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Convergent in Pecuniary Reparations**

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Tort Theory, Microfinance, and Gender Equality Convergent in Pecuniary Reparations

Anita Bernstein

Abstract

Governments around the world have undertaken reparations programs following historically recent experiences of serious human rights violations. This chapter uses tort theory to defend monetary payments as a constituent of national repair. It argues that paying money to victims comports with feminism too.

Once accepted in principle, this measure raises a new question: What is the best way to convey pecuniary reparations in transitional settings? With due heed for the reality that circumstances always vary from country to country, the chapter argues for “microfinance” (as distinguished from “microcredit”) as the preferred mode for transitional governments designing new national reparations programs. The chapter works with, while also trying to deepen, a conventional wisdom that microfinance advances the social and economic status of women.

Introduction

In numerous possible contexts national governments can start reparations programs. From the array of possibilities, this chapter focuses on reparations for the effects of a crisis that ravaged a whole nation—for example civil war, genocide, dictatorship, apartheid—rather than only one discrete, odious deviation from the norms of a functioning democracy. Isolated incidents can generate urgent needs of repair,¹ but the reparations under discussion in this chapter presume a more fundamental ambition: a declaration of the nation’s past as broken, and its future in need of mending.

Precedents for this undertaking provide models for the subcategory of interest here, pecuniary reparations: that is, programs that seek to identify and compensate individual citizen-claimants in recognition of human rights violations that they suffered during the recent past. Such recognition can take monetary form in transfer payments to individuals. Argentina, which through legislation in 1994 appropriated reparations for victims of forced disappearances and detentions that took place from 1975 to 1983, paid in the form of bonds;² Chile, which in 1992 appropriated pension funds for the victims of human rights violations that took place from 1973 to 1990;³ and South Africa, which disbursed cash payments totaling US \$5.5 million to approximately 14,000 apartheid-era victims,⁴ are among the countries that have been able to distribute pecuniary reparations following national crises. In less wealthy nations, including Peru, Rwanda, Haiti, Sierra Leone, and Guatemala, units of government have expressed approval of providing monetary compensation to citizen-victims in the wake of their own national crises, suggesting that pecuniary reparations holds appeal as policy in some nations hard-pressed to finance a new round of transfer payments.

When it opts for pecuniary reparations, a national government necessarily rejects various alternative stances. It disagrees with any onlookers who say that the endeavor of

¹ I remark on the problematic nature of “isolated incidents” in Anita Bernstein, “Treating Sexual Harassment with Respect,” *Harvard Law Review* 111 (1997): 445, 499 n. 331. This reservation noted, I mean to exclude for this purpose reparations contexts like the internment of Japanese citizens in the United States during World War II, or the “stolen generation” of aboriginal children forcibly separated from their parents during the twentieth century in Australia, focusing instead on comprehensive national schemes.

² María José Guembe, “Economic Reparations for Grave Human Rights Violations: The Argentinian Experience,” in *The Handbook of Reparations*, ed. Pablo De Grieff (New York: Oxford University Press, 2006), 29-31.

³ Elizabeth Lira, “The Reparations Policy for Human Rights Violations in Chile,” in *Handbook*, 83-85.

⁴ Christopher J. Colvin, “Overview of the Reparations Program in South Africa,” in *Handbook*, 188-89.

reparation is futile. It does not believe that money in particular cannot effect meaningful reparation, and goes a step further by denying that payments to individuals waste money compared to collective payments.⁵ Consistent with Pablo de Greiff's panoramic "Justice and Reparations,"⁶ this government has implicitly deemed insufficient two significant constituents of transitional justice: non-material reparations (such as an apology only)⁷ and disbursements that pursue a collective goal (such as economic development) that make individuals better off only indirectly.⁸

Economic development hovers in the wings behind a reparations stage. Because reparations programs are frequently established in contexts characterized by disarray and vulnerability, they likely coexist with fragile national economies, shaky financial institutions, uncertain or erratic regulation of these financial institutions and related commercial practices, patchy telephony, and technological underdevelopment generally. Systemic human rights violations for which states have acknowledged responsibility usually are part of a larger devastation that did not leave the rule of law unaffected and had harmful effects on both the safety and protection of investment capital and the physical safety of civilian citizens.⁹ A government certain of its plan to make transfer payments to victims could decide to wait for some marker of stability to arrive before forming its plan. But the wait might be too long, especially for a government that wants to capitalize on some of the advantages of economic reparations. If (contrary to some rhetoric heard from some transitional governments), far from having to choose between reparations programs and development programs, one could design a reparations program

⁵ See *infra* p. — (discussing these debates over reparations fundamentals).

⁶ Pablo de Greiff, "Justice and Reparations," *Handbook*, 451.

⁷ In 1991, for example, Pope John Paul II proclaimed an apology for the injuries done to Africa by Christian Europe.

⁸ After World War II, for example, Japan invested in the economies of Burma, the Philippines, Indonesia, and Vietnam pursuant to treaties whose names included the word "reparations."

⁹ "In a total crisis, the state virtually ceases to exist, national economies disintegrate, and social and political structures melt away. A significant number of people are exposed to a day-to-day struggle for survival, often separated from their homes and deprived of their usual sources of livelihood. In particular, total crisis means that national governmental and civil society organizations have been destroyed; the production and market distribution of goods and services has been disrupted; institutional capacity for policy decision and planning at [the] national level has been eliminated or curtailed ... [and] large numbers of individuals have been physically and socially displaced and were subject to traumatizing experiences of violence."

Hans Dieter Seibel, *From Recipients of Reparation Payments to Shareholders of Microfinance Institutions: A Study of the Possible Relations Between Reparations for Victims of Human Rights Abuses and Microfinance*, presented Oct. 15-18, 2003, <http://www.uni-koeln.de/ew-fak/aef/08-2005/2003-6%20ICTJ%20Microfinance.pdf> (hereinafter Seibel, *Reparations Shareholders*).

in a way that at the same time serves developmental goals, the advantages of moving forward immediately become plain.

This prospect of achieving both reparation and development is realistic if “microcredit” or “microfinance”¹⁰ is indeed as salutary as its many admirers believe. That individuals benefit from receiving money is axiomatic. When financial institutions profit from such transactions with individuals, they too regard themselves as better off. When enough people and individuals join this new expansion of the banking business, gains spread beyond parties to the deals.

Many observers continue to believe that gains rooted in small banking transactions change the world. The Nobel peace prize went in 2006 not to treaty-signers or war-renouncers but jointly to an economist and the high-yield bank he founded, which had about \$564,000,000 on deposit at the time of the award.¹¹ “Lasting peace can not be achieved unless large groups find ways to break out of poverty,” the Norwegian Nobel Committee said in its announcement of the prize. “Micro-credit is one such means. Development from below also serves to advance democracy and human rights.” Tellingly for this volume, the Committee added that microcredit was “an important liberating force in societies where women in particular have to struggle against repressive social and economic conditions.”¹²

As other contributors establish elsewhere in this volume, the effort to achieve reparation following national crisis is at least hobbled, if not defeated, by conceptions of agency, identity, and recognition that take inadequate note of women’s experiences and consciousness. Human rights, procedural rights, the law of war, acts of state, public discourse, dignity, distributive justice, and everything else that occupies the polity are all women’s issues as well. They give rise to entitlements for both men and women, as individual citizens and stakeholders in the national collective.

Economic Compensation for Individuals Post-Crisis

International law creates at least a basis if not a mandate for reparations that can take a pecuniary form. Numerous legal instruments—the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment; the Convention on the Rights of the Child; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the American Convention on Human Rights; and the African

¹⁰ Working definitions follow below on pp. —.

¹¹ <http://www.grameen-info.org/bank/GBGlance.htm>.

¹² Press release, Norwegian Nobel Committee, The Nobel Peace Prize for 2006, October 13, 2006, http://nobelprize.org/nobel_prizes/peace/laureates/2006/press.html

Charter on Human and Peoples' Rights—declare a right to redress for human rights violations.¹³ Broadly understood, reparations constitute one form of such a legal remedy.

The law continues intertwined with reparations at every stage, from the early design of each program to its conclusion. Legislation creates reparations schemes.¹⁴ National laws decree what the government may do and which individuals will participate in processes. Judges, advocates, administrative lawyers play leadership roles in the implementation of reparations measures. Even when laws and lawyers are absent from a particular locus of reparations, a discourse associated with law—words like rights and justice—will likely be present, and reparations themselves serve as instruments to rebuild or install a rule of law.

Although these iterations of law in reparations emphasize “public” law—especially international law, human rights law, and criminal law—the identification of individual victims also invokes a field of “private” law, the law of personal injuries. Tort law provides for compensation to persons injured by wrongful conduct. Within law, it contains its own jurisprudence—a perspective on law-based responsibility that, while compatible with the public law governing states, crimes, and assertions of human rights violations, brings its own concerns to the assignment of entitlements and responsibilities. This jurisprudence provides for torts-focused views on particular choices that face reparations planners.

Compensation as a Constituent of Doing Justice

International law recognizes a variety of means, not just money, to effect repair following violations of human rights. In 2006, the General Assembly of the United Nations adopted a report of the High Commissioner for Human Rights declaring that reparations to, or in respect of, victims encompass “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”¹⁵ The last two are particularly broad categories that include a range of measures: verification of facts and disclosure of truth, searches for corpses, public apologies, tributes to victims, civilian

¹³ Human Rights and Equal Opportunity Commission [Australia], Social Justice Report 2000, ch. 5, “Reparations” http://www.hreoc.gov.au/social_justice/sj_report/chap5.html#ch5_international_law.

¹⁴ The Handbook of Reparations contains almost three hundred pages of “primary documents and legislation.”

¹⁵ UN General Assembly, Sixtieth Session, Agenda item 71(a), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Human Rights Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 18, A/RES/60/147, 2006.

control of the military, an independent judiciary, and the installation of codes of conduct and ethical norms.¹⁶

A torts perspective on reparations casts no slight on these ambitious ends by focusing on a discrete portion of them. The torts vantage point shares de Greiff's view that the word reparations "refer[s] to measures that provide benefits to victims directly."¹⁷ It emphasizes compensation more than restitution, while acknowledging overlap between these two categories.¹⁸ Most fundamentally, it emphasizes the need for money (or its close equivalent) to change hands. An entity accepting responsibility for past wrongs—probably a government—disburses money; victims or their heirs receive it.

