens some control over the decision-making process, is likely to make citizens believe that the process is fairer than if they did not participate in it. The evidence shows that “the opportunity to express one’s opinions and arguments, the chance to tell one’s own side of the story, is a potent factor in enhancing the experience of procedural justice, even when the opportunity for expression really accomplishes nothing outside the procedural relationship.”<sup>129</sup> Studies have even shown that process control is often more important than decision control with respect to procedural justice judgments.<sup>130</sup>

Each state should structure the public participation in balancing the costs of a legitimacy deficit according to its idiosyncratic political, social, and economic circumstances. There is no one-size-fits-all approach. There are, however, broad guiding principles that each state should use to decide who will be involved and how the process will unfold.

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129. Tyler & Lind, *supra* note 62, at 149; see also Robert Folger, *Distributive and Procedural Justice: Combined Impact of “Voice” and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977); Ruth Kanfer et al., *Fairness and Participation in Evaluation Procedures: Effects on Task Attitudes and Performance*, 1 SOC. JUST. RES. 235 (1987); Stephen LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOL. 1531 (1978); E. Allan Lind et al., *Procedure and Outcome Effects on Reactions to Adjudicated Resolution of Conflicts of Interest*, 39 J. PERSONALITY & SOC. PSYCHOL. 643 (1980); E. Allan Lind et al., *Decision Control and Process Control Effects on Procedural Fairness Judgments*, 13 J. APPLIED SOC. PSYCHOL. 338 (1983) [hereinafter Lind et al., *Decision Control*]; Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987); Tom R. Tyler et al., *The Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72 (1985); Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOL. 295 (1974).

130. D.E. Conlon et al., *Nonlinear and Nonmonotonic Effects of Outcome on Procedural and Distributive Fairness Judgments*, 19 J. APPLIED SOC. PSYCHOL. 1085 (1989) (procedural justice judgments were more affected by a subject’s belief that their position had been considered than a favorable outcome); Lind et al., *Decision Control*, *supra* note 129, at 338; Linda Musante et al., *The Effects of Control on Perceived Fairness of Procedures and Outcomes*, 19 J. EXPERIMENTAL SOC. PSYCHOL. 223 (1983); Tyler, *supra* note 129, at 333 (noting that, when the decisionmaker was seen as acting in bad faith or biased and even when the outcome was important, process control positively affected procedural justice judgments; process control, however, did not edify procedural justice judgments when the decisionmaker was seen as not giving consideration to the respondent’s views); Tyler et al., *supra* note 129, at 72.

*1. Who Will Be Involved in the Process?*

The type of public participation envisioned in this Article requires the state to use a bottom-up approach for defining the relevant public. These may include stakeholders such as political parties, bureaucrats, community organizations, citizens, and experts.<sup>131</sup> To ensure that there is significant buy-in, the state must include both organized groups as well as citizens not affiliated with particular groups.<sup>132</sup> Before inviting organized groups, however, the state must understand how democratic each group is and whom each one represents:

An almost universal finding in participation studies is that groups or individuals active in such programs (1) represent organized interests likely to have been previously active in agency affairs, (2) include a large component of spokesmen for other government agencies, (3) represent a rather limited range of potential publics affected by programs, and (4) tend toward the well-educated, affluent middle- to upper-class individuals.<sup>133</sup>

States must be sure to avoid these well-trodden pitfalls and encourage public participation from a diverse, wide-ranging group of stakeholders.

*2. How Will the Process Unfold?*

There are several ways to manage the public's participation. Each state should draw upon successes in other localities. One example where a state body successfully achieved the correct balance between participation and deliberation was in the process employed by the Corpus Christi municipality to define the long-term goals of the city.<sup>134</sup>

First, a representative fourteen-person steering committee was formed to oversee the entire process. That committee then selected a larger committee "of approximately 100 persons representing a cross-section of the ethnic, sex, age, socioeconomic and leadership composition of the population," a committee that in turn was divided into subcommittees for different goal areas. As discussion progressed, subcommittee members visited other community groups to publicize the evolving goals. Finally, a community vote on various goals was solicited through mail-in ballots published in the city's newspapers. To increase interest in voting, on the day of the vote local television stations broadcast video documentaries on the various goal areas. Citizens responded positively: "The effort aroused the interest of thousands of citizen and strengthened the ties

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131. The state must not engage only certain groups and purposely exclude others with a contrary view.

132. See THOMAS, *supra* note 125, at 61–62 (citing A.R. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* 81–89 (1983)) (discussing the Port Townsend Terminal case and the time and money government lost by only consulting organized groups and excluding others).

133. Rosenbaum, *supra* note 127, at 372.

134. Bruce W. McClendon & J.A. Lewis, *Goals for Corpus Christi: Citizen Participation in Planning*, 74 NAT'L CIVIC REV. 72, 72–80 (1985).

between citizens, experts and decision makers. The climate for future community involvement was improved. And at the completion of the goals program more than 10,000 ballot responses had been received.”<sup>135</sup>

The fatal flaw in the process was that it failed to include municipal administrators who were key actors in implementing the city’s goals. But the important thing to glean from this example is that there are lessons states can learn from Corpus Christi and other state bodies that have made an earnest attempt to elicit public participation. In essence, the principles underlying a successful process are representativeness and the presence of structures that promote a balance between deliberation and participation.

### CONCLUSION

*Things Fall Apart*, the classic novel by renowned author Chinua Achebe, is a timeless story about a culture on the verge of change.<sup>136</sup> Through his novel, Achebe brings to our attention the fact that social transition often leads to chaos or instability. In this Article, I have explained how a transitional state can avoid present-day property-related instability when a significant number of people believe that the current property distribution is illegitimate because of past property theft. I first defined legitimacy and past property theft using empirical understandings of the concepts. Second, I established the relationship between a highly unequal property distribution that the general population views as illegitimate and property-related disobedience. Third, I described the three ways that a state can achieve stability when faced with an illegitimate property distribution. The state can use its coercive powers; attempt to influence people’s beliefs about the legitimacy of the property distribution through stereotypes and doctrines, for instance; or it can influence people’s beliefs through the most effective solution—an LECP.

Fourth, I developed the concept of a legitimacy deficit, which is a rational-choice model that establishes when a state should enact an LECP to avoid property-related noncompliance in the face of pervasive past theft. I argue that as the cost of illegitimacy begins to outweigh the cost of an LECP, the society is in a legitimacy deficit and should enact an LECP. On the contrary, when the cost of an LECP is more than the cost of illegitimacy, then the status quo is stable and failure to address past property theft will not cause property-related disobedience or broader instability. Lastly, I acknowledge that many of the model’s costs are subjective so I argue that a state should use a highly participatory process in determining and balancing the costs involved. The model is a valuable contribution to the transitional justice literature because it gives conceptual clarity to the question of how a transitional state can maintain stability in the face of extensive past property theft; it offers citizens, policymakers and academics a framework within which they can identify and debate the various costs and benefits involved;

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135. THOMAS, *supra* note 125, at 70 (citing McClendon & Lewis, *supra* note 134, at 74–79).

136. See generally CHINUA ACHEBE, THINGS FALL APART (1958).



and it provides a framework that is versatile enough to apply to a wide array of contexts and time periods.

In conclusion, past property theft can cause a population to believe that the property distribution is illegitimate. In many instances, if nothing is done, property-related rebellion will result. This Article gives insight into how states can prevent things from falling apart.

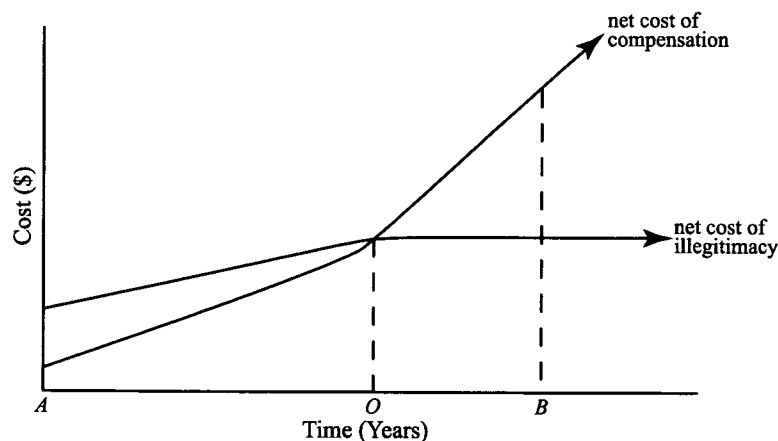
**APPENDIX:  
HYPOTHETICAL ILLUSTRATIONS OF FACTORS AFFECTING THE  
COST CURVES**

Noncompliance can occur for several reasons, but in the models below, the cost of illegitimacy incorporates increases and decreases that are a result of property-related disobedience broadly connected to past property theft. While every country has a unique set of cost curves, there are four core patterns:

Pattern 1: At the point of expropriation the cost of illegitimacy is higher than the cost of compensation. As time progresses, the two lines eventually intersect at the equilibrium point. Beyond the equilibrium point, the lines begin to diverge such that the cost of illegitimacy is less than the cost of compensation.

In this example, the land theft could have caused an immediate violent uprising, which forced the state to ratchet up the use of its coercive power until the situation normalized. The cost of compensation could have started extremely low and then rapidly increased because initially the state distributed state-owned land and, as time progressed, state land ran out so it had to acquire land from private owners and pay just compensation.

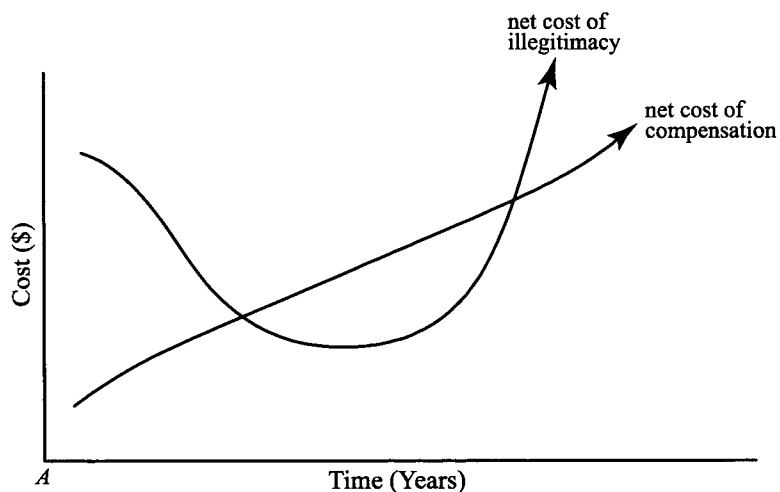
**Legitimacy Deficit:  
Pattern 1**



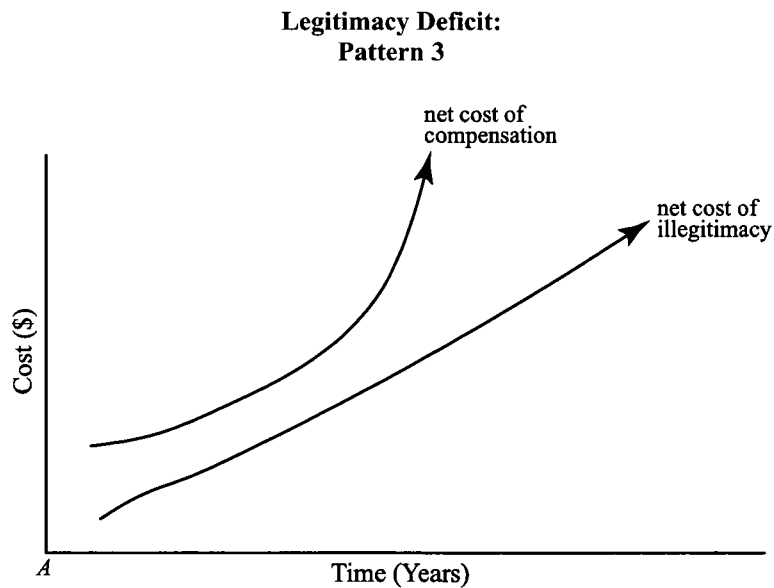
Pattern 2: The cost of compensation is low at the point of expropriation and gets progressively more costly over time. The cost of illegitimacy is high initially, but gradually decreases until it reaches its nadir; then it suddenly begins to increase again.

In this example, the cost of compensation could have steadily increased due to economic growth, which led to an increase in the cost of living and thus an increase in the compensation the state had to pay to acquire land for redistribution. The cost of illegitimacy could have been high initially because the state used its coercive power to repress an organized guerilla movement fueled, in part, by the failure of land reform; it could have decreased when the rebellion was suppressed, and it could have increased again when the movement was resurgent.

**Legitimacy Deficit:  
Pattern 2**



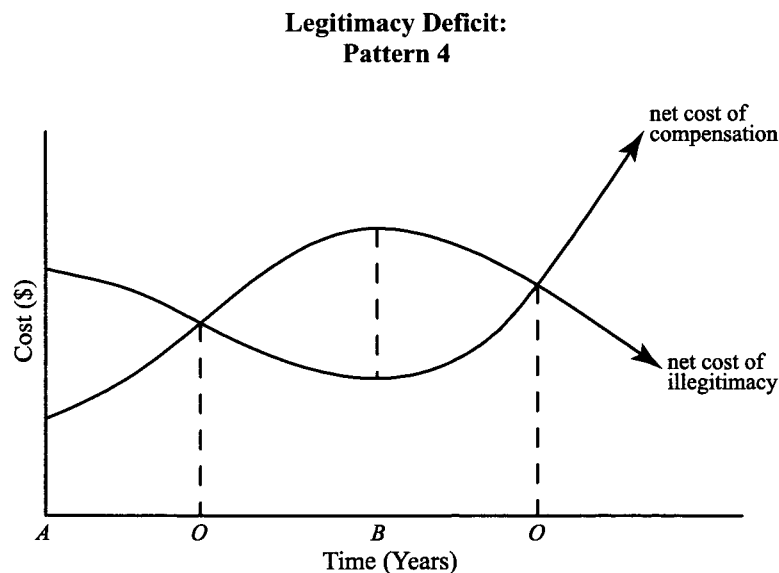
Pattern 3: The cost of compensation and the cost of illegitimacy gradually increase (or decrease) as time progresses but the lines never intersect. The legitimacy deficit model suggests that so long as there is a point when the cost of an LECP is less than the cost of illegitimacy, a state should enact an LECP. The model below challenges the framework by illustrating that in some cases the cost of an LECP will never be less than the cost of illegitimacy.



Pattern 4: The net cost of compensation and the net cost of illegitimacy intersect at two distinct points, which means there is only a limited window of time during which a state should implement an LECP.

In this example, perhaps the net cost of compensation was high initially due to the large initial costs inherent in establishing a bureaucracy, but the cost decreased as bureaucrats figured out what they were doing and established efficient systems that propelled the process. The net cost of compensation could have begun to increase again at point *B* due to a cost-of-living increase or because it took those opposed to the LECP time to organize, and at point *B* their opposition made the process more costly. Perhaps the cost of legitimacy started low because the dispossessed bought into myths of inferiority and thus willingly accepted their lot; the cost began to increase due to the eventual initiation of a disobedience campaign where the formerly dispossessed demanded their land back by any means necessary, and the cost decreased again when that movement was suppressed.

The window of opportunity existed before the dispossessors opposed to the LECP mobilized and caused the cost of compensation to shoot back up, but also before the disobedience campaign launched by the dispossessed group was suppressed and the cost of illegitimacy went back down.



# FROM REPARATION TO RESTORATION: MOVING BEYOND RESTORING PROPERTY RIGHTS TO RESTORING POLITICAL AND ECONOMIC VISIBILITY

*Bernadette Atuahene\**

## TABLE OF CONTENTS

I. INTRODUCTION .....	1420
II. INVISIBILITY .....	1425
A. PROPERTY CONFISCATION CAN REMOVE INDIVIDUALS AND COMMUNITIES FROM THE SOCIAL CONTRACT AND RENDER THEM INVISIBLE .....	1425
B. WIDESPREAD PROPERTY INDUCED INVISIBILITY CAN LEAD TO INCREASED ENFORCEMENT COSTS AND POLITICAL AND ECONOMIC INSTABILITY.....	1440
III. RESTORATION .....	1444
A. THE IMPORTANCE AND LIMITS OF CHOICE .....	1447
B. THE IMPORTANCE OF ASSET OWNERSHIP.....	1450
IV. CASE STUDY: MOVING FROM REPARATION TO RESTORATION IN SOUTH AFRICA'S LAND RESTITUTION PROGRAM .....	1452
A. PROPERTY-INDUCED INVISIBILITY IN SOUTH AFRICA ..	1453
1. <i>Historical Context of Property-Induced Invisibility</i> .	1453
2. <i>Consequences of Property-Induced Invisibility</i> .....	1454

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B. REFORMING THE LAND RESTITUTION PROGRAM .....	1456
1. <i>The Land Restitution Program and Its Challenges</i> .	1456
2. <i>Who Should Benefit from the Land Restitution Program?</i> .....	1463
3. <i>How Should the Process Unfold?</i> .....	1465
a. Transparency and Rule of Law are Crucial ....	1465
b. Providing Asset-Based Choices is Critical .....	1466
V. CONCLUSION .....	1470

## I. INTRODUCTION

IN South Africa, whites own about 87% of the country's agricultural land, though they make up less than 2% of the population.<sup>1</sup> The dominant belief among South Africa's Black<sup>2</sup> majority is that whites obtained this property not through their hard work, but instead through systematic land dispossession and other forms of unyielding oppression that began at colonial conquest and intensified with Apartheid. There are several other countries where past theft rather than hard work is widely believed to explain the status quo of property ownership. Bolivia's indigenous majority—primarily the Aymara, Quechua, Chiquitano, and Guarani peoples—constitutes about 62% of the total population.<sup>3</sup> Yet, the minority—the Europeans and mixed-race peoples—owns the lion's share of the country's wealth.<sup>4</sup> In the minds of Bolivia's indigenous majority, the present distribution of land is the result of colonial-era theft, and is thus illegitimate.<sup>5</sup> In 1992, Russia embarked on a privatization program that established the post-Communism status quo of property ownership.<sup>6</sup> This program was so riddled with corruption that a signifi-

1. Johan van Rooyen & Bongiwe Njobe-Mbuli, *Access to land: selecting the beneficiaries*, in AGRICULTURAL LAND REFORM IN SOUTH AFRICA: POLICIES, MARKETS AND MECHANISMS 461 (Johan van Zyl et al. eds., 1996) ("Land distribution in South Africa is highly skewed. Approximately 87% of agricultural land is held by almost 67,000 white farmers and accommodates a total population of 5.3 million. The remaining 71% of the population, which is predominantly black, live on 13% of the land in high density areas—the former homelands.").

2. When I refer to Blacks (with a capital "B") in the South African context, I am talking about those classified as Coloureds, Indians, and Africans under Apartheid.

3. Indigenous groups constitute 56-70% of the population, and two-thirds of indigenous people, who are mostly subsistence farmers, live in poverty. U.S. DEP'T OF STATE, BACKGROUND NOTE: BOLIVIA (Mar. 2007), <http://www.state.gov/r/pa/ei/bgn/35751.htm>.