The monetary nexus is integral to torts. In its use of the term "damages" for "the monetary award for legally recognized harm,"¹⁹ tort law aspires to integrate wrongs and rights through the disbursement and receipt of money. This implicit unity appears more explicitly in the American compendium *Restatement (Second) of Torts*, which defines damages as "the sum of money awarded to a person injured by the tort of another"²⁰ and declares that this money is awarded to vindicate the ideals of tort law generally:

The rules for determining the measure of damages in tort are based upon the purposes for which actions of tort are maintainable. These purposes are:

- (a) to give compensation, indemnity or restitution for harms;**
- (b) to determine rights;**
- (c) to punish wrongdoers and deter wrongful conduct; and**
- (d) to vindicate parties and deter retaliation or violent and unlawful self-help.²¹**

¹⁶ *Ibid.*, 22-23.

¹⁷ De Greiff, "Justice and Reparations," 453.

¹⁸ *Restatement (Second) of Torts* (Philadelphia: American Law Institute 1977) § 901(a) (asserting that the first principle of tort actions is "to give compensation, indemnity or restitution for harms"). On the ranking of compensation ahead of restitution, see *ibid.*, cmt. *a* (noting that tort law, unlike the law of unjust enrichment, does not focus on the benefit that the defendant received: "This first purpose of tort law leads to compensatory damages."). See also John C.P. Goldberg, "Two Conceptions of Tort Damages: Fair v. Full Compensation," *De Paul L. Rev.* 55 (2006): 435 (parsing distinctions between compensation and indemnification, which parallel distinctions between full and fair compensation).

¹⁹ Dan B. Dobbs, *The Law of Torts* (St. Paul: West Publishing Co. 2000), 1047.

²⁰ *Restatement (Second) of Torts*, § 902.

²¹ *Ibid.*, § 901.

In contrast to this wide claim of reparative ambition and possibility, several writers have singled out monetary compensation as uniquely problematic among the possible means of reparation following national crisis. Taking the perspective of a victim, they question the reparative effect of receiving cash from a distant government.²² Taking the perspective of a payor-planner or observer, they doubt that disbursements to individuals constitute a priority for a nation as it emerges from chaos and crisis.²³

A torts-centered response to these criticisms would insist that while money is indeed never sufficient to repair serious violations of human rights, it is necessary. Truth commissions, apologies, forward-looking rhetoric, newly elected democratic governments committed to change, and other nonpecuniary measures are crucial to the rebuilding of societies in transition: but the currency of torts redress is literally found in currency. Moreover, because human rights violations trammel on persons as individuals, the currency of reparations must go to them directly and personally: Collective payments and programs, though undoubtedly salubrious, do not discharge this obligation.

Torts perspectives focus on a crucial half of a balance that otherwise might be overlooked. According to de Greiff, reparations payments without truth-telling can look to victims like “blood money,” whereas without payments, truth-telling can look like “cheap talk.”²⁴ Truth-telling ceases to be cheap talk when it includes the receipt and the disbursement of reparations monies. The value of receipt is at one level obvious: For most people, to have more of it is better than to have less. The rare recipient who disagrees and deems money odious may repudiate or give away her payment. (Exploring another level, we presently take up the question of how to refine the payment of money to enhance its gains.²⁵)

²² Women are prominent among the money-skeptics. Roman David & Susanne Choi Yuk-Ping, “Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic,” *Human Rights Quarterly* 27 (2005): 392, 403 (noting that some mothers of disappeared sons in Argentina refused financial compensation on the ground that it would reduce their quest for “truth and justice”); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 103 (arguing that “reparations fall short of repairing victims or social relationships after violence” and questioning “whether the most obvious need of victims is for compensation”); *ibid.* at 110 (“Social and religious meanings rather than economic values lie at the heart of reparations”). See also Tom Tyler & Hulda Thorisdottir, “A Psychological Perspective on Compensation for Harm: Examining the September 11 Compensation Fund,” *De Paul L. Rev.* 55 (2003): 355, 361 (2003) (emphasizing that from a victim’s point of view, monetary compensation can never be adequate: only “moral accountability” can satisfy).

²³ Minow, *Between Vengeance and Forgiveness*, 73; Maryam Kamali, “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa,” *Columbia Journal of Transnational Law* 40 (2001): 79, 129 n.173.

²⁴ De Greiff, “Justice and Reparations,” 461.

²⁵ See *infra* p. — (pagination to be added)

Disbursement yields its own benefits to the society and its government. Instrumentalists may note that by declaring a financial obligation that a successor regime owes to victims, these payments open the possibility of deterrence: Even though primary wrongdoers are likely not available to share in the obligation, a pecuniary program of reparations establishes ledgers that can be used in the future should wrongdoer-controlled assets become accessible. Technological innovation having made recordkeeping cheaper, and hidden wealth easier to uncover, the establishment of these ledgers declares that this government has not only the machinery but the will to find, catalogue, and reallocate the wealth that human rights violators wrongly hold. For noninstrumentalists and instrumentalists alike, ledgers affirm an ideal of governmental responsibility—not only to apologize and tell the truth but to pay for its own misdeeds as measured in wrongs and rights.²⁶ The endeavor of determining a monetary amount to be paid, both in the aggregate and to each recipient, makes the reality of past wrong concrete and visible even before any funds are transferred.²⁷

Not Just Money: Torts as Recognition

We have noted the dichotomy that casts the phrase “blood money” to describe monetary compensation without truth-telling, with “cheap talk” the complementary dismissive phrase used for the inverse phenomenon. Monetary compensation and truth-telling in this view are incomplete halves, each needing the other to forestall a well-earned pejorative and effect real reparation. How do the two come together? The annals of reparations present several possibilities, to which the tort-focused approach of this chapter adds its own perspective. For this purpose, Torts emphatically does not reduce to the payment of damages. It concerns itself at least as much with the agency of the victim, and the generation of recognition for an affront to her agency, as with her pecuniary state.

Mere compensation has never accounted for all of what tort law and policy seek to accomplish. Any law-based scheme that purports to compensate without recognition of the individual behind a claim—a person who holds rights and freedoms—is abjuring Torts for something else.²⁸ Tort law endeavors to speak for victims by supporting them

²⁶ This issue too arises later in the chapter. See *infra* – (page to be added)

²⁷ Cf. Christian Sundquist, “Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations,” *New York University Annual Survey of American Law* 58 (2003): 659, 697 (arguing that reparations for African-Americans ought to take pecuniary form in order to highlight the economic privileges of white Americans, to “foster community activism,” and to emphasize the need among recipients for economic self-sufficiency).

²⁸ For discussion of alternative routes to the ends associated with torts, especially compensation and deterrence, see Stephen D. Sugarman, *Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business* (New York: Quorum Books, 1989).

as they speak for themselves. Complaint-initiated engagement of the legal system is a hallmark of tort—in sharp contrast to the criminal prosecutions, administrative regulations, and social welfare spending that all alter the status quo only after government takes some initiative.²⁹

This pride of Torts notwithstanding, reparations planners start their work familiar with the protest that the central tort equation – approximately, wrongs=damages=money –does not align with injury as victims have experienced it. In her comparison of pecuniary versus nonpecuniary reparations schemes, Naomi Roht-Arriaza relates a useful survey of recipients in Latin America and South America. Though sympathetic to both types of reparations, Roht-Arriaza reports that victims value nonpecuniary measures much more than cash:

Over and over again, in interviews and in interactions with therapists, victims ask for official and societal acknowledgment that they were wronged, restoration of their good name, knowledge of who and how it was done, justice and moral reparations. Victims are much more ambivalent about monetary reparations. On the one hand, a number of victims and organizations of family members refused all money as "blood money" intended to silence them and to deflect attention from the larger issues of impunity and societal recognition. On the other, some victims saw material reparations as just recognition by the state of the harm caused, money that would otherwise go to the state. All agreed that compensation was never enough, or even the most important thing.³⁰

A defender of torts perspectives on reparations may need to say more than “pecunia non olet”³¹ when asked why a reparations plan should spend scarce resources on a measure that recipients have declared would not by itself satisfy them.

But it is a mistake to think that a tort approach would reduce reparations to cash transfers. An article from a bygone era is instructive on the point. The American civil-procedure scholar Maurice Rosenberg once contended that government had a role to play as facilitator and supporter of personal injury claims.³² The notion sounds jarring today, at least in the United States;³³ Rosenberg in 1971 nevertheless envisioned government as

²⁹ Anita Bernstein, “Complaints,” *McGeorge Law Review* 32 (2000):37.

³⁰ Naomi Roht-Arriaza, “Reparations Decisions and Dilemmas,” *Hastings International & Comparative Law Review* 27 (2004): 157, 180-81.

³¹ Cash will be welcomed by those who receive it; less literally, “money has no odor.”

³² Maurice Rosenberg, “Devising Procedures That Are Civil to Promote Justice That Is Civilized,” *Michigan Law Review* (1971) 69:797.

³³ In contemporary American debates, liberals defend tort law as practiced, and associate proposals to reform it with business interests. Stephen D. Sugarman, “Ideological Flip-Flop:

intervening to assert the interests of injured citizens. He proposed a new ministry, named the Department of Economic Justice, that would pay out cash in response to reports of injury and also be empowered to go after the wrongdoers it identified as responsible, taking “legal action appropriate to the situation, including wholesale (and hence, economically worthwhile) suits to recover amounts it had already paid out administratively, along with costs, interest, and other economic sanctions....”³⁴

Anyone inclined to deem this suggestion a naive, idle dream about benevolence in support of other persons’ injury claims should remember that the principle of vicarious liability is heeded in daily practice around the developed world:³⁵ An entity that did not participate directly or personally in wrongdoing may in some circumstances nevertheless be required, without a finding of its own fault, to compensate victims who suffered at the hands of individual wrongdoers. The best-known example of vicarious liability is respondeat superior, a form of strict liability prevalent worldwide. In the United States, business entities can also take on vicarious liability by succession: they might, through the purchase of corporate assets, gain ownership of a business’s liabilities too.³⁶ After being compelled to pay damages pursuant to vicarious liability, an entity has the prerogative to seek indemnification from the person responsible for having committed the more fundamental, primary wrong.³⁷ In this light it becomes plausible to envision a unit within a national government, though probably not named the Department of Economic Justice, taking on the role of a successor government, empowered to recoup plundered national assets from notorious wrongdoers.

Such persons by hypothesis have lost their power to inflict harm on their fellow citizens, but may own property sufficient to pay for some of their past harms. Examples abound. The rumor that Augusto Pinochet had stashed nine tons of gold in a Hong Kong bank vault proved to be untrue, but the estimate of \$28 million deposited in foreign accounts was well founded;³⁸ this sum could have made an impact on Chile’s reparations

American Liberals are Now the Primary Supporters of Tort Law,” UC Berkeley Public Law Paper No.925244, January 17, 2005, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925244

³⁴ Rosenberg, “Devising Procedures,” 814.

³⁵ Thanks to Mark Geistfeld, for clarifying this point, and to John Owen Haley for his insights into the relation between subrogation and torts-thinking about reparations, which inform these paragraphs.

³⁶ See generally Symposium, “Multinational Corporations and Cross Border Conflicts: Nationality, Veil Piercing, and Cross Border Liability,” *Florida Journal of International Law* 10 (1995): 221, 272 (discussing divergence between U.S. and U.K. law).

³⁷ On the common law entitlement of an entity defendant to recover against an individual wrongdoer for monies that the entity paid to a third party as compensation for physical injuries see *Lister v. Romford Ice, etc. Co. Ltd.*, [1957] A.C. 555; *Saranillo v. Silva*, 889 P.2d 685 (Haw. 1995); *Jackson v. Associated Dry Goods Corp.*, 192 N.E. 2d 167 (N.Y. 1963).

³⁸ Eva Vergara & Patrick J. McDonnell, “No Pinochet Gold Hoard, Bank Says,” *Los Angeles Times*, October 27, 2006, A7.

program.³⁹ One human rights group has tried to force a reckoning of the gains amassed by the multinational corporations that did business in South Africa supportive of the apartheid regime, the subject of another reparations program.⁴⁰ Haile Mengistu Meriam, under whose rule an estimated half-million civilians were killed in Ethiopia, took up residence in Zimbabwe endowed with “a free apartment and a fleet of luxury cars” that could have been liquidated to pay reparations to families of these civilians, a group that includes political dissidents killed by his military junta in the 1970s.⁴¹ Too poor to effect its limited reparations scheme that had budgeted about 3,500,000 in United States dollars,⁴² Haiti could certainly use some of the money that the Duvalier family embezzled before fleeing, even if the astounding estimate of “up to US \$900 million”⁴³ overstates what they stole.

In this torts-influenced reckoning, victims of human rights violations would assert their claims and receive reparations payments from governments not in a bloodless shuffle of papers but to compensate for discrete wrongdoing, with human malefactors borne in mind. The government would accept responsibility on its own behalf—either for having done wrong itself or for not having fulfilled its duty to protect citizens from active wrongdoers⁴⁴—and also as quasi-insurer making payments for the wrongs of others, pursuant to its obligation. It would pay reparations to citizen-victims without condescension, valuing its right of indemnification against the persons and entities that bear primary responsibility for harm.

³⁹ See Lira, *Handbook of Reparations*, 55.

⁴⁰ “Jubilee South Africa has pointed out that the multinational corporations that helped to finance the apartheid government in its final, most repressive years removed roughly R3 billion (US \$375,000,000) a year between 1985 and 1993 from the country. Jubilee argues that if 1.5 percent of these profits was returned every year for six years, financial reparations at the level of the original TRC recommendations could be paid.” Colvin, *Handbook*, 176, 199. Jubilee also supported a lawsuit in the United States against several of these corporations, arguing that they violated international law by exploiting cheap labor and collaborating with armed enforcers of the apartheid government. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 544-45 (S.D.N.Y. 2004) (dismissing the action on the ground that plaintiffs did not demonstrate a violation of international law).

⁴¹ Victor T. LeVine, “Taylor Case Only a Start: Leaders Seldom Answer for Abuses, But That May Be Changing,” *St. Louis Post-Dispatch*, April 9, 2006, B4.

⁴² Alexander Segovia, “The Reparations Proposals of the Truth Commissions in El Salvador and Haiti: A History of Noncompliance,” *Handbook*, 154, 164. Segovia does not attribute Haiti’s failure to implement a program simply to scarcity of resources, but the nation’s poverty played an undisputed role.

⁴³ Paul Hamel, “Preventing Democracy in Haiti: Turning the Light Off at the End of the Tunnel,” *Peace Magazine*, Jan. 1, 2005, at 14.

⁴⁴ Rubio-Marín, 44 [manuscript]

Conveying payments for wrongful violations of human agency would thus signal not only an acknowledgment of responsibility but a tacit pledge to pursue, or at least care about, the reclamation of this money from primary offenders. The tacit pledge, implying that the giver values its payment, expresses recognition of a particular historical event and the claim of right that derives from a wrong. When the primary offenders gained the holdings in question through theft, extortion, or wrongful seizure, the reclamation effort also links the pathology of rights-violation with the pathology of plundering a nation's wealth—a connection that stands up for fiscal law and order along with human rights, and thus could enhance the reparations program in the eyes of foreign investors.

Such recognition, with or without public relations boosts, has more force than a bland mistakes-were-made handout, the acceptance of responsibility with no specific referents. Lacking any consciousness of opportunity cost, payment devoid of any implicit reference to indemnification sounds like “cheap talk”—only slightly less cheap than talk accompanied by no money at all. In the reparations setting of wrongs and rights, payment ought to come across as both compensation and fulfillment of a debt. The money is not laundered, one might say. Victims could accept it with honor.⁴⁵

Honoring Both (and Mediating Between) Security and Freedom Through Reparations

Reparations planners who have decided to pay monetary compensation to victims might consider the purposes of transfer payments that are made as compensation for injury in ordinary litigation. Following the lead of Ruth Rubio-Marín and Margaret Walker in this volume, who urge attention to human rights violations,⁴⁶ I argue here for a commensurate concern with what financial recompense seeks to accomplish: the ends of tort law, which are security and freedom.

Tort-thinking pursues security and freedom for both sides of the litigation caption. A tort claim by a plaintiff complains of an invasion that may be seen as a breach of

⁴⁵ One activist lawyer pursuing human rights claims was irked by his compatriots' interest in the rumors of Pinochet's gold in Hong Kong. “It speaks badly of us Chileans that we react more strongly when we read a story about Pinochet and money, Pinochet and dollars, than when it is about Pinochet and deaths.” Quoted in Vergage & McDonnell, “No Pinochet Gold Hoard.” Citizens of this very country who received “dollars” for events of the Pinochet era nevertheless told researchers that money did not fulfill their needs for reparation. Roht-Arriaza, “Reparations Decisions and Dilemmas,” 180. This apparent inconsistency becomes consistent when one recognizes that the torts preoccupation with money as damages is not merely pecuniary and nothing more. Money changes hands to achieve fairness. The Chilean reaction to news of money was indeed also a reaction to news of deaths.

⁴⁶ Rubio-Marín MS at 15-16 (advocating attention to reasons and rationales behind human rights as a way to pursue gender equity); Walker MS at 16 (noting that what appears to be one trauma can expand into a multiplicity of injuries).

security; but defendants, for their part, are entitled to shelter from the danger of an arbitrary official conclusion that they caused injuries for which they must pay. For defendants, security takes form in procedural justice. Tortious conduct impinged on the freedom of persons who were hurt by it; at the same time, too much tort liability—condemnation out of proportion to the magnitude of real injuries and risks—unduly impinges on freedom of action.

Divergent perspectives on torts share these two priorities even while unaligned on other questions. For example, “security” speaks as pertinently to various problems of economic efficiency in torts as it does to corrective-justice attention to the nature of the wrong that a victim suffered;⁴⁷ human freedom is as integral to the jurisprudential concept of “fairness” as to the prerogative to engage in profitable activity that occupies the center of “welfare;”⁴⁸ the paired ends of “compensation” and “deterrence” mediate between security and freedom while honoring them both.⁴⁹

Enhancing Security

Although security applies to both sides of the litigation caption, it functions more fundamentally on the plaintiff side. After defendants are deemed responsible for injury following a procedure that is faithful to the rule of law, security in tort law addresses mainly the safety or settled equilibrium that these defendants disturbed. Any national-scale repair of this disruption must consider the swath of time ahead that ought to be made secure: Wrongfully inflicted injury is a breach of the peace whose consequences extend into a victim’s future.

In this reparations context, consider violence that agents of government initiated or condoned, followed by post-traumatic stress disorder and related anxieties. Tort-thinking reminds policymakers that the repair of this injury cannot succeed without acknowledging its future effects. Every wrong amenable to legal redress, not just trauma, protrudes forward in time. Some of the protrusion into the future may be juridical rather than inherent in the wrong itself—that is, kept alive by the preparation of testimony, the

⁴⁷ Among numerous examples: insecurity as a transaction cost impedes bargaining; the right to hold property is integral to participation in civil liability system as well as to one’s status as an economic actor; threats to physical security absent tort liability would be guarded against by wasteful precautions.

⁴⁸ Notwithstanding the contention in one widely cited work that fairness and welfare are opposites, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (Cambridge, Mass.: Harvard U. Press 2002).

⁴⁹ In principle deterrence can be severed from compensation, as long as a system forces actors to internalize the costs of their activities by some other means like fines; but welfare analysts prefer to empower compensation-seeking victims as enforcers of this obligation, at least in settings like the United States where these alternative sources of cost internalization are weak.

stoking of narration in public venues (such as truth commissions), or the tendency of adjudication to look backward—but victims feel its effects all the same. Inflictors of injury know, or should know, that what they commit will undermine a victim’s security even after they stop acting.

Even in the driest precincts, a quest for monetary compensation in court for noncontractual wrongs necessarily complains about a violation of security; at the same time the resistance that a defendant mounts is a plea to keep the tranquility of the status quo, casting the plaintiff as disruptor. Private-law adjudication sets out in binary fashion to determine who of the two is the troublemaker, the putative wrongdoer or the complainant,⁵⁰ and then, if the plaintiff wins, to fashion a remedy to restore equanimity and civil peace.⁵¹ Part of the work of recompense is to give the victim more security in the future. Money damages paradigmatically do this job: Collect your award and put it in the bank, sleep better.

Enhancing Freedom

Perpetrators of wrongdoing found obliged under tort law to pay victims for recompense—in contemporary practice, such perpetrators could be nation-states or business entities, not just individuals—overindulged in their own freedom, hurting other people at least along the way, if not on purpose. Their freedom to swing their fist, or to not care about the foreseeable consequences of their inattention, or recklessly to neglect the basic safety of their citizenry, should have ended before the other person was hurt, but did not. They felt free to cross a boundary. They were wrong. “Our autonomy is limited,” writes torts scholar and philosopher Jules Coleman, “only insofar as we are not free to cross the borders that define the protective moral spheres of our neighbors. Boundary crossings are violations, and should harm ensue, compensation is owed.”⁵² Whether taking a trivial form, like an automobile collision that bends fenders, or a deep one, like a massacre, every wrongfully inflicted injury calls out for repair of what it inflicted on its victim. Too much prerogative—insufficiently checked and inhibited—has violated the rights of a human being.

⁵⁰ Anita Bernstein, “Reciprocity, Utility, and the Law of Aggression,” *Vanderbilt Law Review* 54 (2001): 1.

⁵¹ Even in an idealized version of this restoration, nominal winners often fail to get what they really want. American tort plaintiffs, for instance, often seek medical monitoring following the exposure to toxic substances, but almost never receive it. The focus of law (as contrasted to “equity”) on monetary damages forecloses creative remedies. See also Stephen G. Gilles, “The Judgment-Proof Society,” *Washington & Lee Law Review* 63 (2006): 603 (noting the difficulty of collecting judgments).