4. See Jose de Cordoba, *Class Struggle: Along the Andes, Indians Agitate for Political Gain; Radicals Topple Governments, Test U.S. Regional Policy; Rising Clout in Bolivia; Longing for the Inca Empire* WALL ST. J., Jan. 8, 2004, at A1.

5. Land dispossession is one source of the indigenous people's recent unrest, which vaulted Evo Morales to the presidency. *Id.*

6. See generally Andrei Baev, *The Privatization of Land in Russia: Reforms and Impediments*, 17 LOY. L.A. INT'L & COMP. L. REV. 1, 9 (1994) (discussing the history of Russian land privatization programs and existing land legislation and land reforms); Merton Peck, *Russian Privatization: What Basis Does it Provide for a Market Economy?*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 21, 22, 27 (1995) (noting the rapid pace of privatization: "There were only thirty-nine private enterprises as of January 1992; by February 1994 there were about 93,000 such firms.").

cant amount of state resources ended up in the hands of a few of Russia's powerful oligarchs.<sup>7</sup> As a result, the status quo of property ownership in Russia is widely perceived to be illegitimate.<sup>8</sup> These three examples are merely the tip of the iceberg; history is rife with similar examples.

Despite the fact that in certain countries the majority of citizens believe that the property status quo is illegitimate,<sup>9</sup> under the neoliberal paradigm for economic development,<sup>10</sup> property rights are nonetheless given sanctity and enshrined in their constitutions because people have an incentive to work hard and produce if they know that the fruits of their labor are secure and not subject to capricious takings.<sup>11</sup> The underlying

7. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 6 (2003); Virginie Coulloudon, *Privatization in Russia: Catalyst for the Elite*, FLETCHER F. WORLD AFF., Fall 1998, at 43, 44 (noting that privatization in Russia was riddled with scandals and gave birth to an oligarchic regime.).

8. Hilary Appel, *Voucher Privatisation in Russia: Structural Consequences and Mass Response in the Second Period of Reform*, 49 EUR.-ASIA STUD. 1433, 1441 (1997) ("A large number of Russians today hold the privatisation process in extreme contempt."); *id.* at 1448 n.51 ("Gurkov's 1994 survey research reports that 47.7% of respondents in October 1994 thought that privatisation equalled a robbery of national property.")

9. An individual's understanding of the circumstances under which property was generally acquired will determine what her attitudes are with respect to the legitimacy of property arrangements. If the prevailing perception is that, for the most part, people deserve to be in possession of the property that they presently own because they worked hard for it or inherited it from someone who did, then it is likely that the majority of citizens will be amenable to significant protection of private property. For instance, in the United States, the general understanding is that *today* people have not acquired their possessions through theft. Although people do acknowledge that at many points in history the United States usurped land from native peoples and others through illegal and immoral means, this has not created a widely held perception among Americans that the status quo of property ownership in the United States *today* is illegitimate because of past theft. This is in part because the injustice happened to a group that is now a politically and economically marginalized minority. Also, it happened so long ago that the majority views those who own property *today* as having a nominal connection to the perpetrators of the past land theft. This is not the case in a place like South Africa or Zimbabwe (particularly before the 2000 land crisis began), where the prevailing belief is that the *present* status quo of property distribution is a direct result of Apartheid or colonial-era theft, rather than hard work.

10. See generally GERARD DUMENIL & DOMINIQUE LEVY, *CAPITAL RESURGENT: ROOTS OF THE NEOLIBERAL REVOLUTION* (Derek Jeffers, trans., Harvard Univ. Press 2004); LESTER C. THUROW, *THE FUTURE OF CAPITALISM: HOW TODAY'S ECONOMIC FORCES SHAPE TOMORROW'S WORLD* 1-5 (1996); John L. Campbell & Ove K. Pedersen, *Introduction to THE RISE OF NEOLIBERALISM AND INSTITUTIONAL ANALYSIS* 1 (John L. Campbell & Ove K. Pedersen eds., 2001). The equity and efficacy of neoliberal economic policies has been vigorously debated in academic circles. For a conservative viewpoint, see MELVIN J. THORNE, *AMERICAN CONSERVATIVE THOUGHT SINCE WORLD WAR II: THE CORE IDEAS* 114-116 (Contributions in Political Science Series No. 251, Bernard K. Johnpoll ed., 1990) (discussing the importance of private property rights to individual liberty); for a liberal viewpoint, see Barry K. Gills, *Democratizing Globalization and Globalizing Democracy*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2002, at 158, 167 (noting that the "neoliberal discourse has emphasized a Hayekian understanding of freedom as freedom above all for capital, for the movement of commodities, and for markets, that is, a freedom for the holders of PROPERTY to pursue maximum flexibility and profit"). See generally NOAM CHOMSKY, *PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER* 32 (1999).

11. Most notably, this is an idea espoused and defended by Jeremy Bentham. Bentham believed security of property is essential in maximizing social utility. See JEREMY BENTHAM, *Principles of the Civil Code*, in *THEORY OF LEGISLATION* 110 (Etienne Dumont



assumption behind the sanctity given to property is the notion of desert: People generally deserve what they own because they labored for it or received it through the hard work of someone else who bequeathed that property as a gift or in a will. The “sanctity of property” principle becomes obfuscated when sanctuary is given to property arrangements widely perceived to be defined by pervasive theft. In such cases, the principle merely serves to ossify ill-gotten gains.

It is an injustice when the law provides sanctuary to past theft instead of reversing it. More importantly, this injustice can lead to disrespect for property rights, which can substantially disrupt market economies. Nevertheless, the neoliberal solution for developing successful, stable markets is to deregulate trade and markets, reduce restrictions on capital, reduce government spending, and privatize government enterprises. In the effort to promote stable, successful markets, the neoliberal agenda often discounts the importance of transforming, and thus legitimizing, the property status quo.<sup>12</sup>

Transforming the property status quo is especially necessary when an ethnically distinct minority acquired significant amounts of property through some form of past theft and today continues to enjoy the benefits of their illicit or immoral act at the expense of the majority. At the very least, the majority would resist strong property rights that ossified these illicit gains; at worst, they would be more inclined to capricious and arbitrary takings of land, as witnessed in Zimbabwe beginning in 2000.<sup>13</sup>

In her book, *World on Fire*, Amy Chua argues that the calamitous situation in Zimbabwe, and other similarly situated nations, is caused by the fact that

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ed., R. Hildreth trans., London, Trubner & Co. 4th ed. 1882) (1843) (“Law does not say to man, *Labour, and I will reward you; but it says: Labour, and I will assure to you the enjoyment of the fruits of your labour—that natural and sufficient recompense which without me you cannot preserve; I will insure it by arresting the hand which may seek to ravish it from you.* If industry creates, it is law which preserves; if at the first moment we owe all to labour, at the second moment, and at every other, we are indebted for everything to law.”) (emphasis original). For a critique of Bentham, see Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 473 (1982) (arguing that Bentham “exaggerates the need to uphold existing expectations” with regard to property arrangements).

12. Geoffrey E. Schneider, *Neoliberalism and Economic Justice in South Africa: Revisiting the Debate on Economic Apartheid*, 61 REV. SOC. ECON. 23, 25 (2003) (arguing that neoliberal economists have a “p penchant to ignore the problems created by inequality and their pursuit of narrowly defined economic goals and criteria,” causing them to “abstract from reality and ignore the economic benefits that could stem from developing an economy from the bottom up.”). If the property status quo is successfully transformed and chaos averted, an ancillary effect of this project will be to buttress the economic system—neoliberalism. Inasmuch as neoliberalism systematically concentrates economic and decision-making power in an elite group, this is a temporary evil. The larger, long-term project is to enhance democracy by democratizing decision-making power to the greatest extent. Invisible people, however, do not have the power to overcome economic forces that tend to undermine the devolution of decision-making power, whereas visible people do. Reversing invisibility and creating an empowered citizenry is a necessary first step in the long-term project to create an economic system that does not systematically favor the elite.

13. See generally DONALD S. MOORE, *SUFFERING FOR TERRITORY: RACE, PLACE, AND POWER IN ZIMBABWE* (2005).

[m]arkets concentrate wealth, often spectacular wealth, in the hands of the market-dominant minority, while democracy increases the political power of the impoverished majority. In these circumstances the pursuit of free market democracy becomes an engine of potentially catastrophic ethnonationalism, pitting a frustrated “indigenous” majority, easily aroused by opportunistic vote-seeking politicians, against a resented, wealthy ethnic minority.<sup>14</sup>

She argues that this volatile dynamic of inequality produces social instability in the form of a backlash against market-dominant minorities, democracy, and markets.<sup>15</sup> To avoid a backlash, I argue that states with this dynamic must change the actual distribution of property. Countries can achieve this end through various means.

There are several countries that have decided to change the property status quo by restoring past rights in property. This has happened post-communism in countries such as Germany, Czech Republic, Slovakia, Hungary, Albania, Bulgaria, Croatia, Estonia, Lithuania, and Romania; post-World War II in the former Federal Republic of Germany; post-Apartheid in South Africa; and post-conflict in Kosovo. Native people in Canada, Australia, New Zealand, and the United States have also received compensation for property that was improperly confiscated in the past. This Article will explore two important questions facing countries that decide to restore past rights in property: Who, at a minimum, should receive restoration of property rights, and how should the restorative process transpire?

Part II explores who, at a minimum, should receive restoration of property rights. I argue that, under certain circumstances, confiscating property removes people from the social contract and renders them invisible. I call this property-induced invisibility. Widespread property-induced invisibility is of particular concern because it can place the legitimacy of existing property arrangements in serious doubt. As a baseline, therefore, states must rectify property-induced invisibility in the restorative process.<sup>16</sup>

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14. CHUA, *supra* note 7, at 6. See also Amy Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 287–92 (2000); Amy Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 6 (1998); Amy Chua, *The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries*, 95 COLUM. L. REV. 223, 226 (1995). Also, it is important to note that Chua recognizes that the introduction of democracy does not necessarily mean that the majority will gain any significant political power because the will of the majority is still often subordinated via vote rigging and corruption of various hues. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, *supra*, at 56.

15. CHUA, *supra* note 7, at 6.

16. There is property-induced invisibility, which results from the dispossession of one's property, and invisibility that occurs through other means, such as torture, incarceration, loss of employment, loss of educational opportunity, *etc.* Restoration and redistribution, which is not based primarily upon returning a lost right in property, must be implemented in tandem to address the needs of both populations simultaneously. See *infra* Part II and accompanying discussion of invisibility.

Part III investigates how the restorative process can address property-induced invisibility. I argue that societies must change the focus from the limited concept of reparations—return of the actual property confiscated—to restoration, which is the larger project of restoring a dispossessed group or individual's relationship to society.<sup>17</sup> In the context of property-induced invisibility, the confiscation of property is part of a larger strategy of dehumanization, resulting in the removal of that person or community from the social contract. The consequence is more than just the taking of real property, but also the destruction of their relationship to society. Hence, the restorative process must do more than just give people their property back; its aim must be to repair this relationship to society (that is, restore political and economic visibility). I argue that a substantial amount of work towards restoring a relationship to society and correcting property-induced invisibility will occur if the dispossessed are included in the social contract through a bottom-up process that provides asset-based choices, which both allow people to choose how they are made whole and give them viable options from which to choose.<sup>18</sup>

Lastly, in Part IV, I evaluate South Africa's Land Restitution Program ("LRP") to test the theoretical concepts of property-induced invisibility and restoration that I have constructed. More specifically, I investigate whether, as a baseline, South Africans subject to property-induced invisibility benefit from the LRP. I also analyze how the government can transform the LRP from a reparations program to a restoration program.

For the purposes of this Article, legitimacy is construed in both empirical and moral terms. Empirically, legitimacy is determined by the number of citizens who believe that land arrangements are legitimate.<sup>19</sup> Under the Weberian view, legitimacy "is meant to designate the beliefs and attitudes that members have toward the society they make up. The society has legitimacy when members so understand and value it that they are willing to assume the disciplines and burdens which membership entails. Legitimacy declines when this willingness flags or fails."<sup>20</sup>

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17. The following definitions will be used throughout the Article: Compensation—generic term for any action taken to remedy a violation of a right, specifically a right in property; Monetary compensation—money is given to remedy the harm; Restitution—compensation is the return of the exact property taken or property that is similar; Reparations—compensation for the loss of a past right, which does not allow the dispossessed person to take an active role in shaping her remedy.

18. The legislature can construct a broad set of choices that make sense given the historical, political, economic, and social context of the country and the nature of the expropriations. The remedies may include restoration of property and cash or in-kind payments. The in-kind payments can entail, *inter alia*, the establishment of a trust fund that can be used for education and health expenses, a voucher to purchase any government services or properties, or preferential access to credit. See *infra* Part III and accompanying text.

19. A. John Simmons, *Justification and Legitimacy*, 109 ETHICS 739, 748 (1999).

20. Charles Taylor, *Alternative Futures: Legitimacy, Identity, and Alienation in Late Twentieth Century Canada*, in COMMUNITARIANISM: A NEW PUBLIC ETHICS 58 (Markale Daly ed., 1994). See also JEREMY BENTHAM, THE THEORY OF LEGISLATION xiv (Oceana Publications 1975) ("Bentham grasps, thus, that public opinion is an important supportive structure both for the legitimacy of the law (as well as the legal system) and for its effective

When evaluating the legitimacy of property arrangements, I will use the same empirical approach adopted by Weber. Property arrangements are considered legitimate as long as a substantial portion of society believes so and is willing to respect and accept the disciplines and burdens of maintaining the property status quo.<sup>21</sup> To protect minorities, this empirical approach will be supplemented with a moral understanding of legitimacy, which considers actions that contravene a person or community's fundamental human rights as necessarily illegitimate.<sup>22</sup>

## II. INVISIBILITY

### A. PROPERTY CONFISCATION CAN REMOVE INDIVIDUALS AND COMMUNITIES FROM THE SOCIAL CONTRACT AND RENDER THEM INVISIBLE

Aside from actual execution, being rendered invisible is the worst thing that can happen to an individual or community because invisibility is a type of social death. If citizenship is defined as "membership in a political community,"<sup>23</sup> invisible people are either completely excluded from citizenship or are, in effect, sub-citizens. They are politically or economically powerless populations and hence the state can gaze past their diaphanous needs with nominal immediate consequence. Although invisible people live physically within a society, they are not fully part of it. They are not given space at the core of the polity as full members treated with dignity; rather, they are relegated to the periphery where their humanity is denied, and they vanish from the political eye in a haze of otherness.

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implementation"). Legitimacy can be based on perceptions. See Simmons, *supra* note 19, at 749. In contrast, it can be based on rights derived from either written documents (for example, a constitution) or unwritten conceptions of morality. There is substantial literature in psychology and political science about legitimacy. For a thorough literature review of legitimacy as discussed in psychology, see Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375 (2006) ("[L]egitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just. Because of legitimacy, people feel that they ought to defer to decision and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward. Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power."). For a thorough literature review of legitimacy as discussed in political institutions, see James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 187 (2005).

21. A. Taylor, *supra* note 20, at 58.

22. Weber's conception of legitimacy is most vulnerable when the majority of a society's citizens are manipulated by a demagogue and, in their mob mentality, goaded to engage in morally abhorrent activities. Weber died in 1920 and did not live through World War II to witness how Hitler and the Nazis manipulated the fears of many Eastern Europeans and provided the average citizen to hate and kill millions of Jews, Roma, and Sinti. Post-World War II, it is painfully obvious that a purely empirical definition of legitimacy is inadequate.

23. T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1486 (1986) (discussing citizenship).

The use of invisibility as a metaphor for a person's political place in society is not new. This Article echoes many of the characteristics of invisibility developed by legal scholars who have written about the plight of blacks,<sup>24</sup> Latinos,<sup>25</sup> gays,<sup>26</sup> and women.<sup>27</sup> The metaphor is often used as a conduit to explore concepts such as exclusion, subjugation, identity suppression, assimilation, nominal political representation, and, as in the case of gays, lack of physical recognizability.

The metaphor of invisibility gained widespread recognition in 1952 with the publication of Ralph Ellison's classic novel, *Invisible Man*.<sup>28</sup> In the novel, invisibility is a symptom of a societal disease in which the

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24. See T. Alexander Aleinikoff, *A Case For Race-Consciousness*, 91 COLUM. L. REV. 1060, 1070 (1991) ("Blacks are 'invisible' not in the sense that whites do not see them; they are 'INVISIBLE' in the sense that whites see primarily what a white dominant culture has trained them to see."); D. Marvin Jones, "We're All Stuck Here For A While": *Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 52-54 (1998) (arguing that black men are unable to separate themselves from white perceptions and stereotypes of who they are as a group and that deeply embedded stereotypes and myths about black men have eclipsed their true identity and caused their invisibility).

25. See Christopher Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1354, 1358 (1997) (arguing that a lack of legal recognition for national origin discrimination under Title VII is due to Latino's exclusion from the black-white, "bifurcated universe" of racial discourse in the United States: "Racial dualism is problematic not only because it limits judges' understanding of national origin claims, but also because it makes Latinos and their problems in the workplace invisible."); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (1995) (arguing that Latino invisibility is created by an "absence of public recognition and portrayal . . . prohibitions on the use of Spanish . . . [and] through the attribution of foreignness, [which the author termed] 'symbolic deportation'").

26. Mark Chekola, *Equality Foundation v. City of Cincinnati: Invisibility and Identifiability of Oppressed Groups*, 6 LAW & SEXUALITY 141, 143-44 (1996) (suggesting that homosexual invisibility is brought on by the fact that gays are not physically recognizable, which explains the Sixth Circuit's reasoning in the case for holding that homosexuals are not an identifiable class); Darren Lenard Hutchinson, "Closet Case": *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 110 (2001) (arguing gays are rendered invisible by the courts because they fail to "recognize the expressive components of sexual identity"); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 487, 490 (1998) (arguing that courts encourage homosexual invisibility through equal protection heightened scrutiny).

Two commonalities emphasized by the courts are that race and sex ostensibly mark individuals with immutable and visible traits. A classification will therefore be less likely to receive heightened scrutiny if its defining traits can be altered or concealed. By withholding protection from these classifications, the judiciary is subtly encouraging groups comprised by such classifications to assimilate by changing or hiding their defining characteristic. See Yoshino, *supra*, at 487, 490.

27. See generally BREAKING OUT OF INVISIBILITY: WOMEN IN INDIAN HISTORY (Aparna Basu & Anup Taneja eds., 2002); Berta Esperanza Hernandez-Truyol, *Sex, Culture, and Rights: A Reconceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607, 616 (1997) (using invisibility to describe the lack of female representation in organizational bodies involved in decision making and rights defining); Patricia McLean & Marion Kostanski, *Factors that Protect Women from Becoming 'Invisible'*, 55 AUSTL. J. PSYCHOL. 197, 197 (2003); Carolyn Whitzman, *At the Intersection of Invisibilities: Canadian Women, Homelessness and Health Outside the 'Big City'*, 13 GENDER, PLACE & CULTURE: J. FEMINIST GEOGRAPHY 383, 383-84 (2006).