⁵² Jules L. Coleman, “Legal Theory and Practice,” *Georgetown Law Journal* 83 (1995): 2579, 2615.

Pecuniary recompense for wrongdoing reminds the recipient that freedom exists not only for the class of assailants who overindulged but for her or him too. And so after legal proceedings have concluded, the recipient will ordinarily enjoy more choice than before. If a monetary transfer succeeds in enhancing security for victims, then that increase in security will foster a sense of power over their environment. Receiving money adds a layer of freedom to this minimum where the best revenge, so to speak, is not actual vengeance against perpetrators⁵³ nor withdrawal from civil society but a superior exercise of one's human prerogatives: doing what one wants in a way that, unlike the actions of the wrongdoer, violate the rights of no one else.

Again, money makes for a uniquely effective instrument. Tortfeasors found liable in the legal systems of developed nations don't turn over a new appliance or a fancier wheelchair to you after you have established yourself as their victim. They cut you a check and you spend your 'reparations' as you like. Measures of compensation that reparations programs might use should also foster choice, and thus freedom, as well.

Microfinance as a Device for Reparations

Reparations planners willing to consider the medium of pecuniary compensation face the question of which means of payment to use. This part outlines a proposal to convey payment in the form of shares in a microfinance institution. To assess and defend the suggestion, it begins with "microfinance" in contradistinction to the more familiar term "microcredit." It next explores alternative structures for microfinance programs, and considers what microfinance has to offer that simple cash transfer payments do not. Later parts of the chapter build on this case by linking microfinance with the normative ambitions of tort theory and the enhancement of gender equality.

Nomenclature: "Microfinance"

Coinage of the neologisms "microcredit" and "microfinance" added a contemporary gloss to ancient practices: small-time financial transactions are as old as commerce itself. Lack of clarity about what "microcredit" in particular means has sown confusion.⁵⁴ Today, decades after its entrée into development discourse in the mid-1970s, "microcredit" might refer to many kinds of small-time lending and borrowing: "agricultural credit, or rural credit, or cooperative credit, or consumer credit, credit from

⁵³ Recall the American declaration that damages are awarded "to vindicate parties and deter retaliation or violent and unlawful self-help." See *supra* p. — and accompanying text (citing *Restatement (Second) of Torts*).

⁵⁴ [T]he word has been imputed to mean everything to everybody;" wrote Muhammad Yunus, the banking pioneer who went on to Nobel acclaim; "[w]e really don't know who is talking about what." Muhammad Yunus, *What is Microcredit?*, Jan. 2003, <http://www.grameen-info.org/mcredit>.

the savings and loan associations, or from credit unions, or from money lenders.”⁵⁵ The younger word “microfinance” was coined by the German development scholar Hans Dieter Seibel in 1990.⁵⁶ “Year of Microcredit 2005,” a nonprofit corporation registered in the United States, suggests that “microcredit” is a subset of “microfinance”:

What is the difference between microfinance and microcredit?

Microcredit is a small amount of money loaned to a client by a bank or other institution. Microfinance refers to loans, savings, insurance, transfer services, microcredit loans and other financial products targeted at low-income clients.⁵⁷

Respecting the distinction between these two terms, this chapter examines the virtues and limitations of distributing reparations benefits in the form of microfinance: that is, by giving beneficiaries new opportunities for savings and credit rather than loans.⁵⁸

The appeal to microfinance instruments rather than microcredit keeps faith with a crucial characteristic of reparations: As complete or perfect transfers, they come with no obligation to be returned. Loans, credits, and exhortations to the poor to cultivate their inner entrepreneur are different from the transfer of wealth. Identified victims of serious

⁵⁵ Ibid.

⁵⁶ Hans Dieter Seibel, *Does History Matter? The Old and the New World of Microfinance in Europe and Asia*, University of Cologne Development Research Center, Oct. 2005, 1 n.1 <http://www.uni-koeln.de/ew-fak/aef/10-2005/2005-10%20The%20Old%20and%20the%20New%20World%20in%20Europe%20and%20Asia.pdf>

⁵⁷ http://www.yearofmicrocredit.org/pages/whyayear/whyayear_aboutmicrofinance.asp. The definition reserves “low-income clients” for microfinance only, leaving open the possibility that high-income clients might partake of microcredit. In common parlance, however, they do not: high-income borrowers do not need small loans. See also Micro Capital Institute, *The Social Impact of Commercial Microfinance*, <http://microcapital.org/downloads/whitepapers/Social.pdf>, 4 (noting that loan size “can be used as a proxy for the social aspects of microfinance”).

⁵⁸ This section sweeps past an extensive bitter political battle over the two words. The United Nations “year,” for instance, is of microcredit rather than microfinance, despite lobbying for “microfinance” by nongovernmental organizations. Connie Bruck, “Millions for Millions,” *New Yorker*, October 30, 2006. For a victory of “microfinance” over “microcredit,” see Stephanie Strom, “What’s Wrong with Profit?,” *New York Times*, November 13, 2006, Giving Section, 1, 12 (noting \$100 million donation of Pierre Omidyar to Tufts University as earmarked for “developing microfinance”).

human rights violations hold no responsibility for earning and paying for their own reparations.⁵⁹

Choosing Among Means to Convey Pecuniary Reparations Through Microfinance

Continuing the theme of going beyond credit to include an array of financial activities, the general plan offered here, derived from work by the development economist Hans Dieter Seibel and others, would establish recipients of reparations payments as shareholders in microfinance institutions. The transfer payment from government to citizen-victims would take the form of shares. For this purpose, a microfinance institution is an entity that provides financial services—at least credit and savings, possibly others—to customers who would normally be considered too poor for a bank to profit from serving them.⁶⁰

Microfinance institutions can be, in Seibel’s helpful tripartite scheme, either “formal,” “semiformal,” or “informal.” The first category of “formal” institutions includes, or resembles, banking in the developed world: An institution (typically a bank or finance company) functions under regulation and supervision by a governmental authority. “Semiformal” institutions are registered but not regulated as financial entities. They include savings and loan cooperatives and nongovernmental organizations (NGOs) that provide credit.⁶¹ “Informal” institutions, including low-level moneylenders and self-help groups, are neither regulated nor registered, although their activities may fall within customary law.⁶² Governments going the “informal” route would make reparations payments in the form of shares in existing unregulated, unregistered local institutions.⁶³

Accountability, transparency, and protection of the rights and interests of shareholders and those who deal with them commend a preference for formal or semiformal entities as reparations vehicles, unless only informal institutions are available during the nation’s transition. Absent a minimal degree of economic development and stability, informal institutions could join the plan with the understanding that their connection to a government program demands a degree of extra oversight. Engagement

⁵⁹ References to “microcredit” arise occasionally in this chapter, however, because the development literature relied on often uses this term when it intends the wider menu of microfinance.

⁶⁰ Seibel, *Reparations Shareholders*, 1-2.

⁶¹ The Grameen Bank started out as a credit NGO, funded first by “soft loans and grants” before becoming more self-sustaining. Bruck, “Millions.” On credit NGOs in operation, see *infra pp.* —

⁶² Seibel, *Reparations Shareholders*, 1 n.2.

⁶³ See generally Douglas Snow, *Microcredit: An Institutional Development Opportunity*, http://spaef.com/IJED_PUB/v1n1_snow.html (“Sustainable microcredit programs must be embedded in the network of existing local institutions.”).

with national reparations would necessarily push the institution upward toward the semiformal category.

One common starting place for a reparations program, feasible in most countries that have started to emerge from crisis and falling under the “semiformal” category of microfinance institution, is the credit NGO. A credit NGO typically offers small loans, often along with other interventions (education, counseling, health care) to its low-income clientele.⁶⁴ Capitalized by external donor agencies, this entity would have been at work inside the strife-torn country before the government starts to disburse its reparations payments. A reparations program could partner with a credit NGO in a transitional relationship aimed ultimately at forming a freestanding financial institution that citizen-recipient would own collectively.⁶⁵ The NGO would deliver financial services to this clientele, along with practical means of help (like office space for its operations) on terms of cooperative ownership, until the membership of shareholders achieves the capacity to govern itself.⁶⁶ Working with an existing credit NGO offers this reparations plan an established connection between funders and poor people, as well as the flexibility to take on new projects quickly;⁶⁷ these advantages might outweigh the difficulties presented by shared governance.

Reparations planners could alternatively pursue a type of partnership with a different mix of advantages and disadvantages for the program. Governments might bypass (or be unable to engage) a credit NGO and instead link up with informal—unregulated and unregistered—local institutions that function only as microfinancers.⁶⁸ Recipients of reparations would acquire shares in existing entities that might have been formed as associations, cooperatives, or foundations. Their government-disbursed payments would join capital already held by the informal institution. Such an arrangement would on one hand lack the access to capital and established routes to reach the poor that a credit NGO would likely have, but on the other hand could pay undivided attention to microfinance and enjoy freedom to veer from the mandate of a foreign entity.

⁶⁴ Seibel, *Reparations Shareholders*, 8-9.

⁶⁵ In Rwanda, for example, a nation that has tried to use microcredit as a constituent of reparations, an NGO called AVEGA extends microcredit to genocide widows. See Global Youth Connect, *Rwanda Program Report*, May 21-June 19, 2006, www.globalyouthconnect.org. An existing relation like this one could form the base of microfinance in contrast to microcredit.

⁶⁶ Seibel, *Reparations Shareholders*, 12 (noting NGOs will resist); Bruck, “Millions” (quoting one founder of a credit NGO: “If you give them a loan and don’t see that their other needs are met, perhaps they are worse off. They have a debt to pay, but still they have no sanitation, no health care, no education.”).

⁶⁷ Seibel, *Reparations Shareholders*, 9.

⁶⁸ *Ibid.*, 12.

A third possibility for reparations-through-microfinance is the formation of a new microfinance institution from the ground. When choosing this approach, the government would make reparations payments in the form of shares in new institutions. Experience suggests that planners of this new entity should strongly consider building a revenue base consisting of more than government-directed transfer payments: Adding the “savings of other people, no matter how small” would make the institution more likely to succeed in its community.⁶⁹ The Arab *sanadiq*, a plural noun, present a model for this approach. *Sanadiq*, financed by “a mixture of member-equity and external equity contributions,”⁷⁰ have succeeded in Syria⁷¹ and offer a model for reparations someday in Iraq.⁷²

In every form that a national reparations program might pick to convey reparations payments, the microfinance institution deployed would establish recipients who suffered violations of their human rights as owner-decisionmakers, thereby enhancing their agency in the process of rehabilitation. Victims of abuses would receive their reparations payments in the form of shares in an enterprise that offers them savings and the prospect of credit. Pooled capital would become their shared portfolio, amenable to diversification and oriented toward pecuniary returns for its owners.⁷³ Restrictions on how to trade or otherwise alienate shares in the microfinance institution would necessarily vary from country to country in response to existing corporate law and the reparations goal of maximizing the autonomy, agency, and welfare of shareholder-recipients.⁷⁴

Simple Transfer Payments Contrasted

⁶⁹ Ibid., 16.

⁷⁰ Ibid., 18.

⁷¹ Markus Buerli & Aden Aw-Hassan, “Assessing the Impact of Village Credit and Savings Associations on the Rural Poor in Low Rainfall Areas in Syria,” *Deutscher Tropentag*, October 5-7, 2004, http://www.tropentag.de/2004/abstracts/links/Buerli_fHJgUS4i.pdf.

⁷² Seibel, *Reparations Shareholders*, 18.

⁷³ The government would need to resolve, preferably by transparent means, the contentious question of how much freedom these shareholders should have to govern their institution. At present, a consensus in the development literature advocates the frank pursuit of profit by microfinance institutions: Shelter from the market results in the squandering of opportunity, in this view. A national government supportive of this stance would encourage recipients of reparations payments to become small capitalists. As shareholders of their institutions, they could extend credit at uncapped (even usurious) interest rates, foreclose on loans no matter how poignant the defaulting debtors; in general they would live by a free-to-fail market ideology. This development-literature consensus could shift in the future to favor more regulation and less owner-manager prerogative.

⁷⁴ See *infra* p. — (on keeping control out of male relatives’ hands).

Although microcredit is an extraordinarily popular tool in the development kit, even its admirers like to call it “no panacea,”⁷⁵ and counsel caution in its application. The lexical move from “microcredit” to the vaguer (and, of course, debt-free, at least before the institution starts making loans) “microfinance” may ease some worries, but does not eliminate all controversy in the recommendation. Scarcity is a precept that unites those who might otherwise disagree on reparations policy: Microeconomic understandings of what choosers gain and lose, the macroeconomic theories that underlie development intervention, and national governments making policy decisions all would call on an advocate of microfinance in reparations to say why this particular expenditure makes sense as a means to effect a reparative goal when this choice would necessarily conflict with other means. The most straightforward alternative to microfinance is a simple cash transfer payment.⁷⁶ The cash transfer alternative, though attractive in its simplicity, is inferior to microfinance in several ways.⁷⁷

The first advantage of microfinance over cash transfers is a practical one, as well as a reminder of the central role of security in reparations: Functioning in the role of shareholders in a microfinance institution gives recipients a safe place to store their monetary property, which includes not only reparations payments but also their savings. Given the near certainty that poverty will accompany a reparations program, planners who seek to make pecuniary distributions need to address the question of whether a recipient can hold on safely to the money she receives. Around the world, poor people—who never own absolutely nothing—suffer from this lack of basic security. They

⁷⁵ E.g. Nan Dawkins Scully, “Micro-Credit No Panacea for Poor Women,” <http://www.gdrc.org/icm/wind/micro.html> (conceding that “[m]icroenterprise development has, in some circumstances, contributed positively to women’s empowerment”); Lisa Avery, “Microcredit Extension in the Wake of Conflict: Rebuilding the Lives and Livelihoods of Women and Children Affected by War,” *Georgetown Journal of Poverty Law and Policy* 12 (2005): 205, 228 (“Microcredit is Not a Panacea”); Yunus, *What Is Microcredit?* (recommending more clarity in the definition of terms); Celia W. Taylor, “Microcredit as Model: A Critique of State/NGO Relations,” *Syracuse Journal of International Law and Commerce* 29 (2003): 303, 320-35 (contending that the effects of microcredit on international law warrant more attention)

⁷⁶ Another, and to many observers a more attractive, alternative to both microfinance and simple cash transfer payments would be “collective payments,” see *supra* p. —, or social welfare spending, for the good of the entire public rather than to benefit individuals identified as victims of wrongdoing. A government might establish new health clinics, for example, or implement programs that reduce or eliminate school fees. Such spending would in many cases do more good for the country than pecuniary reparations for individuals. One would hope that governments recognize the public good of expenditures on the needs of citizens. This chapter omits study of this alternative, however, in the belief that social welfare spending is not reparations. Compare de Grief, “Justice as Reparations” (making the argument) with Rubio-Marín MS (advocating the inclusion of social spending in the reparations category).

⁷⁷ Seibel, *Reparations Shareholders*; Hans Dieter Seibel with Andrea Armstrong, “Reparations and Microfinance Schemes,” *Handbook*, 676, 678.

struggle to find substitutes for the insured and well-guarded bank accounts that wealthy people take for granted.⁷⁸ Savings first, then.

Second, microfinance opens the possibility of expanding credit to the poor who would otherwise be regarded as ineligible to borrow money. The microfinance institution funded by the government scheme would go on to lend out portions of its capital, probably offering small loans to borrowers in its community who would otherwise have little or no access to credit. By this move, a significant share of reparations-money makes a transition through microfinance into microcredit, and shares in microcredit's considerable success. For reparations purposes, the curative effect of expanded credit reaches fundamentally into a victim's well-being. The word "victim," the source of her entitlement to become a shareholder, loses its hold as she moves to bankability: Shakespeare notwithstanding, any person who may both "a borrower ... [and] a lender be"⁷⁹ is more autonomous, more likely to enjoy both self-respect and the respect of others, than a person shut out of both roles. As they become investors, reconstructors, and rebuilders of the social tissue, these shareholders gain in relative social status, and by their work and risk-taking they earn this gain.⁸⁰

Third, through their investment decisions and eventual extraction of income from the microfinance institution, recipients gain routes to the social services that some deem at least as central to compensation for the human rights violations they experienced⁸¹ (planners think first of medical clinics, but counseling, adult education, and vocational and agricultural training are also among the possibilities). A recipient who gains a cash transfer payment can obtain social services by spending the transfer on them; a recipient who obtains shares in a microfinance institution can obtain social services by turning her shares into cash and by directing investment into for-profit vehicles that make social services likely to emerge and flourish faster than they would from the injection of more money into the local economy—by elevating per capita income, engaging women as adult civic participants, and strengthening networks. Microfinance thus comes closer

⁷⁸ "With no safe place to store whatever money they have, the poor bury it, or buy livestock that may die, or invest in jewellery that may be stolen and can be hard to sell." Tom Easton, "The Hidden Wealth of the Poor," *Economist*, November 3, 2005.

⁷⁹ Hamlet, act I, s. 3.

⁸⁰ Thanks to Ruth Rubio-Marín for underscoring this point.

⁸¹ Reparations in Guatemala, for example, emphasize the need for social supports and direct relatively little funding to what the program calls "economic indemnification." Claudia Paz y Paz Bailey, "Guatemala: Gender and Reparations for Human Rights Violations," in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, ed. Ruth Rubio-Marín (New York: The Social Science Research Council, 2006): 92, 110. One alderman in Chicago has issued a call for slavery reparations in the United States that would eschew transfer payments in favor of social supports. Fran Spielman, "Slavery Reparations Leaders Rip Bank's Scholarship Offer," *Chicago Sun-Times*, January 23, 2005, 10.

than cash payments to the social-investment alternative expenditure that some observers would prefer. Indeed, over time microfinance delivers these other two types of recompense, cash and (for those recipients who want them) social services.

The fourth point in the roster moves from individuals to societies: In action, microfinance moves beyond savings and credit as pursued and deployed by citizens to social effects. As a means of reparation, it enlists recipients into a common pursuit of institution-building and the relationships that follow the rise of stable institutions. Any national repair following a total crisis requires both sustainable income-generating activities and sustainable local entities that can extend capital to finance them.⁸² Neither of these two conditions will endure without the other; both call on citizens to participate in collective undertakings. The establishment of microfinance institutions for reparations supports both conditions. New capital makes sustainable income-generating activities more likely to occur, and extending shareholder ownership to victims of human rights abuses engages these individuals in civic repair. Seibel has gone further, noting that new locuses of economic power pull wealth away from a government that has been at best unreliable in the past: Microfinance “creates alternative nongovernmental sources of power,” Seibel and Andrea Armstrong write, and thus “is a potential impediment to future abuses by the central government.”⁸³

To this four-item virtues list—safe savings for the poor, enhancement of agency, expansion of services, and civic repair through the building of financial institutions—one might add a pecuniary fifth that builds on the second and third points: Reparations programs that feature microcredit would share in extraordinary worldwide enthusiasm for this measure,⁸⁴ and thus might become simply more likely to happen.⁸⁵ An international donor disinclined to finance a cash-transfer or social-supports reparations program, on the ground that mending a nation following crisis is a task for government rather than foreign benefactors, may hold a different view of a program patterned in part on longstanding development initiatives.

Many who laud this form of development have added hard capital of their own, not just words of praise, to the microfinance endeavor. One admirer, who in the early 1980s asked Muhammad Yunus for advice on how to apply the small-loan methods of the Grameen Bank to alleviate poverty in the low-income U.S. state of which he was governor, declared two decades later a Clinton Global Initiative that placed \$30 million in

⁸² Seibel, *Reparations Shareholders*, 1.

⁸³ Seibel with Armstrong, *Reparations Schemes*, 679.

⁸⁴ Avery, “Microcredit Extension,” 207-09 (summarizing acclaim); Press Release, cited above n. 4 (recognizing microcredit in the awarding of the Nobel Peace Prize).

⁸⁵ It would be irresponsible not to acknowledge, in a work on reparations, that some reparations plans fail.

microcredit funds in NGOs around the world.⁸⁶ The story of the \$27 loan that Dr. Yunus made out of his own pocket to Bangladeshi basket weavers in 1976 joined the folklore of a multibillion-dollar business in which some of the world's largest financial institutions—including Citibank, Deutsche Bank, and the Dutch giant ABN AMRO—have become players.⁸⁷ Microcredit also appeals to big businesses beyond big banks: As one industrialist remarked at a microcredit summit, success in microlending would mean new prospective customers for his own company.⁸⁸

As this volume goes to press, “microcredit” as a buzzword still enjoys continuing popularity with numerous and varied sources of development funding. No jargon will stay eternally in fashion. By any name, however, microcredit as macro-prescription—the fostering of gainful economic activity through small loans for which lenders expect and enforce repayment—will continue to appeal to sources of capital located outside the boundaries of the nation that builds a reparations scheme.⁸⁹ This sector of foreign supporters reliably prefers entrepreneurship to mere “handout[s],”⁹⁰ or what Seibel has

⁸⁶ *Commitment Announcement 2005*, <http://www.clintonglobalinitiative.org/home.nsf/cmt/coACDB3018B91004B8852570B4006723E>. Other American politicians admire microcredit too. American legislation identified microcredit as a measure to address women under conditions of transitional justice with the Women and Children in Conflict Protection Act, introduced in the United States Senate in 2003. S. 1001, 108th Cong. Focused on acute humanitarian needs, this bill also addresses longer-term problems of sustainability, and includes provisions for microcredit as a source of enhanced economic security for women as household providers. *Ibid.*, Title III, § 306(b).