28. See generally RALPH ELLISON, *INVISIBLE MAN* (1947).

plight of blacks is relegated to obscurity and societal institutions systematically deny black people's humanity. Invisibility is caused by the onlooker's blindness rather than the protagonist's lack of substance or translucent humanity. "I am invisible, understand, simply because people refuse to see me. . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me."<sup>29</sup>

In his book, *Slavery and Social Death*, Orlando Patterson further develops the idea of invisibility with his concept of social death.<sup>30</sup> Patterson argues that a socially dead person has no recognizable being outside of that given to her by, or derived from, her powerful master.<sup>31</sup> A socially dead person does not exist in society in her own right because the reigning social compact includes her only as a sub-person, if it includes her at all.

Like Ellison and Patterson, my conception of invisibility is predicated upon a person's dehumanization and exclusion from society. Invisibility results when the terms of the social contract are set or reordered such that individuals or communities are dehumanized and excluded from the contract. Invisible people are those who are denied their basic humanity by the state, or other prevailing power structures, and excluded from the polity; invisibility is a term that describes their consequent relationship to that state. My definition of invisibility is centered upon the social contract, because this is an effective tool to explain the moral and political obligations between individuals and the state: the social contract sets the terms of people's relationship to the state.<sup>32</sup>

The body of literature that discusses the conditions under which individuals and communities are made invisible through their dehumanization and exclusion from the social contract includes the diverse and enlightening insights of John Locke, Carole Pateman, and Charles Mills.

29. *Id.* at 3.

30. See generally ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* (1982).

31. *Id.* at 1 ("[A]ll human relationships are structured and defined by the relative power of the interacting persons."). A socially dead person is powerless and has "no socially recognizable existence outside of his [powerful] master." *Id.* at 4–5.

32. In democracies, the terms are set by a constitution or other federal and local laws as well as informal or customary laws. For more on how the social contract establishes moral and political obligations between the state and individuals, see, for example, P.F. Brownsey, *Hume and the Social Contract*, 28 PHIL. Q. 132, 132 (1978) ("While the details of the social contract varied from theorist to theorist, it was common to all forms of social contract theory that no one has rightful political authority and no one is morally obliged to yield political obedience except in consequence of a social contract."); Edward A. Harris, Note, *From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law*, 92 COLUM. L. REV. 651, 657 (1992) ("Social contract theory appeals to the principle of rational voluntarism in explaining the origin of moral and political obligations, and to the principle of consent in explaining how the autonomous individual voluntarily relinquishes her natural liberty to the state, thereby incurring moral and political obligations."). Many scholars also question whether the social contract is the source of moral and political obligation. See, e.g., A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 3–4 (1979); *SOCIAL CONTRACT THEORY* 83–90, 97–123 (Michael Lessnoff ed., 1986).

Their work provides the foundation for my understanding of the circumstances under which a relationship between the state and an individual breaks down, such that a person or community is taken out of the social contract and made invisible.

According to Locke, in the state of nature, all individuals are equal and “much better that they are not bound to submit to the unjust will of another.”<sup>33</sup> When an aggressor threatens to take away an individual’s life, liberty, or estate (that is, their Property),<sup>34</sup> that individual has the right to resort to violence in self-defense.<sup>35</sup> Consequently, a state of war ensues and is fueled by the need for every person to constantly and individually defend their Property against interlopers and thieves. To avoid this calamitous fate and to secure protection of their Property, people ceded their individual God-given sovereignty and vested it in the state as fiduciary.<sup>36</sup> For Locke, this bargained-for exchange is the essence of the social contract.<sup>37</sup>

An individual’s consent to be part of a particular society is a binding obligation that forbids him from returning to the state of nature, unless the government is dissolved or an unjust state action terminates his participation in the contract.<sup>38</sup> The state was given its sovereignty in a fiduciary capacity, and if the state fails to fulfill its fiduciary duties, then sovereignty is returned to its source—the people. Since the protection of Property is the central reason for entering into a social contract in the first place, the systematic and arbitrary confiscation of Property by the state is one of the primary reasons that an individual would be removed

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33. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 276 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). Locke’s state of nature explanation of moral obligation to the state is still relevant because

State-of-nature explanations of the political realm *are* fundamental potential explanations of this realm and pack explanatory punch and illumination, even if incorrect. We learn much by seeing how the state could have arisen, even if it didn’t arise that way. If it didn’t arise that way, we also would learn much by determining why it didn’t; by trying to explain why the particular bit of real world that diverges from the state-of-nature model is as it is.

ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 8–9 (1974) (emphasis in original).

34. LOCKE, *supra* note 33, at 368. Life, liberty and estates are what Locke defines as property, and this is what I mean when I use the capitalized term “Property” in this portion of the article discussing Locke. When I use the un-capitalized term “property” throughout the article, it refers to real property. I limit the discussion in this Article to the confiscation of real property and do not include other types of property, including cultural, intellectual, or property in one’s person.

35. *Id.* at 308–09.

36. *Id.* at 368–69 (“The great and *chief end* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*. To which in the state of Nature there are many things wanting.”) (emphasis in original).

37. *Id.*; *but cf.* BENTHAM, *supra* note 11, at 72–74, 81–82 (discussing Locke’s social contract theory).

38. LOCKE, *supra* note 33, at 367 (“Whereas he, that has once, by actual Agreement, and any *express* Declaration given his *Consent* to be of any Commonwealth, is perpetually and indispensably obliged to be and remain unalterably a Subject to it, and can never be again in the liberty of the state of Nature; unless by any Calamity, the Government, he was under, comes to be dissolved; or else by some publick Act cuts him off from being any longer a Member of it.”) (emphasis in original).

from the social contract and once again become sovereign in her own right.<sup>39</sup> This is especially true when the arbitrary confiscation leads to the individual's total dependence on the state, such that she is in the state's absolute power.<sup>40</sup> At this point, individuals have a right to revolution which those who are still in the social contract do not have.

Carole Pateman and Charles Mills give another perspective on how people are excluded from the social contract. Their concept of exclusion is more extensive than Locke's, in that it describes how some people are never initially included, or are included but relegated to a subordinate position, in the social contract. Also, while Locke's analysis is at the level of the individual, Pateman and Mills analyze how groups are excluded from the social contract.<sup>41</sup>

In her groundbreaking book *The Sexual Contract*, Pateman argues that alongside the social contract exists a concomitant sexual contract.<sup>42</sup> The sexual contract ensures and solidifies men's political right over women.<sup>43</sup> She argues that while social contracts are supposed to enhance and secure freedom,<sup>44</sup> this freedom is reserved for certain classes of individuals, excluding women.<sup>45</sup> Pateman claims that contracts are one of the most important ways social relationships are formed, and women are subordinated in these relationships due to social fictions surrounding who

39. Celeste Friend, Social Contract Theory [Internet Encyclopedia of Philosophy] (2001), <http://www.iep.utm.edu/soc-cont.htm> ("[T]he justification of the authority of the executive component of government is the protection of the people's property and well-being, so when such protection is no longer present, or when the king becomes a tyrant and acts against the interests of the people, they have a right, if not an outright obligation, to resist his authority. The social compact can be dissolved and the process to create political society begun anew.").

40. LOCKE, *supra* note 33, at 297 (emphasis original) ("[H]e who attempts to get another Man into his Absolute Power, does thereby *put himself into a State of War* with him; It being to be understood as a Declaration of a Design upon his Life.").

41. Locke bases his justification for private ownership on the individual. See Christopher Berry, *Property and Possession: Two Replies to Locke—Hume and Hegel*, in NOMOS XXII: PROPERTY 89 (J. Roland Pennock & John W. Chapman eds., 1980) ("The most distinctive element in Locke's theory of property in his two *Treatises of Government* is his justification of private ownership in purely individual terms.").

42. See CAROLE PATEMAN, *THE SEXUAL CONTRACT* 1–3 (1988). See also Friend, *supra* note 39 (citing Pateman) ("[T]he 'original pact' that precedes the social contract entered into by equals is the agreement by men to dominate and control women. This 'original pact' is made by brothers, literally or metaphorically, who, after overthrowing the rule of the father, then agree to share their domination of the women who were previously under the exclusive control of one man, the father. The change from 'classical patriarchy' to modern patriarchy is a shift, then, in who has power over women. It is not, however, a fundamental change in whether women are dominated by men. Men's relationships of power to one another change, but women's relationship to men's power does not. Modern patriarchy is characterized by a contractual relationship between men, and part of that contract involves power over women.").

43. PATEMAN, *supra* note 42, at 2 ("The social contract is a story of freedom; the sexual contract is a story of subjection. The original contract constitutes both freedom and domination. Men's freedom and women's subjection are created through the original contract—and the character of civil freedom cannot be understood without the missing half of the story that reveals how men's patriarchal right over women is established through contract.").

44. *Id.* at 62.

45. *Id.* at 5.



has the capacity to enter into contracts.<sup>46</sup>

The imaginations of Hobbes, Locke, Rousseau, Kant, and other social contract theorists were arrested by the prevailing myths of female inferiority that reigned unchallenged in their respective time periods. One factor that harmonizes the writings of these men is the transformation of social or anatomical differences between women and men into political differences.<sup>47</sup> Thus, women were perceived as not being full-fledged persons who possessed the mental acumen necessary to enter into the social contract on the same terms as their male counterparts.<sup>48</sup> This variant of dehumanization led to their exclusion from society as full and equal members.

Charles Mills also makes an important contribution to the body of literature on social contract theory that examines the politics of dehumanization and exclusion. In his influential book, *The Racial Contract*, he builds upon Pateman's work on gender to elicit the role of social contract in racial subordination.<sup>49</sup> The racial contract is intended to be an actual historical account of the origins of racial oppression and white supremacy rather than a political metaphor.<sup>50</sup> Mills argues that the racial contract underwrites the social contract and ensures that non-whites are excluded or marginalized.<sup>51</sup>

One fundamental premise of contract theory is that all men are born free and live as such in the state of nature. Mills argues that European powers considered non-white people to be savages born "unfree and unequal."<sup>52</sup> This subordinate ontological status was then legally codified and perpetuated by both individuals and institutions. Despite the strands of enlightened thought and egalitarianism that pervaded Europe at different points in history, Mills posits that "*European humanism usually meant that only Europeans were human . . . [and] nonwhite subpersonhood is enshrined simultaneously with white personhood.*"<sup>53</sup> Like Pateman, Mills

46. *Id.*

47. *Id.* at 6.

48. In the work of Hobbes, women are excluded from becoming civil individuals with the capacity to enter into the original pact. *Id.* at 50. For Locke, women have not risen to the status of individual in the State of Nature, and only individuals can enter into the social contract. *Id.* at 52. Pateman highlights, however, that women's capacity with regard to entering into the marriage contract was never questioned. *Id.* "Women are held both to possess and to lack the capacities required for contract—and contract demands that their womanhood be both denied and affirmed." *Id.* at 60.

49. See generally CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

50. *Id.* at 18–19. The social contract story recounted by Hobbes, Locke and other philosophers is a political fiction and thus does not explain the actual and historical origins of society. *Id.* at 19. Although the sexual contract explains actual conditions, it does not give an historical exposition of how things come to be. *Id.*

51. *Id.* at 72–73.

52. *Id.* at 16 (emphasis in original).

53. *Id.* at 27, 56 (emphasis in original).

In philosophy one could trace this common thread through Locke's speculations on the incapacities of primitive minds, David Hume's denial that any other race but whites had created worthwhile civilizations, Kant's thoughts on the rationality differentials between blacks and whites, Voltaire's polygenetic conclusion that blacks were a distinct and less able species, John Stuart

argues that when certain people are considered sub-persons, this conceptual dehumanization becomes the yeast in the leaven bread of oppression and exclusion.<sup>54</sup>

In sum, Locke, Pateman, and Mills lay the groundwork for a robust understanding of how people are excluded from the social contract and thus made invisible. Both Pateman and Mills stress the fact that exclusion, or lack of initial inclusion, from the social contract is premised upon the idea that those excluded are not full persons. In a Lockean analysis, when the state systematically and arbitrarily deprives a person of life, liberty, or estate and places an individual in its absolute power, creating a situation of dependency, then the individual has effectively been removed from the social contract and returned to the State of Nature, where the state no longer has any legitimate authority over him.<sup>55</sup>

While I realize that invisibility is a broad concept that can result from, *inter alia*, confiscation of property, severe restrictions on liberty, disappearance, incarceration, torture, loss of employment, educational disruption, psychological scars, and sexual violence, in this Article, I concentrate on the property-related avenues to invisibility.<sup>56</sup> Using the work of Locke, Pateman, and Mills, I have constructed a definition of property-induced invisibility that enumerates the circumstances in which real property is confiscated from individuals or communities based on the understanding that they are subhuman,<sup>57</sup> and as such, victims are excluded from the social contract and therefore become invisible. Property-induced invisibility is the confiscation or destruction of real property with no payment of just compensation, executed such that dehumanization occurs. The act is perpetrated by the state or other prevailing power structure(s) and adversely affects powerless people or people made powerless

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Mill's judgment that those races 'in their nonage' were fit only for "despotism."

*Id.* at 59–60.

54. Friend, *supra* note 39 ("This racial contract determines in the first place who counts as full moral and political persons, and therefore sets the parameters of who can 'contract in' to the freedom and equality that the social contract promises. Some persons, in particular white men, are full persons according to the racial contract. As such they are accorded the right to enter into the social contract, and into particular legal contracts. They are seen as fully human and therefore as deserving of equality and freedom. Their status as full persons accords them greater social power. In particular, it accords them the power to make contracts, to be the subjects of the contract, whereas other persons are denied such privilege and are relegated to the status of objects of contracts.").

55. LOCKE, *supra* note 33, at 350–51.

56. Invisibility and property-induced invisibility are highly interrelated concepts. Property confiscation can cause invisibility or, alternatively, property confiscation can be a consequence of the fact that people were made invisible through other means.

57. In the language of Carol Rose, the nature of the property disruption I speak of can be classified as a "Type III disruption." Carol Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 6 ("Type III disruptions are what I will call 'extraordinary.' These are the rights alterations that accompany revolutions and warfare or other upheavals that create massive overthrows of existing property rights and resource uses."). This is in contrast to property disruptions classified as Type I and Type II, which are of the "housekeeping" and "regulatory" varieties, respectively. *Id.* at 5–6.

by the act, such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.<sup>58</sup> Individuals and communities subject to property-induced invisibility have a moral right to compensation.

Using historical examples, the chart below portrays the nuances of the five criteria for property-induced invisibility. My claim is that all five criteria must be satisfied in order for property-induced invisibility to result. The answers I have provided below are not intended to be definitive, and I encourage debate as to whether the historical examples used actually do or do not satisfy the five criteria. My primary objective is to give readers a sense of how to apply the criteria and establish an understanding of both the expansiveness and the limits of property-induced invisibility.

#### CONTOURS OF PROPERTY-INDUCED INVISIBILITY

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
<b>Property confiscated during slavery, colonialism and/or Apartheid</b>					
Black farmers in South Africa under colonialism and Apartheid. <sup>59</sup>	Yes. Most times payment was not made, but in rare in-	Yes. Colonialist and Apartheid governments conspicuously	Yes. Land was first taken by England, the colonial power,	Yes. The fact that victims owned land signified they were bet-	Yes. Forced to move to Bantustans, where land was infer-

58. Defined in this manner, property-induced invisibility is always a violation of human rights because "human rights 'derive from the inherent dignity of the human person' . . . [and] are, by definition, the rights one has simply because one is a human being." INTERNATIONAL HANDBOOK OF HUMAN RIGHTS 1 (Jack Donnelly & Rhoda E. Howard eds., 1987) (citations omitted). Therefore, any action that causes dehumanization is a violation of these rights. Due to the dehumanization component, invisibility always involves a violation of human rights, but a violation of human rights does not always result in invisibility.

The human right that most directly deals with the confiscation of property is found in the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948). It asserts that a person arbitrarily deprived of her property with no just compensation is entitled to an effective remedy. *Id.* at 74 ("No one shall be arbitrarily deprived of his property."). See also *id.* at 73 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."). It is important to further note that the realization of certain economic and social rights (for example, the right to housing) requires citizens to have a basic level of property.

59. Confiscation of native land began with the arrival of the Dutch in the 17th century, and mass land removals continued until the 1980s as racist Apartheid land policies mandated the forced removal of blacks from their farmland. See generally LAURINE PLATZKY & CHERRYLL WALKER, *THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA* (1985) (discussing in detail the removal of Black South Africans from their land); Lauren G. Robinson, *Rationales for Rural Land Redistribution in South Africa*, 23 BROOK. J. INT'L L. 465 (1997) (providing a concise history of land removals in South Africa).

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
Property-induced invisibility applicable	stances when it was, it was not adequate.	believed that non-whites were subhuman savages.	and subsequent Apartheid governments erected legal architecture to further systematically dispossess Blacks.	ter off than other unpropertied Blacks, but never as well off as similarly situated white land owners. Black land owners were part of a people who were made powerless.	ior and overpopulated, and hence poverty rampant.
<b>Property confiscated during war or social unrest</b>					
Tutsi and moderate Hutu in Rwanda <sup>60</sup> Property-induced invisibility applicable	Yes. There was a massive exchange of land from Tutsi to Hutu hands and, for the most part, compensation was never paid.	Yes. Tutsis and those who aided them were widely referred to as roaches in need of extermination.	Yes. The state broke down after Habyarimana was killed; consequently, the Hutu generals responsible for the massacre were the prevailing power structure at the time.	Yes. Both Hutus and Tutsis were poor, most living on less than \$1 per day. Tutsis were made especially powerless in the face of the Hutus who committed genocide.	Yes. Thousands died, those who survived were forced to flee and leave all of their possessions behind.

60. Hutu desire to confiscate Tutsi property was one impetus behind the 1994 killings and exacerbated the devastating after-effects of the genocide. See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1249–50 (2000) (noting that some Hutu “pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from which they had fled”). See also MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* 197 (2001) (citing a USAID-commissioned study which attributes conflicts between neighbors to land scarcity, and concludes by saying “[d]isputes over land are reported to have been a major motivation for Rwandans to denounce neighbors during the ethnic conflicts of 1994”) (citations omitted); GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 248 (1995) (noting while the desire to acquire Tutsi land was not the primary motivation behind the 1994 mass killings; there was “an element of material interest in the killings. . . . Villagers also probably had a vague hope that if things settled down after the massacres they could obtain pieces of land belonging to the victims, a strong lure in such a land-starved country as Rwanda”).