⁸⁷ Mark Sappenfield & Mark Trumbull, “Big Banks Find Little Loans a Nobel Winner, Too,” *Christian Science Monitor*, October 16, 2006, World, 1.

⁸⁸ Remarks of Hugh Grant, Chief Operating Officer, Monsanto Company, *Microcredit E-News*, March 2003, http://www.microcreditsummit.org/enews/2003-03_sp_grant.html.

⁸⁹ For a more cynical expression of this point, see Walden Bello, “Microcredit, Macro Issues,” *The Nation*, October 14, 2006, <http://www.thenation.com/doc/20061030/bello> (arguing that microcredit holds strong appeal within “establishment circles” because “it is a market-based mechanism that has enjoyed some success where other market-based programs have crashed. Structural-adjustment programs promoting trade liberalization, deregulation and privatization have brought greater poverty and inequality to most parts of the developing world over the last quarter century, and have made economic stagnation a permanent condition.”).

⁹⁰ On the contrast between the two as seen by a microcredit leader, see “Can Technology Eliminate Poverty?” *Business Week Online*, December 16, 2005, www.businessweek.com (quoting Dr. Yunus: “I get very upset when people say [the poorest] people don't have the entrepreneurial ability, initiative, and skills to use loans, so they need some other kind of intervention like subsidy, handout, or charity”); Evelyn Iritani, “Tiny Loans Seen as Big Way to Invest in Developing Nations' Poor,” *Los Angeles Times*, July 28, 2006, C1 (reporting the strong interest that successful high-tech entrepreneurs have in microcredit and its “hand-up, not a handout” approach to poverty).

called “one-off payments.”⁹¹ Another virtue that might remain central after the figurative Year of Microcredit ends is that while this technique flatters neoliberalism and the politicians who promote markets in the wealthy West, microcredit also can be practiced in harmony with Islam.⁹² Partnerships between national reparations-through-microfinance plans and foreign sources of capital could thus arise in Muslim contexts with relatively little worry about provoking militant disruption—an unusual advantage for a device that gets praised as feminist⁹³ and for serving as a force for more secularization in the Muslim nation of Bangladesh.⁹⁴

Microcredit offers much to many, in short: “millions to millions.”⁹⁵ It need not deliver on everyone’s ambitious dreams to help a reparations plan: popularity itself is a useful virtue, and reparations programmers who avail themselves of microfinance would find themselves connected to sources of powerful external support.

Microfinance Payments as Sources of Gender Fairness and Welfare

According to the many admirers of microfinance, this innovation, particularly its variant of “microcredit,” permits women to flourish. The citation for the Nobel Prize awarded to Muhammad Yunus and the Grameen Bank mentioned women’s liberation as one of the effects of microcredit.⁹⁶ Conventional wisdom holds that women who receive microloans work hard, repay debts faithfully, encourage fellow borrowers to comply with loan terms, and, perhaps, manifest ideals of community and team-player solidarity from

⁹¹ Seibel, *Reparations Shareholders*, 1 (noting that, in contrast to microfinance, the benefits of such payments “tend to be short-lived and unsustainable”).

⁹² Zofeen Ebrahim, “Pakistan: Islamic Teachings Inspire Loans to Poorest of Poor,” *Inter Press Service*, February 5, 2006 (reporting that one microcredit lender in Pakistan espouses the religious tenet of Qarze-e-Hasna, or “helping someone in need with interest-free loans, which are preferred over charity”). The question of interest on the loans would play a part in Muslim opinions of microcredit schemes, but poses no insurmountable hurdle: enterprises do transact financial business in the Muslim world while respecting its disapproval of interest. Jerry Useem, “Banking on Allah,” *Fortune*, June 10, 2002, 154 (describing solutions to the problem within Islamic doctrine, including murabaha, a method of profiting on a transaction that resembles interest but differs from it, and darura, the excuse of “overriding necessity”). Going beyond microcredit to microfinance, <http://www.islamic-microfinance.com> features a range of materials of interest to planners.

⁹³ See supra p. — (reporting Nobel citation).

⁹⁴ Celia W. Dugger, “Peace Prize to Pioneer of Loans for Those Too Poor to Borrow,” *New York Times*, October 14, 2006, 1 (“In the overwhelmingly Muslim nation of Bangladesh, Mr. Yunus’s approach also offered hope and ideas to compete with the allure of fundamentalist Islamic causes. ‘It’s a very secular movement,’ Professor [Amartya] Sen said, ‘very egalitarian, market friendly and socially radical.’”).

⁹⁵ Bruck, “Millions.”

⁹⁶ See supra note 14 and accompanying text.

which a male-dominated model of commercial banking could learn.⁹⁷ In response, critics have called microcredit a false cure for female poverty and powerlessness.⁹⁸ This critical literature prompts a useful reminder of the difference between “microcredit” and “microfinance” for reparations purposes: Because it regards reparations payments as conveyed outright, rather than loaned to recipients, the microfinance scheme advocated here does not create the burden of new debt, and so even if critics are correct to worry about the imposition of loan repayment obligations on women who may not be able to control the money they borrow, that concern does not pertain to the reparations plan advocated here.

This reservation noted, microfinance and what one World Bank report calls gender equality—a term defined there to include “equality under the law, equality of opportunity (including equality of rewards for work and equality in access to human capital and other productive resources that enable opportunity), and equality of voice (the ability to influence and contribute to the development process)”⁹⁹—have common elements. Both have to do, at least in part, with the distribution of material goods.¹⁰⁰ Both are secular phenomena. Both are at least consistent with, if not committed to, the seizure of new opportunity by historically oppressed persons. As practiced around the world, microfinance puts money in the hands of women, an outcome that advocates of gender equality pursue.

To add tort theory to the mix of gender and microfinance, consider the quest for security and freedom that underlies tort actions as prosecuted in the courts. Tort principles emerge with reference to the purposes and functions of civil liability as policy.

⁹⁷ Avery, “Microcredit Extension;” Fundación Adelante, *What We Do: Our Loan Program*, http://www.adelantefoundation.org/sub/our_loan_program.php (attributing a better than 95% repayment rate to “character-based lending” to poor female borrowers in Honduras, in contrast to traditional “collateral-based lending”).

⁹⁸ Anne Marie Goetz & Rina San Gupta, “Who Takes the Credit? Gender, Power, and Control Over Loan Use in Rural Credit Programs in Bangladesh,” *World Development* 24 (1996): 45 (noting that male relatives control much of the loaned capital that women are obliged to repay); Gina Neff, “Microcredit, Microresults,” *Left Business Observer*, October 1996, <http://www.leftbusinessobserver.com/Micro.html> (criticizing Yunus and the Grameen bank for failing to lift most borrowers out of poverty; using entrepreneurship rhetoric to divert women from wage labor that would pay better; and restricting women borrowers to low-yield work that men do not want to do).

⁹⁹ World Bank, *Engendering Development Through Gender Equality in Rights, Resources, and Voice*, http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000094946_01020805393496 2-3.

¹⁰⁰ Some strands of “feminism” do not share this inclination: “gender equality,” by contrast, cannot escape the material world.

Its doctrine compels wrongdoers to pay damages to their victims not only to enhance the freedom and security of individuals in the correct balance but also, at a societal and conceptual plane, to achieve results. Welfare and fairness are its two chief desiderata. Fairness (associated with corrective justice) looks backward, to redress injury attributed to wrongdoing: in this perspective, leaving the injury unrectified is wrong. Some observers of tort law regard fairness as central; others deem it peripheral and subordinate to its rival, welfare. Reparations through microfinance comports with both fairness and welfare.

Reparations Through Microfinance as a Source of Fairness for Women

*Ameliorating the Additional Injustice of Having Been Deprived of
a Fair Measure of Control Over Money*

The endeavor of planning reparations for recent human rights violations coexists with a less vivid, but older and more deeply rooted, wrong: Throughout human history, and continuing to this moment, women have not enjoyed equality with men with respect to the possession of and control over wealth. Laws and norms have taken money out of their hands as if women were moral children and money something too dangerous for them to hold. A generation ago, the United Nations made a famed announcement on point: Women do two-thirds of the world's work (as measured in hours), earn one-tenth of the world's income, and own less than one hundredth of the world's property.¹⁰¹

Although the U.N. has not updated this notorious statistic about the world, local studies continue to find that big disparities remain. For example, the United Nations Millennium Task Force reported in 2005 that women produce 80 percent of the food in Africa and the Caribbean,¹⁰² and that women in Zambia devote an extraordinary 800 hours a year to gathering food and firewood.¹⁰³ Ownership of land—a time-honored means for individuals to accrete economic strength—is less available to women than men, particularly in developing countries. The World Bank reports that many national laws still place women under the guardianship of husbands and recognize “no independent right to manage property.”¹⁰⁴ Several African countries deny married women the right to own land,¹⁰⁵ and take land ownership away from women who become

¹⁰¹ Catharine A. MacKinnon, *Are Women Human?* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2006), 21 (quoting United Nations, *The State of the World's Women* 1979).

¹⁰² UN Millennium Project Task Force Report on Education and Gender Equality, *Taking Action: Achieving Gender Equality and Empowering Women* 77 (2005).

¹⁰³ *Ibid.* at 7.

¹⁰⁴ World Bank, *Engendering Development*, 37.

¹⁰⁵ *Ibid.*

widowed or divorced.¹⁰⁶ Studies of cultivated-land ownership in Asia and Latin America as well as Africa show that women possess smaller parcels, inferior land, and less farming equipment than what men possess.¹⁰⁷

These conditions—more toil, less income, and much less property for women—persist and appear more benevolent than they are with the help of ideology. Patriarchy posits a male provider who heads his household and meets the needs of the women and children inside. It further asserts that the women inside are better off than they would be under conditions of gender parity.¹⁰⁸ The male-headed household protects women from their various infirmities regarding money and property: Women, it has been said around the world, are too naive to manage money, too swayed by emotion to retain it, too busy with child-making and -minding to have time for it, too petty-minded to leverage it, or too pure to want it. Unequal educational opportunity for girls and young women, a dire pattern in much of the world, is both a symptom and a cause of these beliefs.

Payments in the form of shares in a microfinance institution serve to repair this unfairness more effectively than other forms of pecuniary reparations. No matter the

¹⁰⁶ Ibid., 51.