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
Japanese in American internment camps during World War II <sup>61</sup> <b>Property-induced invisibility applicable</b>	Yes. Some property was restored or compensated through symbolic reparations, but most of it was not.	Yes. Their equal standing as law-abiding citizens was revoked, and they were dehumanized and forced to live in squalid internment camps based on their ethnicity and not any wrongdoing.	Yes. Internment was instituted by the US government. All three government branches were involved in authorizing the internment.	Yes. Those interned were of various socio-economic standings, but all were made powerless by the internment.	Yes. Many were robbed of their jobs and property, and thus were forced to rely on welfare for their basic sustenance and left economically vulnerable.
British Crown after the American Revolution <sup>62</sup> <b>Property-induced invisibility inapplicable</b>	Yes. Lands that once belonged to the British Crown were transferred to the administrators of the colonies after the Revolution and no compensation was paid for the lands.	Yes. Although American revolutionaries were fighting against a more powerful adversary that they respected and often tried to emulate, war is per se an attempt to dehumanize or kill the enemy.	Yes. When the lands were confiscated, America was not yet a state, but qualified as the prevailing power structure at the time because the revolutionaries had military control over many towns.	No. The British Crown was far from powerless before and after the American Revolution.	No. The loss of the American colonies did not make Britain a poor nation.

61. See generally PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004). See also Lika C. Miyake, *Forsaken and Forgotten: The U.S. Internment of Japanese Peruvians During World War II*, 9 ASIAN L.J. 163, 163-64 (2002) (describing the experiences of Japanese Peruvians during the War, their deportation following the war, and lack of reparations provided to them).

62. Property-induced invisibility is not applicable to the British Crown, but would be applicable to the Loyalists who fought in the war and, after their property was confiscated, were left powerless, poor, and dependent on the state for their basic needs. Confiscation of Loyalist property during the American Revolution began with the seizure of Tory assets in 1775, and later came to include confiscation of Loyalist land. While some loyalists were able to recover confiscated property through American courts following the war, most Loyalists "never attempted to recover any of their losses . . ." David E. Maas, *The Massachusetts Loyalists and the Problem of Amnesty, 1775-1790*, in *LOYALISTS AND COMMUNITY IN NORTH AMERICA* 72 (Robert M. Calhoon et al. eds., 1994). See also ADELE HAST, *LOYALISM IN REVOLUTIONARY VIRGINIA: THE NORFOLK AREA AND THE EASTERN SHORE* 181 (1982) (noting that as a result of a 1779 Act, British property became "vested in the commonwealth [of Virginia]"); ROBERT STANSBURY LAMBERT, *SOUTH CAROLINA LOYALISTS IN THE AMERICAN REVOLUTION* 239 (1987) (noting that the South Carolina law permitting the confiscation of British property stated that "the state could no longer protect the property of persons who had supported the Crown" because of prior British confiscation and destruction of South Carolina property).

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
<b>Property confiscated by the state for a purported social purpose</b>					
White farmers after the 2002 land grab in Zimbabwe <sup>63</sup> <b>Property-induced invisibility applicable</b>	Yes. White-owned farms were targeted by the ZANU-PF and no compensation has been paid.	Yes. For years, blacks had been dehumanized by colonial and white settlers; the ZANU-PF-orchestrated land grabs were an attempt to turn the tables.	Yes. The state had direct involvement in the planning and execution of the land grabs.	Yes. White land owners were among the wealthiest people in Zimbabwe, but many were made powerless by the land grabs.	Yes. Those farmers who had no other assets on which to rely after their land was taken became economically vulnerable.
Expropriations of property in the U.S. under the "public use" clause for construction of privately owned developments. <sup>64</sup> <b>Property-induced invisibility inapplicable</b>	No. Just compensation is paid.	No. In the worst-case scenario, there may be collusion between local authorities and private developers, resulting in unjust enrichment but not dehumanization.	Yes. State powers of expropriation are used.	No. Owners receive just compensation.	No (conditional). Only renters who were paying below market rent prior to expropriation and are unable to find another apartment with reduced rent can be left economically vulnerable.

63. Zimbabwe President Robert Mugabe's Fast Track Land Reform program, which began in 2000, employed controversial legal and political tactics to expropriate land from white landowners and redistribute it to blacks. See Tom Tirivangani, *LAW, LAND REFORM AND SOCIAL JUSTICE: A CASE FOR ZIMBABWE* 156–66 (2004) (providing a detailed analysis of the political impetus and legislation behind the Fast Track program); Thomas W. Mitchell, *The Land Crisis in Zimbabwe: Getting Beyond the Myopic Focus Upon Black & White*, 11 *IND. INT'L & COMP. L. REV.* 587, 590 (2001) (providing a summary of Zimbabwe's land redistribution programs since Zimbabwe gained independence in 1980). See generally CATHERINE BUCKLE, *AFRICAN TEARS: THE ZIMBABWE LAND INVASIONS* (2001); ISAAC MAPOSA, *LAND REFORM IN ZIMBABWE: AN INQUIRY INTO THE LAND ACQUISITION ACT* (1992) COMBINED WITH A CASE STUDY ANALYSIS OF THE RESETTLEMENT PROGRAMME (1995); LUKE ZUNGA, *FARM INVASIONS IN ZIMBABWE: IS ZIMBABWE A DEMOCRACY?* (2003); *The Great Terrain Robbery: Plunder in Zimbabwe*, *THE ECONOMIST*, Aug. 17, 2002, at 45.

64. Supreme Court cases have interpreted the public use requirement broadly. Leading Supreme Court public use clause cases include: *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005) (holding that the taking of private property in order to facilitate development constituted a public use within the meaning of the Fifth Amendment); *Hous. Auth. v. Midkiff*, 467 U.S. 229, 239–42 (1984) (expounding upon the court and legislature's role in determining what constitutes public use); *Berman v. Parker*, 348 U.S. 26, 35 (1954) (discussing the court's role in determining what constitutes public use). For detailed discussion on the public use requirement, see, for example, Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 64–66 (1986).

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
Eastern European and Central Asian property owners during Communism <sup>65</sup> <b>Property-induced invisibility applicable</b>	Yes. Property was confiscated and no compensation was paid.	Yes (conditional). Communism's purported goal was to create a just and equal society; however, in the face of resistance from private property owners during the transition, the government used violence or threatened to kill people for non-cooperation, showing sufficient evidence of dehumanization.	Yes. The communist state expropriated the land.	Yes. Many private property owners became politically and economically powerless after the expropriations, although they may have been powerful prior to them.	Yes. It is the nature of Communism that all property is state-controlled and everyone is forced to rely on the state for their basic sustenance.

65. See generally Richard W. Crowder, *Restitution in the Czech Republic: Problems and Prague-Nosis*, 5 IND. INT'L. & COMP. L. REV. 237, 238 (1994) (noting that outside of the Soviet Union itself, the greatest magnitude of property confiscation and nationalization occurred in the Czech Republic); Frances H. Foster, *Restitution of Expropriated Property: Post-Soviet Lessons for Cuba*, 34 COLUM. J. TRANSNAT'L L. 621 (1996); Rainer Frank, *Privatization in Eastern Germany: A Comprehensive Study*, 27 VAND. J. TRANSNAT'L L. 809, 813-15 (1994) (noting that Communist expropriations in East Germany occurred both under the Soviet occupation from 1945-1948, and under the East German Government from 1949-1989). The Communist examples are unique because land was confiscated in order to give effect to a drastically different conception of property: Individual ownership was widely prohibited, while collective ownership became the norm. This is in contrast to the vast majority of situations, where the status of property in society did not change, only the owners did. Under Communism, the purported reason for the shift from individual to collective ownership was to create a more egalitarian society, where humanity was valued above property. In this context, it is important to note that dehumanization only results from the actual violent taking of property or a credible threat to do so, rather than the Communist reordering or property arrangements taken alone.

	Property confiscations with no payment of just compensation	Executed such that dehumanization occurs	Perpetrated by the state or other prevailing power structure(s)	Adversely affecting powerless people(s) or people(s) made powerless by the act	Such that communities, individuals or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs
Slave owners in the Antebellum South after manumission <sup>66</sup> <b>Property-induced invisibility inapplicable</b>	Yes. In so far as slaves were property, emancipation deprived owners of property without just compensation.	No. It was a campaign of re-humanization of slaves rather than dehumanization of slave owners.	Yes. The Thirteenth Amendment mandated manumission.	Yes (conditional). Slaves were the most valuable asset of many slaveholders, so emancipation caused economic vulnerability. This was not the case if subsequent sharecropping arrangements reversed the negative economic effects of emancipation for former slaveholders.	Yes (conditional). If, without slave labor, the plantation went bankrupt, the owner was left unable to satiate his basic needs; but, again, subsequent sharecropping arrangements often prevented this.

1. *Confiscation or destruction of property from owner(s) with no payment of just compensation:*

Property-induced invisibility is relevant when compensation is not paid at all, or if it is not just (that is, inadequate or accepted under conditions of duress, fraud, or extreme asymmetrical information). The form and amount of just compensation should be contextual. Just compensation can be the fair market value of property at the time of confiscation or destruction. Alternatively, it could entail a settlement reached in negotiations free from significant duress or asymmetries of information that would capture a property's non-market and market value.

66. In the debates leading to the ratification of the Thirteenth Amendment, Republicans were divided on the question of whether the writers of the Constitution viewed slaves as property. This question was closely linked to the debate on whether slave owners should receive compensation for the emancipation of slaves. Some Republicans felt that no slave owners should be compensated, but most Republicans believed slave owners in loyal states should be compensated. In the end, in part due to the growing hostility toward slave owners as the Civil War continued, Republicans "backed a constitutional amendment that said nothing about compensation." However, the Congress "refused to deny explicitly that loyal slave owners should be reimbursed for their loss, thus leaving open the possibility of further legislation granting compensation." See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 109 (2001). In contrast, the British Emancipation Act gave slave owners compensation of twenty million pounds and the option of keeping slaves on as paid apprentices for up to six years. See Seymour Drescher, *Abolitionist Expectations: Britain, in AFTER SLAVERY: EMANCIPATION AND ITS DISCONTENTS* 54 (Howard Temperley ed., 2000).



2. *Executed such that dehumanization occurs:*

Pateman and Mills convincingly argue that removal from the social contract is predicated upon various forms of dehumanization. At its core, [D]ehumanization involves denying a person “identity”—a perception of the person “as an individual, independent and distinguishable from others, capable of making choices”—and “community”—a perception of the other as “part of an interconnected network of individuals who care for each other.” When people are divested of these agentic and communal aspects of humanness they are deindividuated, lose the capacity to evoke compassion and moral emotions, and may be treated as means toward vicious ends.<sup>67</sup>

For example, the South African Apartheid-era government’s overt belief that Blacks were sub-human, the militant Hutus’ belief that Tutsis’ lives were worth no more than cockroaches’, and the subsequent property confiscations or destruction based on these beliefs are strong forms of dehumanization. Dehumanization will also result insofar as property is confiscated in the context of a deadly war or rebellion (death is the most extreme form of dehumanization).

There is a spectrum of offenses that do not reach the point of dehumanization but do reduce an individual or community’s dignity.<sup>68</sup> For instance, if a modern day Robin Hood steals someone’s property because she is exorbitantly wealthy while others have too little, this will not necessarily lead to the dispossessed’s dehumanization. The theft may result, however, in a blow to her dignity.

3. *Perpetrated by the state or other prevailing power structure(s):*

The social contract is an agreement between a state and its citizens, so only state action or inaction (often in the form of structural inequality that it tolerates) can forcibly remove citizens and make them invisible. The state’s responsibility for a person or community’s invisibility is contingent upon its level of culpability. For example, during Hurricane Katrina, United States shores along the Gulf of Mexico were ravished, people were displaced or died, and billions of dollars worth of property was destroyed.<sup>69</sup> Hurricanes are an uncontrollable act of nature, but the

67. Nick Haslam, *Dehumanization: An Integrative Review*, 10 PERSONALITY & SOC. PSYCHOL. REV. 252, 254 (2006) (quoting H. C. Kelman, *Violence Without Restraint: Reflections on the Dehumanization of Victims and Victimizers*, in VARIETIES OF PSYCHOHISTORY 301 (G.M. Kren & L.H. Rappoport eds., 1976)).

68. For example, when property is a constitutive part of someone’s personhood, its confiscation may adversely affect their dignity, but does not necessarily result in dehumanization. For a longer discussion of the property as personhood idea, see Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–78 (1982). Locke also had a conception of property as personhood. He believed that property in things was based upon property in/ownership of one’s self (that is, one’s labor and work). Consequently, when a person mixes their labor with a thing, it becomes his. See LOCKE, *supra* note 33, at 101.

69. See generally MICHAEL E. DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* (2006).

damage was deeply intensified by the fact that the state (both federal and local governments) knew the levees were faulty and furthermore, failed to respond adequately once the scale of the devastation became apparent.<sup>70</sup> Watching the post-hurricane chaos that erupted in the Superdome, it was evident that scores of people were dehumanized by the effect of state inaction. To the extent that the state had a duty to keep the levees in good condition and respond adequately but failed to do so, it is responsible for the invisibility although the hurricane was an act of God.

There may be situations in which the state is not complicit, but is non-existent or simply too weak to stop the dispossession. In this case, it is a non-state actor that becomes the prevailing power structure, steps into the shoes of the state, and renders people invisible. This occurred, for example, in Nazi-occupied territories during World War II. Although many of the governments in the occupied territories were still nominally in power, the Nazis were the true prevailing power structure that dictated the new terms of the social contract and caused widespread death and invisibility among the Roma, Sinti, Jews, and other groups.

4. *Adversely affects powerless people or people made powerless by the act:*

Throughout history, certain people have been targets of confiscations because they were economically powerless and thus vulnerable. The scapegoating of Roma and Sinti people—an economically powerless and vulnerable group—during World War II is an example of this. On the other hand, Jews were not an economically vulnerable group, but were nevertheless targeted as a reviled ethnic group. In fact, Nazi confiscations were fueled, in part, by anger and envy concerning the perceived economic prosperity of Jews.<sup>71</sup> The expropriation of their property was all part of a larger attempt to make this allegedly economically powerful group not just powerless, but extinct.

5. *Such that individuals, communities, or their heirs are effectively left economically vulnerable and dependent on the state to satiate their basic needs:*

Locke argued that any act by the state that places a man in the state's absolute power is grounds for dissolution of the social contract.<sup>72</sup> Follow-

70. FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H. R. Rep. No. 109-377, pts. 6, 15, at 90, 313 (2006) ("Potential for Katrina to breach levees was well-known . . ."); *id.* at 313 ("There was inappropriate delay in getting people out of shelters and into temporary housing—delays that officials should have foreseen due to manufacturing limitations.").

71. See AVRAHAM BARKAI, FROM BOYCOTT TO ANNIHILATION: THE ECONOMIC STRUGGLE OF GERMAN JEWS, 1933-1943, at 4-5 (William Templer trans., Univ. Press of New England 1989) (1987); FRANK BAJOH, 'ARYANISATION' IN HAMBURG: THE ECONOMIC EXCLUSION OF JEWS AND THE CONFISCATION OF THEIR PROPERTY IN NAZI GERMANY 1-7 (2002).

72. See LOCKE, *supra* note 33, at 278-84.

ing the same logic, when a state confiscates or destroys property, and leaves a person or community economically vulnerable and dependent on the state to meet her basic needs, the act of confiscation or destruction can effectively remove that person from the social contract, causing property-induced invisibility. There are many acts of property confiscation or destruction that will not leave a person economically vulnerable or dependent on the state. These occur when the person or community is able to use various economic buffers to avoid property-induced invisibility.<sup>73</sup>

For example, the Apartheid government could have confiscated the land of a Black farmer who maintained other assets apart from the land; for example, a profitable store. If the confiscation did not leave her or her descendants economically dependent on the government, it was unjust, but did not cause property-induced invisibility.<sup>74</sup> The farmer and her descendants should receive compensation, but in a world of limited resources, she should not be given priority over those who have had no economic buffer.

Although the presence of an economic buffer prevents property-induced invisibility from occurring, other types of invisibility could result. To address other forms of invisibility, it is crucial for any program designed to restore past rights in land to be accompanied by redistributive measures not based on past rights, but rather on need.

My central argument in this subpart has been that, as a baseline, those subject to property-induced invisibility should be restored; though, in certain situations the magnitude of property confiscations renders irrelevant the considerations of who, at a minimum, should be restored. For example, after the Rwandan genocide of 1994, thousands of people suffered from property-induced invisibility. Estimates suggest that half of Rwanda's population was somehow displaced, which means significant amounts of property were confiscated or unwillingly abandoned as a consequence of the genocide.<sup>75</sup> If the national government decides to return property to those dispossessed, it does not have sufficient resources to restore all those subject to property-induced invisibility. Nonetheless, in these types of cases, international donor funds should help indigent countries to compensate individuals and communities subject to property-induced invisibility.

B. WIDESPREAD PROPERTY-INDUCED INVISIBILITY CAN LEAD TO  
INCREASED ENFORCEMENT COSTS AND POLITICAL AND  
ECONOMIC INSTABILITY

The probability of violent backlashes is determined by an oppressed group's numbers, their reaction to their invisibility, their coalition-build-

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73. Invisibility of other types could result, although the presence of an economic buffer prevents property-induced invisibility from occurring.

74. Property-induced invisibility occurs at the time of expropriation, but can persist over generations if the dispossessed's descendants never recover from the initial taking.

75. See PRUNIER, *supra* note 60, at 312–13.

ing skills, and the adeptness of the state at quelling discontent. Invisible people can react to their dehumanization and exclusion by either trying harder to conform to societal norms in hopes of gaining acceptance, or by rejecting societal norms and laws altogether.

By “passing” for a group that is accepted, some are able to eclipse the identity that causes their invisibility.<sup>76</sup> There are others who, while they do not deny the identity that is the source of their oppression, do become obsessed with conforming to societal standards in hopes of winning the respect of those in society who are visible.<sup>77</sup> This spectrum of oppressed people’s reactions to their invisibility is the least threatening to societal stability.<sup>78</sup>

In contrast, there are those who have embraced their condition of invisibility and derive a certain freedom from it. Invisible people are not morally bound by a society’s rules, since they are not part of the social contract (or are relegated to an inferior position therein).<sup>79</sup> A social contract only morally binds contracting parties; those outside of or subjugated by the contract may acquiesce or comply as they desire, but a moral imperative to do so is absent. For example, the legal system in South Africa during its Apartheid era codified Blacks as inferior human beings, explicitly excluded them from the democratic enterprise, and therefore failed to bind Blacks morally to the legal system of the time. Although Blacks may have conformed to a system that excluded them and considered them subhuman, they had no moral imperative to do so. A positive and negative freedom can arise from this lack of moral attachment to the existing system of rules.<sup>80</sup>

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76. “Passing” is when a person attempts to avoid or hide the source of their oppression by passing for another more accepted group. This is a mechanism people often use to eclipse their invisibility. In the Jim Crow South and Apartheid-era South Africa, blacks with lighter skin frequently tried to “pass” in society as white, thereby eluding altogether their source of oppression. For more on the phenomenon of passing, see generally GRAHAM WATSON, *PASSING FOR WHITE: A STUDY OF RACIAL ASSIMILATION IN A SOUTH AFRICAN SCHOOL* (1970); Amy Robinson, *It One to Know One: Passing and Communities of Common Interest*, 20 *CRITICAL INQUIRY* 715, 728 (1994).

77. See EVELYN BROOKS HIGGINBOTHAM, *RIGHTEOUS DISCONTENT: THE WOMEN’S MOVEMENT IN THE BLACK BAPTIST CHURCH 1880-1920*, at 187–88 (1993) (discussing how African American women conformed to societal standards to increase the visibility of their movement: “Although the Baptist church provided women an oppositional space in which to protest vigorously against social injustice,” their movement to gain respectability ultimately “reflected and reinforced the hegemonic values of white America. . .”).

78. There are also varieties of social myths that prevent people from rebelling and thus ensure societal stability. For instance, the myth of the divine right of kings (and divinely-sanctioned subservience of serfs) that dominated feudal times, or the myth that blacks are the cursed sons and daughters of Ham that God intended to be slaves. In many situations, people accept their station in society and the blatant injustices that go with it because they truly believe that their suffering is consistent with the will of God. Social myths lead people to accept their invisibility rather than engage in social struggle to become visible.

79. LOCKE, *supra* note 33, at 350. The moral legitimacy of social control is based upon the social contract. When the state removes individuals or communities from the social contract, it can no longer subject them to social control that is morally legitimate.

80. See Daniel Markovits, *Democratic Disobedience*, 114 *YALE L.J.* 1897, 1902 (2005).

A positive freedom results when people are not morally attached to a legal regime that renders them invisible, and they then use this freedom to violate laws in an attempt to inject a dose of morality into an ignoble society.<sup>81</sup> For instance, in the Jim Crow South, sit-ins violated the legal architecture of segregation in order to bring about a society where blacks were treated as equals instead of sub-persons. Brave individuals were able to transform their lack of moral adhesion to the laws that oppressed them into protest actions that served to subvert those very same laws. The exercise of positive freedom can entail a non-violent or violent strategy, so long as the intent is to bring about a more just world.

On the other hand, a negative freedom results when people use their lack of moral adhesion to engage in self-enrichment or morally dubious activities.<sup>82</sup> Through his protagonist in *Invisible Man*, Ralph Ellison articulates a possible reason one would engage in negative freedoms as follows: "Irresponsibility is part of my invisibility. But to whom can I be responsible, and why should I be, when you refuse to see me?"<sup>83</sup> Gangsters that terrorized South Africa's townships during Apartheid are a perfect example. The gangsters robbed people and engaged in a plethora of illegal activities. These young men lived under a system that sought to dehumanize them and hence had no moral imperative to abide by the immoral legal framework. However, they used this freedom as a license to escape all standards of comportment, even the morally legitimate, customary traditions that prevailed in the townships.

When either positive or negative freedoms arise, people are driven to the point at which they sincerely feel that they have little to lose in opposing the government and its laws.<sup>84</sup> Invisibility is most likely to result in increased enforcement costs or disorder when those made invisible either constitute a substantial portion of the population or are able to form coalitions and inspire others to take part in their protest actions.<sup>85</sup> Society

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81. *Id.* (arguing that the exercise of positive freedoms edifies democracy and that "political disobedience can provide for the broader political process by correcting democratic deficits in law and policy that inevitably threaten every democracy"); see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 105 (1985).

82. This is the conception of invisibility espoused by Glaucon in Book II of Plato's *Republic* in his attempt to explain the nature of justice. In the myth of Gyges, a shepherd discovers a gold ring that has the power to make him invisible. Invisibility allows Gyges to break the law with impunity. He uses his newly found power to seduce the queen, kill the king, and usurp his kingdom. He derives a negative freedom from his invisibility. See PLATO, *THE REPUBLIC* 37-71 (G.R.F. Ferrari ed., Tom Griffith trans., 2000) (360 B.C.).

83. ELLISON, *supra* note 28, at 14.

84. See also PATTERSON, *supra* note 30, at 2 ("[T]otal personal power taken to its extreme contradicts itself by its very existence, for total domination can become a form of extreme dependence on the object of one's power, and total powerlessness can become the secret path to control of the subject that attempts to exercise such power." (quoting GEORG HEGEL, *THE PHENOMENOLOGY OF THE MIND* 228-40 (J.B. Ballice trans., Swann Sonnenschein 1910) (1807))).

85. At one end of the spectrum, there is full compliance with the law, and at the other end, there are unmet expectations and chaos. In between these two extremes is a space where prevalent property-induced invisibility, at the very least, causes the cost of enforcing property rights to increase. The misaligned expectations caused by property-induced invisibility can be rectified through restoration of property. See Leonid Polishchuk, *Distribu-*

functions under the status quo only so long as the majority of people adhere to the established rules and those who do not can be contained. Containment depends upon the state's ability to meet the expectations of the majority. Bentham rightly argued that,

To the extent laws are concordant with expectations, one may hypothesize that they will be willingly complied with by a substantial number of people. The fact that laws are rooted in common expectations thus facilitates willing compliance; the latter in turn, fosters respect for the law and law-makers. Compliance on a large scale helps legitimation of law and the authority of the law-makers.<sup>86</sup>

To the extent that the state is unable to meet the majority's expectations and secure their willing compliance with the law, it can use its police power to force those exercising negative and positive freedoms to comply.<sup>87</sup> The cost of enforcing property rights will increase in proportion to the extent the police power must be invoked.<sup>88</sup> There may come a point, however, at which the state's military prowess and social institutions cannot contain disobedient populations, and disorder will prevail. That is, while the fabric of society can withstand losing a few threads, there comes a certain point when a frayed fabric can do nothing but fall apart.<sup>89</sup> To prevent this, the state must transform and thus legitimize the property status quo.<sup>90</sup>

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tion of Assets and Credibility of Property Rights 3 (Mar. 2, 2004) (unpublished manuscript), available at [http://harrisschool.uchicago.edu/Academic/workshops/polecon\\_archive.asp](http://harrisschool.uchicago.edu/Academic/workshops/polecon_archive.asp) ("[T]he cost of enforcement of property rights is observed to be positively correlated with the inequality of their allocation in the society. . . . Destitution provokes attempts on others' property, partly for a lack of socially productive alternatives, partly because those undertaking such attempts have little to lose.").

86. BENTHAM, *supra* note 11 (emphasis added).

87. Perceptions of illegitimacy that can ignite social mayhem are suppressed through the criminal justice system, where the focus is to maintain the status quo through social control. For a review of the social control theories underlying criminal law, see DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 3–22 (1990); RICHARD QUINNEY, *CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN CAPITALIST SOCIETY* 51–55 (1974) (arguing that through class repression, the criminal justice system is intended to maintain the status quo); Donald Black, *Crime as Social Control*, 48 AM. SOC. REV. 34–45 (1983); Allen E. Liska, *A Critical Examination of Macro Perspectives on Crime Control*, 13 ANN. REV. SOC. 67, 67–88 (1987).

88. See Tyler, *supra* note 20, at 376 ("The use of power, particularly coercive power, requires a large expenditure of resources to obtain modest and limited amounts of influence over others. It is therefore important that under some circumstances people are also influenced by others because they believe that the decisions made and rules enacted by others are in some way right or proper and ought to be followed."); see also, Morris Zelditch, *Processes of Legitimation: Recent Developments and New Directions*, 64 SOC. PSYCHOL. QUARTERLY. 4, 4–6 (2001).

89. Using Locke's imagery, widespread non-cooperation throws society back into a state of nature, which is bound to devolve into a state of war. See LOCKE, *supra* note 33, at 278–84.

90. Many scholars have noted that land reform can prevent revolution and as well as other forms of political instability. See, e.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 375 (1968); B. Curtis Eaton & William D. White, *The Distribution of Wealth and the Efficiency of Institutions*, 29 ECON. INQUIRY 336, 336 (1991) ("We find circumstances in which redistribution of wealth is Pareto optimal and in which increasing sanctions against theft to their maximum level is not."); Herschel Grossman, *Production*,

## III. RESTORATION

Under international law, a person who has property confiscated has various rights to the return of her property.<sup>91</sup> Because property-induced invisibility is not only caused by the confiscation of property, the mere return of property will not be sufficient to correct it. Dehumanization and exclusion are central to property-induced invisibility. A society that is committed to the process of moral regeneration must find a way to include victims in the democratic project to affirm their humanity. A society can do this by giving invisible people or communities asset-based choices, which facilitate active participation in the remedial process and bring dignity to those formerly dehumanized.

Reparation is the return of property that does *not* emphasize rebuild-

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*Appropriation, and Land Reform*, 84 AM. ECON. REV. 705, 711 (1994); Karl Moene, *Poverty and Landownership*, 82 AM. ECON. REV. 52, 52 (1992); Edward N. Muller et al., *Land Inequality and Political Violence*, 83 AM. POL. SCI. REV. 577, 579–86 (1989); Bruce Russett, *Inequality and Instability: The Relation of Land Tenure to Politics*, 16 WORLD POLITICS 442, 453 (1964); cf. T. David Mason, “Take Two Acres and Call Me in the Morning”: Is Land Reform a Prescription for Peasant Unrest?, 60 J. POL. 199 (1998) (noting the ineffectiveness of land reform when accompanied by a rise in state violence aimed at repression); Manus Midlarsky, *Rulers and Ruled: Patterned Inequality and the Onset of Mass Political Violence*, 82 AM. POL. SCI. REV. 491, 504 (1988).

91. See SCOTT LECKIE, *New Directions in Housing and Property Restitution*, in RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS 3 (Scott Leckie ed., 2003); Scott Leckie, *Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice*, REFUGEE SURV. Q. No. 3 2000, at 5–63. International human rights provisions entitling individuals to property restoration include: (1) the right to restoration of housing, land or property, see *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 2(c), U.N. Doc. A/51/18 (Aug. 16, 1996) (“All such refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them.”); (2) the right of those displaced to return to their homes and places of habitual residence in their country should they so wish, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Housing and Property Restoration in the Context of the Return of Refugees and Internally Displaced Persons*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/Res/1998/26 (Aug. 26, 1998) (“The Sub-Commission on Prevention of Discrimination and Protection of Minorities . . . [r]eaffirms the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish.”); *Report of the Committee on the Elimination of Racial Discrimination*, ¶ 2(a), U.N. Doc. A/51/18 (Aug. 16, 1996) (“All such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety.”); (3) the right to compensation for land lost as the result of a forced eviction, see U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Expert Seminar on the Practice of Forced Evictions*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/1997/7 (July 2, 1997) (Section 24 provides that “[a]ll person[s] subjected to any forced eviction . . . should have a right to compensation for any losses of land or personal, real or other property or goods . . .”); and (4) the state’s obligation to make reparation for injury, see U.N. GAOR Int’l L. Comm’n, *Responsibility of States for Internationally Wrongful Acts*, Art. 31, 34–37, U.N. Doc. A/56/10, ch. IV.E.1 (2001) (Article 31, Section 1 provides that “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.” Article 34 provides that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction either singly or in combination.”).

ing a relationship to society,<sup>92</sup> while restoration is the return of property that emphasizes rebuilding a relationship to society through asset-based choices.<sup>93</sup> Reparation, as opposed to restoration, is currently the goal in various programs designed to restore past rights in property.<sup>94</sup> If return of the stolen property is not possible (for example, if a bona fide purchaser is in possession of the property), then the judge or administrator often orders the state to provide monetary compensation, or sometimes alternative land, if available.<sup>95</sup> The judge or administrator chooses the appropriate remedy. While this approach is effective in achieving reparations, it fails to capitalize upon a prime opportunity to restore a person or community's relationship to society.

In order to restore an individual or community's relationship to society, the restorative process must be asset-based, driven from the bottom-up, and defined by choice. To facilitate the process, the legislature can devise and authorize a standard list of assets from which dispossessed popula-

92. In the legal literature, the definition for reparations is consistent, although subtle differences exist. *See, e.g.,* Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1055 (2003) (emphasizing four features of reparations: "1) a focus on the past to account for the present; 2) a focus on the present, to reveal the continuing existence of race-based discrimination; 3) an accounting of past harms or injuries that have not been compensated; and 4) a challenge to society to devise ways to respond as a whole to the uncompensated harms identified in point '3'"); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003) (noting that: "[p]aradigmatic examples of reparations typically refer to schemes that (1) provide payment (in cash or in kind) to a large group of claimants, (2) on the basis of wrongs that were substantively permissible under prevailing law when committed, (3) in which current law bars a compulsory remedy for the past wrong . . . , and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward looking grounds such as the deterrence of future wrongdoing.").

93. *See* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999) (emphasizing the following objectives of restorative justice: "restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support"); John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) (describing restorative justice as "a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm. . . . The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just."); David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 319 ("Restorative justice . . . 'involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.'" (quoting HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181 (1990))); Mark S. Umbreit, *Holding Juvenile Offenders Accountable: A Restorative Justice Perspective*, JUV. & FAM. CT. J., Spring 1995, at 31, 32 ("Rather than defining 'the state' as the victim, restorative justice theory views criminal and delinquent behavior as first a conflict between individuals. . . . [B]oth victim and offender are placed in active problem solving roles."); .

94. This is the case in South Africa, Germany, and the Czech Republic. *See* Michael L. Neff, Comment, *Eastern Europe's Policy of Restoration of Property in the 1990s*, 10 DICK. J. INT'L L. 357, 364-73 (1992) (discussing restoration policy in East Germany and the Czech Republic); Foster, *supra* note 65, at 621, 626-41 (1996) (discussing restoration programs in the Baltic States); *infra* Part IV and accompanying discussion about the South African LRP.

95. *See generally*, Neff, *supra* note 94, at 364-73.



tions can choose.<sup>96</sup> For example, the dispossessed should be able to choose, *inter alia*, return of expropriated property (if possible), a cash payment, an asset account applicable to education, health, housing or retirement, free vocational training or higher education for two generations, priority within an established housing program, or highly subsidized access to credit.<sup>97</sup> The standard list of assets should be tailored to the economic, social, political, and historical realities of each country. The standard list, however, is not enough. The dispossessed should also be allowed to suggest completely self-styled remedies. The state is not expected to give effect to every asset-based option proposed, but rather only those that are reasonable and within its budgetary restraints. Determining what is reasonable should be part of a consultative process involving the state and the dispossessed, supported by their civil society representatives.

It is important to note that there is a difference between restoration and redistribution. Restoration is one type of redistributive program. Restoration is a one-time event that occurs within a specified timeframe. It is an attempt to correct past wrongs by returning to a prior status quo perceived to be more just, or creating a new status quo predicated upon correcting specific past wrongs. Redistribution is an ongoing process that involves a transfer of wealth from the haves to the have-nots, thereby creating a social safety net.<sup>98</sup> Redistribution, however, results in a new status quo *not necessarily designed to correct past wrongs*. Redistributive programs and policies are the only practical alternative in situations where inadequate records make it impossible to determine who is eligible for restoration.<sup>99</sup>

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96. The legislature's role is especially important when interagency coordination is necessary for the delivery of the assets, because either confusion or paralysis will abound if implementing bureaucracies do not have a clear political mandate.

97. The best form of reparations will not always be in monetary form. See William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 6-7 (2005) (noting that "[n]on-monetary modes of redress may be more effective in inducing the national government to accept moral responsibility, in restoring the dignity and autonomy of injured groups, and in healing, reconstituting, and relegitimizing the nation"); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 391 (1987) (noting that appropriate reparations might include "[m]oney for education, housing, medical care, food, job training, cultural preservation, recreation and other pressing needs of victim communities [that] will raise the standard of living of victim groups, promoting their survival and participation").

98. For an intriguing view of redistribution, see Arthur Cockfield, *Income Taxes and Individual Liberty: A Lockean Perspective on Radical Consumption Tax Reform*, 46 S.D. L. REV. 8, 65 (2001) ("Redistribution of wealth and the accompanying high levels of taxation also help to promote the view that all (or almost all) benefit from capitalist taxation systems; this is an important norm that continually needs to be communicated to citizens in order to legitimize social institutions protecting private property. As such, payments toward redistribution of wealth can be seen by the taxpayer as just another payment to the state for protection of the security of the individual's person, the main goal of Lockean private property.").

99. I purposefully use the word "impossible" as opposed to "difficult." It is always difficult to sort out issues related to past violation of rights, but the restoration programs in South Africa and Eastern Europe prove that it is not impossible. For example, a state must decide how many years can pass before a dispossession claim is null and void. Once the

The most important difference between restoration and redistribution is that the former connects directly to a past violation of rights. Restoration is largely protected from political vicissitudes and a claimant that successfully traverses the established judicial or quasi-judicial process is entitled to it.<sup>100</sup> Conversely, politics more profoundly affects redistribution. For instance, while one political administration acknowledged and defended redistributive welfare programs, such as Affirmative Action, because they ameliorate past wrongs, another denied the connection altogether and cancelled the programs.<sup>101</sup> Affirmative Action programs were subject to cancellation because the beneficiaries did not have a right to the benefits. In contrast, restoration restores a past legal right in property and cannot be withdrawn without some judicial or quasi-judicial review.

Depending on the context, redistribution may be more appropriate than restoration. If a state decides to pursue restoration, it must happen in conjunction with broad-based redistribution through the tax and transfer system, which will address non-property related harms. Property-induced invisibility historically coincides with other forms of oppression, such as disappearance, execution, incarceration, torture, loss of employment, educational disruption, psychological scars, and/or sexual violence. A society that appears to be prioritizing only the dispossession of property over other forms of oppression and dehumanization will undoubtedly foment animosities among citizens.

#### A. THE IMPORTANCE AND LIMITS OF CHOICE

Although what makes us human is a complex convergence of factors, at least one pronounced and critical thread in this multifaceted tapestry is the ability to have and make simple choices that determine the trajectory of one's life.<sup>102</sup> Dehumanization, which is a defining feature of property-

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original victim has died, who inherits her claim? And what types of validating documents are sufficient to honor a claim? These are all very context-specific questions that each country must figure out for itself.

100. This is the case with affirmative action programs in the United States. See Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 499 (2003) (noting that "as [Affirmative Action] loses support in legislatures, reparations offers the hope of a different language for talking about many of the same issues").

101. See *id.* at 498–501.

102. Many of the most prominent philosophers have acknowledged the importance of choice and autonomy. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (emphasizing that the principles of autonomy and choice require that individuals who act as representatives for the larger population have one job: to choose principles of justice). The works of Hobbes, Locke, Rousseau, and other social-contract theorists also emphasize the importance of choice and autonomy because they premise their work on the fact that individuals choose to enter into a social contract with the state. See generally LOCKE, *supra* note 33; THOMAS HOBBS, *LEVIATHAN* (A. P. Martinich ed., Broadview Press 2002) (1651); JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., Penguin Books 1968) (1762); but cf. BENTHAM, *supra* note 11, at 72–74, 81–82. Nozick recognizes choice as a defining feature of humanity and states that, "[a] person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being

induced invisibility, is based on the underlying notion that the subject lacks a threshold level of capacity to fully participate in society. The establishment of choice-based remedies is predicated on the countervailing assumption that a person does indeed have the capacity to navigate her life and determine her actions. Restorative policies cannot afford to remain unduly rigid by failing to offer meaningful choices. Instead, these policies must allow people to exercise their volition by choosing the mode of restoration that best fits their idiosyncratic situation to the extent possible, and this will do a significant amount of work in restoring an invisible community or individual's relationship to society.