¹⁰⁷ Ibid., 51-52; see also *ibid.*, 120-21 (reporting that much land reform of the 1990s in Latin American and Africa has failed to alleviate these conditions).

¹⁰⁸ One expression of this ideology argues that it benefits women:

“The women of every society save our own have understood that the male's nature is such that he must be given a special position in the family if he is to peacefully take his place in it.... Women have realized that men will not even attempt to suppress [their socially disruptive] tendencies if they are offered no distinctive and respected position in the family, a position that can act as counterpoise to both the limits marriage sets on male behavior and the centrality that the woman's unique physiological and psychological bond to the infant automatically gives her.

“In response to the refusal to grant them their traditional role men will tend to either a) disrupt the family as they attain through aggression that which they were once granted, or b) channel their energies into sexual conquest outside the family. Women will find that they are raising their children either on a battlefield or alone, wondering why loudmouthed Rambos have replaced strong, silent defenders of justice and protectors of women.”

Steven Goldberg, *Can Women Beat Men at Their Own Game?*, National Review, December 27, 1993, at 30.

level of formality of the microfinance,¹⁰⁹ these shares can work to rectify historical gender-injustice. Formal institutions offer women recipients access to technologies and services that had been closed off to most of them in the past. The category of semiformal institutions available for reparations through microfinance is dominated by nongovernmental organizations, which can offer women recipients a range of supports as well as a place to hold their reparations shares. Informal institutions can advance women's interests by honoring compatible local traditions and promoting ideals of self-help.¹¹⁰

The simultaneous creation of a savings account and a modicum of power over the economic lives of other people bestows property on women whose value exceeds that of the sum transferred. Shares in microfinance institutions give all women recipients at least de facto savings accounts (which might previously have been out of their reach),¹¹¹ and for some fraction of recipients will create real opportunities to govern the institution. Because virtually every microfinance institution makes loans, these women shareholders have a voice in capital investment decisions affecting their communities. A reparations payment with the name of a woman on it links these small savings accounts and shares in a business with the rectification of injustice. If microfinance can generate even a portion of the wealth that its admirers believe it can create, then a reparations scheme that transfers shares of a microfinance institution to women as recipients and owners will improve dramatically the statistic that half the world's population owns less than a hundredth of its property.

Shares in a microfinance institution for women thus take a stand against both the injustice of human rights violations and the unjust effects of patriarchy within a national economy. Patriarchy had instructed women to abjure any desire for overt power in the hope of gaining security in return. Microfinance teaches just the opposite: that the security one receives from holding money takes form not in a wall or barrier from public life but in decisions, choices, investment. Shareholders effect their own wishes and respond to the material consequences of what they express. Whether they participate in microfinance unable to forget even for a moment the human rights violations for which they received monetary compensation, or, at the other extreme, feel determined never to think about their past and only look forward as investors, they reclaim what was theirs all along: recognition and agency.

In standing up against both acute crisis and quotidian patriarchy, this measure of reparation emphasizes what the two evils have in common. The stated transformation of wrongdoing and suffering into shares for holders who may have had no prior experience with financial instruments reminds participants and observers of the connection between,

¹⁰⁹ Seibel, *Reparations Shareholders*, 4 (sketching three levels of formality).

¹¹⁰ *Ibid.* at 14-15 (describing informal microfinance institutions).

¹¹¹ See *supra* p. — (on the elusive nature of safe savings).

on one hand, the episode of oppression that gave rise to a reparations scheme, and on the other, the duller background condition of women disabled from full rights to own property. To name these two wrongs in the same sentence is not to equate them. The first is not only more vivid but worse. Linking a historical antecedent with a facet of everyday life does not deny any portion of the horror inherent in a particular national crisis, however. On the contrary: catastrophes become both more intense and more poignant when one becomes aware of an infrastructure that amplifies their harm. To put the point more optimistically, a reparative project that enables women to hold and spend their own money installs an architecture that can help achieve other repairs, should a subsequent crisis ensue. An architecture that puts money in all its facets—saving, spending, diverting, withholding, encouraging, investing—in the hands of women also makes civil society stronger.

Fairness Through Shareholding Rather than the Receipt of Quick Cash

As we have seen, one reason for policymakers to choose shares in microfinance institutions as the means of effecting pecuniary reparations is to augment “security,” in the sense of allowing a recipient to keep her payment safely rather than have to hide it in her home or convert it into none-too-safe chattels that could be destroyed or taken from her.¹¹² Reparations through microfinance offers security in other senses, including the prospect of leveraging one’s payment into additional income that can buy more shelter from various dangers—cleaner food and water, safer housing, respite from exhausting or dangerous labor—and the fostering of sustainable income-generating activities.¹¹³ There remains for brief treatment here one more crucial “security” theme, present in any plan for pecuniary reparations: the danger that (male) relatives or intimate partners could seize money nominally distributed to (female) recipients.

Layers of complication challenge the delivery of security- and freedom-enhancing increments to women through any pecuniary reparations program, not just the microfinance variant advocated here. Some women recipients might, in particular, wish to share or relinquish what they receive—and believe they enjoy more freedom or more security as a consequence. Or take children: At least some, if not most, women who receive reparations money would without hesitation try to share it with the next generation. Notwithstanding Pablo de Greiff’s warning that “the responsibilities of a program of reparation are not the same as that of a development or social investment plan,”¹¹⁴ mothers would certainly spend part of their reparations funds on education, health care, and food for their young.

¹¹² See supra p. — .

¹¹³ See supra p. — .

¹¹⁴ De Greiff, “Justice and Reparations,” 470-71.

Overriding such choices by women, or making them difficult to effect, could undermine the ambitions of compensation. The large feminist literature on choice and agency cautions against accusing women of ‘false consciousness’ for manifesting decisions that appear self-negating,¹¹⁵ but offers little guidance on how to make reparations money stick to the women who receive it. Here thinking about security and freedom becomes helpful after the fact, as a way to understand what might otherwise look like squandering. The point of the endeavor had been to enhance the security and freedom of recipients. Recipients’ diverting their money to men and children might have been consistent with this goal.

That said, however, it would be a facile error to condone any and every distribution of reparations payments as always (with the help of tautology) enhancing the security and freedom of their female recipients. Reparations programs owe to recipients not only the rendering of a designated payment but the safeguards that protect it from intentional or unintentional disappearance. Like commercial creditors, investors, and mortgagees, women recipients of reparations are entitled to enjoy whatever the rule of law can provide to safeguard their property. Accordingly, the design of a program must anticipate foreseeable obstacles to delivery and receipt of the transfer of wealth.

When recipients are women, one key obstacle worthy of attention is the belief that women ought not have the power to spend money on their own, or for themselves. One can envision women who simply do not feel entitled to make spending decisions that enrich themselves directly until they know that their families’ needs have been satisfied first. A reparations planner probably cannot thwart such an inclination, but each payment should have a chance to get to each individual woman first, rather than to her men or dependent children; and shares in an institution achieve this result better than any other rendering of money. These shares have women’s names on them. They implicitly contain protection against theft and loss. They state plainly that recipients include individual women (or men), and are not paid only to households, families, or communities.

These specifics might provoke an objection, familiar from the gender-controversies surrounding microcredit in the Grameen mode, that recognizing women as individuals with competence in worldly realms and who hold personal identities separate from household and tribe offends the cultural norms of a particular country, and thus that such a reparations scheme would be unsustainable in that venue. This objection should

¹¹⁵ E.g. Kathryn Abrams, “Sex Wars Redux: Agency and Coercion in Feminist Legal Theory,” *Columbia Law Review* 95 (1995): 304, 324-50; Nadine Strossen, “A Feminist Critique of ‘The’ Feminist Critique of Pornography,” *Virginia Law Review* 79 (1993): 1099, 1139-40.

be seen either as mere vapor that rises from what activist Sara Hlupekile Longwe has called “the patriarchal cooking pot”¹¹⁶ and rejected—or else taken seriously and heeded.

In other words, perhaps there are places where cultural predilection and commercial backwardness intersect to destroy basic safeguards that would otherwise protect property transferred to women. Where the claim of absent safeguards is credible, program designers should, in the name of fairness, reconsider their plan of paying recompense to individuals. A society that cannot foster women’s holding property in their own name—that treats women only as the means, never the end, of a national reparative program—is one whose reparations scheme ought to be confined to nonpecuniary measures. Insisting on naming women as payees would in such a setting promote strife; cash changing hands under the contrary approach, one that defers to patriarchy rather than resists it, would reach the wrong people and go to waste.

As the experience of microcredit around the world demonstrates, however, women even in backward economic settings have held this property successfully. The limited successes of microcredit would be enhanced by shareholding in contrast to the receipt of quick cash, which non-recipients could grab and squander. Shares in a financial institution, in sum, can offer the best prospects for fairness in the delivery of pecuniary reparations.

Reparations Through Microfinance as a Source of Gender-Egalitarian Welfare

In contrast to the fairness perspective, welfare analysis looks forward, striving to increase wealth for persons in the aggregate. It seeks incentives. In the context of personal injury law, the welfare perspective encourages legal systems to force injury-inflictors to pay for the injuries they cause, when the internalization of these costs of harm-causing activities would enhance social wealth.¹¹⁷ Recognizing that human activity produces prosperity along with losses, welfare analysis seeks to foster optimal rather than unbounded investments in safety; and so it requires those who inflict injury to pay for not having taken only cost-justified measures, rather than every possible measure, to avoid causing injury.¹¹⁸

Welfare analysis of injury law may appear to deviate slightly from the scope of this chapter because, first, it is normally used to study accidental harm, not the intentional

¹¹⁶ Sara Hlupekile Longwe, “The Evaporation of Gender Policies in the Patriarchal Cooking Pot,” *Development in Practice* 7 (1997):148, 148.

¹¹⁷ Steven Shavell, *Economic Analysis of Accident Law* (Cambridge, Mass.: Harvard University Press, 1987).

¹¹⁸ In other words, if a precaution would have cost more money than it would have saved, the inflictor should not have to pay for the resultant loss. This possibility lies outside the scope of this volume.

or reckless injuries that reparations programs address; and second, in principle, welfare analysis does not pursue the compensation of victims, but rather the imposition of monetary sanctions. As long as the injurer pays—and as long as potential injurers as a group have to take into account their obligations to pay should they injure someone—it matters not to welfare analysis whether any injured person collects anything. These deviations do not limit the value of the exercise, however. Nothing in welfare analysis precludes applying it to intentionally or recklessly inflicted harms,¹¹⁹ and efficiency-minded scholars have recognized that because fines and other public sanctions are typically under-used and too cheap, empowering the victim as recipient can help to ensure that wrongdoers pay at the optimal level.¹²⁰

Variables complicate their assessment of a reparations program, but in general the awarding of monetary reparations to individual victims in the form of microfinance will make sense to welfare analysts. Even though reparations planners may feel confident that the nation has turned a corner and thus that traumas to citizens will not recur, a project of reparation does not supersede the quest of deterrence through incentives: and so even though many individual wrongdoers would now be out of power (or, better yet, dead), awarding money to victims from the government deemed responsible teaches prospective wrongdoers about this particular punch contained in new rule of law. Among the different ways to distribute pecuniary reparations, microfinance in the post-crisis context is particularly attractive to welfare analysts because of the connection between microfinance and sustainable economic development.¹²¹

With the welfare effects of a reparations-through-microfinance scheme noted, government planners can pay heed to the distributive effects of this reparations policy. Enter gender. Welfare analysis aggregates people into groups, and so one may generalize

¹¹⁹ Indeed one prominent practitioner, Richard Posner, applied this analysis to rape. Richard A. Posner, *Sex and Reason* (Cambridge, Mass.: Harvard University Press, 1992), 384-85.