Nobel laureate, economist, and philosopher Amartya Sen argues that freedom is integral to the foundations of justice; freedom entails having the capability to make choices, which lead to outcomes that one has reason to value.<sup>103</sup> Sen's binary conception of freedom is not limited to a procedural "freedom from" framework, which requires noninterference with the exercise of one's agency.<sup>104</sup> Rather, it also incorporates a "freedom to" element, which evaluates the substance of the choices made available.<sup>105</sup> Sen's conception of freedom must permeate restoration programs, because it is critical for a society to allow invisible people to exercise their agency by choosing how they are restored to full citizens, while also ensuring that they have viable options from which to choose.<sup>106</sup> In order for a dispossessed person or community to choose how they are restored, the state and civil society must provide information and assistance; also, the concept of choice suggests that there must be at least two viable choices that a dispossessed person or community is willing to accept. It does not suggest a libertarian conception of choice, which assumes "that all persons are the absolute owners of their own lives, and should be free to do whatever they wish with their persons or property, provided they allow others the same liberty."<sup>107</sup> Choice may be limited in various ways.

There may be practical restraints to providing a full array of choices. While cash distributions give communities and individuals maximum choice, many nations, especially poor ones, must focus on in-kind options because they do not have the ability to give cash payments without printing additional money, thereby triggering inflation.<sup>108</sup> In addition, due to financial constraints, a nation may have to limit in-kind benefits to those

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with the capacity to so shape his life can have or strive for meaningful life." NOZICK, *supra* note 33, at 50.

103. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 54-87 (1999).

104. *Id.*

105. *Id.*

106. *Id.* "[F]reedom is concerned with processes of decision making as well as opportunities to achieve valued outcomes." *Id.* at 291.

107. See *Libertarianism*, <http://en.wikipedia.org/wiki/Libertarianism> (last visited Aug. 20, 2007). See generally Hillel Steiner, *A Libertarian Quandary*, 90 *ETHICS* 257 (1980).

108. A cash payment may also be a more politically volatile option. If a government's restorative agenda has a critical amount of opposition, then payoffs in the form of in-kind services may be easier to sell to the public because the costs are less obvious.

that have low marginal costs.<sup>109</sup> Beyond practical constraints on choice, the state may restrict the choices given to dispossessed populations in order to achieve the larger goal of legitimizing the property status quo. For instance, the state should disallow cash payments if they do not increase the well-being of recipients in the long-term, such that the legitimacy of property institutions is greatly increased.

Evidence suggests that some people who receive an unexpected windfall of money, such as winning the lottery or receiving a large legal settlement, will lose a significant portion of their wealth in a short period.<sup>110</sup> In South Africa it has been reported that “the unaccustomed windfall of relatively large sums of money (from 17,500 rand upward) [through the LRP] can be quickly dissipated in poor households, without producing lasting material benefit or a sense of closure about the past.”<sup>111</sup> This is exactly what happened in St. Lucia, South Africa, which is a dispossessed community of about a thousand households.<sup>112</sup> In this case, the land commission determined that St. Lucia had a valid claim to land that is now used for conservation purposes. Due to the present use of the claimed land, the community was offered alternative land or financial compensation, but the community was not given the option of crafting their own remedy.<sup>113</sup> They opted for financial compensation. The Land Claims Commission determined the present value of the claim and decided that each household was entitled to R30,000 (approximately \$5,000 U.S.). Due to the extreme poverty of the residents, most of the funds were spent within six months with no notable improvement in the community’s condition.<sup>114</sup> There are now rumors that the community is considering retaking their ancestral land via land invasion, despite the fact that they have already been paid.<sup>115</sup> Substantial quantities of money have been expended by the government, but the legitimacy of property arrangements is still under question. In these types of situations, South Africa and other similarly situated states should give assets with less liquidity than cash, such as fixed assets, to prevent people from rapidly

109. For example, assume that providing subsidized credit costs \$8000 and that tuition for a government-funded vocational school is also \$8000, but the government’s marginal cost of admitting one more student is \$200. In this example, despite the fact that the access to subsidized credit is important, providing free education is the type of in-kind option that would be more practical for the government to offer.

110. See ROBERT WAGMAN, *INSTANT MILLIONAIRES: CASHING IN ON AMERICA’S LOTTERIES* 71–116 (1986); see also Ellen Goodstein, *Eight Lottery Winners who Lost Their Millions*, MSN MONEY, <http://articles.moneycentral.msn.com/SavingandDebt/SaveMoney/8lotteryWinnersWhoLostTheirMillions.aspx> (last visited Aug. 20, 2007); *Reversal of Fortune* (Showtime documentary broadcast Dec. 15, 2006) (experimenting by giving a homeless man with no drug or mental problems \$100,000 to see what he would do with the money; within a short amount of time, he lost it all).

111. See Cherryl Walker, *Misplaced Agrarianization? Reflections on Ten Years of Land Restitution*, 72 *SOCIAL RESEARCH* 647, 663 (2005).

112. Interview with Tozi Gwanya, Chief Land Claims Commissioner (SA), in Pretoria, S. Afr. (Jan. 11, 2006).

113. *Id.*

114. *Id.*

115. *Id.*

dissipating their new wealth due to short-term exigencies. If there is no long-term improvement in one's welfare, the perceived legitimacy of land arrangements will not be altered.

Choices should be restored at the level of the individual when the land in question is individually owned, and at the communal level for communally-owned land. For example, through a just and culturally relevant process, a community can decide, among other things, that the harm was intergenerational, such that one generation should not have the ability to dissipate the assets received.<sup>116</sup> The group may decide that lands acquired through the restoration process can be occupied, but may not be sold without the approval of the group. Although restraints on alienation will truncate each individual beneficiary's spectrum of choices, these restraints are a tool to ensure respect of the collective choice, which will move the community towards visibility. The outvoted members of the group, however, may remain invisible, and this is particularly problematic if they are a historically marginalized sub-group. In order to ensure that sub-groups do not remain invisible, restoration programs must allow people to opt out of the group and receive their pro rata share, so that if people feel that they are being ignored or marginalized, they can choose to either exit or remain part of the group and advocate for change from within.<sup>117</sup>

#### B. THE IMPORTANCE OF ASSET OWNERSHIP

Restoring a community or individual's relationship to society is a complex process that requires a considerable amount of private healing and reconciliation that must take place outside of the government's purview. Beyond these private acts, the restorative process can also include public measures, such as public apologies, truth commissions, and public monuments. These public measures can help to restore lost dignity, but cannot adequately address property-induced invisibility. Property-induced invisibility entails economic vulnerability, such that one is dependent on the state for basic needs, so restoration of assets must be a central element in any reversal strategy.

When property is confiscated in such a way that property-induced invisibility occurs, wealth is decimated, and this deficit is transferred intergenerationally until there is an opportunity for a family, community, or individual to re-accumulate the assets stolen and re-establish itself eco-

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116. This is exactly what happened to Native American Tribes with the General Allotment Act of 1887, a federal statute that allotted tribally-owned lands to individuals. The gains from the sales were often quickly dissipated, leaving individuals in abject poverty and tribes with significantly less land. Congress stopped the allotment of tribal lands via the Indian Reorganization Act of 1934 (IRA) after tribes lost over 90 million acres of land to white settlers. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7-16 (1995).

117. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

nomically.<sup>118</sup> Property-induced invisibility will persist for generations if people are not able to rebound economically from the initial confiscation.<sup>119</sup> Asset transfers will afford people the opportunity to re-build their wealth and move beyond their economic dependence on the state for basic needs.

Also, given that exclusion is a defining feature of property-induced invisibility, assets are crucial because they promote economic and political inclusion. On the political front, assets increase poor people's stakeholding and thereby, their investment and participation in the democratic process. This is demonstrated, in part, by the fact that, controlling for relevant factors, property owners vote more often than non-property owners.<sup>120</sup> Asset ownership can also help to overcome barriers that prevent people from being more involved in the democratic process, such as lack of time and economic dependence.<sup>121</sup> Economically, by providing people with capital that they can leverage for productive investments, as-

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118. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 5-6 (1995) ("Just as blacks have had 'cumulative disadvantages,' many whites have had 'cumulative advantages.' Since wealth builds over a lifetime and is then passed along to kin, it is, from our perspective, an essential indicator of black economic well-being. By focusing on wealth we discover how black's socioeconomic status results from a socially layered accumulation of disadvantages passed on from generation to generation."). See generally JOHN A. BRITAIN, *THE INHERITANCE OF ECONOMIC STATUS* (1977).

119. Intergenerational justice, also commonly known as intergenerational equity, is the idea that present generations bear some moral obligation toward past and future generations. See George Sher, *Ancient Wrongs and Modern Rights*, in *JUSTICE BETWEEN AGE GROUPS AND GENERATIONS* 48, 59 (Peter Laslett & James S. Fishkin eds., Yale Univ. Press 1992) (distinguishing between "ancient" wrongs, which "call for no significant amounts of compensation," and "the vast intermediate class of wrongs . . . committed one or more generations ago," which "do call for some compensation"); Hanoch Dagan, *Restoration and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transitions*, 84 B.U. L. REV. 1139, 1162 (2004) (arguing for the "descendibility of wrongful enslavement claims"); Lawrence B. Solum, *To Our Children's Children's Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 174 (2001).

120. See Bernadette Atuahene, *Land Tiling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 ST. LOUIS U. L.J. 761, 775-77 (2006). Those with no property, in theory, also have a strong incentive to participate in the lawmaking process because they are reliant on government largess and should hence want a voice in how it is distributed. In reality, though, poor people are less likely to vote than those with property. See JENNIFER DAY & KELLY HOLDER, *VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2002: POPULATION CHARACTERISTICS* 8 (U.S. Census Bureau, 2004).

121. Atuahene, *supra* note 120, at 775-77 (arguing economic dependence can lead to a compromised ability to exercise one's political rights and thereby prevent people from fully participating in democratic institutions). For example, during the Civil Right Movement, black sharecroppers often could not exercise their constitutional right to vote because landowners threatened to evict them from the land if they did. The sharecroppers' economic dependence lead to a lack of political independence. Property ownership can afford an individual a measure of economic and thereby political independence. *Id.* at 771-72. See also BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 185 (1999) (arguing that although democratic participation requires time, the financial security that flows from property ownership, gives the stakeholder time to participate: "[M]odern stakeholding will create a certain space for civic reflection in millions of lives now dominated by economic anxiety. Fewer Americans will be living on the economic edge; stakeholders will have more energy left to turn their attention to larger things, including the fate of the nation.").

sets allow those once excluded from effectively participating in the capitalist economy to participate.<sup>122</sup>

Lastly, assets have the power to increase the long-term well-being of invisible communities and individuals, which is crucial for increasing the legitimacy of the property status quo. Michael Sherraden convincingly argues that assets have several general welfare effects.<sup>123</sup> They improve economic and household stability,<sup>124</sup> create an orientation toward the future,<sup>125</sup> stimulate development of human and other capital,<sup>126</sup> enable people to focus and specialize,<sup>127</sup> provide a foundation for risk-taking,<sup>128</sup> yield personal social and political dividends,<sup>129</sup> and enhance the welfare of offspring.<sup>130</sup>

#### IV. CASE STUDY: MOVING FROM REPARATION TO RESTORATION IN SOUTH AFRICA'S LAND RESTITUTION PROGRAM

History reveals numerous incidences in which property was confiscated in such a manner that individuals and communities were removed from the social contract and thus rendered invisible. There is, however, a paucity of cases in which governments have taken action to correct past expropriation of property rights.<sup>131</sup> South Africa is one of them. More significantly, South Africa's land policy states that it is committed to a

122. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); see also, Atuahene, *supra* note 120; Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT'L L. REV. 1109, 1116–18 (2004).

123. MICHAEL SHERRADEN, *ASSETS AND THE POOR: A NEW AMERICAN WELFARE POLICY* 148 (1991).

124. Assets do this by serving as a bulwark against income shocks and thereby maintain a family's social and economic health until income flows recommence. "[B]ecause economic worries are a major contributor to a cluster of psychological and social problems associated with unemployment, the family is also more likely to bear the wounds of mental depression, rage, marital breakup, child and spouse abuse, alcohol and drug use, and so forth." *Id.* at 149.

125. Assets give people a larger stake in the future. Also, asset management requires long term thinking and planning. *Id.* at 151.

126. For example, for many Americans, home ownership is the most common way to build wealth. Through homeownership, people have an incentive to learn about real estate markets and capital investments generally. They also have an incentive to acquire home improvement skills. *Id.* at 156–57.

127. *Id.* at 158–59 ("In poor households, people spend their time in a wide diversity of tasks because they do not have sufficient assets to enable greater focus and specialization. . . . Many people forego opportunities for specialized education and training because they have to feed their families.").

128. High risks bring high rewards, but many people are not in a position to take risks because they have nothing to fall back on. Assets provide the security that places people in a position to take social or psychological risks. *Id.* at 159–60.

129. Assets allow greater strength, control, and security. They provide greater power in social and economic negotiations. In addition, with assets, people have a higher incentive and greater resources to participate in the political process. *Id.* at 161–67.

130. *Id.* at 166 ("[A]ssets also increase the welfare of offspring. Assets provide an intergenerational connection that income and consumption cannot provide.").

131. See generally *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy Brooks ed., 1999).

program that moves beyond the limited emphasis on return of property, and is invested in the larger project of restoring invisible peoples' relationships to society.<sup>132</sup> As such, the country ideally serves to further explore the conceptions of property-induced invisibility and restoration developed in this Article.

#### A. PROPERTY-INDUCED INVISIBILITY IN SOUTH AFRICA

##### 1. *Historical Context of Property-Induced Invisibility*

Upon their arrival in 1652, Europeans were able to assume a dominant position in southern Africa through their superior weaponry and warfare strategies.<sup>133</sup> From the time of their arrival until the demise of Apartheid in 1994, Europeans and their descendants leveraged their dominance and unilaterally set the terms of the social contract. Based on the white supremacist notion that all non-whites belonged to ontologically inferior, savage races, non-whites were dehumanized and explicitly excluded from the social contract. Consequently, South Africa is a country that has high levels of property-induced invisibility. That is, the white supremacist state systematically confiscated land from Blacks with no payment of just compensation, and this land dispossession was part of a larger strategy of dehumanization, which left the majority of Blacks powerless, poor, and dependent on the state to satisfy their basic needs.<sup>134</sup>

Land dispossession in South Africa was executed, in part, within a legal framework that began with the 1913 Native Land Act, which constrained Black land rights by prohibiting them from buying or leasing land from whites who lived outside of areas where Black land ownership was allowed.<sup>135</sup> After the Native Land Act came two legal proclamations that further infringed upon Black land rights. The Native Administration Act of 1927 gave the Governor-General plenary power to "order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union upon such conditions as he may determine."<sup>136</sup> The Development Trust and Land Act of 1936 vested title to all native reserves in a trust rather than to Blacks.<sup>137</sup> Black land loss was further entrenched when the National Party came to power in 1948 and introduced a system of separate development called Apartheid. Apartheid legally mandated that whites live apart from Blacks and systematically divided Blacks into homelands, or Bantustans, according to ethnicity.<sup>138</sup>

132. The government has declared that freedom and agency are indispensable elements of the restorative process. See DEPARTMENT OF LAND AFFAIRS, WHITE PAPER ON SOUTH AFRICAN LAND POLICY § 2.1 (1997) [hereinafter WHITE PAPER].

133. See DEPARTMENT OF LAND AFFAIRS, OUR LAND: THE GREEN PAPER ON SOUTH AFRICAN LAND POLICY 37 (1996) [hereinafter GREEN PAPER].

134. For the definition of property induced invisibility, see *infra* Part II and accompanying discussion.

135. See GREEN PAPER, *supra* note 133, at 37.

136. PLATZKY & WALKER, *supra* note 59, at 88.

137. *Id.* at 89.

138. See Thoko Didiza, Minister for Agric. & Land Affairs, The Importance of a Successful Land Reform Programme in South Africa, Opening Address at the National Land



In order to more thoroughly institutionalize the separate development policy, the 1950 Group Areas Act and the Black Resettlement Act of 1954 were passed, which both sought to eradicate "black spots" in urban areas.<sup>139</sup> Blacks who owned property in areas newly declared as white were forcibly removed.<sup>140</sup> The 1964 Bantu Laws Amendment Act intensified Black land loss by giving the government legal license to remove Africans from any town or white farming area at any time.<sup>141</sup> All of these laws were part of the legal architecture intended to sequester Blacks in the homelands and deprive them of any possibility of acquiring or sustaining rights in land.

In addition to the scores of individuals and communities who were dispossessed before 1960, "[t]he Surplus People Project . . . estimated that 3,548,900 people were removed between 1960 and 1983: 1,702,400 from the towns, 1,129,000 from farms, 614,000 from black spots, and 103,500 from strategic and developmental areas."<sup>142</sup> Property-induced invisibility will persist for those dispossessed Blacks and their descendants who have been unable to recover from the original theft and thus remain economically vulnerable without land or other assets.

As a result of continuous legal land dispossession, whites who constituted less than ten percent of the population upon independence in 1994 owned eighty-seven percent of the country's land, while Blacks owned a mere thirteen percent.<sup>143</sup> Because there has been no significant transformation of property arrangements since liberation, the perception commonly held by the Black majority is that the status quo of property ownership is illegitimate because the racially imbalanced property distribution is a direct result of past colonial and Apartheid-era theft. Before any commitment to significant protection for private property can gain widespread purchase among the Black majority, something must be done to assuage the profound sense of illegitimacy that pervades perceptions of present land arrangements. If nothing is done, then one can expect the present disregard for property rights to continue.

## 2. *Consequences of Property-Induced Invisibility*

Nationally, sixty-eight percent of crimes are property-related.<sup>144</sup> In the

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Tenure Conference (Nov 26, 2001), available at <http://www.info.gov.za/speeches/2001/011128946a1002.htm>. The homelands were purportedly self-governing, but in reality, traditional chiefs were hand picked by the Apartheid government to rule the Bantustans and were given power that far exceeded their traditional authority. See also GREEN PAPER, *supra* note 133, at 9.

139. See Didiza, *supra* note 138.

140. See LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 194 (3d ed. 1995). Two of the most infamous forced removals were in Sophiatown and District Six. *Id.*

141. *Id.* at 199.

142. *Id.* at 194.

143. Daniel Owen, Land Reform—Running Out of Time, THE PROGRESSIVE REP., <http://www.progress.org/land16.html> (last visited Sept. 22, 2007).

144. The most common types of property-related crimes are "burglary at a residential premises," "theft out of or from a motor vehicle," and "malicious damage to property." CRIME INFO. ANALYSIS CTR., S. AFR. POLICE SERV., CRIME STATISTICS FOR SOUTH AF-

country's urban centers, electric fences, private security guards, high security walls, and alarm systems are the norm because of the high theft rates.<sup>145</sup>

Also, land invasions are on the rise. Upon independence in 1994, grassroots groups organized around the constitutional mandate to restitute and redistribute land. The government, thus far, has not been able to make the constitutional mandate a reality, so many of these groups are now beginning to employ extra-legal strategies to achieve land equity. For instance, organizations such as the Landless People's Movement ("LPM") organize communities to reclaim land through illegal occupation.<sup>146</sup> Founded in 2002, the LPM claims upwards of 100,000 members.<sup>147</sup> In the eyes of the poor landless masses in South Africa, the LPM has the moral high ground, though it advocates illegal actions, because it is somewhat akin to the United States civil rights organizations that engaged in illegal sit-ins during the 1960s.<sup>148</sup> Sit-ins violated the illegitimate but legal architecture of segregation, just as land invasions violate property laws that uphold a distribution of property widely perceived to be illegitimate.