¹²⁰ Writings on this point from the law and economics camp include Jennifer H. Arlen, “Compensation Systems and Efficient Deterrence,” *Maryland Law Review* 52 (1993): 1093, 1114 (emphasizing that civil actions may be likely more likely than criminal actions to be prosecuted); Ronen Perry & Yehuda Adar, “Wrongful Abortion: A Wrong in Search of a Remedy,” *Yale Journal of Health Policy & Ethics* 5 (2005): 507, 585 (arguing that “wrongful abortion” warrants more deterrence than either tort or criminal liability can deliver, and proposing that courts make available “an extra-compensatory civil fine” to be divided between plaintiffs and the state). See generally Richard Craswell, “Instrumental Theories of Compensation: A Survey,” *San Diego Law Review* 40 (2003): 1135 (arguing that whether requiring the payment of compensation accords with the goal of efficiency is a complex question whose answer depends on variables). Another prominent economic analyst argues that mandating compensation to victims is *more* necessary in the case of intentional torts as compared with “ordinary” or accidental torts, so as to eliminate inefficient expenditures in self-protection that victims make. William M. Landes, “Optimal Sanctions for Antitrust Violations,” *University of Chicago Law Review* 50 (1983): 652, 673.

¹²¹ See generally Seibel, *Reparations Shareholders*, 7.

about “men” and “women,” individual exceptions notwithstanding. In this framework, placing value on the interests and experiences of women citizen-recipients is a good idea if it would make societies better off, a bad one if it would make societies worse off. Because this extra attention to women would have the effect of transferring money into women’s hands, the question becomes whether societies are better off or worse off when, other things being equal, women gain control over more money.¹²²

Evidence indicates that societies will indeed be better off if they transfer money to women (and if they use microfinance rather than simple cash payments to effect this transfer) because male and female adults—the majority of whom in every country have children—provide for their children unequally. Money in the hands of a woman is more likely to buy “goods that benefit children and enhance their capacities.”¹²³ Around the world, men devote more money to pleasures for themselves—cigarettes, alcoholic beverages, leisure activities like sports, sexual conquests—than do women. By contrast, “[s]tudies conducted on five continents have found that children are distinctly better off” when their mothers have more money to spend.

In Kenya, for example, the more income controlled by women in sugarcane farmer households, the greater the household caloric intake. In Jamaica, female-headed households spend more on food and less on alcohol. Data from the Ivory Coast suggest that doubling the proportion of income controlled by women would cause a 26 percent reduction in amounts spent on alcohol and a 14 percent reduction in money spent on cigarettes. “In Brazil, \$1 in the hands of a Brazilian woman has the same effect on child survival as \$18 in the hands of a man,” Crittenden reports.¹²⁴ In richer countries, where calorie counts are a less reliable proxy for well-being, one finds other indicators: for example, affluent divorced fathers in the United States are less likely than their (somewhat less) affluent ex-wives to cooperate with paying for their children’s college

¹²² Other welfare effects relating to reparations for women, though beyond the scope of this paper, warrant brief note here. Researchers have estimated that violence against women cost the national economy of Nicaragua 1.6 percent of its GDP (\$29.5 million) in 1999, and 2 percent of the GDP of Chile (\$1.56 billion) in 1996. Andrew R. Morrison & Maria Beatriz Orlando, Social and Economic Costs of Domestic Violence: Chile and Nicaragua,” in *Too Close to Home: Domestic Violence in Latin America*, eds. Andrew R. Morrison & Maria Loreto Biehl (Washington, D.C.: Inter-American Development Bank 1999), 51. To the extent that reparations payments promote stability through civic engagement, see **Rubio-Marín chapter**, and thereby diminish violence against women, national economies can look forward to becoming more prosperous. Another example is the correlation between GNP and the enrollment of girls at school. UN Millennium Project Task Force Report, *Taking Action*, 47.

¹²³ Ann Crittenden, *The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued* (New York: Metropolitan Books 2001), 120. Crittenden adds that “[s]tudies conducted on five continents have found that children are distinctly better off” when their mothers have more money to spend.

¹²⁴ *Ibid.*, 120-22.

education.¹²⁵ Around the world female legislators introduce and promote more child-friendly government expenditures,¹²⁶ suggesting a secondary welfare effect: the more women can avail themselves of education and other sources of access to civic life, the better off children will be.¹²⁷

Experts on economic intervention, having for more than a decade recognized that development-related expenditures that benefit women yield payoffs to societies, share this assessment.¹²⁸ “This claim has now achieved ‘motherhood’ status, in virtue of the accumulating evidence confirming what has long been available at an intuitive level, which is that “investing in women,” especially in the areas of health and education, is likely to generate payoffs or “positive externalities” for the well-being of children, the household, and the economy as a whole.”¹²⁹ One microcredit leader accordingly decided

¹²⁵ *Ibid.*, 122.

¹²⁶ Matthew M. Davis & Amy P. Upston, “State Legislator Gender and Other Characteristics Associated With Sponsorship of Child Health Bills,” *Ambulatory Pediatrics* 4 (2004): 295 (reporting study of American state legislatures); Crittenden, *Price of Motherhood*, 126 (noting the same pattern in Scandinavia). The voting rights activist Carrie Chapman Catt, working for suffrage in the U.S., looked at several other countries where women had the vote in 1915—including Australia, New Zealand, Norway, and Finland—to conclude that “wherever women, the traditional housekeepers of the world, have been given a voice in the government, public housekeeping has been materially improved by an increased attention to questions of pure food, pure water supply, sanitation, housing, public health and morals, child welfare and education...” Carrie Chapman Catt, *Do You Know?* (1915), http://douglassarchives.org/catt_a07.htm.

¹²⁷ Some criticisms of the Crittenden thesis may be noted briefly. Crittenden writes that men in governments, especially American governments, dislike making transfer payments to mothers because they believe—correctly, it turns out—that money helps women abandon their unsatisfactory relationships with men. It may thus be prudent to anticipate on our welfare ledger an increase in divorce and the severance of informal unions (although it appears equally likely that the receipt of reparations payments would enhance peace and stability in a household). Children are probably still better off. See Crittenden, *Price of Motherhood*, 126 (arguing that poor children are best off when no man has familial input on how money is spent). Another possible criticism: nations could use excise taxes to pursue the same welfare gains that redistribution in favor of women would achieve: “sin” taxation of liquor, cigarettes, motorcycles, brothels and so on could, in theory, generate enough revenue for governments to enhance child welfare through public programs. Such an agenda would burden a transitional democracy trying to repair its recent failure to uphold the human rights of its citizens, however. Better, probably, to pursue welfare by putting money into the hands of mothers.

¹²⁸ See generally World Bank, *Engendering Development*, ch. 5 (2001), and sources cited therein.

¹²⁹ Kerry Rittich, “Engendering Development/Marketing Equality,” *Albany Law Review* 67: (2003): 575, 580.

early in his banking career to take gender into account in his lending decisions, believing that the children of low-income parents would profit more from loans to their mothers.¹³⁰

Differences between microcredit and microfinance are pertinent to this welfare perspective. Microcredit has won praise for making poor women wealthier but also blame for forcing them to toil in repayment efforts. A harried woman struggling to repay her loan might feel compelled to draft her children into her struggling business; under this pressure, a daughter would probably look more valuable to her mother as a housekeeper and child-minder than a student continuing her education. The form of microfinance proposed here—i.e. shares in a financial institution that carry no repayment obligation—does not generate new pressure to turn children into laborers, however. True, it does not eliminate the deleterious effects on society of financial hardship, but neither does any other mode of reparation; and even though becoming a shareholder in a financial institution can disrupt a woman’s life, the disruptions of microfinance payments that beget no new debt are much gentler than the disruption of money-lending among the poor.

And so the scenario of an engaged, decision-making, money-spending, policy-directing female citizenry becomes attainable—even likely to develop—and conducive to the good of all persons in the nation implementing reparations. Wealth in the hands of women enhances welfare not only for children, as recipients of expenditures, but also for mothers, as determiners of these expenditures. Developmental economics regards microfinance as an especially effective means to maximize the value of an initial investment. Thus for purposes of enhancing welfare, the combination of female recipients and microfinance presents an exceptionally high potential yield for a reparations plan.

Conclusion

Standing alone, pecuniary reparations leave the effects of serious human rights violations unrepaired. They do not take recipients back to an idyllic past where they were safe from large-scale horrific wrongdoing. They cannot be rendered in proportion to the harm suffered. Of themselves they provide no truth-telling, nor guarantees of non-recurrence, nor the kind of government and civil society that combine to fend off wrong before it arises.

These infirmities of pecuniary reparations do not obscure a quality necessary to effect recognition of wrongs and an ambition to change current conditions: Governments and individuals who engage in reparation cannot deny the microeconomic tenet of scarcity. The phrase “cheap talk” adverts to the infinite supply of words available to the

¹³⁰ Bruck, “Millions,” (referring to the policies of Mohammad Yunus and the Grameen Bank).

disingenuous or distracted, who can denounce past wrongdoing in endless verbiage without having to surrender anything they value enough to hold.¹³¹ A recipient of pecuniary reparations, by contrast, knows that the payor has parted with something scarce in order to affirm the truth of what happened to her. This monetary acknowledgement does not of itself correct the wrong but it honors her experience, augments her agency, holds potential to increase her security and her freedom, and invites her concretely, as a holder of power, into the emergent civil society.

Once identified as integral to the nation's larger reparative endeavor, pecuniary reparations ought to take the form that best advances the agency, recognition, security, and freedom of injured citizens. This ideal form will seldom be simple cash transfer payments, which are too easy for a recipient to forfeit, alienate, and lose. The alternative presented here—establishing each recipient as shareholder of a financial institution—conveys money to her in honor of the nation's past, where she suffered a wrong, and its future, which her choices and prerogatives will shape.

¹³¹ De Greiff, "Justice and Reparations," 461.