In the face of increasing land invasions and high property-theft rates, the obvious question becomes whether South Africa will end up in chaos like Zimbabwe. After all, the unequal, illegitimate distribution of land in Zimbabwe was one major impetus behind the war veteran occupation of white farms and ensuing chaos that erupted in 2002.<sup>149</sup> The little known fact, however, is that there has been more farm-related violence in South Africa than in Zimbabwe.<sup>150</sup> South Africa's commitment to the rule of law is the only thing preventing a reproduction of the Zimbabwe crisis.<sup>151</sup>

In sum, there is a backlash against markets in South Africa in the form of disdain for property rights. This should not be surprising, given the

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RICA (1994/1995 to 2003/2004), available at [http://www.capegateway.gov.za/eng/pubs/public\\_info/C/86878/1](http://www.capegateway.gov.za/eng/pubs/public_info/C/86878/1).

145. Statistics show that a murder was committed every half hour, so there is no mystery as to why people live in fear. See CRIME SHOWDOWN IN THE WILD SOUTH, GUY ARNOLD, *THE NEW SOUTH AFRICA* 83 (2000).

146. The LPM demands "an end to evictions, whether on farms or in informal and other settlements, and a process of transferring land to those residing and working on it. The movement has targeted land occupations as one method of redistributing land through the self-activity of the landless, and has identified unproductive, unused or underused land and land belonging to abusive farmers as the focus for initial redistribution." See STEPHEN GREENBERG, *THE LANDLESS PEOPLE'S MOVEMENT AND THE FAILURE OF POST-APARTHEID LAND REFORM 2* (Ctr. for Civil Soc'y Research Report No. 25, Dec. 2004).

147. *Id.* The LPM is the South African counterpart to the Brazilian movement called the Landless Rural Workers' Movement (Movimento dos Trabalhadores Rurais Sem Terra). *Id.* at 5-6.

148. Its membership increases in accordance with the level of dissatisfaction with the LRP. Interview with Andile Mngxitama, Land Activist and leader in the Landless People's Movement, in Pretoria, S. Afr. (Sept. 19, 2006).

149. See MOORE, *supra* note 13, at 320.

150. See *More Squeeze than Grab, Land Reform in South Africa: Don't Expect Zimbabwe-style Invasions in South Africa*, *ECONOMIST*, Jan. 17, 2004, at 50, 50, available at <http://www.highbeam.com/doc/1G1-112346471.html>.

151. *Id.*

high rate of invisibility, especially property-induced invisibility, that persists in the country. To end this backlash against property rights, the government must work to instill a sense of legitimacy in present property arrangements through restoration. In their article about countries in transition, Eric Posner and Adrian Vermeule have noted that “[w]hen historical property rights have more legitimacy than the distribution existing at the time of transition, restitution programs channel claims into the legal system that might otherwise destabilize the market by posing a political threat to the security of post-transitional property rights.”<sup>152</sup> If nothing is done to address the ongoing effects of past theft in South Africa, then political unrest will reign supreme.<sup>153</sup> The Land Restitution Program (“LRP”) is South Africa’s attempt to address past theft.

## B. REFORMING THE LAND RESTITUTION PROGRAM

### 1. *The Land Restitution Program and its Challenges*

Under the LRP, only those dispossessed of a right in land after 1913 will receive compensation.<sup>154</sup> This particular date was chosen for several reasons. First, although Black land dispossession began prior to 1913,

152. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 789 (2004).

153. “Despite recent political improvements, South Africa is still in danger of widespread unrest brought on by the continued presence of economic inequality along racial lines” Schneider, *supra* note 12, at 24.

154. (1) A person shall be entitled to restoration of a right in land if-

- (a) he or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
- (b) it is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
- (c) he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who-
  - (i) is a direct descendant of a person referred to in paragraph (a); and
  - (ii) has lodged a claim for the restoration of a right in land; or
- (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
- (e) the claim for such restoration is lodged no later than 31 December 1998.

(2) No person shall be entitled to restoration of a right in land if-

- (a) just and equitable compensation as contemplated in section 25 (3) of the Constitution; or
- (b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.

(3) If a natural person dies after lodging a claim but before the claim is and-

- (a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or
- (b) does not leave a will contemplated in paragraph (a), the direct descendants alone, may be substituted as claimant or claimants.

(4) If there is more than one direct descendant who have lodged claims for and are entitled to restoration, the right or equitable redress in question

South Africa was not one country until after the Boer War in 1910. Thus, the 1913 law was the first major piece of legislation that allowed the newly formed South African state to legally dispossess Blacks of their land.<sup>155</sup> Second, the absence of written records, coupled with the passage of time, makes it extremely difficult to verify claims of dispossession before 1913.<sup>156</sup> Third, “most deep historical claims are justified on the basis of membership in a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics.”<sup>157</sup> Fourth, “the members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times in this century alone and are scattered.”<sup>158</sup> Fifth, “large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British.”<sup>159</sup> As a result of these complications, compensation is provided for dispossession that occurred because of the Native Land Act and subsequent laws.

The LRP has several challenges. First is the issue of landowners who currently have valid title to property that was stolen in the past but are not implicated in the original theft. While this buyer in due course has a valid expectation to maintain her land, there are other valid, competing expectations at play—namely, the expectation that when something is illegally or immorally expropriated, it should be returned.<sup>160</sup> Under no circumstance is the uncompensated taking of land from an innocent buyer in due course justified.<sup>161</sup> Nevertheless, the taking of land using the state’s powers of eminent domain is a valid mechanism for restructuring property arrangements to increase their legitimacy in society. There

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shall be divided not according to the number of individuals but by lines of succession.

Land Restitution and Reform Laws Amendment Act of 1999 § 2(1) [hereinafter the “LRA”].

155. The Afrikaner government immediately passed laws that gave Africans the right to own land only if it was located in areas designated as native reserves. The government then confiscated land from blacks who occupied property outside of the reserves and transferred it to white farmers so that many black landowners were transformed into employees or sharecroppers on white farms. See GREEN PAPER, *supra* note 133.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Bentham is the most famous for characterizing property as a basis of expectation: “Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it.” BENTHAM, *supra* note 11, 111–12.

161. When there is a taking, the majority of states agree that some form of compensation is due. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 509 (6th ed. 2003) (Under international law “[a] considerable number of states insist that expropriation can only take place on payment of adequate, effective compensation. In practice deferred payments are regarded as sufficient provided effective compensation takes place. The requirement of promptness has become subordinated to the other conditions and also to economic realities relating to payment of large sums. . . . The majority of states accept the principle of compensation, but not on the basis of the ‘prompt, adequate, and effective formula.’”) (internal citations omitted).

is extensive literature concerning the virtues and vices of land reform, which reveals that restructuring the property status quo using the powers of eminent domain can increase efficiency, promote equality, and buttress democracy.<sup>162</sup>

A second common critique is that restoration programs that allow restitution (return of the actual parcel of land stolen in the past) are inefficient because they unsettle property rights by introducing an unacceptably high degree of uncertainty over ownership rights. This is not necessarily true. Restitution done in an orderly and efficient manner causes no more uncertainty than accepted and routine features of mature capitalist economies, such as adverse possession, unrecorded security interests, uncompensated regulatory takings, inadequately compensated ordinary takings, increases in property taxes, and government regulation.<sup>163</sup> There is no doubt that during the time between the beginning and end of the claim-filing period, property rights will be uncertain. Once this period is over, "[i]f all claims are immediately recognized and announced to the world, then both losers and winners will know the extent of their existing property rights, and they will invest and trade accordingly."<sup>164</sup>

A third issue raised is the notion that restoration requires one to make morally arbitrary distinctions that have potentially life changing consequences and hence, the distinctions are unjust. For instance, choosing *who* will benefit and *what* violations are covered in the LRP involves morally arbitrary distinctions that have changed the course of many lives.<sup>165</sup> Only those who were dispossessed of a "right in land or portion of land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices" are eligible to participate in the LRP.<sup>166</sup> On what moral basis are those dispossessed the day before (on June 18, 1913),

162. See generally RUSSELL KING, *LAND REFORM: A WORLD SURVEY* (1977); ROY L. PROSTERMAN & JEFFREY M. RIEDINGER, *LAND REFORM AND DEMOCRATIC DEVELOPMENT* (1987); Timothy Besley & Robin Burgess, *Land Reform, Poverty Reduction, and Growth: Evidence from India*, 115 Q. J. ECON. 389 (2000); Eduardo Flores, *Issues of Land Reform*, 78 J. POL. ECON. 890 (1970); Moene, *supra* note 90.

163. Posner & Vermeule, *supra* note 152, at 785–86.

164. *Id.* at 785.

165. See *infra* note 171. Hungary's program makes morally arbitrary distinctions. In Hungary, the restitution program extends to foreign citizens and residents so long as: (1) they were Hungarian citizens at the time of the taking; (2) it was the taking that caused them to lose their status as a Hungarian citizen; or (3) they were residents in Hungary as of December 31, 1990. Stolen land, stolen personal property, and shares in expropriated companies may all be restituted in Hungary. The restitution program allows claims from both communist expropriations that occurred after June 8, 1949, and antisemitic confiscations that occurred between May 1, 1939, and the first Communist Parliament in June 8, 1949. All other expropriations are not covered. See András Osskó, *Land Restitution and Compensation Procedures in Central Eastern Europe*, OICRF, Nov. 19, 2002, available at <http://www.oicrf.org>; Istvan Pogany, *The Restitution of Former Jewish-owned Property and Related Schemes of Compensation in Hungary*, 4 EUR. PUB. L. No. 2, 211, 215 (1998). For information about the compensation program for East Germany and the morally arbitrary distinctions made there see, for example, Jessica Heslop & Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. INT'L. L.J. 243, 288 (1993); Frank, *supra* note 63, at 809, 833; William Karl Wilburn, *Filing of U.S. Property Claims in Eastern Germany*, 25 INT'L LAW. 649, 656 (1991).

166. See the LRA, *supra* note 154.

or even earlier, left out? By what moral standard is compensation offered for property dispossession rather than other injustices that occurred under Apartheid such as death, torture, or loss of employment?

The fact that a state cannot compensate everyone is not a valid reason for it not to compensate anyone. The best cannot be the enemy of the good.<sup>167</sup> In addition, morally arbitrary distinctions are made all the time with regard to compensation. For example, United States takings law is replete with morally arbitrary distinctions. For example, regardless of the size of the invasion, a physical occupation of property is a per se taking, while a regulation that does not allow one to transform their property and thus decreases its potential value is not a taking.<sup>168</sup> There is a high degree of moral arbitrariness in this distinction.

A fourth critique makes the case that the selection of beneficiaries for the LRP may cause serious divisions among citizens. There may be tension between beneficiaries and non-beneficiaries. Although there may be some short-term social tension, research shows that efforts to change an illegitimate status quo have the potential to reduce rather than inflame social strife in the long-term.<sup>169</sup> It is important to note that in many cases, the illegitimate property ownership status quo is what foments social animosities.

Fifth, critics may argue that the LRP is not necessary because the market will efficiently allocate resources such that those who value them the most will purchase them,<sup>170</sup> and thus, government intervention through the LRP is not necessary. Also, the LRP is subject to bureaucratic inefficiency, such as rent seeking in the selection of beneficiaries and the distribution of goods. For the foregoing reasons, critics may argue that the LRP is per se inefficient as compared to a strictly market-based solution.

This is untrue because, as Polishchuk argues, "if private property rights are not sufficiently broadly recognized in the society as legitimate and fair, it makes the property rights regime unstable. This instability precludes efficient relocation of assets, and as a result, expected efficiency gains of private ownership fail to materialize."<sup>171</sup> In South Africa, property arrangements are widely perceived to be illegitimate due to pervasive past theft. The only way to change this perception is by transforming the property status quo. This will only happen with government intervention, because a market-driven process would favor those with resources while excluding the economically vulnerable masses from receiving property.

167. For a contrary argument, see John Elster, *On Doing What One Can: An Argument Against Post-Communist Restitution and Retribution*, E. EUR. CONST. REV., Summer 1992, at 15, 15.

168. *Compare* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982), *with* *Penn Central Transp. Co. v. N.Y. City*, 438 U.S. 104, 130–31 (1978).

169. *See supra* note 90.

170. *See generally* Ronald Coase, *The Problem of Social Costs*, 3 J. L. & ECON. 1 (1960) (theorizing that if there are zero transaction costs, the efficient outcome will occur regardless of legal entitlement because those who value the resource most will purchase it).

171. Polishchuk, *supra* note 85, at 5.

Polishchuk further argues that “[c]redibility of existing property rights is . . . critically important for efficient deployment of privately owned resources.”<sup>172</sup> Without credibility, present owners will use resources to protect their property from extralegal expropriation rather than investing them efficiently, and trade will be suppressed.<sup>173</sup> One critical source of the lack of credibility, widespread property-induced invisibility, would be untouched without government involvement.

Sixth, critics may claim that the LRP is faced with insurmountable barriers that exist because different property systems from different eras must be taken into consideration. In South Africa, European settlers and indigenous Africans have had fundamentally different conceptions of ownership. At the point of expropriation, African norms were dominant, so people had occupancy and cultivation rights allocated by traditional leaders, which were based on need and availability.<sup>174</sup> At the point of compensation through the LRP, however, individuals and communities are given title to land in fee simple, because the prevailing norm is the European notion of ownership.<sup>175</sup> What was taken and what is being restored are two different things.

Under my conception of restoration, there is no challenge presented by the fact that the thing taken and the thing restored are different, and in fact, my emphasis on choice encourages this. If a person was dispossessed of a tract of land, the solution is not necessarily to give her that tract of land back, but instead to give her choices as to what kind of asset she wants. The goal is to place her in the driver’s seat, because this is how a society can begin the process of reconciling an invisible person’s relationship to society.

A seventh critique is that past wrongs should not feature prominently in a new social contract because efforts to redress wrongdoing that occurred under an invalid and presently defunct contract can undermine the new regime. While South African society can enter a new social contract, it does not start at ground zero. There are certain institutions, processes, and status quos established by previous contracts that a society inherits and brings into the new one.<sup>176</sup> Only if the new political dispensation’s break from the past is credible can its new beginning be credible. The South African government’s commitment to restoration sends a message

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172. *Id.*; see also William H. Riker & David L. Weimer, *The Political Economy of Transformation*, in *MODERN POLITICAL ECONOMY: OLD TOPICS, NEW DIRECTIONS* 80, 94 (Jeffrey S. Banks & Eric A. Hanushek eds., 1995).

173. Polishchuk, *supra* note 85, at 9.

174. See THOMPSON, *supra* note 140, at 163; Heinz Klug, *Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law*, 35 J. LEGAL PLURALISM 119, 119–21 (1996).

175. See generally Klug, *supra* note 174.

176. The South African government clearly recognizes the connection between past injustices and the new social contract. See WHITE PAPER, *supra* note 132 § 3.17.3 (“Considering the fact that more than 3.5 million people and their descendants have been victims of racially based dispossession and forced removal during the apartheid era, it is clear that a mammoth responsibility rests on the shoulders of the state to give effect to restitution of land rights.”).

that it is committed to protecting everyone's property (both white and Black), and this commitment is a credible signal that the new regime has done away with the old social contract, which prioritized the rights of whites.

Eighth, critics may also suggest that changed circumstances can void an individual or community's claim to restoration.<sup>177</sup> This argument suggests that we do not know what would have happened to property but for the original theft. The individual may have lost the property due to a natural disaster or bad investments, or alternatively, she might have doubled the value of her asset. Thus, the goal of restoration cannot be to restore a victim to the state she would have been in today but for the act. This would merely be an exercise in conjecture with no basis in fact because it is impossible to know exactly how history would be altered.<sup>178</sup>

Jeremy Waldron argues that:

The idea is that titles and jurisdictions unjustly appropriated in the mid-nineteenth century might simply revert now to their original possessors, who would then set the terms (or participate from a privileged position in setting the terms) on which the resources in question would continue to be used by present-day inhabitants of the territory. And this, it is suggested, is not by way of compensation or reparation of injustices that began and ended in the past, but, rather, as a way of putting a stop to ongoing injustice and restoring resource and power to those who have continued all along to be entitled to them. Such a reversionary proposal evidently assumes that those who were entitled to the resources just before the injustice complained of began, say, in 1850 would—apart from that injustice—*still have been entitled to them in 2003*. And that is what the supersession argument contests in denying that justice is impervious to changes in circumstances. It is a way of showing that, in certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice. And if the dispossession does not continue to count as an injustice, then reversion cannot be conceived as an appropriate

177. Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQUIRIES L. 237, 240 (2004).

178. The present standard is to restore a victim to the state she would have been in but for the act. "The essence of the law of restitution is that it enables a plaintiff to be restored to the position which he or she occupied before the occurrence of a particular event, where that event is of a type which triggers a restitutionary response." Graham Virgo, *What is the Law of Restitution About?*, in *RESTITUTION PAST, PRESENT AND FUTURE* \_\_\_\_ (Cornish et al. eds., 1998). See also *Factory at Chorzów (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) ("The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."). Waldron thinks that the present standard is an untenable counterfactual. See Jeremy Waldron, *Redressing Historic Injustice*, 52 UNIV. TORONTO L.J. 135, 144 (2002) ("How can we know what would have happened if some event that in fact did occur had not taken place?"); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 8 (1992).



remedy.<sup>179</sup>

Waldron is correct, and an attempt to reverse past theft might very well be an injustice to current inhabitants if, as he points out, restoration means current inhabitants will starve or be subject to repugnant inequalities.<sup>180</sup> Justice may require the children of the dispossessed share the land with the daughters and sons of those who unjustly expropriated it, or with newcomers, who may have had nothing to do with the past wrong.

Nonetheless, the dispossessed are still owed compensation for past injustice, insofar as it does not have debilitating consequences for current owners. The correct conceptual framework for restoration is that of unpaid debt obligations, which are inheritable.<sup>181</sup> The debt includes two aspects—which are assets and the agency that comes with owning assets—so justice requires that assets and agency be restored. Restoration does just this, by giving the dispossessed asset-based choices.

Ninth, in addition to the problem of changed circumstances, the passage of time presents other barriers to the LRP. For instance, property may have been dispossessed from an individual, who is now deceased, or a community, whose members are now difficult to identify, evidence of ownership may be depleted or nonexistent, and the present value of the property stolen may be difficult to determine. The LRP, as well as compensation programs in Germany, Hungary, and beyond, prove that these challenges are significant but not insurmountable.<sup>182</sup>

In South Africa, for example, if the entitled individual is dead, then the LRP allows for the direct descendants or the deceased's estate to receive compensation. Various forms of evidence are accepted to prove that an individual was part of a community or that she had a right to a particular piece of land. These include anthropological evidence, evidence from the national archives, graves and ruins that prove occupation by a certain individual or family, and site visits where claimants testify as to exactly where they used to reside, and this testimony is compared to the testimony of neighbors.<sup>183</sup> In terms of valuation, the Land Claims Court decided that the market value at the time of dispossession would be the starting point, which could be adjusted according to factors set out in section 25(3) of the Constitution;<sup>184</sup> all market-value assessments are determined by an independent assessor.<sup>185</sup>

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179. Waldron, *supra* note 178, at 244–45 (emphasis added).

180. This is one example Waldron gives to explain why it is the case that “in certain sequences of circumstances, dispossession may not continue to count as an injustice even though the events that led to it undoubtedly were an injustice.” *Id.*

181. For more about the inheritance argument, see generally Bernard Boxill, *A Lockean Argument for Black Reparations*, 7 J. ETHICS 63 (2003).

182. See *supra* note 65 and accompanying text.

183. Interview with Maureen Tong, Chief Operations Officer of Housing Department (SA), in Capetown, S. Afr. (Sept. 13, 2006).

184. See Former Highlands Residents: *Ex parte In re Ash v. Dep't of Land Affairs* 2000 (Zall) 5A (LCC) (S. Afr.).

185. *Id.*

Lastly, one may argue that the LRP resurrects a past status quo, which can be non-egalitarian or illegitimate. However, restoration requires that the past status quo, or the new one created based on past rights, be significantly more legitimate than the present one. Due to the intensification of law-based, racially discriminatory land dispossession after 1913, the pre-1913 property status quo—although not perfect—is widely thought to be more legitimate than the one that existed at independence in 1994.<sup>186</sup> In order to increase the perceived legitimacy of land arrangements resulting from the LRP, the government decided to treat women and men equally in the restoration program,<sup>187</sup> despite patriarchal land traditions that existed during the period eligible for compensation (1913-94).

## 2. *Who Should Benefit from the Land Restitution Program?*

I have argued that a state committed to restoring past rights in land must, as a baseline, address property-induced invisibility. Addressing property-induced invisibility requires the state to prioritize those who, as a result of past theft, are presently economically vulnerable and dependent on the state for their most basic needs. South Africa has committed a substantial amount of resources to its LRP, and thus has been able to include a wide swath of people in the program, including those who were economically vulnerable at the time of confiscation, those who are still economically vulnerable, and those who were never made economically vulnerable as a consequence of the confiscation. Consequently, the baseline has been exceeded because there are resources available for those who were subject to property-induced invisibility and those who were not.

South Africa's expansive definition of a right in land is how it managed to ensure that a wide population benefits from its LRP. A right in land is

any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.<sup>188</sup>

186. Increasing the legitimacy of land arrangement is one of the objectives of South African land policy. However inadequate settlements may be, compared to the injustices of the past, it is essential that they are perceived as the most equitable that can be achieved in the circumstances.

187. South Africa cannot honor the prevailing system of land ownership at the time of expropriation. For instance, if land was taken from a Zulu tribe after 1913, then each member of the tribe will receive their pro rata share of the resources allocated. The chief is stripped of his traditional control over land. Contrary to the system of land ownership existing at the time of expropriation, the chief and the single mother are placed on an equal plane. While this is not in line with tradition, leveling the playing field is essential for rectifying property-induced invisibility. When land is taken as part of a larger strategy of dehumanization, the re-humanization process cannot recreate hierarchies that undermine equality.

188. Restitution of Land Rights Act of 1994 ch. I § 1(xi). It is important to note that the racial discrimination must have had a "direct divestitive effect," and thus the focus is on the "re-vesting of a right lost," rather than redistribution based on need. See M.D.

The LRP received broad political support because it benefits the pre-1913 Black elite who owned land, as well as those of humble means with mere occupancy rights.<sup>189</sup>

The LRP, however, does not place limits on how much an individual or community can claim, so it is possible for a member of the past Black elite to receive R2,000,000, while a former labour tenant receives R200. Insofar as the LRP perpetuates these glaring inequalities, the process and result are less likely to be viewed as legitimate. In order to reduce inequalities, it is advisable for South Africa to provide full compensation up to a certain amount, partial compensation for amounts above this, and an upper limit on the amount of compensation people can receive.<sup>190</sup> In order to mitigate inequality, the Hungarian government followed a similar path in their reparations program.<sup>191</sup> They compensated in full up to HUF 200,000 (\$2,300), and the remainder was compensated on a sliding scale, but compensation could not exceed HUF 5,000,000 (\$57,600) per piece of property and per former owner.<sup>192</sup>

It would not be fair, however, for the past Black elite to receive less than the full market value for land expropriated pre-1994, while present landowners (mostly white) receive full compensation if their land is expropriated through the state's power of eminent domain post-1994. The weight of reducing inequality must be borne by both the past Black elite, as well as the present white elite. Section 25 of the Constitution takes this into account by making the fair market value applicable to post-1994 expropriations only the starting point for just compensation calculations.<sup>193</sup> The award can be adjusted depending upon the following equitable factors: "the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct

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SOUTHWOOD, THE COMPULSORY ACQUISITION OF RIGHTS BY EXPROPRIATION, WAYS OF NECESSITY, PRESCRIPTION, LABOUR TENANCY AND RESTORATION 234, 247 (2000). The right in land "may have been established by occupation of the land for a substantial period. It is not limited to a right recognised by law. It is not limited to ownership rights, and it may include certain long-term tenancy rights and other occupational rights." WHITE PAPER, *supra* note 132 § 4.14.2.

189. Deborah James et al., *(Re)constituting Class?: Owners, Tenants and the Politics of Land Reform in Mpumalanga* 31 J. S. AFR. STUDIES 825, 841 (2005) (There is "a recognition, among those owners who have derived financial benefit from 'selling' land, that the restitution process, although beneficial only to a few, had been undertaken with the electoral backing of the broader population: 'We got this land back through other people's votes'"); see also Walker, *supra* note 111, at 647 ("The restitution of land rights act was the first piece of transformative legislation to be passed—amid a standing ovation—by South Africa's newly democratized Parliament in November 1994.").

190. The threshold should vary depending upon whether the claim is urban/rural or a group/individual claim.

191. Hungary's scheme provides partial compensation in the form of vouchers. See Cheryl W. Gray, Rebecca J. Hanson & Michael Heller, *Hungarian Legal Reform for the Private Sector*, 26 GEO. WASH. J. INTL. L. & ECON. 294, 309 (1992); Michael Heller & Christopher Serkin, *Private Law: Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1402 (1999); Neff, *supra* note 94, at 373–75 (1992).

192. Gray, Hanson & Heller, *supra* note 191, at 309; Heller & Serkin, *supra* note 191, at 1402; Neff, *supra* note 94, at 374.

193. *Supra* notes 184–85 and accompanying text.

state investment and subsidy in the acquisition and beneficial capital improvement of the property; the purpose of the expropriation.”<sup>194</sup> The present landowning white population must help shoulder the burden of legitimizing property rights alongside the past Black elite.

### 3. *How Should the Process Unfold?*

Invisibility was caused in many ways. Many people were routinely dispossessed of land, subjected to the cruelest forms of torture, deprived of employment and educational opportunities, and denied the most basic human freedoms. That is why it is crucial that the LRP is part of a larger restorative process that includes the Truth and Reconciliation Commission,<sup>195</sup> as well as general redistributive measures through the housing, education, social security, and health sectors. The end of Apartheid began the process of political inclusion, while restoration can do a significant amount of work towards basic economic inclusion.<sup>196</sup>

#### a. Transparency and Rule of Law are Crucial

Racist land laws served as the foundation upon which the Apartheid state was constructed and hence, reversing the effects of these laws is an essential element in the present, ongoing deconstruction of that white supremacist state. An important part of the deconstructionist project is the property clause of the Constitution.<sup>197</sup> That clause takes into account the

194. *Id.*

195. See generally CHARLES VILLA-VICENCIO & WILHELM VERWOERD, LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (2000); RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE (2001). See also Theunis Roux, *Land Restitution and Reconciliation* (Nov. 2006), available at <http://www.saifac.org.za/docs/2006/Land%20Restitution%20and%20Reconciliation%20in%20South%20Africa.dftz.pdf> (suggesting that the Truth and Reconciliation process should have dovetailed with the LRP).

196. American blacks are a minority and are politically and economically marginalized. In contrast, Blacks in South Africa are the majority and hence, politically empowered, but economically marginalized. Reversing invisibility in South Africa must focus on economic inclusion, where a two-prong approach may be more appropriate for American blacks.

197. See S. AF. CONST. 1996 BILL OF RIGHTS § 25 (“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. 2. Property may be expropriated only in terms of law of general application: a. for a public purpose or in the public interest; and b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. 3. The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including; a. the current use of the property; b. the history of the acquisition and use of the property; c. the market value of the property; d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and e. the purpose of the expropriation. 4. For the purposes of this section: a. the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and b. property is not limited to land. 5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. 6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the

pervasive property theft that occurred in South Africa's tumultuous past, while setting the stage for a future where equality and dignity are paramount. The LRP is transparent and comports with the Constitution. In fact, although the Constitution allows expropriation, LRP officials are taking an extremely cautious approach and have for the most part relied on a market-driven willing seller/willing buyer approach. The government did not initiate its first formal proceeding to expropriate white farms until 2007.<sup>198</sup>

So long as the state continues to operate within the Constitution's parameters and pays just compensation for expropriated properties, its efforts to rectify property-induced invisibility will not lead to more property-induced invisibility. Its efforts may cause less severe harms, such as emotional distress, inconvenience, and lack of compensation for the non-market value people place on property, but restructuring the property status quo in order to legitimize it is not a costless, frictionless process.

Nevertheless, it is crucial that all members of society view the process as fair. Whites, who are the gatekeepers of capital in South Africa, will likely close the gate if the process is viewed as unfair. Also, if LRP beneficiaries feel like both the process and result were fair, then it is more likely that the LRP will edify invisible people's relationships to society.<sup>199</sup>

#### b. Providing Asset-Based Choices Is Critical

I have argued that a transfer of assets within a paradigm of choice is required to bring invisible people into the social contract. In theory, under the LRP, a dispossessed claimant can be compensated with a variety of asset-based choices. The options include:

restoration of the land from which claimants were dispossessed; provision of alternative land; payment of compensation; alternative relief including a package containing a combination of the above, sharing of the land, or special budgetary assistance such as services and infrastructure development where claimants presently live; or

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extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. 7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress. 8. No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). 9. Parliament must enact the legislation referred to in subsection (6).").

198. Michael Wines, *South Africa to Seize 2 White Owned Farms*, N.Y. TIMES, Oct. 10, 2006, at A13; *First White Owned Farms Expropriated*, Feb. 14, 2007, <http://iafrica.com/news/sa/628569.htm>.

199. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 162 (1990) (arguing that the normative rather than instrumentalist perspective better captures why people obey the law: From the normative perspective "people react to social experiences in terms of the fairness of the outcomes they receive (distributive justice), and the fairness of the procedures by which those outcomes are arrived at (procedural justice).")

priority access to state resources in the allocation and the development of housing and land in the appropriate development programme.<sup>200</sup>

South Africa is unique because, at least in theory, it has embraced the importance of a bottom-up approach that focuses on asset-based choices in addressing past land dispossession. The *White Paper on Land Policy*, which is the government's definitive policy on land matters, states that "solutions must not be forced on people."<sup>201</sup> As a result, the country has the potential to move beyond a paradigm that focuses merely on reparations to a new emphasis on restoring people's relationships to society.

Choice is particularly important with respect to the return of land, as opposed to other forms of property. For example, one cannot assume that people necessarily want to return to the land that was stolen from them, especially when there has been a significant passage of time between the expropriation and the restorative act. If agricultural land was confiscated, people may no longer have the skills, capital, or desire to work the land as they once had. Instead, they may prefer to establish themselves in the city in order to access the wealth, opportunities, and social infrastructure found therein. Alternatively, the passage of time may have attenuated ties to the community where the property is situated, or individuals may not want to return to the land because a series of harrowing events that culminated in the expropriation make the land a constant reminder of the trauma and pain suffered. Similarly, it is also not fair to assume that people do *not* want to return to the land. Many people have an unquantifiable but reasonable attachment to a particular piece of land. The land may be where their ancestors are buried, it can be a constitutive element of their cultural identity, or it can be infused with valid emotive significance of various other origins.

Unfortunately, despite the mandate of the White Paper, in practice, the role of choice is muted to a large extent, and those who have been dispossessed are not given the full array of asset-based choices.<sup>202</sup> Individual claims have mostly been levied against urban land, where the government's preference (and the most common form of compensation) is monetary compensation.<sup>203</sup> The experience of former Sophiatown residents, which is the site of one of the most infamous Apartheid-era urban evictions, is telling. Nkuzi, a well-regarded land-sector NGO noted that, "[w]hile the validity of their claims was undeniable the government decided that 'restoration of land was not feasible . . . and alternative land within the same magisterial districts was not available'. . . and therefore they offered only financial compensation to the claimants. . . ."<sup>204</sup> It is clear from Nkuzi's accounts that there was no room for creative, people-

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200. See WHITE PAPER, *supra* note 132 § 4.14.4.

201. *Id.* § 4.14.1.

202. *Id.*

203. *Id.*

204. Walker, *supra* note 111, at 662.

driven remedies as contemplated in the White Paper, because the only options contemplated were return of the land, alternative land, or financial compensation.<sup>205</sup> There were no innovative in-kind options offered, such as access to highly subsidized credit, free vocational training, or any other options claimants may have desired.<sup>206</sup>

Group claims are largely made against rural lands, where the government's preference (and incidentally, the common outcome) is to give the group their land back.<sup>207</sup> For all group claims, the Commission on Restitution of Land Rights holds a general meeting that all beneficiaries are invited to attend.<sup>208</sup> Ostensibly, the advantages and disadvantages of all options are discussed and eventually a remedy is chosen by majority vote. But it is unclear to what extent the government's preferences color these meetings or which options are discussed. What is clear is that people-driven, in-kind options are not seriously on the table.

Despite the political mandate articulated in the White Paper and the fact that approximately 68,000 claims have already been decided,<sup>209</sup> there have only been a few instances where people were given the opportunity to craft bottom-up, self-styled restoration packages. This is what led Tozi Gwanya, Chief Land Claims Commissioner, to admit that "the White Paper provides for options but as officials, we have been unable to make it a reality."<sup>210</sup> The problem is that providing creative choices takes time, but time is short.<sup>211</sup> The Commission on Restitution of Land Rights was given until March 31, 2008 to finish its job.<sup>212</sup>

There have been a few rural examples of self-styled remedies where beneficiaries were allowed to exercise their agency.<sup>213</sup> A community in Putfontein, which is located in the Guateng region, leveraged their money to construct a housing development.<sup>214</sup> A community in Queen-

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205. *Id.*

206. *Id.*

207. Didiza, *supra* note 138.

208. *Id.*

209. See Interview with Tozi Gwanya, *supra* note 112.

210. *Id.* See also Interview with Blessing Mphela, Land Claims Commissioner for Guateng and North West, in Pretoria, S. Afr. (Jan. 11, 2006) (expressing the view on the matter that "issues around remedies were not well thought out").

211. In general, in order to allow for creative asset-based choices, restoration programs require a sophisticated, efficient, and non-corrupt bureaucracy. The problem is that transitional or developing governments who most need restoration programs often do not have developed bureaucracies or suffer from high rates of corruption. See generally, SHAUKAT ALI, CORRUPTION: A THIRD WORLD PERSPECTIVE (1985); DAVID J. GOULD, BUREAUCRATIC CORRUPTION AND UNDERDEVELOPMENT IN THE THIRD WORLD: THE CASE OF ZAIRE (1980); STEPHEN KOTKIN & ANDRÁS SAJÓ, POLITICAL CORRUPTION IN TRANSITION: A SKEPTICS HANDBOOK (2002).

212. Walker, *supra* note 111, at 648.

213. One critique proffered by an opposition party is that restoration monies are being used to provide services that the government is suppose to provide anyway. However, many of the projects the communities are pursuing were not the local government's priority list. By using restoration monies, communities are able to make their priorities come to fruition because they are able to leverage their monies to receive additional monies from the government. Interview with Tozi Gwanya, *supra* note 112.

214. *Id.*

stown, which is located in the Eastern Cape, received half of their award in money paid to eligible households, while the other half was used for three development projects that would benefit all members of the community—a community center, an old-age home, and an indoor sports center.<sup>215</sup> Finally, a community in Keiskamahoek also split the funds: Half of the money was received in financial compensation, while the other half was invested in community development projects, which included building three extra classrooms in the local school, repairing the central road, and creating a forestry project to expand the forest.<sup>216</sup>

In urban areas, there are also a few instances where people were able to take an active role in shaping their remedy. District Six, in Cape Town, is the most acclaimed example, but communities in Port Elizabeth, East London, and Durban have been successful at moving beyond the cookie-cutter remedies presented by the government to remedies that are largely self-styled housing developments.<sup>217</sup>

South Africa must transform the LRP, which at present functions as a reparations program, into a restoration program. The state must encourage communities and individuals to exercise their volition as they did in the few rural and urban communities discussed above, because ultimately, the provision of asset-based choices is how the larger project of restoring a community or individual's relationship to society will be accomplished. This type of creative, humanizing approach that places dispossessed individuals in control of their own lives and communities will go a long way toward reintegrating people back into the social contract, thereby ameliorating property-induced invisibility.

When the full array of choices is not on the table, then the consequences can be dire. For example, the Khomani San were given limited options—return of their land or cash compensation.<sup>218</sup> They chose return of their land, but today, the settlement is in shambles, partly due to lack of post-settlement support.<sup>219</sup> This could have been avoided if the Khomani San were given a more robust set of options. They could have, for example, reduced the acreage received in exchange for various types of government-guaranteed post-settlement support. The key is for the government to provide a space in which beneficiaries are heavily encouraged to look beyond the narrow options presented, take charge, and, within the bounds of resources available, create a remedy that satiates their idiosyncratic needs.

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215. The Department of Social Development and the local municipality contributed to the development projects. *Id.*

216. *Id.*

217. Walker, *supra* note 111, at 658.

218. *Id.* at 649.

219. *Id.*



## V. CONCLUSION

My analysis begins at the point that a state has already decided to compensate people for past dispossession. The two pertinent questions this Article addressed were: Who should benefit?, and How should the process unfold? I have argued that, as a baseline, those subject to property-induced invisibility must be restored. Property-induced invisibility results when property is confiscated, such that a person or community is removed from the social contract.

In terms of how the process should unfold, I have argued that states must move beyond mere reparations (compensation without choice) to restoration (compensation with choice). Restoration is superior to reparations because it entails the larger, more complex task of restoring an invisible person's or community's relationship to society. The reintegration process of dispossessed individuals and communities is facilitated when they are allowed to choose how they are compensated and given viable asset-based options to choose from. By rejecting the dominant paradigm of reparation and adopting a policy of restoration, a country can move beyond restoring property rights to restoring political and economic visibility.